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## Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct

N. Gregory Smith  
*Louisiana State University Law Center*

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# Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct

N. Gregory Smith\*

## I. INTRODUCTION

We are entering a period of potentially significant changes in the rules that govern the conduct of lawyers. The American Law Institute has just published its new *Restatement of the Law Governing Lawyers*.<sup>1</sup> It contains a number of provisions that significantly depart from conventional codes of lawyer conduct.<sup>2</sup> An American Bar Association commission, called the Ethics 2000 Commission, has just completed an extensive review of one of the ABA's own products—the Model Rules of Professional Conduct.<sup>3</sup> The Commission's report calls for significant

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\* Associate Professor, Louisiana State University Law Center. Many thanks to my colleagues James W. Bowers, Christopher L. Blakesley, Saul Litvinoff, Lucy S. McGough, Warren L. Mengis, and Katherine S. Spaht, for their comments on prior drafts, or portions of prior drafts, of this article; to Geoffrey C. Hazard, Jr., for his insights on the ABA's comments to Rule 8.4 of the Model Rules of Professional Conduct; to Pascal F. Calogero, Jr., Chief Justice of the Louisiana Supreme Court, for permission to use documents generated by the Louisiana Supreme Court; to Wallace D. Riley, former President of the American Bar Association, and the American Bar Association, for permission to use documents generated by the American Bar Association; to John C. Combe, Jr., and Robert E. Leake, Jr. for background information about the work of the Louisiana State Bar's Task Force to Evaluate the ABA Model Rules of Professional Conduct; to Charles B. Plattmier, Chief Disciplinary Counsel for the State of Louisiana, for access to background papers on the development of the Louisiana Rules of Professional Conduct; to John Kelly and the Special Collections Department of the Earl K. Long Library at the University of New Orleans for access to papers of John A. Dixon, Jr., former Chief Justice of the Louisiana Supreme Court; to Loretta L. Topey, Executive Director of the Louisiana State Bar Association, for permission to use documents generated by officers and committees of the Louisiana State Bar Association; and to Lori L. Ruello, of the Louisiana State Bar Association, for access to records of the House of Delegates and the Board of Governors of the Louisiana State Bar Association.

1. See 16 ABA/BNA Lawyer's Manual on Professional Conduct 444 (2000); see also Ritchenya A. Shepherd, *Law of Lawyering: New ALI Restatement for Attorneys Could Affect Malpractice Liability*, ABA Model Ethics Code, A.B.A.J., July 1998, at 30; *ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections*, 14 ABA/BNA Lawyers' Manual on Professional Conduct 211 (1998).

2. Of course, the text of the Restatement speaks for itself, but the Foreword to its first volume says:

The Restatement draws heavily on decisional law, while the ethics codes in almost all jurisdictions have the form and force of statutes, or at least administrative regulation. Of course, on subjects addressed in the ethics codes the Restatement began with the statutory language and usually tracked it literally, or at least without material change. In many instances, however, the Restatement significantly departs from the code formulations.

1 Restatement of the Law Governing Lawyers XXI-XXII (2000).

3. See *Ethics 2000 Commission Releases its Report with Recommended Changes to Model Rules*, 16 ABA/BNA Lawyer's Manual on Professional Conduct 672 (2000). The Commission was established to consider changes because of concerns that the Rules of Professional Conduct were

changes in the rules.<sup>4</sup> Other efforts are underway that could result in changes to existing ethics rules.<sup>5</sup> These developments at the national level will eventually encourage Louisiana and other states to re-evaluate their own rules on lawyer conduct. They will create a climate for change.

Something like this happened not too long ago. In 1983, the American Bar Association promulgated the Model Rules of Professional Conduct.<sup>6</sup> Those rules were substantially different from the Model Code of Professional Responsibility,<sup>7</sup> which Louisiana, and most other states, had used as a model for their own rules on lawyer conduct.<sup>8</sup> Most states eventually followed the lead of the American Bar Association, and patterned their lawyer codes on the Model Rules.<sup>9</sup> Louisiana was

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inadequate to deal with some problems facing the profession. See Debra Baker, *Ethics 2000 Marches On*, A.B.A.J., Apr. 1999, at 85.

4. See *Ethics 2000 Commission Releases its Report with Recommended Changes to Model Rules*, 16 ABA/BNA Lawyer's Manual on Professional Conduct 672 (2000). Recommendations of the Commission would, among other things, permit lawyers to reveal confidential information about clients to prevent financial harm to others, prohibit lawyer solicitation of substantial gifts from clients, amend the rule on communication with clients, prohibit sex with clients unless the personal relationship predated the lawyer-client relationship, prohibit lawyer solicitation of clients in Internet "chat rooms," require lawyers who receive inadvertently-sent documents to notify the lawyer who sent them, and rework several rules dealing with conflicts of interest.

5. Some examples: (1) The ABA has recently approved a new rule, Model Rule 7.6, that limits lawyer "pay to play" activities. See James Podgers, *A New Ethics No-No*, A.B.A.J., April 2000, at 96; *Task Force Urges ABA to Ban "Pay to Play" Practices*, 14 ABA/BNA Lawyers' Manual on Professional Conduct 365 (1998). "Pay to play" refers to the practice of making (or soliciting) campaign contributions in order to obtain favorable consideration from government officials in the allocation of government legal work. (2) The United States Judicial Conference has been considering whether to standardize the rules of conduct for lawyers practicing in federal courts. See *Federal Judges Study New Option for Uniform Rule on Attorney Conduct*, 16 ABA/BNA Lawyers' Manual on Professional Conduct 155 (2000); *Federal Judges Weigh Proposal to Issue Uniform Ethics Rules*, 66 U.S.L.W. 2549 (1998). (3) The ABA has established a Commission on Multijurisdictional Practice to examine ethical and legal constraints on multijurisdictional practice. See *ABA Names Panel Members Who Will Study Issues Raised By Multijurisdictional Practice*, 16 ABA/BNA Lawyers' Manual on Professional Conduct 471 (2000).

6. Model Rules of Professional Conduct (1983). Unless otherwise indicated, by reference to a date other than 1983, or by some other indication in the text of this article, all references to the Model Rules of Professional Conduct will be to the original 1983 version adopted by the American Bar Association.

7. Model Code of Professional Responsibility (1969). Unless otherwise indicated, by reference to a date other than 1969, or by some other indication in the text of this article, all references to the Model Code of Professional Responsibility will be to the original 1969 version adopted by the American Bar Association.

8. Eventually, every jurisdiction but California followed the model of the Model Code, though not all states adopted all of its parts. And the Model Code had a strong influence in California as well. See Charles W. Wolfram, *Modern Legal Ethics* § 2.6.3, at 56-57 (1986).

9. To date, forty-four jurisdictions, including Louisiana, have based their legal ethics rules on the Model Rules. See *Model Rules: Georgia Adopts Ethics Code Patterned on ABA Model Rules*, 16 ABA/BNA Lawyers' Manual on Professional Conduct 445 (2000); see also 1 ABA/BNA Lawyers' Manual on Professional Conduct 3 (1998) (lists jurisdictions that have adopted new legal ethics rules since the ABA approved the Model Rules in 1983).

no exception. It adopted the new Rules of Professional Conduct in 1986.<sup>10</sup> But Louisiana did not entirely follow the ABA's lead. While it adopted most of the ABA's black-letter rules,<sup>11</sup> it did not adopt some significant elements in the ABA's model. In particular, Louisiana did not adopt the Preamble, Scope, and Terminology sections that appeared at the front of the ABA's Model Rules of Professional Conduct. Nor did Louisiana adopt the comments that followed each of the ABA-drafted rules. In omitting these materials, Louisiana missed some opportunities.

