

San Diego Law Review

Volume 48
Issue 1 2011

Article 31

2-1-2011

The Complexities of Lawyer Ethics Code Drafting: The Contributions of Professor Fred Zacharias

Nancy J. Moore

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Nancy J. Moore, *The Complexities of Lawyer Ethics Code Drafting: The Contributions of Professor Fred Zacharias*, 48 SAN DIEGO L. REV. 335 (2011).

Available at: <https://digital.sandiego.edu/sdlr/vol48/iss1/31>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

The Complexities of Lawyer Ethics Code Drafting: The Contributions of Professor Fred Zacharias

NANCY J. MOORE*

TABLE OF CONTENTS

I.	INTRODUCTION	335
II.	THE ROLE OF “ETHICS” AND “PROFESSIONALISM” IN MODERN LAWYER DISCIPLINARY CODES	337
III.	BEYOND THE NARROW DISCIPLINARY FUNCTION	342
IV.	THE TENSION BETWEEN SPECIFICITY AND GENERALITY	349
V.	CONCLUSION	355

I. INTRODUCTION

When I was asked to contribute to this special issue of the *San Diego Law Review* honoring Fred Zacharias, I knew immediately that I would write about ethics code drafting, a subject addressed by Professor Zacharias in many of his writings.¹ I had published an article in 2002

* Professor of Law and Nancy Barton Scholar, Boston University School of Law. Thanks to Bruce Green and John Leubsdorf for reviewing and commenting on a draft of this essay.

1. See, e.g., Fred C. Zacharias, *A Nouveau Realist's View of Interjurisdictional Practice Rules*, 36 S. TEX. L. REV. 1037 (1995) [hereinafter Zacharias, *A Nouveau Realist's View*]; Fred C. Zacharias, *Are Evidence-Related Ethics Provisions “Law”?*, 76 FORDHAM L. REV. 1315 (2007); Fred C. Zacharias, *Evidence Laws and Ethics Rules*, 19 PROF. LAW., no. 2, 2009 at 12; Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) [hereinafter Zacharias, *Federalizing Legal Ethics*]; Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787 (1998); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69 (1999);

entitled *Lawyer Ethics Code Drafting in the Twenty-First Century*, in which I reflected on my experience as Chief Reporter to the American Bar Association's (ABA) Commission on the Evaluation of the Rules of Professional Conduct (Commission), better known as the Ethics 2000 Commission or simply E2K.² In reviewing both my 2002 article and Professor Zacharias's scholarship, I observed that Professor Zacharias and I touched upon many of the same themes. Nevertheless, I was struck by the extent to which Professor Zacharias systematically explored the various aspects and the complexity of modern ethics codes.

The role of the E2K reporters was significantly constrained because the Commission had decided early on that, rather than drafting an entirely new ethics code as the Wright Committee did with the 1969 *Code of Professional Responsibility* and the Kutak Commission did with the 1983 *Model Rules*, it would seek merely to amend the *Model Rules of Professional Conduct (Model Rules)* to bring them into the twenty-first century.³ Nevertheless, because it was building on a solid

Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199 (2001); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997) [hereinafter Zacharias, *Reconceptualizing Ethical Roles*]; Fred C. Zacharias, *Should the Internet Make Us Reconsider Advertising Rules?*, in COURSEBOOK FOR THE 31ST NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY 199, 199–208 (2005); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993) [hereinafter Zacharias, *Specificity in Professional Responsibility Codes*]; 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 Zacharias, *Future of Legal Ethics Regulation*]; Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009) [hereinafter Zacharias, *The Myth of Self-Regulation*]; Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003) [hereinafter Zacharias, *Purposes of Discipline*]; Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407 (1998); Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?*, PROF. LAW., Symp. Issue, 2005 at 45 [hereinafter Zacharias, *What Direction Should Legal Advertising Regulation Take?*]; Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002). In addition, Professor Zacharias coauthored several articles with Professor Bruce Green on the topic of lawyer ethics code drafting. See, e.g., Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006); Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009).

2. See Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923 (2002) [hereinafter Moore, *Lawyer Ethics Code Drafting*]. More recently, I addressed the drafting of lawyer ethics codes in an article on mens rea standards in ethics codes, a topic that I first thought about in connection with my experience as Chief Reporter to the ABA Commission on Evaluation of the Rules of Professional Conduct. See Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (2010).

3. See Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 925–28.

foundation of existing rules, the Commission had an opportunity, as I described it in my 2002 article, to “reflect more deeply on the special and evolving nature of lawyer ethics codes.”⁴ In particular, I identified and discussed three aspects of the broader picture that the Commission had addressed: (1) it considered, and rejected, a proposal to make the ethics code “more ‘ethical’—rather than strictly ‘legal’—by incorporating some form of ‘best practices’ or ‘professionalism’ concepts”;⁵ (2) it acknowledged that the role of the ethics code was broader than its narrow disciplinary function, expanding it to provide “greater guidance for lawyers, thus enhancing the likelihood of compliance with the Rules as professionalism norms”;⁶ and (3) it struggled “with the tension between specificity and generality in rule drafting,” opting sometimes for specificity to provide clarity and notice and other times for generality, to provide flexibility in addressing a variety of individual circumstances.⁷

In this essay, I return to these three aspects of the special and evolving nature of lawyer ethics codes in order to acknowledge the important contributions of Professor Zacharias. As I hope to show, Professor Zacharias’s publications present a far more complex and nuanced view of the task of drafting lawyer ethics codes than either the Commission or I had contemplated. Although there was not much time then to further address these more theoretical concerns, I am confident that we would have benefitted enormously from a deeper exploration of his scholarship in this area.

II. THE ROLE OF “ETHICS” AND “PROFESSIONALISM” IN MODERN LAWYER DISCIPLINARY CODES

Early in its deliberations, the Ethics 2000 Commission considered “whether it would be possible to add some discussion of ‘better practice’ back into the Commentary to the Rules,”⁸ thereby implementing the recommendation of a 1986 ABA report urging lawyers to abide by higher standards than the minimum required by lawyer disciplinary

4. *Id.* at 929.

5. *Id.* at 930 & n.47.

6. *Id.* at 930.

7. *Id.* at 931–32.

