Fordham Urban Law Journal

Volume 19 | Number 4 Article 3

1992

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Stephen B. Burbank
University of Pennsylvania Law School

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Cover Page Footnote
Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania. This is a revised version of remarks at a panel discussion sponsored by the Association of the Bar of the City of New York on March 19, 1992. I appreciate the helpful comments and suggestions of Howard Lesnick, Curtis Reitz and Ned Spaeth.

STATE ETHICAL CODES AND FEDERAL PRACTICE: EMERGING CONFLICTS AND SUGGESTIONS FOR REFORM

*Stephen B. Burbank**

Approached literally or narrowly, the topic of emerging conflicts posed by state ethical codes in federal practice is not very interesting. When, however, one looks at the conflicts that have in fact occurred and imagines those that could occur in the future, very interesting questions about law and lawmaking are presented. The standards for resolving putative conflicts between federal laws are not always clear, and neither for that matter is the standard for determining what constitutes a federal law capable of superseding effect. The technique of setting federal norms of professional conduct on a decentralized basis by borrowing or incorporating state norms is increasingly troublesome to the extent that the borrowed state norms are disuniform and that they are being put to multiple remedial purposes. Federal legislation preempting state law of professional conduct is conceivable but hardly likely, particularly as the norms are pressed into duty for purposes other than professional discipline. Pending other steps that might lead to national uniformity, the answer for the federal courts may be a uniform set of norms directly regulating litigation conduct in all federal courts.

* * *

If a provision in a state's code of professional conduct is in conflict with federal law, we know how to resolve the conflict because the Supremacy Clause tells us how.[1] To be sure, determining whether there is pertinent and valid federal law conflicting with state law may call for, as interstate choice of law often calls for, what Brainerd Cur-

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1. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. *See* Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania, No. 91-1425, 1992 U.S. App. Lexis 22184 (3d Cir. Sept. 16, 1992)(holding that enforcement as state law of rule requiring prior judicial approval of federal subpoena to attorney violates Supremacy Clause).

rie termed "restraint and enlightenment."[2] But a court's role and function in answering the pertinence and validity questions is a far cry from the freedom a state court enjoys in choosing the governing law in an interstate case.[3]

Most of the cases implicating state codes of professional conduct in federal practice have not involved conflicts between federal and state law. Rather, they have involved putatively conflicting federal norms, one of which has been borrowed, usually as part of a wholesale operation, from state law or from ABA rules directly. In those cases, because state law norms of professional conduct or unmediated bar association norms had been incorporated in local federal court rules, there was no conflict for the Supremacy Clause to resolve. The conflicts and alleged conflicts between different types of federal law have been anything but uninteresting, however.

In *Rand v. Monsanto Co.*[4] the question was whether a local district court rule that directly incorporated DR 5-103(B) of the ABA's Model Code of Professional Responsibility,[5] which forbids ultimate lawyer responsibility for legal costs, was consistent with Rule 23,[6] the national class action rule. Here again, there could be no doubt how to resolve a conflict — a federal statute and a Federal Rule of Civil Procedure both require that local district court rules be consistent with national rules.[7] The difficulty was determining how to formulate the notion of consistency. On the assumption that the local rule required a representative plaintiff personally to underwrite the costs of the

2. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 186, 604 (1963).

3. *See* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. — (forthcoming 1992). For an illuminating discussion of the supremacy of pertinent (applicable) and valid federal law, see Peter Westen and Jeffrey S. Lehman, *Is There Life for Erie after the Death of Diversity?*, 78 MICH. L. REV. 311, 314, 318-21, 390-91 (1980).

4. 926 F.2d 596 (7th Cir. 1991).

5. Disciplinary Rule 5-103(B) provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1981).

6. FED. R. CIV. P. 23.

7. The statute requires that local court rules "shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(a) (1988). The rule empowers district courts to "make and amend rules governing its practice not inconsistent with these rules." FED. R. CIV. P. 83; *cf.* FED. R. CRIM. P. 57 (same).

class action, the court held that it was inconsistent with Rule 23 "because it would cripple the class action device that rule creates."[8] In reading Judge Easterbrook's opinion in *Rand*, one is struck by the absence of attention to Supreme Court decisions that speak to the question of consistency. Of the most important, Judge Easterbrook cited only *Gulf Oil Co. v. Bernard*,[9] and he did not discuss it.[10] That may be because the Court's cases provide so little guidance.[11]

The same type of conflict arose in cases involving local district court rules incorporating state rules that require prior judicial approval of subpoenas summoning attorneys before grand juries. In those cases, the challenges to the local rules included claims that they were inconsistent with the Federal Rules of Criminal Procedure or with federal statutes.[12]

In some cases, however, it has not been clear where in positive federal law to locate a conflict. In this category, it seems to me, are cases in which federal prosecutors have argued, on the basis of the so-called Thornburgh memorandum,[13] that they are not subject to norms of professional conduct, incorporated by local district court rules, that prohibit *ex parte* contacts with represented individuals.[14] Whatever one thinks of the result in *Rand*, it is easy enough to understand how

8. *Rand*, 926 F.2d at 600.