The climate of change will provide Louisiana with an opportunity to rethink some of the decisions that were made in 1986—decisions regarding what was and what was not included in the Louisiana Rules of Professional Conduct. This article focuses mainly on the materials in the ABA's model that were not included. It calls them "omitted materials." Not all of the omitted materials should have been adopted in Louisiana, but most of them should have been. Some of the omitted materials could help Louisiana lawyers understand the rules that are used to define lawyer misconduct. Others reach beyond standards of discipline and articulate higher ideals for the legal profession. Some of the omitted materials contain important substantive rules relating to lawyer conduct. And some of them provide useful instruction about the nature of legal ethics. In short, the omitted materials contain much that is good. Louisiana missed the opportunity to take full advantage of them in 1986. It ought to take advantage of them now.

## II. HOW WE GOT TO THIS POINT

### *A. Emergence of the Model Rules of Professional Conduct*

We should begin with a brief discussion of the ABA model and how it came to be. In particular, it will be helpful to know some basic things about the nature and structure of the Model Rules of Professional Conduct and how the Model Rules differ from earlier codes of legal ethics. This will provide a useful background for a discussion of Louisiana's 1986 adoption of the Rules of Professional Conduct.

#### *1. The Model Rules Contrasted with Earlier ABA Codes of Ethics*

The Model Rules of Professional Conduct were adopted by the American Bar Association in 1983.<sup>12</sup> It was the ABA's third code of legal ethics,<sup>13</sup> and it was

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10. The Rules of Professional Conduct were adopted in 1986, effective Jan. 1, 1987. See Louisiana Rules of Professional Conduct, *in* La. R.S. 37, Ch. 4 App. (1988 and Supp. 2000). Unless otherwise indicated, by reference to a date other than 1986, or by some other indication in the text of this article, all references to the Louisiana Rules of Professional Conduct will be to the version of the rules adopted in 1986.

11. In most cases, Louisiana adopted the ABA black-letter rules as they were written. But a number of the rules were changed, a few substantially so.

12. See Center For Professional Responsibility, American Bar Association, Annotated Model

significantly different from the first two. The ABA hoped that the Model Rules would eliminate some of the problems that had arisen with the earlier codes, and that states would see fit to base their own lawyer codes on the new model.<sup>14</sup>

*a. The Canons of Professional Ethics*

The first ABA code, the Canons of Professional Ethics, was adopted on August 27, 1908.<sup>15</sup> These Canons of Ethics covered a number of matters, including conflicts of interest, fixing fees, punctuality, advertising, contact with parties represented by counsel, and a lawyer's duty to the courts.<sup>16</sup> However, the Preamble to the Canons indicated that they were intended more to be statements of principle than to be a codified collection of disciplinary rules.<sup>17</sup> Indeed, the Canons had a pronounced inspirational or hortatory thrust.

For example, the Canons stated that lawyers should have a "respectful attitude" toward the courts;<sup>18</sup> that it was "indecent" for a lawyer during trial to mention the "personal peculiarities and idiosyncrasies of counsel";<sup>19</sup> and that the lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."<sup>20</sup> The Canons stated that "a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."<sup>21</sup> The Canons expressed many ideals, but they did not express many standards for lawyer discipline.

Rules of Professional Conduct vii (3d ed. 1995).

13. The earlier codes were the Canons of Professional Ethics, adopted in 1908, and the Model Code of Professional Responsibility, adopted in 1969. See Center For Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct vii (3d ed. 1995). All of the ABA codes have been "model" codes. The ABA does not enforce its codes; instead, it offers them as models for state adoption. If a state follows the ABA's lead, and adopts a code based on an ABA model, the state can then use the code as a basis of lawyer discipline.

14. See Robert J. Kutak, *Model Rules of Professional Conduct: Why Do We Need Them?*, 36 Okla. L. Rev. 311 (1983).

15. American Bar Association Canons of Professional Ethics (1908). See Center For Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct vii (3d ed. 1995).

16. See Canons of Professional Ethics, *supra* note 15, Canons 1, 6, 9, 12, 21 and 27.

17. The Preamble stated:

The following canons of ethics were adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

*Id.* Preamble.

18. See *id.* Canon 1.

19. See *id.* Canon 17.

20. See *id.* Canon 29.

21. See *id.* Canon 32.

*b. The Model Code of Professional Responsibility*

The Model Code of Professional Responsibility was adopted by the American Bar Association in 1969 to deal with that deficiency.<sup>22</sup> The Model Code was more complicated than the Canons. It was prefaced by a Preamble and Preliminary Statement. It included sections called "Canons," "Ethical Considerations" and "Disciplinary Rules." These three things, according to the Preliminary Statement, "define the type of ethical conduct that the public has a right to expect."<sup>23</sup> But they were very different. The Canons were described as "statements of axiomatic norms."<sup>24</sup> They expressed standards of conduct in very general terms. The Ethical Considerations were much more specific, but were aspirational in character. They were said to "represent the objectives toward which every member of the profession should strive."<sup>25</sup> The Disciplinary Rules, in contrast, were "mandatory in character."<sup>26</sup> They set forth "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."<sup>27</sup>

Some examples will illustrate the differences. Canon 7 of the Model Code articulated a general principle about lawyer advocacy. It stated in its entirety: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."<sup>28</sup> A number of detailed Ethical Considerations immediately followed the Canon. One of those, EC 7-38, mentioned some aspirational ideals concerning conduct toward opposing counsel:

A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.<sup>29</sup>

After the Ethical Considerations came the Disciplinary Rules. One of those, DR 7-105, set a disciplinary standard regarding lawyer threats of criminal prosecution. It said: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."<sup>30</sup>

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22. See Center For Professional Responsibility, American Bar Association, *Annotated Model Rules of Professional Conduct* vii (3d ed. 1995).

23. See Model Code of Professional Responsibility Preliminary Statement (1969).

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.*

28. See Model Code of Professional Responsibility Canon 7 (1969).

29. See *id.* EC 7-38.

30. See *id.* DR 7-105.

In most respects, the Model Code represented a significant improvement over the 1908 Canons. But there were problems with the Model Code. Some of the Disciplinary Rules were incomplete and some were ambiguous.<sup>31</sup> In some instances courts began to reach beyond the minimum standards of the Disciplinary Rules and to treat the Canons and Ethical Considerations as enforceable rules.<sup>32</sup> Other problems were identified, some even before the Model Code was adopted.<sup>33</sup>

*c. The Model Rules of Professional Conduct*

Problems with the Model Code prompted the American Bar Association to establish a Commission on Evaluation of Professional Standards in the summer of 1977. In 1981, the "Kutak Commission,"<sup>34</sup> as it came to be known, proposed a new set of rules in a restatement format that featured black-letter rules and accompanying comments. After two years of debate and amendment, the House of Delegates approved the Model Rules of Professional Conduct on August 2, 1983.

The Model Rules were much different than the Model Code. Gone were the Canons. Gone were the Ethical Considerations. The Model Rules included "comments," but these were intended, as in a restatement, to explain and illustrate "the meaning and purpose of the Rule."<sup>35</sup> Additional help regarding the meaning of the rules was offered by a new section, called "Terminology" that featured definitions of several important terms that appeared in the rules. The overall emphasis was clearly on standards of discipline—on the rules themselves. Compared to the Canons of Professional Ethics and the Code of Professional Responsibility, there was very little in the Model Rules of an aspirational dimension. The very nature of the Model Rules drew the attention of a reader to minimum standards of conduct.

Still, the Model Rules did manage to reach beyond mere disciplinary standards. A preamble, entitled "Preamble: A Lawyer's Responsibilities," incorporated several aspirational ideals, reminiscent of some of the Ethical Considerations from the Model Code. For example, one of the sentences of the Preamble read: "A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."<sup>36</sup>

Another preliminary section entitled "Scope," defined some of the parameters for ensuing rules of conduct and referred to the relationship between the rules and other sources of law that regulate lawyers. For example, the Scope explained: "The Rules presuppose a larger legal context shaping the lawyers' role. That context

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31. See Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 5 (5th ed. 1998).