8. Minutes, Comm’n on Evaluation of the Rules of Prof’l Conduct (Aug. 4, 1997), *quoted in Moore, Lawyer Ethics Code Drafting*, *supra* note 2, at 930 n.47.

rules⁹ and responding to the concern of many lawyers to improve the public image of lawyers and recapture the pride of professionalism.¹⁰ In particular, the Commission was considering a request to add aspirational—and thereby unenforceable—“Principles of Better Practice” in the comments to the black-letter disciplinary rules.¹¹ The Commission concluded that “given the regulatory sophistication of the *Model Rules*, it was simply impossible to return to the exhortatory or aspirational nature of the earlier [ethics] codes”¹² because the use of exhortatory language would be perceived as inappropriate “preaching.”¹³ In addition, the Commission was concerned that “any attempt to give such guidance clearly would be misperceived as having a regulatory dimension,”¹⁴ as had occurred when courts sometimes enforced the Ethical Considerations (ECs) of the 1969 *Code of Professional Responsibility*, which were also intended to serve as aspirational guidelines rather than the basis for lawyer discipline.¹⁵

With respect to the decision to reject the addition of “Principles of Better Practice” to the disciplinary rules,¹⁶ I am satisfied not only that the Commission was correct, but also that the Commission rightly relied on the difficulty of introducing purely aspirational statements into a document designed primarily to serve as a basis for lawyer discipline.¹⁷ Nevertheless, my review of Professor Zacharias’s scholarship has persuaded me that the Commission may have failed to consider the

9. See AM. BAR ASS’N COMM’N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).

10. See Nancy J. Moore, *The Usefulness of Ethical Codes*, 1990 ANN. SURV. AM. L. 7, 11 (observing that these lawyers typically assume that “a lofty code of ethics is a central component of any true profession”).

11. See Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 930 & n.47.

12. *Id.* at 930.

13. *Id.* at 930 n.48 (citing AM. BAR ASS’N, CTR. PROF’L RESPONSIBILITY, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT xii (2000)); see also Moore, *supra* note 10, at 7–10 (describing assorted codes that were adopted at the state and local level following the ABA Commission on Professionalism report as “[o]ften ‘preachy’ in tone, their language recalls the ‘Victorian moralizing’ of the former ABA Canons—certainly not a useful model for the 1980’s” (footnote omitted)).

14. Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 930 & n.49.

15. See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 59 (1986) (noting that although most jurisdictions considered the ECs to be nonbinding, some jurisdictions enforced them).

16. See Memorandum from Nancy Moore to Comm’n on Ethics 2000 (Oct. 3, 1997) (on file with author), *cited in* Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 930 n.47.

17. Even so, there may be aspirational statements in the current *Model Rules*. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. 10–11 (2010) (containing various statements about what a lawyer “should” do).

extent to which the *Model Rules* can—and do—serve not only as a basis for lawyer discipline but also as a means of fostering ethical decisionmaking and a sense of professionalism among lawyers.

According to Professor Zacharias, in addition to providing the basis for lawyer discipline, lawyer ethics codes provide guidance for lawyers in “choosing from among several [otherwise] permissible courses of conduct”¹⁸ because, “at least on occasion, lawyers do consult and rely upon professional codes for guidance even when the codes pose no threat [of discipline].”¹⁹ In itself and read literally, this statement is unremarkable and was certainly understood by the Commission when it “proposed a number of changes designed primarily to give greater guidance for lawyers.”²⁰ However, the Commission was primarily concerned with making it more likely that lawyers would conform their conduct to what was specifically required under the disciplinary rules, whereas Professor Zacharias meant something entirely different.

As early as 1993, in an article entitled *Specificity in Professional Responsibility Codes*, Professor Zacharias analyzed what he saw as a “drift toward specificity” and argued that the “modern trend may go too far.”²¹ In particular, he noted that “clear rules and punishment for violation of those rules are not always necessary to produce desirable conduct” because the purpose of some rules, even black-letter rules, is to “promote introspection by lawyers—thought about what conduct is ‘professional’ given the lawyer’s ‘role.’”²² The point here is twofold. First, by refusing to direct lawyer conduct in a particular situation, code drafters may be acknowledging that more than one response is appropriate; therefore, the code gives lawyers discretion to choose which course of conduct is best under the circumstances.²³ Second, and more important, Professor Zacharias believed that encouraging or forcing lawyers to think about what conduct is best can foster professionalism because it makes “the lawyer act for ethical or systemic reasons rather than because of the coercive force of potential discipline.”²⁴ And “[b]y forcing lawyers to think in ethical and systemic terms, the codes hope to

18. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 234.

19. *Id.* at 236.

20. Moore, *Legal Ethics Code Drafting*, *supra* note 2, at 930.

21. Zacharias, *Specificity in Professional Ethics Codes*, *supra* note 1, at 224.

22. *Id.* at 236–37.

23. *See id.* at 257–58.

24. *Id.* at 258.

promote an introspective process that carries over to situations the drafters do not, and perhaps cannot, foresee.”²⁵ This concept of deliberately promoting ethics and professionalism in a disciplinary code by using general rules to prompt moral introspection runs directly counter to the trend, first noted with approval by Professor Geoffrey Hazard, to draft rules as specifically and clearly as possible on the assumption that lawyers are “entitled to *legal rules* that are not confounded by appeals for moral regeneration.”²⁶

In both *Specificity in Professional Responsibility Codes* and subsequent articles, Professor Zacharias elaborated upon his initial insight. For example, he explained that in choosing between different levels of specificity or generality, regulators must be mindful that too highly generalized mandates may not promote introspection but rather may make it possible for lawyers to “justify virtually any response to any ethical dilemma.”²⁷ As a result, it may be necessary, in commentary or otherwise, to provide criteria and prioritize the different interests at stake when lawyers exercise the discretion given to them under the rule.²⁸

Subsequently, in an article entitled *Permissive Rules of Professional Conduct*, coauthored with Professor Bruce Green, Professor Zacharias addressed at length the complex nature of discretion in permissive ethics rules.²⁹ Professors Green and Zacharias differentiated among rules that are the equivalent of no regulation at all—thus neither encouraging nor contemplating the exercise of discretion; rules that affirmatively defer to lawyer choice—thus discouraging external regulators from exercising any regulatory oversight; and rules that constitute “regulated discretion,” that is, “permissive rules [that] give lawyers ‘discretion,’ but only

25. *Id.* at 258–59.

26. Geoffrey C. Hazard, Jr., Address, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1981), quoted in Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 260 n.110.

27. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 263.