9. 452 U.S. 89 (1981).

10. *See Rand*, 926 F.2d at 600-01. Prominently missing from Judge Easterbrook's opinion were Colgrove v. Battin, 413 U.S. 149 (1973), and Miner v. Atlass, 363 U.S. 641 (1960). Both cases dealt with, and adumbrated standards for resolving, alleged conflicts between local and national rules.

11. *See* H.R. REP. NO. 422, 99th Cong., 1st Sess. 15, 27-28 (1985).

12. *See* Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania., 764 F. Supp. 328 (E.D. Pa. 1991), *aff'd*, No. 91-1425, 1992 U.S. App. Lexis 22184 (3d Cir. Sept. 16, 1992); United States v. Klubock, 832 F.2d 649 (1st Cir. 1986), *aff'd on reh'g*, 832 F.2d 664 (1st Cir. 1987)(en banc). In *Baylson*, the court of appeals held that a local district court rule incorporating a state rule requiring prior judicial approval of subpoenas to attorneys was invalid because inconsistent with Federal Rule of Criminal Procedure 17.

13. Memorandum from Dick Thornburgh, Attorney General to all Justice Department Litigators (June 8, 1989). This memorandum takes the position that "the 'authorized by law' exemption in DR 7-104 applies to all communications with represented individuals by Department attorneys or by others acting at their direction."

14. *See, e.g.*, United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991). *Lopez* involved Rule 2-100 of the Rules of Professional Conduct of the State Bar of California, which "tracks the language of American Bar Association Disciplinary Rule ("DR") 7-104 (A)(1) and ABA Model Rule of Professional Conduct 4.2." *Id.* at 1444. The court found that an "Assistant United States Attorney twice met with a represented and indicted defendant in a criminal case and concealed those meetings from the defendant's attorney." *Id.* at 1460. Finding further that, notwithstanding the Thornburgh memorandum, this conduct constituted "an intentional violation of the long-standing ethical prohibition, adopted by this court's Local Rules, which categorically proscribes contacts between a prosecutor and a represented defendant without the knowledge and consent of the defendant's attorney," *id.*, the court dismissed the indictment. *Id.* at 1464.

insistence on client responsibility for costs could eviscerate the small claim class action.[15] I have been unable to discover any such obvious policy dissonance between the rule against *ex parte* contacts and the Federal Rules of Criminal Procedure or pertinent federal statutes. Perhaps that is because I do not believe that the various statutes and federal rules governing the system of federal criminal law enforcement are animated by a policy of convictions at any cost, and I can think of no other policy that would require freedom for federal prosecutors to end-run the adversary system in precisely that context when it is most important.[16] For similar reasons, I do not believe an *ipse dixit*, even from the Attorney General, should have the force of law with the superseding effect of a statute or federal rule.[17]

* * *

Apart from the standards for resolving conflicts between federal laws, the borrowing of state (or ABA) norms of professional conduct as federal law is itself of interest for a number of reasons, suggesting the broader vistas of the topic.

So long as norms of professional conduct are substantially uniform among the states, borrowing or incorporation in local district court rules imports that uniformity into the federal system. State law norms of professional conduct *were* substantially uniform after the ABA's adoption of the Model Code of Professional Conduct, but they have become progressively less uniform, at least in certain areas, since the adoption of the Model Rules.[18] In other words, it appears that interstate uniformity has diminished in recent years, and the resulting interstate disuniformity is being translated into the federal system through local rules.

The situation recalls the circumstances that prompted the ABA to embark on its twenty year campaign for the Rules Enabling Act of 1934.[19] Prior to that time, the procedure applied in actions at law in the federal courts was predominantly state procedure imported "as

15. *See Rand*, 926 F.2d at 599.

16. *See Lopez*, 765 F. Supp. at 1463.