32. See Robert J. Kutak, *How the New Ethics Code Will Affect Your Law Practice*, Barrister, Fall 1981, at 5; Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 Clev. St. L. Rev. 571, 572 (1982).

33. See Charles W. Wolfram, *Modern Legal Ethics* § 2.6.4, at 60 (1986).

34. The Commission was chaired by Robert J. Kutak until his death in 1983.

35. See Model Rules of Professional Conduct Scope (1983).

36. See *id.* Preamble.

includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural laws in general.<sup>37</sup> Further, the Scope contemplated the existence of "moral and ethical considerations" that were beyond the Rules themselves, and explained that those considerations should also "inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."<sup>38</sup>

### *B. The Emergence of Louisiana's Rules of Professional Conduct*

Louisiana has generally followed the lead of the American Bar Association with respect to codes of legal ethics. Thus, at different times, Louisiana lawyers have been subject to Louisiana's versions of the Canons of Professional Ethics, the Code of Professional Responsibility, and the Rules of Professional Conduct.<sup>39</sup> This section of the article discusses the history of Louisiana's adoption of the Rules of Professional Conduct.

#### *1. The Task Force and its Charge*

After the American Bar Association adopted the Model Rules of Professional Conduct, Chief Justice John A. Dixon, Jr. of the Louisiana Supreme Court asked the Louisiana State Bar Association to evaluate the ABA's new product.<sup>40</sup> Louis D. Smith, the President of the Louisiana State Bar from 1983-1994, and Charles W. Salley, the 1984-1985 president, jointly appointed a five-member task force (the "Task Force") to study the rules and to make a report to the House of Delegates and the Board of Governors.<sup>41</sup>

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37. See *id.* Scope.

38. See *id.*

39. The Canons of Professional Ethics were adopted in 1910. See Louisiana Bar Association, 1910 Annual Report (1910). The Code of Professional Responsibility was adopted in 1970. See A. Leon Hebert, *Professional Responsibility*, 19 La. B.J. 199 (1971). The Rules of Professional Conduct were adopted in 1986, effective Jan. 1, 1987. See Louisiana Rules of Professional Conduct, in La. R.S. 37, Ch. 4 App. (1988 and Supp. 2000). Unless otherwise indicated, by reference to a date other than 1986, or by some other indication in the text of this article, all references to the Louisiana Rules of Professional Conduct will be to the version of the rules adopted in 1986.

40. See Task Force Report: Report to House of Delegates, *infra* note 42.

41. See *id.* I have been unable to determine the exact date or dates when members of the Task Force were actually appointed, but I think the members were appointed in March of 1984. There is a March 28, 1984 letter from Thomas O. Collins, Jr., Executive Counsel to the Louisiana State Bar Association, addressed to the members of the Task Force that confirms their appointment and suggests that the Task Force have its first meeting after the bar association's April 25-27, 1984 annual meeting. See Letter from Thomas O. Collins, Jr., Executive Counsel of the Louisiana State Bar Association, to John C. Combe, Jr., Robert E. Leake, Jr., Wood Brown, A. Russell Roberts, and John B. Scofield (Mar. 28, 1984) (original in Special Collections, Earl K. Long Library, University of New Orleans). In addition, some minutes of an April 27, 1984 meeting of the Louisiana State Bar Association Board of Governors state:

Mr. Salley specifically noted the recent joint appointment by Louis Smith and himself of the committee to study interest on lawyers' trust accounts and the Model Code of Professional



There are indications that the members of the Task Force believed that they were expected to do more than evaluate the ABA's new model. For example, the first sentence of a November 23, 1985 report by the Task Force (the "Task Force Report") states: "This task force was created by then President, Louis D. Smith for the stated purpose of evaluating and proposing for adoption the Model Rules of Professional Conduct promulgated by the American Bar Association."<sup>42</sup> This is an interesting sentence. One might have expected such a sentence to say that Mr. Smith created the Task Force to evaluate the Model Rules and to make a recommendation about their adoption. But this sentence suggests that, from the beginning, the Task Force was expected to propose adoption of the Model Rules.

This observation may place too much stress on the literal words used in the opening sentence of the report. But there are other statements in the Task Force Report that indicate that the Task Force may have been expected to recommend adoption of the Model Rules. For example, the second sentence of the report says that the appointment of the Task Force itself "was brought about as a result of pressure from the American Bar Association and, also, at the suggestion of the Louisiana Supreme Court."<sup>43</sup>

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Responsibility, as adopted by the American Bar Association.

See Minutes of the Louisiana State Bar Association Board of Governors Meeting, in Biloxi, Mississippi, Apr. 26, 1984, at 3. The reference in the minutes to the "Model Code," rather than the "Model Rules," appears to have been an error.

42. See Report and Recommendation of the Task Force to Evaluate the American Bar Association's Model Rules of Professional Conduct, Nov. 23, 1985. The Task Force Report has three parts. The first part consists of four recitals about what the Task Force had done and two additional paragraphs of recommendations. I will cite to this part as "Task Force Report: Report and Recommendations." The second part, separately entitled "Report to the Members of the House of Delegates by the LSBA Task Force to Evaluate the ABA Model Rules of Professional Conduct," includes some information about the history of the work of the Task Force, some observations about the Code of Professional Responsibility and the Model Rules of Professional Conduct, a suggestion about parts of the Model Rules that were omitted from the Task Force proposals, and some comments about differences between the ABA model and the version of the rules recommended by the Task Force. I will cite to this part as "Task Force Report: Report to House of Delegates." The third part of the Task Force Report is entitled "Proposed Model Rules of Professional Conduct of the Louisiana State Bar Association." This part of the Task Force Report includes all of the rules that the Task Force proposed for adoption (some of which were changed from the ABA's model) and some comments that tell whether a proposed rule tracks its ABA counterpart, or, if not, how it differs. I will cite to this part of the Task Force Report as "Task Force Report: Proposed Rules."

43. See Task Force Report: Report to the House of Delegates, *supra* note 42. John C. Combe, Jr., one of the co-chairmen of the Task Force, told me that the impetus for the work of the Task Force came from the American Bar Association, which had initiated a campaign to interest the states in adopting its new Model Rules. The Louisiana Supreme Court became interested. Mr. Combe recalled that Chief Justice Dixon, was "strong on ethics," and was the person who "moved the effort" to adopt the new ABA rules. Interview with John C. Combe, Jr. (June 15, 1999) (notes of interview on file with author). I have discovered a September 27, 1983 letter from Chief Justice Dixon, addressed to Louis D. Smith, the then-president of the Louisiana State Bar Association that states:

Yesterday I was reminded of a letter I received from the American Bar Association about the Model Rules of Professional Conduct. The president of the ABA has offered that institution's assistance when the Louisiana Bar Association decides to entrust to a

The members of the Task Force did not regard the then-existing Code of Professional Responsibility as badly in need of replacement. Indeed, the Task Force Report said that, as work began, there was "some sentiment" that no change to the existing ethics code was warranted or that some changes might be made "within the framework of the existing code."<sup>44</sup> The Task Force Report also offered some mild praise for the then-existing code: "Although there are a few areas in the existing Code of Professional Responsibility which are somewhat difficult of interpretation and even more difficult of application, by and large, it has served its purpose fairly well."<sup>45</sup> Nonetheless, "after further consideration," and in light of the "pressures" mentioned above, the Task Force

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committee the study and review of the Model Rules.

You have probably already taken the appropriate steps toward the adoption of the new standards for professional conduct. At any rate, I would like to recommend that we communicate with the ABA Center for Professional Responsibility and let them know that we would welcome assistance while we have the Model Rules under consideration.