28. *See id.* To illustrate, he gives the example of prosecutors being required to simply “do justice,” without much in the way of setting criteria and prioritizing different views of justice, for example, convicting guilty defendants versus preserving defendants’ rights. *See id.* at 248, 263. With respect to this particular example, it should be noted that there is not, nor has there ever been, any disciplinary rule that requires prosecutors to “do justice.” Rather, as Professor Zacharias himself acknowledges, these “requirements” derive from an aspirational ethical consideration under the 1969 *Model Code* and an unenforceable comment to the current *Model Rules*. *See id.* at 248 & n.81 (citing MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (1983); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1969)). It is indeed regrettable that the current comment does not give more guidance to prosecutors, *see* MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2010), but I would have thought an example based on a highly generalized black-letter rule would have made the point better.

29. Green & Zacharias, *supra* note 1.

‘discretion to exercise professional judgment.’”³⁰ Presumably, rules constituting both affirmative deference and regulated discretion encourage lawyers to engage in moral introspection. It is the latter, however, that are more likely to be effective in achieving this goal. This is because they subject lawyers to criticism for “abusing their discretion,” and “the permission to choose among the options comes with [enforceable] expectations.”³¹ Indeed, according to Professors Green and Zacharias, these rules hearken back to a more traditional form of regulation in which codes relied not so much on specific conduct rules but rather on the anticipation that lawyers would exercise “self-restraint, guided by professional norms.”³² Moreover, regulated discretion rules may actually *force* lawyers to make reflective choices in individual cases by prohibiting them from bargaining away their future ability to choose certain options that would harm client interests in favor of the interests of individuals intended to be protected by the rule. For example, Professors Green and Zacharias argue that it would be improper for a lawyer to argue at the outset of a representation that the lawyer would not, under any circumstances, disclose client wrongdoing as permitted by Model Rule 1.6(b).³³

Had the Commission reflected on Professor Zacharias’s view that modern ethics codes promote ethics and professionalism by sometimes encouraging, perhaps even forcing, moral introspection by lawyers, it is unclear whether the Commission would have proposed any additional revisions to the *Model Rules*. Nevertheless, the Commission probably would have provided a better explanation for its decision to reject the addition of a “better practices” section in the comments. In other words, rather than implying that ethics and professionalism are no longer appropriate aspects of a modern disciplinary code,³⁴ the Commission could have explained that one way codes can and do foster ethics and professionalism, in a different, arguably more effective manner, is through the occasional use of black-letter rules that require lawyers to exercise professional judgment.

30. Green & Zacharias, *supra* note 1, at 278, 281 (quoting MODEL RULES OF PROF’L CONDUCT pmbl. para. 14 (2006)).

31. *Id.* at 282.

32. *Id.* at 283.

33. *See id.* 284–85. To my knowledge, there has been no judicial opinion or ethics committee opinion addressing the question of whether such an agreement is in violation of the rule.

34. *See supra* notes 8–15 and accompanying text.

III. BEYOND THE NARROW DISCIPLINARY FUNCTION

What Professor Zacharias identified as a “drift toward specificity”³⁵ is part of what I have elsewhere described as a broader trend in professional codes to evolve from a simple set of ideals to a “‘second-level’ code” that contains more stringent language, designed to be enforced, and finally to a “‘third-level,’ in which the standards for proper practice are so clearly laid out that ‘[w]hat is left is little more than a quasi-criminal code.’”³⁶ Despite this trend, the Ethics 2000 Commission refused to view the *Model Rules* as having only a narrow disciplinary function and proposed a series of changes designed primarily to give greater guidance to lawyers.³⁷ These changes included transforming and expanding the terminology section of the *Model Rules*, expanding the comments throughout the rules, giving more explanations and rationales for the black-letter rules, adding cross-references to other rules, and providing guidance on other applicable law.³⁸ What the Commission did not consider, however, was the extent to which modern lawyer disciplinary codes may serve a variety of functions beyond either discipline or education, as Professor Zacharias believed they do.

Professor Zacharias first addressed this subject in his 1993 article on *Specificity in Professional Responsibility Codes*. Here, he argued that in order to decide what level of specificity to use in any particular rule, it is important to identify the rule’s purpose because “failing to identify the underlying code’s purposes and linking the specificity of reform to those purposes leads to poor drafting and a muddled debate.”³⁹ Professor Zacharias then noted that some commentators, including Professor Hazard, view lawyer codes as the equivalent of “legislation—legalized in format and judicially enforced,” in which case the purpose of every rule is to provide “a control mechanism for lawyer behavior.”⁴⁰

According to Professor Zacharias, however, lawyer codes are similar to typical legislation “only when they try both to fix specific behavior and to anticipate at least some measure of discipline for violation of the rules.”⁴¹ As discussed above, one of the ways in which lawyer codes differ from typical legislation is that they do not necessarily embrace objective rules for behavior but rather permit lawyers to exercise

35. See *supra* text accompanying note 21.

36. Moore, *supra* note 10, at 15 (quoting L.B. Cebik, *Ethical Trilemmas*, in 1 ETHICAL PROBLEMS IN ENGINEERING 17, 18 (Albert Flores ed., 2d ed. 1980)).

37. Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 930.

38. *Id.* at 930–31.

39. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 225.

40. *Id.* at 225–26.

41. *Id.* at 238–39.

discretion in determining appropriate conduct.⁴² In doing so, part of a code's function is "to explain the parameters of the system and attempt to identify how, when, and why a lawyer should act differently than well-intentioned laypersons might act."⁴³ Other functions include giving greater guidance to lawyers and "creat[ing] a fraternity, or 'profession,' in which the members perceive a norm in dealing with one another," thereby facilitating the legal process by helping to "normalize and guide lawyer behavior vis-a-vis others."⁴⁴

These views were more fully developed in a 2003 article entitled *The Purposes of Lawyer Discipline*.⁴⁵ In this article, Professor Zacharias examined the entire disciplinary process, including not only the drafting—and adoption—of lawyer disciplinary codes but also the conduct of disciplinary prosecutors, reviewing courts, and bar organizations engaged in a variety of regulatory activities, including offering assistance to troubled lawyers. Addressing ethics code drafters, Professor Zacharias reiterated his view that "[e]thics codes serve even more purposes than disciplinary decisions" through rules that serve primarily as instruction or guidance for lawyers and rules that serve the "'fraternal' function, attempting to order relationships among lawyers and the courts and to facilitate communication."⁴⁶ In addition, he argued that "[s]till other rules are geared primarily toward maintaining the image of the bar," citing, for example, lawyer advertising prohibitions, which according to him are designed, in part, "to avoid a perception that lawyers are seedy businessmen, a perception that can interfere with the ability of lawyers to develop efficient relationships with their clients."⁴⁷

42. See *supra* notes 28–33 and accompanying text; see also Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 238 ("The professional codes . . . truly intend to avoid objective rules for behavior and seek to leave the determination of appropriate conduct to individual lawyers' own consciences.").

43. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 231.

44. *Id.* at 231 & n.27.

45. Zacharias, *Purposes of Discipline*, *supra* note 1.

46. *Id.* at 730.

47. *Id.* at 730–31 & n.210. Many commentators would argue that provisions designed to "maintain the image of the bar" are instances of the bar acting to promote its members' economic or reputational self-interest and therefore have no legitimacy. See, e.g., Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 645, 655, 686 (1981) (discussing how "the Rules are both underinclusive (in the double sense of overlooking salient behavior and being unduly lax) and overinclusive" due to the fact that "the ABA is an elite organization concerned with protecting the interests of elite lawyers," and ultimately concluding that they are only revised and rewritten "in a vain effort to renew their legitimating force"); see also Deborah L. Rhode, *Why the ABA*

Of even greater interest, however, is what Professor Zacharias identified as the implications of focusing on the entire disciplinary process for the general drafting or rulemaking process. For example, “regulatory agencies have multiple, sometimes inconsistent, priorities . . . [and] some of these may conflict with or undermine the rulemakers’ goals.”⁴⁸ If the rulemakers take into account the broader disciplinary process, they may “consider more explicitly the enforceability of the rules,” including “defining [their] policies,” “incorporat[ing] statements defining their own priorities within the rules themselves, or even incorporat[ing] suggestions regarding appropriate sanctions for particular situations.”⁴⁹ Or they might draft more “self-executing” rules, such as rules requiring written notification or consent.⁵⁰ Finally, they may “recognize the need for routine review of the rules, with a view to evaluating how the realities of enforcement have affected the rules’ impact.”⁵¹

As part of this broader focus, Professor Zacharias also considered the sometimes contradictory goals of lawyer discipline—such as incapacitating

Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689, 689–92, 708 (1981) (questioning “whether the bar as a whole can rise above parochial concerns on issues that place its income or status at risk,” due to the fact that the “ABA formulates and fulminates for its health,” but ultimately rejecting Professor Abel’s implication that the “precepts lack ‘instrumental’ significance”). Professor Zacharias was realistic about bar motivations and was often severely critical of bar organizations, including their promotion of some of the advertising rules. See, e.g., Zacharias, *What Direction Should Legal Advertising Regulation Take?*, *supra* note 1, at 45, 45–48; see also Green & Zacharias, *supra* note 1, at 312 (“Bar associations rarely advocate the adoption of rules on the express basis that the rules benefit lawyers (economically or psychologically) or the bar organization itself. Yet there is little doubt that ethics codes traditionally have included self-serving propositions.”). Nevertheless, he accepted that much of the time the bar and the courts act legitimately and in good faith pursuit of the public interest. See, e.g., Zacharias, *The Myth of Self-Regulation*, *supra* note 1, at 1172 (“Some commentators have questioned the good faith of the personnel who draft the professional codes, but the consensus is that lawyer-regulators in other contexts—particularly judges and modern disciplinary prosecutors—implement their functions relatively objectively.” (footnote omitted)). His views on the relationship between advertising and its effect on lawyer-client relationships are an example of his willingness to give bar organizations credit for acting in good faith.

48. Zacharias, *Purposes of Discipline*, *supra* note 1, at 731 (footnote omitted).

49. *Id.* The ABA has indeed published a separate document suggesting factors to take into account in determining sanctioning for rule violations. See AM. BAR ASS’N, STANDARDS FOR IMPOSING LAWYER SANCTIONS 25 (1991). However, these standards were not drafted by the same groups that drafted the substantive rules.

50. Zacharias, *Purposes of Discipline*, *supra* note 1, at 733. It is not clear to me what is meant here by the term *self-executing*. Certainly the requirement of a writing makes the rule easier to enforce, but the rule must nevertheless be enforced by bar counsel. However, Professor Zacharias appears to have meant something entirely different, namely that “[r]equiring written notifications from lawyers to clients regarding the consequences of conflicts . . . helps foster loyalty by forcing lawyers to address the issue with their clients.” *Id.* If so, then I believe that the term *self-executing* is not helpful in conveying his intended meaning.

51. *Id.* at 731.

“miscreant lawyers”—and “other bar regulatory efforts,” such as “lawyer assistance programs that emphasize rehabilitation.”⁵² Perhaps, he suggested, “what [the bar] does best is to assist lawyers and . . . what the public trusts least is its efforts to regulate lawyers.”⁵³ If so, then perhaps the bar should defer more to “civil and criminal law, as well as outside regulation, to enforce rules against lawyer misbehavior.”⁵⁴ Although he acknowledged that it may be neither realistic nor desirable for the bar to abandon or even severely curtail the field of lawyer regulation, Professor Zacharias did suggest that “[a]s a practical matter, bar regulators may in future years come to rely more heavily on extra-code constraints and outside regulat[ion].”⁵⁵

The relationship between ethics codes and external law is a topic that Professor Zacharias addressed on numerous occasions. In 2002, in an article entitled *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, Professor Zacharias noted inconsistencies “between the codes and other forms of lawyer regulation,” and observed that these inconsistencies “may suggest that existing standards are unrealistic.”⁵⁶ Indeed, he went further and argued that “[p]erhaps the greatest delusion of the modern codes is the notion that the professional rules are all-encompassing,” whereas in truth, “codes play only a small (though significant) role in constraining lawyer misconduct.”⁵⁷ He acknowledged that “[t]he bar has started to recognize this reality,” citing the 2000 publication of the *Restatement of the Law Governing Lawyers* as “an express admission that the professional codes are but a small part of the law that governs, guides, affects, and deters lawyers.”⁵⁸ Nevertheless, he

52. *Id.* at 725.

53. *Id.*

54. *Id.*

55. *Id.* at 725–26. Of course, as Professor Zacharias has acknowledged elsewhere, external law already plays a large role in the regulation of lawyers, particularly court disqualification decisions and malpractice lawsuits. See Zacharias & Green, *supra* note 1, at 73–77 (discussing conflicting and overlapping state court oversight of lawyers’ conduct in “rule-making, discipline, supervision of lawyers’ conduct in litigation, and the administration of equity and common law causes of action,” including malpractice and breach of fiduciary duty lawsuits). For a discussion of the extent to which the U.S. Congress and other nonjudicial institutions are now regulating many aspects of lawyer conduct, see John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959 (2009).