17. *See id.* at 1445-48, 1452-53. Finding that there "is no federal statute which authorizes government attorneys to question represented parties in the absence of counsel," *id.* at 1448, the court concluded that if it accepted the Justice Department's argument, "it is not clear that there would be *any* conduct the prosecutor could not undertake as long as it was pursuant to his or her responsibility to investigate and prosecute crimes." *Id.* (emphasis in original).

18. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 50 (1986).

19. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1048-98 (1982).

near as may be" by command of the Conformity Act of 1872.[20] The ABA's call was for uniformity in the federal courts in the interest of the multistate federal practitioner, with the subsidiary goals of improving the procedure in those courts and inducing national uniformity through state adoptions of the federal model.[21]

The response to the phenomenon of imported disuniformity in norms of professional conduct suggested by this history would be uniform federal law for the federal courts and only the federal courts, along the lines of the Federal Rules of Civil and Criminal Procedure. Imported disuniformity is a self-inflicted wound; the federal courts have chosen to borrow and to do so on a decentralized basis. Surely, the federal judiciary has the means to solve the problem, one way or another, by requiring federal uniformity.[22] From that perspective, it is a shame that the Judicial Conference's Local Rules Project stopped studying problems of disuniformity in bar admission and discipline matters.[23]

However superficially alluring, a comparison of disuniformity in norms of professional conduct in federal court today to the situation under the Conformity Act of 1872 is of limited utility. Rules of procedure may differ from state to state, but they rarely present choice of law difficulties.[24] Differences in norms of professional conduct, on the other hand, can present very difficult choice of law questions in the conduct of an attorney's practice.[25] Thus, uniform professional norms applicable only in federal court practice may be an inadequate response, except perhaps for attorneys who practice exclusively in fed-

20. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. *See* Burbank, *supra* note 19, at 1039-42.

21. *See* Burbank, *supra* note 19, at 1040-50.

22. To the extent that uniform federal norms could fairly be described as norms of litigation conduct, *see infra* note 48 and accompanying text, they could be promulgated by the Supreme Court under the Rules Enabling Act. *See* 28 U.S.C. § 2072 (1988). A more ambitious effort, comparable in scope to the Model Code or the Model Rules, would be hard to justify under that authority. But there may be more than one route to uniformity. *See* 28 U.S.C. §§ 331, 2071 (1988); Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62.

23. *See* Letter from Mary P. Squiers, Local Rules Project, Judicial Conference of the United States, to Professor Stephen B. Burbank, University of Pennsylvania Law School (June 19, 1989) (on file with author).

24. The traditional choice of law rule looking to the law of the forum for matters of "procedure" has proved both broad and durable. For recent progress in breaking it down, by subjecting statutes of limitations to normal conflicts techniques, see RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS (1986 rev.) § 142 (1988). *But cf.* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (forum may constitutionally apply its statute of limitations to lawsuit brought in its courts).

25. *See, e.g.*, WOLFRAM, *supra* note 18, at 50-51; Joanne Pitulla, *Mixed Messages*, A.B.A. J., Feb. 1992, at 93.

eral court (such as some employees of the United States government). For other attorneys it is often no easier to predict whether, if a transaction grows into a dispute that in turn blossoms into litigation, the case will end up in federal or state court than it is to predict in what state litigation may be filed. In any event, even accepting the need for uniform rules applicable in federal litigation, that need hardly seems adequate justification by itself for federalizing the entire corpus of norms of professional conduct, including those which are directed to other (non-litigation) contexts.

Perhaps, however, it is time to think seriously of a national bar, governed by uniform federal norms of professional conduct in all practice contexts, including in state and federal court. After all, we have gone some way down that road with the use of the multistate bar examination for admissions, and the way exists to share discipline information, if only there were a will.[26] Are the benefits derived from state autonomy and experimentation — how much experimentation is there? — worth the costs of conflict in an age when multistate transactions have become commonplace? Obviously, any serious thinking along these lines would need to include the problem of enforcement, which lurks beneath the surface of much of the mischief that plagues us today.[27]

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In thinking about the costs resulting from conflicts in norms of professional conduct and about the drastic remedy of federal preemption of state law, it may be important to recognize that those norms are being asked to play more roles today than was traditionally the case. If a lawyer guesses wrong about the norm of professional conduct applicable to a particular transaction or in a particular situation, the result may not be simply discipline from the state bar. Indeed, the fact that discipline was unlikely to follow may have increased pressure for alternative enforcement vehicles. Today the result may be disqualification in litigation or a malpractice judgment.[28] Indeed, if the recent past is prologue, the result may even be furnishing the predicate for a government enforcement action in which an entire law firm's assets are at risk.[29]

The phenomenon of multi-purpose professional norms is, of course,

26. *See* Burton C. Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249, 281-82 (1975).