See Letter from John A. Dixon, Jr. Chief Justice of the Louisiana Supreme Court, to Louis D. Smith, President of the Louisiana State Bar Association (Sept. 27, 1983) (original in Special Collections, Earl K. Long Library, University of New Orleans) (copy on file with author). The apparent purpose of the letter was to let the State Bar Association know about the ABA's offer of help. But the main purpose was probably to nudge the State Bar Association toward approval of the Model Rules. That seems to be the message of the first sentence in the second quoted paragraph above. And it appears to be confirmed by something else. The letter that Chief Justice Dixon received from the ABA president shows that copies of it were also sent to Louis D. Smith, President of the Louisiana State Bar Association; Charles W. Salley, President-elect; and Thomas O. Collins, Executive Counsel to the bar association. In addition, Chief Justice Dixon received a copy of a separate letter from the ABA to Louis D. Smith that had the same content as the letter that had been addressed to Chief Justice Dixon himself. The reality is that Mr. Smith would already have known of the ABA's offer for help, and Chief Justice Dixon should have known that he knew. Chief Justice Dixon's letter thus appears to have had a purpose other than to simply inform the State Bar Association of something that it already knew. See Letter from Wallace D. Riley, President of the American Bar Association, to Chief Justice John A. Dixon, Jr. (Aug. 26, 1983) (original in Special Collections, Earl K. Long Library, University of New Orleans) (copy on file with author); Letter from Wallace D. Riley, President of the American Bar Association, to Louis D. Smith, President of the Louisiana State Bar Association (Aug. 26, 1983) (original in Special Collections, Earl K. Long Library, University of New Orleans) (copy on file with author).

John C. Combe, a co-chairman of the Task Force, told me that, with respect to the need to adopt the new ABA model: "The handwriting was on the wall." Interview with John C. Combe (June 15, 1999). See also the discussion above regarding Chief Justice Dixon's letter of September 27, 1983.

One of the things that the ABA did to encourage adoption of the new Model Rules was to establish a Special Committee on Implementation of the Model Rules of Professional Conduct. The committee distributed information about the Model Rules, including periodic reports of how many jurisdictions had adopted them. See, e.g., Status Report on the A.B.A. Model Rules of Professional Conduct, July 4, 1985 (reports that Montana had adopted the Model Rules, that three other states had completed their review processes, and that five additional states were nearing completion of their review of the Model Rules).

44. See Task Force Report: Report to the House of Delegates, *supra* note 42. John C. Combe, a co-chairman of the Task Force, told me that some members of the Task Force at first wondered "what are we doing?" They had the impression that "the old code isn't broken." Interview with John C. Combe, Jr. (June 15, 1999) (notes of interview on file with author).

45. Interview with John C. Combe, Jr. (June 15, 1999) (notes of interview on file with author).

moved ahead with an analysis of the ABA's Model Rules and a proposal for Louisiana adoption.<sup>46</sup>

Ultimately, the Task Force Report does not reflect much enthusiasm about the final product of its labors. For example, consider this rather neutral endorsement of the proposed new rules: "Submitted, herewith, is the task force's draft of proposed Model Rules of Professional Conduct for Louisiana Lawyers, which the task force believes are workable should the House see fit to adopt them."<sup>47</sup> Further, although the Task Force recommended adoption of the Model Rules, it also recommended that they not be adopted. The Task Force suggested the following to the House of Delegates and the Board of Governors:

WHEREAS, the task force has concluded its study and evaluation, it now files its report attached hereto with the following alternative suggested courses of action.

1. If it be the desire of the House of Delegates and the Board of Governors of the Louisiana State Bar Association that it adopt and recommend approval to the Louisiana Supreme Court of the Model Rules of Professional Conduct, that they adopt and recommend the Model Rules in the form and content proposed in this report and not as originally adopted by the American Bar Association, or

2. If it be the desire of the House of Delegates and the Board of Governors of the Louisiana State Bar Association that its present Code of Professional Responsibility be retained, that it so act and report its action to the Louisiana Supreme Court.<sup>48</sup>

The Task Force also commented on the ABA model:

No member of the task force was completely satisfied with the ABA version. As will be set out hereinafter, a number of changes were made. One complete section was deleted entirely because it was felt to be inapplicable to the practice of law in Louisiana. Other sections were "renovated" to make them conform to the practice of law in the State of Louisiana and to practices with respect to ethics in Louisiana which are, apparently, somewhat different from those contemplated by the redactors of the ABA Code.<sup>49</sup>

There is certainly no suggestion in this language that the Task Force thought that Louisiana notions of ethics were inferior to the notions of the American Bar Association. Indeed, the reverse appears to be true. The ABA's ideas were the ones in need of renovation.<sup>50</sup>

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46. *Id.*

47. See Task Force Report: Report and Recommendation, *supra* note 42.

48. See *id.*

49. Task Force Report: Report to the House of Delegates, *supra* note 42.

50. This, of course, is not the only time that the Model Rules have been subjected to some criticism. See, e.g., Monroe H. Freedman, Understanding Lawyers' Ethics 5 (1990) ("I find the *Model*

## 2. *The Omitted Materials*

The version of the rules that the Task Force submitted with its November 23, 1985 report departed from the ABA's model in several respects. As indicated above, the Task Force did not propose adoption of every rule in the ABA's model, and it proposed to modify others. The Task Force draft also did not incorporate several prominent features in the ABA model. It omitted the Preamble, Scope, and Terminology sections that were included at the front of the ABA version. Even more significantly, the Task Force draft did not include the comments that followed the black-letter rules in the ABA's model. But the Task Force offered the following suggestion about the materials it had omitted:

In considering that which follows, it is the suggestion of the task force that the introductory comments in the ABA code, the "comments" under each of the Model Rules, and other materials in the ABA document would be considered as precatory to any interpretation or application of the Louisiana version of the Model Rules, except to the extent that they are inconsistent with the verbiage in the rules adopted by the House of Delegates.<sup>51</sup>

"Precatory" is a word that lawyers sometimes use that most normal people do not. *Black's Law Dictionary* defines it as follows: "Having the nature of prayer, request,

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*Rules overall to be less satisfactory than the Model Code.*"); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 Ohio State L.J. 243 (1985). Professor Gillers wrote in that article:

The lawyers who approved the Rules looked after their own. They have given us an astonishingly parochial, self-aggrandizing document, which favors lawyers over clients, other persons, and the administration of justice in almost every line, paragraph, and provision that permits significant choice. It is internally inconsistent to the bar's benefit. It continues the practice of using the language of ethics to mask controls on the availability of legal services that in turn artificially inflate the cost of legal services. True, the Rules read better than the Code and fill some critical gaps. Here and there, they require or forbid conduct for which they deserve commendation. But the big issues are almost consistently resolved in favor of lawyers. As finally adopted, the Rules seem guided by the view that what's good for lawyers is good for the public. Look at any part and that conclusion may not suggest itself; look at the whole and it is inescapable.

*Id.* at 245-46 (footnotes omitted). Of course, people also criticized the prior Model Code of Professional Responsibility. See, e.g., Hazard, *supra* note 32, at 571 ("The point, very simply, is that comprehensive revision is required because the structure of the present Code has turned out to be disastrous [sic]"); Robert J. Kutak, *The Law of Lawyering*, 22 Washburn L.J. 413, 416 (1983) ("In analyzing the 1969 Code's two-level approach to standards of professional conduct, our Commission discerned at least one fundamental problem. The structure created inherent internal inconsistencies. One level of rules might exhort the lawyer to conduct purportedly consistent with the highest aspirations of the profession, while a different level of rules might characterize the same conduct as unacceptable.").

51. See Task Force Report: Report to the House of Delegates, *supra* note 42.

or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction."<sup>52</sup>

So, the Task Force saw some role for the omitted materials, but the role was a limited one. The Task Force suggested that the omitted materials be considered when it came to interpreting or applying the rules, but merely at the level of recommendation, advice, or expression of wish. The omitted materials would not have the force of positive command or direction.