56. Zacharias, *Future of Legal Ethics Regulation*, *supra* note 1, at 831.

57. *Id.* at 858.

58. *Id.* at 863.

concluded that what the *Restatement* did not do is address the normative question of “how the codes and other law *should* relate and . . . make clear the purposes and limitations of each set of professional rules.”⁵⁹

In *The Future of Legal Ethics Regulation*, Professor Zacharias found it difficult to predict how regulators would consider the interaction of professional standards and other forms of regulation, but he did “envision that future codes will make more specific reference to other law.”⁶⁰ Not surprisingly, the Ethics 2000 Commission took this step in proposing its 2002 amendments to the *Model Rules*. In fact, the adoption of the *Restatement* was one of the significant developments to which the Commission looked in order to bring the *Model Rules* into the twenty-first century.⁶¹ For example, recognizing that the disciplinary rules are often used in other contexts, the Commission added language clearly acknowledging that the *Model Rules* establish standards of conduct by lawyers; therefore, a lawyer’s violation of a rule may be considered as evidence of a breach of the applicable standard of conduct in civil liability and other nondisciplinary proceedings.⁶² In addition, the Commission added references to external law in the comments, particularly when such law was more restrictive than that reflected in the disciplinary rules.⁶³

Alerting lawyers to the existence and potentially more onerous requirements of external law is an important function that lawyer ethics codes can perform. However, Professor Zacharias also observed that code provisions are often inserted in an effort to influence external lawmakers, typically courts.⁶⁴ According to him, these efforts are most likely to succeed when they fill in “[g]aps in the prevailing law” and, in addition, when there is “reason to believe the bar’s response is measured.”⁶⁵ In my view, this description accurately characterizes the Ethics 2000 Commission’s approach to its proposed rule on the screening of lateral lawyers.⁶⁶ In crafting this rule, the Commission was

59. *Id.* at 864. For a well-known article suggesting a methodology for determining the appropriate relationship among the various methods of regulating lawyers, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

60. Zacharias, *Future of Legal Ethics Regulation*, *supra* note 1, at 869.

61. See Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 935–41.

62. *Id.* at 936; see also MODEL RULES OF PROF’L CONDUCT pmb1. para. 20 (2010) (“[S]ince the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”).

63. See Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 936.

64. See Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 274–78.

65. *Id.* at 275–76.

66. See Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 937–38. The rule proposed by the Commission was not adopted by the ABA House of Delegates. See *Ethics 2000 Commission: Summary of House of Delegates Action on Ethics 2000*

aware that some courts would consider whether and to what extent a personally conflicted lawyer had been involved in a matter before agreeing that the lawyer could be screened. Concerned, however, that a “proposed ‘side-switching lawyer’ exception to the black-letter rule” could not realistically be enforced in a disciplinary proceeding, the Commission chose to state in the comment that “[l]awyers should be aware . . . that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.”⁶⁷ Although not explicitly acknowledged, this was clearly one instance in which “the proposed rules were being used not merely to reflect other law but rather to shape it.”⁶⁸

What may have been clear to the Commission, however, would not necessarily have been clear to others. For example, in an article coauthored with Professor Bruce Green entitled *Permissive Rules of Professional Conduct*, Professor Zacharias implied that if one of the purposes of giving lawyers discretion is to actively discourage external regulators from entering into the field, code drafters should say so explicitly.⁶⁹ After all, the practicing bar may assume that, by definition, all permissive rules reflect this position, but a careful review of the entire spectrum of permissive rules indicates that this is not always the case.⁷⁰ Moreover, he cautioned that code drafters should not advance this position lightly because other lawmakers are unlikely to defer to the judgment of code drafters in the absence of a persuasive reason to do so.⁷¹

Commentators other than Professor Zacharias, most notably Professor Susan Koniak, have argued that code provisions are sometimes adopted

Commission Report, AM. BAR ASS’N, http://www.abanet.org/cpr/e2k/e2k-summary_2002.html (last visited Mar. 3, 2011). A different screening rule was finally adopted by the ABA in 2009. See William Freivogel, *A Short History of Conflicts of Interest. The Future?*, 20 PROF. LAW., no. 2, 2010 at 3, 6.

67. Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 938 (internal quotation marks omitted). In addition to applying more stringent standards, courts sometimes decline to disqualify a law firm, even when the rules of professional conduct have been violated, for various institutional reasons, including the failure of the aggrieved client to raise the conflict in a timely fashion. See generally Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71 (1996) (examining the relationship between disciplinary and disqualification standards).

68. Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 938.

69. See Green & Zacharias, *supra* note 1, at 288–89.

70. *Id.* at 289.

71. See *id.* at 291.

in a more pernicious effort not merely to influence the direction of external law but rather to defy it.⁷² Although Professor Zacharias agreed that, at times, the bar may be “driven by its self-interest or self-image,”⁷³ he did not concede that apparent inconsistencies necessarily reflect contradictory visions of the same issues.⁷⁴ Nevertheless, in a 2009 article entitled *The Myth of Self-Regulation*, Professor Zacharias argued that, if Professor Koniak is correct in her assessment of the purpose of these provisions, “there are a variety of costs associated with professional rule making that challenges external law,” including providing misinformation to lawyers, “undermin[ing] faith in the legitimacy of the rules,” and “mak[ing] the rules less important [by] effectively confin[ing] their applicability to the narrow areas in which the codes alone govern.”⁷⁵

Decrying the bar’s insistence on viewing itself as fully self-regulating, Professor Zacharias urged that ethics codes are more properly viewed as a form of “co-regulation” and that fully embracing that view will “enhance the efficiency of the codes.”⁷⁶ For example, he suggested that code drafters determine whether unenforced rules merely parallel external law; if so, then “that might speak to elimination of the rule absent an independent reason to keep it . . . [because] perpetuating unenforced provisions undermines their force and lawyers’ respect for the codes.”⁷⁷ Moreover, “identifying the guidance provided by external law would inform the bar about when professional regulation is necessary to fill gaps.”⁷⁸ “In short,” argued Professor Zacharias, “perceiving the role of the professional codes unrealistically as a regulatory regime that should operate in the place of external regulation can cause the bar to err in the rules it includes, the way it writes its rules, and the focus of its operations.”⁷⁹ In other words, “meshing the codes with external law can lead to a clearer regulatory regime and better guidance for lawyers.”⁸⁰

72. See Zacharias, *The Myth of Self-Regulation*, *supra* note 1, at 1179 & n.138 (citing Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1391 (1992)).

73. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 274–75.

74. See Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 57–60 (2005).

75. Zacharias, *The Myth of Self-Regulation*, *supra* note 1, at 1179–80.

76. *Id.* at 1181.

77. *Id.* at 1182.

78. *Id.*

79. *Id.* at 1183.

80. *Id.* at 1184.

The Ethics 2000 Commission clearly recognized the existence of external law, and even in hindsight, I do not view it as acting in defiance of such law.⁸¹ Nevertheless, we might not have fully recognized the extent to which we were acting as mere coregulators, and we certainly did not undertake any comprehensive review of the relationship between the disciplinary rules and external law. It is doubtful whether there was either the time or the will to conduct such a review, but it would have been useful for the Commission to have more deliberately pondered the purposes of ethics codes beyond lawyer discipline and education.

IV. THE TENSION BETWEEN SPECIFICITY AND GENERALITY

There were several points at which the Commission struggled with the tension between specificity and generality in rule drafting. To a large extent, it continued the modern trend, identified by Professor Hazard,⁸² toward specificity in lawyer disciplinary codes. In a few instances, however, the Commission opted for a more general regulatory approach because the Commission was “less concerned with clarity and notice to lawyers and more concerned with flexibility, recognizing that the terms of disciplinary rules are (and should be) increasingly subject to case-by-case interpretation by ethics committees or courts, both in disciplinary and in other types of cases.”⁸³ This, of course, is a variation on the perennial choice between rules and standards.⁸⁴

81. However, one might well characterize the ABA House of Delegates as acting in defiance of external law when it refused to approve the E2K Commission's recommendation to amend the confidentiality rule to permit lawyers to disclose a client's intent to perpetrate an economic crime or fraud when the lawyer's services had been used. See Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 450–51 (2002) (summarizing the E2K proposal to amend Model Rule 1.6 with regard to economic crimes and frauds and the rejection of this proposal by the ABA House of Delegates). The 2001 version of the *Model Rules* prohibited the lawyer from disclosing a client's economic crimes or frauds even when external law required such a disclosure in order for the lawyer to avoid assisting the client in such illegal conduct. See MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2001) (stating that a lawyer may not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6*” (emphasis added)).

82. See *supra* note 26 and accompanying text.

83. Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 931–32 (footnote omitted).

84. See, e.g., Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 240 & n.53. According to Professor Zacharias, the general debate over rules

In opting for more general rules in these cases, the Commission was aware of Professor Zacharias's view that ethics codes are different from typical legislation because they are rarely fleshed out in ethics committee opinions or in judicial opinions.⁸⁵ However, the Commission was more sanguine than Professor Zacharias that the details would be worked out over time because, as Professor Green has concluded, clarifying ethics opinions have become more prevalent and more accessible.⁸⁶ Nevertheless, perhaps the Commission was too quick to downplay this unique aspect of ethical codes. After all, ethics opinions often respond to the fact-specific inquiry of a particular lawyer, and it may be unclear when their conclusions can be generalized to the situations of other lawyers where the facts may differ in some respects.⁸⁷ Another problem is that ethics committee opinions are not usually binding on courts, thereby further lessening their ability to guide lawyers.

As was typical of his work,⁸⁸ Professor Zacharias's study of specificity versus generality in drafting ethics codes was highly systematic. Not surprisingly, he rejected the standard binary choice in favor of a more complex "specificity continuum," in which he recognized greater variation in the extent to which regulators intend code provisions to establish uniform conduct.⁸⁹ Professor Zacharias identified

versus standards is not necessarily applicable to lawyer ethics codes because "[t]he rules-standard debate focuses upon the likely effect of particular laws in inducing agreed-upon, desirable behavior," whereas "some code provisions simply seek to influence behavior—sometimes in an undefined direction—by shaping lawyer attitudes." *Id.* at 240–41.

85. Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 932 n.62 (citing Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 237–38).

86. Moore, *Lawyer Ethics Code Drafting*, *supra* note 2, at 932 n.62 (citing Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 732 (2002); Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 542 (1997) (noting "the ever-burgeoning number of ethics opinions and court decisions that interpret and apply the code provisions . . . in a wide variety of contexts"))).

87. This is also true of judicial opinions; however, common law judges are very much aware of the fact that their decisions and opinions will be used to determine the result in future cases and draft accordingly. Lawyers drafting ethics committee opinions may or may not have future cases in mind, and in some instances, these lawyers will be drafting quickly in order to get advice to the inquiring lawyers in a timely fashion.

88. See, e.g., Zacharias, *Purposes of Discipline*, *supra* note 1, at 693–744 (systemically analyzing four separate orientations toward discipline, the impact of these different orientations, and the consequences of acknowledging the various purposes of discipline, including the ramifications for reviewing courts, rulemakers, disciplinary prosecutors, and bar agencies); see also Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 175, 176–83 (2008) (offering "a taxonomy of the ways in which lawyers' reputations are important").

89. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 244 (internal quotation marks omitted).

four points along this spectrum, thus enabling a rule to be characterized as one that either (1) offers a mere “axiom” without suggesting any particular result; (2) suggests a “process,” with “factors to weigh”; (3) suggests a result; or (4) requires a result.⁹⁰ According to Professor Zacharias, current codes “reflect a mix of these approaches,”⁹¹ which is perfectly understandable given the variety of purposes of these codes.⁹² Indeed, in his view, regulators need to recognize and draft with the specificity continuum in mind, considering both “how [proposed provisions] interrelate with other provisions, and how a package of regulation at that level of specificity effectuates the codes’ goals.”⁹³

Professor Zacharias addressed an entirely different aspect of the tension between specificity and generality in his 1997 article entitled *Reconceptualizing Ethical Roles*.⁹⁴ The question he posed in this article is “whether lawyers in different categories of practice should assume different roles” and, if so, “whether ethics regulators and theorists should recognize finer distinctions among lawyers’ roles than they have relied upon thus far.”⁹⁵ The article examined three ways of reconceptualizing legal ethics, each of which might entail drafting more specialized, that is, specific, ethical rules. The first focuses on the varied goals of legal representations,⁹⁶ while the second focuses on different types of clients and the varying nature of the attorney-client relationship these clients would require.⁹⁷ Professor Zacharias concluded that both of “[t]hese reconceptualizations have much to offer in a theoretical sense, but may prove difficult to implement on a case-by-case or rule-by-rule basis.”⁹⁸

As Professor Zacharias accurately noted, other commentators have proposed yet a third way of reconceptualizing legal ethics—according to different areas of practice. If accepted, this could result in specialized codes of conduct in areas like family law, estate law, and immigration practice.⁹⁹ Professor Zacharias viewed this third way as more promising because of its practicality; however, rather than rely on an entirely “ad

90. *Id.*

91. *Id.* at 246.