27. *See id.* at 280-83; Judicial Conference of the United States, Report of the Proceedings 9-10 (1984).

28. *See, e.g.*, WOLFRAM, *supra* note 18, at 51-53.

29. *See, e.g.*, John C. Coffee, Jr., *Due Process for Kaye, Scholer?*, LEGAL TIMES, March 16, 1992, at 39; *infra* note 34 and accompanying text.

another form of borrowing or incorporation. Apart from the impact it may have in raising the costs of conflicting norms of professional conduct and the states' stake in preserving their lawmaking autonomy, the phenomenon deserves discrete attention. We have begun to acknowledge that norms of professional conduct may vary depending on an attorney's role.[30] The summary of Professor Hazard's expert opinion for Kaye, Scholer suggests that he placed great weight on the contention that the firm's lawyers were acting as litigation counsel.[31] Whatever the truth as to that, isn't it odd that at the same time we are recognizing the different roles that lawyers play, we should increasingly turn to the norms of professional conduct as a substitute for thought about conduct that warrants various forms of legal and equitable relief? From that perspective, it may not have been wise to write standards of disqualification into the norms of professional conduct,[32] and one should applaud the Delaware Supreme Court's insistence that they be kept separate.[33] Resort to the disqualification remedy can muddy the waters about responsibility for, as well as the content of, the underlying norms.

But we have gone far beyond using norms of professional conduct as the yardstick of disqualification or malpractice liability, as is evident when we see the Office of Thrift Supervision relying on supposed "breaches of professional responsibility"[34] for its temporary order to cease and desist against Kaye, Scholer, or for that matter when we see the sketch of Kaye, Scholer's defense provided by Professor Hazard.[35] It appears that the American Law Institute's *Restatement of the Law Governing Lawyers* project is pursuing a transremedial approach, formulating norms on the basis of sources involving multiple remedial

30. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT, preamble (1983); GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW (1978).

31. *See* Summary of the Expert Opinion of Geoffrey C. Hazard, Jr. (Feb. 25, 1992) (on file with author) [hereinafter Summary of Expert Opinion]. Kaye, Scholer retained Professor Hazard to "testify generally concerning standards of professional conduct and ethical rules applicable to attorneys who act in the capacity of litigation counsel, as well as the generally accepted standards by which statements of such counsel on behalf of their clients have been understood to be judged." *Id.* at 1. Settlement rendered such testimony unnecessary.

32. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983).

33. *See In re* Appeal of Infotechnology, Inc., 582 A.2d 215 (Del. 1990); *see also* Hizey v. Carpenter, 830 P.2d 646 (Wash. 1992) (trial court correctly excluded testimony and jury instructions referring to Code of Professional Responsibility and Rules of Professional Conduct in legal malpractice action).

34. *In re* Peter M. Fishbein, OTS AP-92-20 (March 1, 1992) (temporary order to cease and desist).

35. *See* Summary of Expert Opinion, *supra* note 31.

contexts, from disqualification to malpractice litigation.[36] The Reporters apparently contemplate "unfurling the separate flags"[37] in their multi-purpose norms through discrete remedial provisions.[38] If so, they should consider that, whatever other problems that approach poses, it places a high premium on the ability to foresee all the various uses to which a norm may be put, what might be called remedial stasis. The ability to do that surely is not one of the lessons of Kaye, Scholer.

* * *

If one regards national uniformity as important but not sufficiently important to justify federal legislation preempting state law, there may be alternative strategies worth considering. I doubt that the ABA could be, or that it should be, motivated to revisit the subject. One could put the matter in the hands of the Commissioners on Uniform State Laws, recognizing that the Commissioners have on occasion couched their product in a form suitable for embodiment in court rules as well as legislation.[39] In order to solve the problem created by a separate system of federal courts, however, it would still be necessary to have uniform federal court rules incorporating the resulting Uniform Rules.[40]

In the absence of steps such as these designed to make the norms of professional conduct nationally uniform, the situation in federal courts requires attention. As a first step, local district court rules that incorporate more than one set of rules of professional conduct should be amended. In a recent case in federal court in Utah, multiple borrowing proved not to be a problem because the Utah Rules and the

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36. We take this occasion to remind readers that, as with all work on this Restatement of the Law Governing Lawyers, this draft aims to restate the law. It reflects decisional law and statutes and takes account of the lawyer codes in its formulations. The formulations are a statement of the law applicable in malpractice and disqualification proceedings and other contexts to which that body of law is applicable. It also may inform the interpretation of the lawyer codes in disciplinary and similar proceedings.