Why did the Task Force decline to recommend adoption of the omitted materials? There appear to have been at least three reasons. The first was simplicity. There was apparently some feeling on the Task Force that ultimate adoption of the new rules would be facilitated if the Task Force submitted a relatively short, bare bones version of the rules for ultimate consideration by the Louisiana Supreme Court.<sup>53</sup> There would be less to read, less to understand, and less to disagree with.<sup>54</sup> In this connection, one of the co-chairmen of the Task Force recently recalled that there had been substantial controversy within the American Bar Association concerning some of the black-letter rules, especially the rules about confidentiality,<sup>55</sup> and that there had been a perception among members of the Task Force that the controversy had spilled over into the omitted materials, especially into the comments to the Model Rules. Rather than getting bogged down in disputes over language or concepts in the omitted materials, and to avoid the possibility that the Task Force might generate majority and minority reports, the members of the Task Force apparently thought it would be better to focus their energies on reaching consensus on the black-letter rules alone.<sup>56</sup>

A second reason for non-adoption of the omitted materials related to changes the Task Force recommended in the black-letter rules themselves. The Task Force proposed some changes that it thought would represent improvements to the ABA's rules; it proposed other changes because it thought particular ABA rules were at odds with Louisiana practice.<sup>57</sup> Regardless of the reasons for change, any departure from the ABA black-letter rules gave rise to the prospect of inconsistency between

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52. Black's Law Dictionary 1176 (6th ed. 1990). The same dictionary also defines "precatory words." They are:

Words of entreaty, request, desire, wish, or recommendation, employed in wills, as distinguished from direct and imperative terms. Mere precatory words or expressions in a trust or will are ineffective to dispose of property. There must be a command or order as to the disposition of property.

*Id.*

53. Telephone Interview with Robert E. Leake, Jr., Co-Chairman of the Task Force, (June 4, 1999) (notes of interview on file with author).

54. *See id.*

55. The Task Force Report had observed, with respect to Rule 1.6, on confidentiality: "The membership may recall the extreme amount of controversy engendered by the initial Kutak Proposal. The principle of confidentiality is expanded, in large measure, by the current proposal." *See* Task Force Report: Proposed Rules, *supra* note 42, Rule 1.6 cmt.

56. Telephone Interview with John C. Combe, Jr., Co-Chairman of the Task Force (May 18, 1999) (notes of interview on file with author).

57. *Id.*

the affected Louisiana rule and the related comments of the Model Rules of Professional Conduct. One way to avoid such inconsistency would have been to make conforming changes in the ABA's comments. However, this would have entailed considerable effort, and there appears to have been no enthusiasm among the members of the Task Force for the endeavor. Another way to avoid conflicts would have been to refuse adoption of the ABA's comments as a whole. This was what the Task Force elected to propose.<sup>58</sup>

Finally, the Task Force knew that it did not have to adopt the omitted materials in order to preserve them.<sup>59</sup> They had already been issued by the ABA. Anybody who wanted to look at the omitted materials could do so, even if they were not made a part of the Louisiana Rules of Professional Conduct.<sup>60</sup> Indeed, as we have seen, the Task Force Report recommended that the comments and other preliminary materials to the ABA Model Rules be considered as precatory to any interpretation or application of the Louisiana version of the rules.

The Task Force actually did append some comments to the rules when it issued its recommendations to the Louisiana State Bar Association, but the Task Force comments were not at all like the comments that had been generated by the ABA. For the most part, the Task Force comments merely reported whether the proposed version of a rule departed from the ABA's model. If there was no change from the ABA Model, the comment typically stated: "No change proposed to the ABA rule."<sup>61</sup> If there was a change, the Task Force comment typically described what the change was and why it was made.<sup>62</sup> These comments were, of course, intended only

58. Some undated handwritten notes by John C. Combe, Jr., regarding Task Force deliberations, state:

Declined to adopt *comments* although in some instances they may shed light of [sic - probably should read "or"] offer guidance. But in other instances notes are wrong &/or misleading in view of amendments suggested by the committee.

(copy on file with author). Interestingly, these same notes say: "adopt preamble." Ultimately, the Task Force did not recommend adoption of the Preamble to the Model Rules.

59. Telephone Interview with Robert E. Leake, Jr., Co-Chairman of the Task Force (June 4, 1999) (notes of interview on file with author).

60. *Id.*

61. There were some exceptions. One was made in the case of Rule 1.6, the confidentiality rule. There, the Task Force offered the following comment:

COMMENT: No change is proposed by the task force to the ABA proposal. It is suggested that the code comparison, contained on page 8 of the ABA materials be read carefully. The membership may recall the extreme amount of controversy engendered by the initial Kutak Proposal. The principle of confidentiality is expanded, in large measure, by the current proposal.

See Task Force Report: Proposed Rules, *supra* note 42, Rule 1.6 cmt.

Another exception was made for Rule 1.15, on safekeeping of property. The Task Force said: "(No change proposed to the ABA Rule, however, pending IOLTA Legislation may impact this rule.)" *Id.* Rule 1.15 cmt.

62. See, e.g., this comment that followed the Task Force version of Rule 1.7, on conflicts of interest:

COMMENT: No change is made from the ABA proposal with the exception that the prefatory sentence "loyalty is an essential element of the lawyer's relationship to the client.

to facilitate consideration of the work of the Task Force. They were not intended to be included in the final version of newly approved rules.

### 3. Completion of the Task

On November 23, 1985, the House of Delegates and the Board of Governors approved the adoption of the Task Force draft of the Rules of Professional Conduct.<sup>63</sup> On December 12, 1985, Eldon E. Fallon, the President of the Louisiana State Bar Association, forwarded the draft rules to the Louisiana Supreme Court with a recommendation that they be adopted effective July 1, 1986.<sup>64</sup> The justices considered the proposed rules, giving particular attention to the rules that departed from the ABA's version.<sup>65</sup> The court thereafter asked to meet with the members of the Task Force to discuss some concerns.<sup>66</sup> The meeting took place on January 23, 1986; thereafter, the court took the proposed rules under advisement.<sup>67</sup> On April 15, 1986, Chief Justice Dixon wrote to the co-chairmen of the Task Force and explained that the court had reached "the tentative conclusion that it should approve the rules" subject to six exceptions.<sup>68</sup> Each of the exceptions that Justice Dixon listed went in the direction of making the Louisiana version of the affected rule more like its ABA counterpart.<sup>69</sup> Justice Dixon's letter did not say anything about

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Therefore:" was lifted from the initial sentence in the comment. The task force felt that this was important enough that it ought to be in the "black letter" statement of the law.

See Task Force Report: Proposed Rules, *supra* note 42, Rule 1.7 cmt.

63. See Letter from Thomas O. Collins, Jr., executive counsel to the Louisiana State Bar Association, to the justices of the Louisiana Supreme Court (Nov. 25, 1986) (copy on file with author).

64. See Letter from Eldon E. Fallon, President of the Louisiana State Bar Association, to the Chief Justice and Associate Justices of the Louisiana Supreme Court (Dec. 12, 1985) (original on file with Special Archives, Earl K. Long Library, University of New Orleans) (copy on file with author).

65. See Letter from Chief Justice John A. Dixon, Jr., to John C. Combe, Jr. and Robert E. Leake, Jr., Co-Chairmen of the Task Force (Apr. 15, 1986) (copy on file with author).

66. See Letter from Thomas O. Collins, Jr., Executive Counsel to the Louisiana State Bar Association, to New Orleans attorney Barry W. Ashe, (July 2, 1986) (copy on file with author) (According to Mr. Collins' letter, Mr. Ashe had requested some information regarding the history and status of Louisiana's efforts to evaluate and adopt the Model Rules.).