92. See generally Zacharias, *Purposes of Discipline*, *supra* note 1.

93. Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 247.

94. Zacharias, *Reconceptualizing Ethical Roles*, *supra* note 1.

95. *Id.* at 170–71.

96. *Id.* at 172–86.

97. *Id.* at 186–90.

98. *Id.* at 171.

99. *Id.* at 190–91.

hoc” process of picking specific areas of practice to regulate, he attempted to systemically identify different ways of categorizing these subject matter areas.¹⁰⁰ For example, there are subject areas in which the interests of third parties are implicated on a regular basis, such as matrimonial and environmental law.¹⁰¹ Other subject areas involve “[n]ontraditional [a]dversaries,” in which the parties will be continuing to interact in the future; these subject areas include not only matrimonial law, but also elder law and the representation of joint clients in business ventures.¹⁰² Finally, Professor Zacharias considered representations of clients with nontraditional mental states, representations that implicate special systemic interests, and representations involving predominantly nonlegal work.¹⁰³

Reconceptualizing lawyer roles along these lines does not necessarily entail the adoption of separate ethics codes for each unique area of practice. Rather, according to Professor Zacharias, alternative approaches to implementing these reconceptualizations include relying “on noncode, substantive law constraints (e.g., fiduciary, criminal, and malpractice law) to guide lawyers with respect to specialized contexts,” rewriting “the universal code to include enough specific provisions to guide lawyer behavior in subspecialties,” and continuing “to rely on the universal code, but provide regulatory supplements or protocols . . . for practices in which deviation from the general norms is appropriate.”¹⁰⁴ In the end, Professor Zacharias preferred the adoption of either supplemental protocols or entirely separate ethics codes.¹⁰⁵ According to him, substantive law is unlikely to develop specific standards of conduct, and revising universal codes to account for significant differences is likely to produce inconsistent rules that are so detailed that they more closely resemble statutes rather than standards for professional conduct.¹⁰⁶

Given his belief that general rules serve both to prompt moral introspection and to create a “fraternity” or a sense of “profession,”¹⁰⁷ it

100. *Id.* at 191.

101. *Id.* at 191–92.

102. *Id.* at 194–98.

103. *Id.* at 198–203.

104. *Id.* at 205. For examples of some specialized codes that have already been promulgated, see *id.* at 190 n.97, which cites specialized rules for immigration lawyers, lawyer mediators in family disputes, lawyers representing professional athletes, and lawyers practicing matrimonial law.

105. *See id.* at 205–07.

106. *Id.* at 206. The danger of looking at detailed codes as legislation rather than “a standard for professional behavior” is that “[l]awyers may fail to recognize the need to engage in moral analysis of issues that arise elsewhere or may fail to perceive principles within the code that apply more generally.” *Id.*

107. *See supra* notes 25, 44 and accompanying text.

was surprising to me that Professor Zacharias did not put greater faith in the continuing evolution of universal codes to address these significant variations in particular areas of practice. Indeed, Professor Zacharias more recently concluded that “the most dramatic delusion inherent in the modern professional codes . . . [is] that a single set of rules should apply equally to, and can adequately govern, all legal representation.”¹⁰⁸ But perhaps he was right to emphasize the need for more specialized regulation, not only with respect to unique subject areas but also with respect to the different forms of legal practice. For example, he recognized that “the traditional assumption of regulatory symmetry” may explain the ABA’s vigorous opposition to recognizing multidisciplinary practices (MDP), particularly the delivery of legal services to “sophisticated multinational corporate clients [who] can protect themselves from the risks of multidisciplinary representation.”¹⁰⁹ In addition, he was an early champion of the need to differentiate between lawyers who practice as individuals and those in large firm practice,¹¹⁰ including the desirability of imposing discipline on law firm entities in at least some cases.¹¹¹

It is unlikely that the Commission would have endorsed separate codes for lawyers practicing in different subject areas, although it might

108. Zacharias, *Future of Legal Ethics Regulation*, *supra* note 1, at 841 & n.59.

109. *Id.* at 842–43. According to Professor Zacharias, the proponents of MDPs were “large American law firms representing sophisticated global clients” that wanted “to respond to accounting firms’ ability to offer an array of legal and nonlegal services.” *Id.* at 842. But others have viewed the large law firms as more opposed to MDPs than solos or small firms because of their fear of competing with the large accounting firms. See, e.g., Dave Foster, Comment, *Get off my Turf! Attorneys Fight Accountants over Whether To Allow Multidisciplinary Practice*, 31 TEX. TECH L. REV. 1353, 1364–65 (2000).

110. See Zacharias, *Federalizing Legal Ethics*, *supra* note 1, at 386 (“[T]he codes have yet to come to grips with the essential difference in ethical issues that arise in individual and law firm practice.”); see also Fred C. Zacharias, *The Restatement and Confidentiality*, 46 OKLA. L. REV. 73, 85 (1993) (“Would not the *Restatement* be an ideal place to introduce some recognition that the term lawyering is shorthand for a variety of professions? There are differences among law firm lawyers, corporate counsel, and solo practitioners.”).