RESTATEMENT OF THE LAW GOVERNING LAWYERS xxiii-xxiv (Tentative Draft No. 5, 1992).

37. Katz v. Realty Equities Corp. of New York, 521 F.2d 1354, 1358 (2d Cir. 1975). In *Katz*, the district judge justified an order requiring a consolidated complaint for pretrial purposes on the ground that it "would be useful and efficient and could be without prejudice to unfurling the separate flags at trial, if necessary, to protect any legitimate interests that may have to be dealt with separately." *Id.* The court of appeals' opinion upholding the order does not persuade me that any harm could be undone.

38. *See* Letter from Curtis R. Reitz to Professor Stephen Burbank, University of Pennsylvania Law School (Sept. 20, 1990) (on file with author).

39. *See* UNIF. R. EVID. (1986).

40. *See supra* note 22.

ABA Model Rules provisions — the local rule incorporated both — were found to be identical.[41] What if, as increasingly seems possible,[42] the multiple incorporated provisions are flatly inconsistent? Choice of law problems in a multistate practice situation are bad enough, but conflicts within the norms applicable in one court are inexcusable.

More generally, the practice of borrowing or incorporating state or bar association norms of professional conduct in federal local court rules deserves attention for reasons independent of the disuniformity that can result. Borrowing has been justified as an appropriate means to avoid the costs of intrastate disuniformity and to take advantage of state enforcement mechanisms.[43] For these purposes, we should perhaps distinguish between (1) borrowing rules at retail, that is, after determining their appropriateness for the particular federal purpose, and (2) the wholesale borrowing of a body of rules.[44] One's comfort with the second type of borrowing may depend on the confidence one has that the borrowed corpus of law fits well with the system into which it is being imported,[45] the willingness of the borrower to police the system for inconsistencies, and the ability of the borrower to deal promptly and effectively with inconsistencies.[46]

If disuniformity is increasing among the states, that is reason enough to be uncomfortable with the wholesale borrowing of state rules of professional conduct by federal courts. Certainly that is the case if such rules are to be borrowed for purposes other than bar discipline. There are limits to the federal interest in rules of professional conduct for application only in federal court, and state enforcement mechanisms are of limited effectiveness. Perhaps it is time to finish the job of recognizing the many roles that lawyers play and thereby reverse the trend toward proliferating the remedial purposes to which professional norms are put. Perhaps it is time for uniform federal rules of federal litigation conduct backed up by uniform federal enforcement mechanisms. An ancillary benefit of such a lawmaking en-

41. *See* Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412, 414 (D. Utah 1991).

42. *See, e.g.*, United States v. Walsh, 699 F. Supp. 469, 470-71 (D.N.J. 1988); *supra* note 18 and accompanying text.

43. United States v. Miller, 624 F.2d 1198, 1200 (3d Cir. 1980).

44. *Cf.* Burbank, *supra* note 19, at 1037 (distinguishing on this basis early statutes requiring federal courts to apply state law).

45. *But see* ALAN WATSON, LEGAL TRANSPLANTS 96 (1974) ("usually legal rules are not peculiarly devised for the particular society in which they now operate and . . . this is not a matter of great concern").

46. *Cf.* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 694-96 (1988) (costs of federal borrowing of state limitations law).

terprise might be hastening the demise of provisions like Rule 11[47] that obliquely and fecklessly regulate litigation conduct in federal court today.[48]

* * *

Legal borrowing may reflect simply a concession to the shortness of life. It may also reflect deference to another legal system. The federal courts can no longer afford to defer to the states regarding the norms of professional conduct applicable in federal practice. The costs of that approach are increasing for the courts themselves, lawyers and their clients. As norms of professional conduct are pressed into service for purposes other than professional discipline, however, it becomes clear that control of the legal profession is the central issue in fact as well as in theory. A posture of deference to state law makes it harder for the federal courts to resist assertions of power from elsewhere in the federal government. Equally important, that posture makes it harder for the federal courts to deal effectively, by dealing directly, with problems of professional misconduct in federal practice.

47. FED. R. CIV. P. 11.

48. *See generally* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989).