67. See *id.*

68. See letter from Chief Justice John A. Dixon, Jr., to John C. Combe, Jr. and Robert E. Leake, Jr., Co-Chairmen of the Task Force (Apr. 15, 1986) (copy on file with author). Five of the exceptions related to changes that the court wished to see in the following rules: Rule 1.4(b), on communicating with clients; Rule 1.8(c), which limits the lawyer's ability to prepare an instrument for a client that gives the lawyer a substantial gift; Rule 1.8(e)(2), on lawyer financial assistance to clients; Rule 3.9, on the lawyer's obligation to disclose his or her representative capacity in nonadjudicative proceedings; and Rule 5.6, on restricting the right to practice. The last exception called for the inclusion of the "Public Service" component of the Model Rules (Rules 6.1 through 6.4), which the Task Force had not wanted to adopt.

69. See *id.* The court's recommendation concerning Rule 1.8(e) warrants some discussion. The ABA version of the rule generally prohibits lawyers from giving financial assistance to clients in connection with litigation, subject to exceptions for court costs and litigation expenses "the repayment of which may be contingent on the outcome of the matter," and court costs and litigation expenses paid on behalf of indigent clients.

the omission of the Preamble, Scope, Terminology, or Comment sections of the ABA's Model Rules. Nor did it say anything about the suggestion by the Task Force that these materials be considered "precatory" with respect to rule interpretation or application.

The members of the Task Force questioned the advisability of some of the changes that the supreme court wanted to make and requested a meeting to discuss them.<sup>70</sup> On May 29, 1986, the members of the Task Force again met with the justices of the supreme court to review the desired changes. On June 2, 1986, Justice Dixon sent another letter to the Task Force expressing the view of the court with respect to needed changes in the Task Force draft.<sup>71</sup> The letter reaffirmed the court's position with respect to five of the six changes that it had previously asked the Task Force to make.<sup>72</sup> But the letter indicated that the court was now willing to relent on the other proposed change.<sup>73</sup>

The Task Force responded by generating a revised draft of the proposed rules,<sup>74</sup> styled a "Supplemental Report and Recommendation,"<sup>75</sup> and readied it

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The Task Force proposal had not changed the language of the ABA rule, as such, but had renumbered it as 1.8(d), because the Task Force had also recommended deletion of ABA Rule 1.8(c), limiting the lawyer's ability to prepare an instrument giving the lawyer a substantial gift. The supreme court wanted Rule 1.8(c) to go back in, and it also asked the Task Force to return to the original ABA numbering for Rule 1.8. But there was something else that the court directed the Task Force to do. It turns out that the literal language of the ABA rule is more generous, with respect to providing financial assistance to clients, than was the existing Louisiana practice. To deal with this, the court said that "in the comment to the rule it should be noted that it is the intention of the court not to change the current law as expressed in *LSBA v. Edwins*, 329 So. 2d 437 (La. 1976)."

The court was referring to the Task Force's comment to Rule 1.8. The Task Force comment had not mentioned any tension between the text of the rule and the rule of the *Edwins* case. The Louisiana Supreme Court wanted to mention the tension, apparently to alert the House of Delegates and the Board of Governors to the position of the Louisiana Supreme Court on financial assistance to clients.

This is a bit strange. From a drafting standpoint, it would have been better if the court had either directed a change in the language of the rule to make it consistent with Louisiana practice, or left the language of the rule alone but said, in a comment, that the new rule represented a change. The court did neither. Perhaps the best that can be said about the court's handling of Rule 1.8(e) was that it was untidy.

70. See Letter from John C. Combe, Jr. and Robert E. Leake, Jr., Co-Chairmen of the Task Force, to Chief Justice John A. Dixon, Jr. (Apr. 28, 1986) (original on file with Special Archives, Earl K. Long Library, University of New Orleans) (copy on file with author).

71. See Letter from Chief Justice John A. Dixon, Jr. to John C. Combe, Jr. and Robert E. Leake, Jr., Co-Chairmen of the Task Force (June 2, 1986) (original on file with Special Archives, Earl K. Long Library, University of New Orleans) (copy on file with author).

72. See *id.*

73. The Task Force had recommended a change to the ABA Model Rule 1.4(b) on the lawyer's duty to communicate with the client. The resulting Louisiana rule is discussed *infra* in Part III(A)(1).

74. See Letter from John C. Combe, Jr., Co-Chairman of the Task Force, to Chief Justice John A. Dixon, Jr. (June 6, 1986) (original on file in Special Archives, Earl K. Long Library, University of New Orleans) (copy on file with author).

75. The actual name was longer: "Supplemental Report and Recommendation by the Task Force to Evaluate the American Bar Association's Model Rules of Professional Conduct Proposing that the Attached Louisiana State Bar Association's Rules of Professional Conduct Replace as Article XVI of the Articles of Incorporation of the Louisiana State Bar Association the Present Code of Professional



for presentation to the House of Delegates and the Board of Governors on November 22, 1986. However, on November 17, 1986, the supreme court issued another letter directing a change to Rule 1.1, the "competence" rule. It directed the addition of a new part (b) to Rule 1.1 that mandated compliance with continuing legal education requirements.<sup>76</sup> The letter explained that, on that same day, the court had "preliminarily adopted" some new rules for continuing legal education.<sup>77</sup>

The House of Delegates adopted all of the changes the supreme court desired, and also approved one additional change. The State Bar Committee on Professional Responsibility had recommended modifications to Rule 7.3, concerning direct contact with prospective clients, to bring it into closer conformity with decisions of the United States Supreme Court and other federal courts on the constitutionality of restrictions on lawyer advertising and solicitation.<sup>78</sup> The Board of Governors and the House of Delegates approved the change. On November 25, 1986, Thomas O. Collins, Jr., Executive Counsel of the Louisiana State Bar, forwarded the revised rules to the supreme court and included a form of order that the court could use to approve them.<sup>79</sup> Mr. Collins' letter included a recommendation that the effective date of the new rules be January 1, 1987.<sup>80</sup>

On December 18, 1986, the Louisiana Supreme Court issued an order adopting the Rules of Professional Conduct, effective January 1, 1987.<sup>81</sup> The form of the

Responsibility." The proposed rules themselves were attached as Exhibit "A" to the Supplemental Report.

76. See Letter from Chief Justice John A. Dixon, Jr. to John C. Combe, Jr., Robert E. Leake, Jr., Co-Chairmen of the Task Force, LeDoux R. Provosty, Jr., President of the Louisiana State Bar Association, and Eldon E. Fallon, Immediate Past-President of the Louisiana State Bar Association (Nov. 17, 1986) (copy on file with author). Letter from Thomas O. Collins, Jr., Executive Counsel of the State Bar Association, to the Chief Justice and Associate Justices of the Louisiana Supreme Court (Nov. 25, 1986) (original on file with Special Collections, Earl K. Long Library, University of New Orleans) [hereinafter "Collins Letter"].

77. See Letter from Chief Justice John A. Dixon, Jr. to John C. Combe, Jr., Robert E. Leake, Jr., Co-Chairmen of the Task Force, LeDoux R. Provosty, Jr., President of the Louisiana State Bar Association, and Eldon E. Fallon, Immediate Past-President of the Louisiana State Bar Association (Nov. 17, 1986) (copy on file with author). About a month later, on December 23, 1986, the supreme court gave final approval to new Louisiana Rules for Continuing Legal Education. See 8 La. Sup. Ct. R. 30 (1991).

78. See Collins Letter, *supra* note 76. According to a November 22, 1986 resolution of the committee, the concern was that the original draft of Rule 7.3, if adopted, might unconstitutionally limit targeted direct-mail solicitation and inappropriately require advance approval of written communications. The committee proposed that, instead of prohibiting direct mail solicitations, or imposing prior restraints upon them, Rule 7.3 ought to be modified to require such communications to be identified as advertising material and to provide for the monitoring of such communications for compliance with otherwise enforceable ethical requirements. See Proposed Amendment to Rule 7.3, *in* Collins Letter, *supra* note 76, Exhibit B.

