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When Realism and Idealism Collided in Fred Zacharias's Work on the Purposes and Limitations of Legal Ethics Codes

TED SCHNEYER*

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I. INTRODUCTION

From 1988 until his untimely death, Fred Zacharias published approximately ninety articles on legal ethics, the law of lawyering, and the regulation of law practice.¹ Fred tackled a remarkable range of topics in the field, but legal ethics codes—their nature, functions, and place in the regulatory framework—were an abiding interest. I shared that interest² as have many others.³ Drawing on Fred's work, this brief

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1. My hunch, based on a review of Fred's publication list, is that he was, over that period, the most prolific American scholar in the field.

2. See, e.g., Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 PROF. LAW. 161 [hereinafter

Article argues that various forces, many of which Fred was among the first to discuss, have been conspiring for some time to make drafting and debating legal ethics rules within the American Bar Association (ABA) a fractious exercise in interest group politics rather than a mark of professional solidarity.

To make my point, I look back at one of Fred's early works, a 1993 article entitled *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*.⁴ *Specificity* concerns the formal characteristics of legal ethics codes rather than the substantive values they embody. That topic might seem dry, but the article is intriguing because it evidences a clash between idealism and realism in Fred's thinking.⁵ Although both strands of thought were prominent in much of Fred's work,⁶ the clash between them was never starker than in

How Things Have Changed]; Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989) [hereinafter *The Making of the Model Rules*]; Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939.

3. Indeed, the subject has been a preoccupation of legal ethics scholars for decades. ABA leaders also continue to treat the *Model Rules of Professional Conduct*—the ABA's current ethics code—as the primary site for formulating and reconciling norms of professional conduct. In 2009, when ABA President Carolyn Lamm created the ABA Commission on Ethics 20/20 to conduct a three-year study of potential reforms in professional regulation in light of the globalization of law practice, changes in practice technology, international trade agreements, and new forms of lawyer regulation abroad, she indicated that a review of the *Model Rules* would be a key feature of the project. See James Podgers, *Firm Hand for Hard Times*, A.B.A. J., Aug. 2009, at 63, 64. As what has become the “go-to” site for all manner of norms for regulating law practice, the *Model Rules* now include provisions that have little to do with legal ethics as traditionally conceived, such as rules on multijurisdictional law practice and choice-of-law rules for lawyer disciplinary proceedings. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2010); *id.* R. 8.5(b).

4. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

5. Other scholars have also generated interesting insights by analyzing the formal characteristics of legal ethics rules. See, e.g., Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839 (2001); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999); Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (2010).

6. Fred the realist took considerable pleasure in debunking what he considered “myths,” “fictions,” or worse in legal ethics regulation. See, e.g., Fred C. Zacharias, *Foreword: The Quest for a Perfect Code* 11 GEO. J. LEGAL ETHICS 787 (1998) (emphasizing the futility of any quest for the “perfect code” of legal ethics); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002) [hereinafter *Lies, Fictions, and False Paradigms in Legal Ethics Regulation*]; Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009). Yet most of his articles were constructive, suggesting reforms that he hoped would improve the regulatory state of affairs.

Specificity. There, Fred the idealist offered up an elaborate methodology for drafting of legal ethics codes or specific rules in order to achieve “optimal effect,”⁷ while Fred the realist slipped in a number of subversive “asides” that, taken together, make it clear why, at least in modern times, the ABA can hardly be expected to produce ethics rules in a process that even remotely conforms to Fred’s highly rationalistic methodology. Part II boils that methodology down to two principles that cannot do justice to Fred’s nuanced analysis but should suffice to serve my limited purposes here. Part III presents some of Fred’s subversive asides. I conclude by speculating about just how Fred came to write an article in which the tensions between his idealism and his realism were so stark.

II. FRED AS IDEALIST: *SPECIFICITY* AS A PRIMER ON HOW TO DRAFT A LEGAL ETHICS CODE

Specificity has a four-part structure that reveals the principles at the heart of Fred’s proposed methodology.⁸ The first part identifies purposes that drafters of ethics rules may and may not appropriately pursue.⁹ The second explains what Fred meant by “specificity”¹⁰ and provides a typology of the degrees of specificity professional rules can have.¹¹ The third part uses the very general “do-justice” standard that

7. See Zacharias, *supra* note 4, at 225. Although *Specificity* speaks of legal ethics codes generally, it focuses, as I will here, on the ABA’s *Model Rules of Professional Conduct*, which the ABA issued in 1983 and which serve as the template for the legal ethics codes in force in nearly every state. The ABA has amended the *Model Rules* on several occasions since *Specificity* appeared, and many state codes have followed suit. See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 638 (2005). But the changes do not lessen the value of Fred’s analysis of the formal characteristics of ethics rules.