111. See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1371–73 (1995) (recommending law firm discipline not only because of the difficulty of identifying responsible individuals but also because it responds to institutional pressures on individual law firm members, prompts “entity ‘introspection,’” and encourages firms to institute internal mechanisms of control); see also Zacharias, *Future of Legal Ethics Regulation*, *supra* note 1, at 866 (predicting that regulators will ultimately discipline the entities in which lawyers practice).

have approved of the issuance of specialty codes designed either to supplement the *Model Rules* or at least demonstrate how the universal rules would apply in different specialty areas.¹¹² The Commission considered and rejected requests to impose law firm discipline,¹¹³ but perhaps this issue deserved more attention and debate, along with the possibility of encouraging regulators to include fines among the sanctions available in the disciplinary process¹¹⁴—a reform that may have been required, as a practical matter, had law firm discipline been adopted.¹¹⁵ Indeed, law firm discipline is one of these issues currently being considered by the recently appointed ABA Ethics 20/20 Commission, along with the possibility of embracing multidisciplinary practices and other alternative business structures for the delivery of legal services.¹¹⁶ Professor Zacharias was prescient in raising and

112. It should be noted that there are already individual rules within the universal code that are addressed to lawyers practicing in specialized areas. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010) (stating that a criminal defense lawyer may not refuse to offer evidence of defendant when the defense lawyer reasonably believes but does not know the testimony is false); *id.* R. 3.8 (listing the special responsibilities of prosecutors).

113. *See* Meeting Minutes, Comm'n on Evaluation of Rules of Prof'l Conduct pt. XV (Aug. 6–8, 1999) [hereinafter August 1999 Meeting Minutes], available at <http://www.abanet.org/cpr/e2k/080699mtg.html> (rejecting proposal to impose law firm discipline); Meeting Minutes, Comm'n on Evaluation of Rules of Prof'l Conduct pt. VI (May 7–8, 1999) (requesting reporters to prepare draft recommendations). The minutes do not reflect the Commission's reasons for rejecting law firm discipline; however, they do reflect the sentiments of two disciplinary counsel observers that law firm discipline was unnecessary. In addition, one Commission member voiced the concern "that law firm discipline seems to soften individual responsibility." August 1999 Meeting Minutes, *supra*.

114. *See, e.g.*, Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1, 77–80 (1998) (arguing for the use of fines in conjunction with other disciplinary sanctions). The current ABA Standards for Imposing Sanctions does not list fines as one of the sanctions that may be imposed, and an earlier version actively discouraged their use. *Id.* at 77.

115. *Cf. id.* at 79 & n.356 (discussing how "fines may prove to be an especially effective sanction for [large law] firms," and noting that "[m]ost objections to the use of fines can be addressed by writing standards that require the use of fines in conjunction with other sanctions, not in lieu of those sanctions"). New York and New Jersey are the only U.S. jurisdictions that have adopted law firm discipline, and neither jurisdiction uses fines as a form of disciplinary sanction. *See How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?*, 16 GEO. J. LEGAL ETHICS 203, 203, 209 (2002) (transcript of panel discussion from symposium entitled *Legal Ethics and Large Law Firms*). However, as of 2002, there had been only a few law firms that had been disciplined, and they were merely issued confidential letters of admonition. *Id.* at 204. Thus, as a practical matter, fines may be the most effective form of discipline for law firms. *See* Levin, *supra* note 114, at 79.

116. *See* ABA Comm'n on Ethics 20/20, Preliminary Issues Outline (Nov. 19, 2009), available at www.abanet.org/ethics2020/outline.pdf. This Commission was created in 2009 to review the ABA *Model Rules of Professional Conduct*, as well as the overall U.S. system of lawyer regulation, in light of advances in technology and the increasing globalization of legal services. *See id.*

pressing these issues and others, including multijurisdictional practice¹¹⁷ and the nationalization or federalization of U.S. lawyer regulation.¹¹⁸

V. CONCLUSION

As should now be obvious, Professor Zacharias had much to say about legal ethics code drafting. In virtually every instance, his approach was systematic, thorough, and exhaustive.¹¹⁹ Throughout his scholarship, he was less concerned with the content of individual provisions than with identifying and exploring the process by which such rules are crafted.¹²⁰ His goal was to help drafters write more coherent codes and to better focus the debates over future reforms.¹²¹ He urged drafters to articulate and prioritize the varied and often conflicting purposes of lawyer disciplinary codes,¹²² to tailor the specificity or generality of each provision to better achieve its primary purpose,¹²³ and to recognize and embrace the limited role of ethics codes within the broader regulatory regime, including various forms of external law that the bar often vilifies.¹²⁴ In the end, what I will remember most about Fred's scholarship is his ability to appreciate and demonstrate the complexity of

117. See, e.g., Zacharias, *A Nouveau Realist's View*, *supra* note 1 (responding to symposium contributors' proposals to address the problems lawyers face in interjurisdictional practice); Zacharias, *Federalizing Legal Ethics*, *supra* note 1, at 345 (proposing the federalization of legal ethics as the best means of implementing a uniform code of ethics, which is necessary because of the increasingly national character of the legal profession). Professor Zacharias's proposal for federalizing legal ethics was made in response to the increasingly multijurisdictional practice of law within the United States. More recently, the profession's focus has been on the increasing globalization of law practice. See, e.g., ABA Comm'n on Ethics 20/20, *supra* note 116 (describing the creation of the ABA Commission on Ethics 20/20 to address issues arising as a result of globalization, as well as advances in technology). In my own view, the nationalization of U.S. ethics law may be necessary for U.S. lawyers to effectively negotiate with non-U.S. lawyers in order to solve similar problems that arise when lawyers and law firms are engaged in international cross-border practice.

118. See Zacharias, *Federalizing Legal Ethics*, *supra* note 1.

119. See *supra* text accompanying notes 2–3, 88.

120. See, e.g., Zacharias, *Purposes of Discipline*, *supra* note 1, at 734 (indicating that the goal of the article was not to propose amendments to specific code provisions but rather “to highlight the relevance of identifying the purposes of discipline to optimal implementation of the rules”).

121. See Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1, at 242.

122. See Zacharias, *Purposes of Discipline*, *supra* note 1, at 730–33.

123. See generally Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 1.

124. See, e.g., *supra* notes 56–68 and accompanying text.

all aspects of lawyer regulation¹²⁵ and the need to draft with the appropriate nuance that is often lacking in current ethics codes.¹²⁶ I wish that the Ethics 2000 Commission had been able to fully debate the many aspects of code drafting he explored in such great depth. I am confident that future legal ethics scholars will acknowledge and extend his valuable contributions to this field.

125. This complexity includes the messiness of the real world in which codes operate—the different kinds and forms of law practice, the variety of actors involved in construing and enforcing the codes, and the myriad of ways in which individual lawyers respond to both the codes themselves and to the threat of different types of enforcement.

126. See, e.g., Zacharias, *Federalizing Legal Ethics*, *supra* note 1, at 386 (urging the “appropriate nuancing of professional rules to distinguish among contexts and types of practice”).