79. See Collins Letter, *supra* note 76.

80. See *id.*

81. See Order of Dec. 18, 1986. The order approved a version of the Model Rules of Professional Conduct that was attached as "Exhibit A." The order also authorized the President or President-Elect of the Louisiana State Bar to execute the documents that would be needed to amend the Articles of

rules adopted by the court contained no preliminary materials or comments of any sort. It included only the black-letter rules themselves.

### III. A CLOSER LOOK AT THE OMITTED MATERIALS

At this point, we should take a closer look at the omitted materials. If, as I argue, Louisiana missed some opportunities in connection with its adoption of the Rules of Professional Conduct, the evidence should appear in the parts of the ABA model that Louisiana did not adopt: the Preamble, Scope, and Terminology sections of the Model Rules, and the comments included in the ABA version of the rules. We should also consider whether there are any negative consequences of their omission.

In our examination, we should be mindful of a matter of timing. The Model Rules of Professional Conduct have been amended several times since they were promulgated in 1983.<sup>82</sup> The Louisiana Rules of Professional Conduct have been amended on several occasions as well.<sup>83</sup> For some purposes, it could be useful to compare the most current version of the Model Rules with the most current version of the Louisiana Rules of Professional Conduct.<sup>84</sup> But that will not be the principal focus of our comparative efforts here. My theme is that some important opportunities were missed at the time Louisiana adopted its version of the Rules of Professional Conduct. A discussion of that theme requires that we devote most of our comparative analysis to the Model Rules of Professional Conduct and the Louisiana Rules of Professional Conduct as of December 18, 1986—the date when the Louisiana Supreme Court adopted the Rules of Professional Conduct.<sup>85</sup>

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Incorporation of the State Bar Association to incorporate the new rules. *See id.*

82. A list of amendments made between 1983 and 1986 is found in Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct 579-582 (3d ed. 1996). More current and detailed information on amendments to the Model Rules may be found in Stephen Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* (1998) (see individual rules) and John S. Dzienkowski, *Professional Responsibility Standards, Rules & Statutes* (1999) (see individual rules).

83. Amendments to the Louisiana Rules of Professional Conduct are reflected in "Historical and Statutory Notes" in the Louisiana Revised Statutes Annotated volume that includes the rules. *See* La. R.S. 37, Ch. 4 App. (1998 and Supp. 2000).

84. *See, e.g.*, the discussion *infra* at Appendix.

85. In any event, the amendments that have been made to both codes in the years since adoption do not undermine my principal point about missed opportunities. Because Louisiana has never adopted the introductory portions of the Model Rules or the comments to those rules, any opportunities that were missed by omitting them in 1986 continue to be missed.

Unless otherwise indicated, references to the ABA Model Rules of Professional Conduct refer to the rules as adopted in 1983, and references to the Louisiana Rules of Professional Conduct refer to the rules as adopted in 1986. In most instances, the current rules are the same as the ones that were originally adopted. In some instances, however, it could be confusing not to acknowledge some post-adoption changes in either the ABA's Model Rules or the Louisiana Rules of Professional Conduct. I will mention some of them as we proceed.

The next three sections of this article will look at the omitted materials from three perspectives. In Part III(A) we look at the omitted materials from a perspective of "inclusion." It turns out that not all of what we have been calling the omitted materials was, strictly speaking, omitted. In some instances, expressions in otherwise omitted materials made their way into the text of the Louisiana black-letter rules.

In Part III(B), we look at parts of the omitted materials that could not have been adopted in Louisiana, or at least could not have been adopted without creating inconsistencies between those materials and the text of the rules themselves. As indicated in Part II(B), the Task Force that was charged with evaluating the ABA's Model Rules was not particularly awed by the ABA's product. It proposed a number of departures from the Model Rules. Some of those departures created inconsistencies between the Louisiana black-letter rules and the comments to the corresponding ABA rules.

Finally, in Part III(C), we look at the consequences of omission and consider whether the exclusion of the omitted materials matters.

#### *A. Inclusion of Omitted Materials*

Although the Task Force apparently considered adoption of comments to the Model Rules too controversial or too burdensome to undertake, it did find a few things in the comments that were meritorious enough and free enough from controversy to include in its recommendations to the Louisiana State Bar Association. In several instances, the Task Force proposed to modify the text of the ABA black-letter rules by incorporating language from the comments. All of these inclusionary proposals were accepted by the Louisiana Supreme Court. This section of the article identifies the inclusions.

##### *1. Rule 1.4: Providing Information to Clients*

The first example of this type of change appears in Louisiana Rule 1.4, which concerns the lawyer's duty to keep the client informed. The Louisiana version of the rule substitutes some language from the ABA comment to Model Rule 1.4 for a portion of the text of the rule itself. Thus, ABA Model Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>86</sup> But Louisiana Rule 1.4(b) states: "The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."<sup>87</sup> The substituted language is taken directly from the first sentence of the

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86. See Model Rules of Professional Conduct Rule 1.4(b) (1983).

87. See Louisiana Rules of Professional Conduct Rule 1.4(b) (1986).

ABA comment to the rule but has been slightly modified to articulate a duty on the part of the lawyer.<sup>88</sup>

Why did the Task Force propose this change in the text of the rule? The Task Force Report stated that some clients were incapable of understanding the type of explanation that the ABA rule seemed to contemplate, and that the Task Force "felt the lawyer's duty was somewhat deeper than merely offering an explanation."<sup>89</sup>

The Louisiana modification seems to provide helpful guidance to lawyers about how much information they should provide to clients. But one might quarrel a bit with the movement away from the word "explain." Giving information is not the same as explaining. An explanation goes beyond transmitting information and attempts to interpret information, to make sense out of it, and to help someone else understand it.<sup>90</sup> The Louisiana version of the rule can be read to require something less, even though the Task Force indicated it wanted to require more.

## 2. Rule 1.7: Loyalty and Conflicts of Interest

A second instance of borrowing language from the ABA comments shows up in Louisiana Rule 1.7, which is the basic rule on conflicts of interest. This is one of the more difficult rules to understand and apply. It describes both direct and indirect conflicts of interest, it covers representation of multiple clients, and it sets forth conditions that, if satisfied, allow a lawyer to take on otherwise impermissible representation. Louisiana's version of the rule does not subtract words from the ABA version, nor does it substitute new words for the words in the ABA model. Instead, it takes the first sentence from the ABA comment to the rule and makes it the first sentence in the Louisiana black-letter rule. The sentence reads: "Loyalty is an essential element in the lawyer's relationship to a client."<sup>91</sup>

88. The actual language of the comment states:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Model Rules of Professional Conduct Rule 1.4 cmt. (1983).

89. See Task Force Report: Proposed Rules, *supra* note 42, Rule 1.4 cmt. The Louisiana Supreme Court initially objected to the change. See Letter from Chief Justice John A. Dixon, Jr., to John C. Combe, Jr. and Robert E. Leake, Jr., Co-Chairmen of the Task Force (Apr. 15, 1986) (copy on file with author). Chief Justice Dixon's April 15, 1986 letter to the co-chairmen of the Task Force stated that "Rule 1.4(b) should be eliminated and for it the ABA Model Rule 1.4(b) should be substituted." *Id.* In the end, however, the court agreed to permit a departure from the ABA model with respect to the rule. See Letter from Chief Justice John A. Dixon, Jr. to John C. Combe, Jr. and Robert E. Leake, Jr., Co-Chairmen of the Task Force (June 2, 1986) (original on file with Special Archives, Earl K. Long Library, University of New Orleans) (copy on file with author). The only change that was made in part (b) from the original Task Force draft was to take out the initial words of that draft, which said: "The client should be given sufficient information . . ." and to substitute the words: "The lawyer shall give the client sufficient information. . . ." See Louisiana Rules of Professional Conduct Rule 1.4 (1986).