8. See Zacharias, *supra* note 4, at 225.

9. See *id.*

10. Fred identifies four elements of rule specificity: an absence of vague terms that defy understanding, ease of determining the operative facts that establish whether a rule has been violated, coverage of a relatively narrow range of events or conduct, and the presence of a mandate for or prohibition against particular acts. See *id.* at 239–40.

11. See *id.* Fred’s typology or continuum runs from (i) rules that state a general axiom such as “lawyers must practice competently”; to (ii) rules that guide a lawyer’s decisionmaking by suggesting factors to consider but do not prioritize among those factors; (iii) rules that prioritize among factors and identify the appropriate conduct for most circumstances, but recognize the need for some leeway and do not dictate a particular course of action across the board; and (iv) rules that dictate or prohibit a particular course of action and are enforceable across the range of relevant cases. See *id.*

appears in a comment to Model Rule 3.8 on prosecutorial ethics¹² to illustrate how “making rules more or less specific affects the accomplishment of the drafters’ objectives.”¹³ And the fourth identifies “the practical benefits of analyzing professional rules in specificity terms” and shows how failing to settle on an ethics rule’s purpose and tie that purpose to the appropriate level of rule specificity “leads to poor drafting and a muddled debate.”¹⁴ From this structure I infer that Fred’s first methodological principle is that, before drafting or amending legal ethics rules, the drafters must “identify their purpose or, if rules have multiple purposes, assign priorities among them. Only with this foundation can drafters hope to formulate rules that have an optimal effect.”¹⁵ His second principle is that rules with the same purpose should generally share the same position along a continuum running from the general to the specific. Problems can arise when a rule with a given purpose is not stated at the appropriate level of generality or specificity.

Specificity begins by identifying some purposes that, by Fred’s lights, are not—or at least “should not be”—a proper basis for legal ethics rules, and others that are proper.¹⁶ One aim that the *ABA Model Rules* officially disavow, and Fred appears to consider improper, is to devise ethics rules in a *sub rosa* effort to recast—rather than reinforce or fill gaps in—the constitutional, statutory, and common law of lawyering.¹⁷ He is clearer about the impropriety of devising ethics rules to promote the “economic self-interest of the bar.”¹⁸ Appropriate aims include

at 244–47 (giving examples). Thus, the continuum concerns a “particular type of specificity; namely the extent to which codes identify and designate [i.e., dictate] desired conduct.” *Id.* at 244 n.62.

12. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2010) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”). See also MODEL CODE PROF’L RESPONSIBILITY EC 7-13 (1981) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”).

13. See Zacharias, *supra* note 4, at 225.

14. *Id.*

15. *Id.* at 224–25. This proposition borders on the tautological because one cannot assess whether a rule has an optimal effect without attributing one or more purposes to the rule.

16. *Id.* at 227–32. However, Fred does not dwell on his distinctions between proper and improper purposes. See *id.* at 262 n.114 (“My analysis considers the effect of specificity on a code’s ability to accomplish its purposes, whatever those purposes may be.”).

17. See *id.* at 229, 308. How strongly Fred disapproved of this aim is not entirely clear. He states at one point that whether the bar may properly issue ethics rules in an effort to “recast” the external law of lawyering “is a normative question beyond [his article’s] scope,” *id.* at 275, but elsewhere he criticizes a briefly successful attempt in 1990 by proponents of a *Model Rules* amendment to recast the external law as a move that “[a]rguably . . . oversteps the bar’s proper role,” *id.* at 288.

18. *Id.* at 230.

defining lawyers' roles in the legal system; promoting professional solidarity and cooperation by providing lawyers with norms for dealing with one another, which in turn helps lawyers coordinate their conduct with that of other actors in the legal process; providing a basis for sanctioning what lawyers generally agree is professional misconduct; promoting lawyer introspection by suggesting factors to consider when exercising discretion; influencing lawyers' attitudes in hopes of indirectly influencing their conduct; and controlling lawyers' behavior through rules that bar or require specific conduct and can be readily enforced.¹⁹

At a broader level of generality, Fred refers to two views that *all* legal ethics rules should serve the same function but whose proponents have opposing functions in mind. The first and more "modern" view is that ethics rules should be designed, like most legislation, to be legally and practically enforceable.²⁰ On this view, ethics codes and code reforms would be judged as most statutes are judged—"in political terms and in terms of their adequacy as a control mechanism for lawyer behavior."²¹ The second and "more traditional" view is that ethics codes should express professional ideals and provide a model for practice, rather than "enforceable behavioral constraints."²² On that view, the impact of ethics rules on lawyer conduct becomes a "secondary consideration" in judging their value.²³

19. *See id.* at 231–32, 241–43, 249.

20. *Id.* at 225–26 & nn.7–9 (citing works by proponents of this view, including Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *YALE L.J.* 1239, 1240, 1255, 1279 (1991)). Professor Hazard argues that there was a shift in ethics codes over the course of the twentieth century, from fraternal admonitions in the 1908 *Canons of Ethics* to provisions designed for legal enforcement in the *Model Rules of Professional Conduct*, a shift that Hazard "apparently favors." *See Zacharias, supra* note 4, at 225 n.7. I agree that there has been such a shift. But I also agree with Fred that this has been more a change of *emphasis* than a complete transformation and that a complete transformation would have a considerable downside at a time when the lawyer's professional identity, which is closely linked to shared traditions, is under siege. *See infra* notes 24–26 and accompanying text. I also disagree with Hazard's view that the ABA issued the 1908 *Canons* with no thought to their becoming positive law. Some bar leaders at the time hoped and expected that the *Canons*, though vague and moralistic by today's standards, would be adopted as positive law. *See Schneyer, How Things Have Changed, supra* note 2, at 175.

21. Zacharias, *supra* note 4, at 226. What Fred meant by judging rules "in political terms" is unclear.

22. *See id.*

23. *Id.* Of course "judging" ethics rules entails ex post scrutiny of what has already been drafted and promulgated. But ex post "judging" is linked to drafting in the

Fred's position is that both of these functions have a legitimate place in ethics rulemaking. He insisted, however, that attempting to control lawyer behavior through rules that prohibit or require specific conduct and are designed for effective enforcement is not the only appropriate function and that other purposes must also have their due.²⁴ He also asserted that the "modern trend" toward code specificity "may go too far"²⁵—meaning, presumably, that controlling lawyer behavior through highly specific rules may now be receiving undue emphasis and also, perhaps, that rules meant to serve other goals are becoming unduly specific. Great specificity in ethics rules that have aims other than tight control of behavior may be a vice, not a virtue. For example, a rule meant to define a certain role that lawyers play may work best if it identifies the goals that a lawyer acting in that role should pursue, or suggests priorities among certain interests affected by the role, rather than specifying just what conduct the role requires or forbids.²⁶

Finally, although acknowledging that the rather frayed legal community that now exists "does not share a unified view of the goals of lawyer regulation," Fred did not consider the multiplicity of valid purposes that this implies an obstacle to meeting his drafting principles *as long as* drafters can agree on the goal or goal priorities they intend their rules to serve.²⁷ Fred the idealist was apparently confident enough that this is possible that he took the trouble to construct his methodology for drafting and debating a new ethics code or revisions of an existing code. At one point, he expresses his faith that "[c]ode drafters who learn these lessons [that is, grasp his drafting principles] will undoubtedly write better, or at least more rational, codes."²⁸ In his conclusion, he adds that his methodology "should help participants in the debates to . . . reject the invitation to act as legislators in just another political process."²⁹ This

sense that assessments of existing provisions, such as Fred's criticisms of the *Model Rules in Specificity*, could at least in principle promote better drafting in the future.

24. Fred also claims that their multiplicity of legitimate goals distinguishes professional ethics codes from the bulk of legislation and administrative regulations, which presumably have behavior control as their sole aim. *See id.* at 232–39. Here I think he captured a profound difference between the lawyer's traditional conception of professional "self-regulation" and the perspective of legislators or that of government agencies that regulate law practice before them. For an excellent discussion of the difference, see generally Wibren van der Burg, *The Regulation of Professionals: Two Conflicting Perspectives* (Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies, Working Paper No. 09-01, 2009), available at <http://ssrn.com/abstract1456422>.

25. Zacharias, *supra* note 4, at 224.

26. *See id.* at 242–43.

27. *See id.* at 225.

28. *Id.* at 285.

29. *Id.* at 309.

optimism, however, is curiously at odds with Fred's realist observations about how legal ethics codes are actually produced.

III. FRED AS REALIST: REASONS TO DOUBT THAT HIS PROPOSED METHODOLOGY IS AVAILABLE

A number of Fred's observations about the manner in which the ABA drafted and debated the original *Model Rules* and subsequent amendments seem to me to supply cogent reasons to doubt that anything like Fred's idealistic methodology has been employed to date or will be employed in future projects to amend the *Model Rules*. Discussing a few of those observations should suffice to make the point.

First, recall the first principle of Fred's methodology: any proposed ethics code or part thereof must be approached by the drafting body and debate participants with a clear—and shared—understanding of the purpose or the prioritized purposes that lie behind it. I fail to see how a recommended methodology that is built on that principle can be reconciled with Fred's skeptical and, in my view, largely accurate observation that “[h]istorically . . . promulgators of the professional codes *have never* been clear about their overall goals.”³⁰

Second, as noted earlier, Fred appears to have had serious reservations about the propriety of devising legal ethics rules to undermine constitutional, statutory, or common law governing law practice, and to substitute the bar's—or a segment of the bar's—vision of what is sometimes called the external law of lawyering should be.³¹ Yet he refers to Professor Susan Koniak's “persuasive case for the proposition that many aspects of the [*Model Rules*] are designed precisely to establish lawyers' own vision of the law of lawyering.”³² Although the

30. *Id.* at 227 (emphasis added).

31. *See supra* note 17.

32. Zacharias, *supra* note 4, at 274 & n.151 (citing Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1417–41 (1992)); *see also id.* at 227 n.10 (“After reviewing aspects of professional regulation that are in tension with state law, Professor Koniak argues that code drafters . . . have attempted not only to supplement substantive law governing lawyers, but also to trump it with their own vision.”). My work on the drafting of the original *Model Rules* found a number of instances in which language was inserted in an effort to influence courts or administrative agencies, including one of the original comments to Model Rule 1.6 on the lawyer's duty of confidentiality that was clearly meant to influence judges when determining whether the duty of confidentiality was overridden by other law. “Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules,” the comment stated, “*but a presumption should exist against such a supersession.*” MODEL

ABA does not officially “intend” for the *Model Rules* to be used in that way, they exist in an environment that is rich with external law, and it would be quite naïve to suppose that the many bar constituencies that are governed by both the internal and the external law never try to shape the *Model Rules* to influence external law or legal decisionmakers. The incentives to do so are very strong.

Third, although Fred’s idealism put him at pains to distinguish code drafters following his principles from “legislators in [the] political process,”³³ he not only points to evidence of “behind-the-scenes political jockeying” in the *Model Rules* drafting process³⁴ but also acknowledges the likely “inevitab[ility]” of specialty groups within the bar lobbying for and influencing provisions in the *Model Rules*.³⁵ He refers, for example, to the political pressure that a criminal-defense-lawyer-dominated ABA Criminal Justice Section brought to bear in a successful adoption of a model rule requiring prosecutors to obtain judicial approval before they may subpoena a defense lawyer to give testimony that is not based on privileged information but might be adverse to the lawyer’s client.³⁶ Further evidence that the high degree of specialization—and therefore fragmentation—that exists in the legal profession today makes it unrealistic to suppose that any substantial effort to amend or supplant the *Model Rules* could proceed on the basis of Fred’s recommended ideology lies in the fact that many specialty bars have issued nonbinding ethical guidelines geared to practice in a particular field. As Fred has observed, some of those guidelines appear to be in tension with the *Model Rules*.³⁷

IV. CONCLUSION

Because I share Fred’s realism but not his idealism, I do not find especially damning the interest group politics that, as Fred recognized, have come to play a major role in the making of the ABA’s legal ethics rules.³⁸ My point is simply that the phenomenon is so entrenched that it

RULES OF PROF’L CONDUCT R. 1.6 cmt. 20 (2001) (emphasis added). This language was later deleted. *See id.* R. 1.6 cmt. 12.

33. *See Zacharias, supra* note 4, at 309.

34. *See id.* at 227 n.11. My own study of the drafting of the *Model Rules* between 1977 and 1983 provides many illustrations of this “jockeying.” *See Schneyer, The Making of the Model Rules, supra* note 2, at 688–725.

35. *See Zacharias, supra* note 4, at 233 n.31.

36. *See id.* at 289–91 & nn.204 & 207.

37. *See, e.g., Zacharias, Lies, Fictions, and False Paradigms in Legal Ethics Regulation, supra* note 6, at 841–42 & nn.59–62.

38. For political analysis of the fractious six-year process in which the ABA produced the *Model Rules*, see Schneyer, *The Making of the Model Rules, supra* note 2.

casts doubt on the viability of Fred's proposed code-drafting methodology. The lingering question is how Fred the realist came to the conclusion that the highly rationalistic methodology for drafting rules of legal ethics could be adopted. My only explanation is that Fred was no cynic and insisted in writing *Specificity* based on the power of hope over experience.