90. A dictionary definition of the word "explain" is "to make clear, plain, or understandable." See Webster's New World Dictionary 479 (3d College Edition) (Victoria Neufeldt ed., Press 1988).

91. Louisiana Rules of Professional Conduct Rule 1.7 (1986). See Model Rules of Professional

This is a positive change. Lawyers faced with conflict of interest problems might get so bogged down in analytical details that they could lose sight of the underlying principle of client loyalty. Lawyers who practice in states where the comments are part of the rules will be reminded of the principle, if they remember to look at the comments; lawyers who practice in Louisiana can hardly avoid the reminder, if they look at the rule at all.

### 3. Rule 1.8: Transactions with Clients

Rule 1.8 is a specialized conflict of interest rule. It identifies a number of activities that are prohibited, including: undertaking business transactions with clients; using client information to a client's disadvantage; and acquiring a proprietary interest in the subject matter of litigation.<sup>92</sup> As is the case with Rule 1.7,

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#### Conduct Rule 1.7 cmt.

#### 92. Model Rules of Professional Conduct Rule 1.8:

##### Rule 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expense of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas

Louisiana Rule 1.8 includes some preliminary words that were taken from the ABA's comment to the corresponding model rule.

The preliminary words to Louisiana Rule 1.8 are:

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. Furthermore, a lawyer may not exploit his representation of a client or information relating to the representation to the client's disadvantage. Examples of violations include, but are not limited to, the following:<sup>93</sup>

The first two sentences in the quoted language were taken from the comment to Model Rule 1.8.<sup>94</sup>

Unfortunately, the change to Rule 1.8 was not quite as clean as the change mentioned above to Rule 1.7. Here, the added language, by its terms, renders all of the subparts of Rule 1.8 examples of rule violations.<sup>95</sup> What then is the general

involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

93. Louisiana Rules of Professional Conduct Rule 1.8 (1986).

94. The first sentence is exactly the same as the first sentence of the comment. The second sentence is a modified version of the third sentence from the comment. The unmodified version of that sentence from the comment says: "Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage." See Model Rules of Professional Conduct Rule 1.8 cmt. (1983).

95. Louisiana Rules of Professional Conduct Rule 1.8 (1986):

**Rule 1.8 Conflict of Interest: Prohibited Transactions**

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. Furthermore, a lawyer may not exploit his representation of a client or information relating to the representation to the client's disadvantage. Examples of violations include but are not limited to the following:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the

disciplinary standard that the subparts exemplify? The first of the three preliminary sentences does not offer much help. It simply articulates a "general principle" about fairness. And the use of the word "should," instead of "shall," in that sentence appears to confirm that discipline ought not to be based on the general principle mentioned in that sentence.<sup>96</sup>

disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expense of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client consents after consultation, or the compensation is provided by contract with a third persons such as an insurance contract or a prepaid legal service plan.

(2) There is no interference with the lawyer's independent or professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

96. In this respect, it is helpful to consider the following statement from the Scope section of the Model Rules:

Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. . . . Many of the Comments use the term

The second sentence—"a lawyer may not exploit his representation of a client or information relating to the representation to the client's disadvantage"—sounds more like a standard for discipline since it contains a broad prohibition against exploitation of clients. But this prohibition does not seem broad enough to comfortably subsume all of the specific subparts of Rule 1.8. For example, subpart (i) restricts a lawyer's ability to take on a client when the representation will be directly adverse to a party represented by the lawyer's own parent, child, sibling, or spouse. While such a situation presents a potential conflict of interest, it seems a bit of a stretch to characterize it as one that involves exploitation of a client. A similar observation could be made about part (e) of the rule, which limits a lawyer's ability to provide financial assistance to clients. That subpart appears to focus on preventing exploitation of the lawyer rather than the client.

On the other hand, this general anti-exploitation rule might have utility beyond the specific prohibitions set forth in Rule 1.8. It does not seem too unreasonable, for example, to suggest that a lawyer who demands sexual relations with a client as a condition to representation, or as payment of a "fee," has engaged in the exploitation of a client. Some jurisdictions, in fact, have adopted specific rules that are hostile to lawyers having sex with clients.<sup>97</sup> The anti-exploitation language of Louisiana Rule 1.8 would tend to diminish the need for such a rule in this state.<sup>98</sup>

There is another positive aspect of the change to Louisiana Rule 1.8 that should be mentioned. There is some virtue in articulating general statements of principle in a body of ethics rules. They can be found in early lawyer ethics codes and, to some extent, in the introductory materials and the comments to the ABA Model Rules. Louisiana's version of the rules, which omitted these materials, is not as strong in articulating general principles. But one of the general principles was preserved in Rule 1.8, and that seems to be a good thing.

#### 4. *Rule 4.3: Communications with Unrepresented Persons*

Louisiana Rule 4.3, which governs how a lawyer should interact with unrepresented persons in legal matters, is quite different from its ABA counterpart. The ABA version of the rule prohibits a lawyer who communicates with an unrepresented person from stating or implying that the lawyer is disinterested. It also requires the lawyer to make reasonable efforts to correct misunderstandings that an unrepresented person has about the lawyer's role.<sup>99</sup> The rule is intended to

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"should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

Model Rules of Professional Conduct Scope.

97. See, e.g., Rules of Professional Conduct of the State Bar of California Rule 3-120 Annotated Calif. Code Vol. 23, Part 3 (West 1996 and Supp. 2000).

98. Cf. *In re Ashy*, 721 So. 2d 859 (La. 1998) (Louisiana attorney suspended from practice based, in part, on his having made unwanted sexual advances towards a client; court did not rely on the exploitation language from Rule 1.8).

99. The text of the rule is:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer



prohibit lawyer overreaching.

The Louisiana version of the rule is more stringent than the ABA's model. In the first place, the Louisiana rule requires the lawyer to "assume that an unrepresented person does not understand the lawyer's role in a matter."<sup>100</sup> It also requires the lawyer to "carefully explain to the unrepresented person the lawyer's role in the matter."<sup>101</sup> Neither of these changes was based on language from the ABA's comment to Model Rule 4.3.

The second paragraph of Louisiana Rule 4.3, however, was based on the ABA's comment. It states: "During the course of a lawyer's representation of a client, the lawyer should not give advice to a non-represented person other than the advice to obtain counsel."<sup>102</sup> In this instance, Louisiana moved a comment with perceived substantive content to the text of the rule without significant change. Further change might have been appropriate. The problem lies in the word "should." That word is weaker than "shall," suggesting that the lawyer's obligation is more discretionary than mandatory. "Should" is a comfortable word for a comment but not for a rule.<sup>103</sup>

It might be thought that the Task Force, which had recommended this change, did not intend the borrowed language from the comment to be mandatory. Maybe it simply incorporated the language for the helpful guidance of Louisiana lawyers. But if the Task Force had been interested in providing practice guidance in the case of Rule 4.3, why was it not interested in doing so with respect to other rules? In fact, Rule 4.3 is an easy rule to understand and apply. Many other rules, especially those relating to confidentiality and conflicts of interest, are much more difficult. The Task Force might have attempted to provide guidance with respect to such rules by incorporating relevant Scope and Comment offerings of the ABA Model Rules, with appropriate adaptations. But the Task Force did not. The use of "should" in Louisiana Rule 4.3 appears to have been an error.

### *B. Some Omitted Materials Could Not Have Been Included*

We have seen that a few sentences from the omitted materials were actually incorporated into the text of the Louisiana Rules of Professional Conduct. This indicates that the Task Force did pay some attention to the materials that it omitted, even though it ultimately decided not to incorporate most of them into the Louisiana rules. Later we will see that there are other parts of the omitted materials that

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shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Model Rules of Professional Conduct Rule 4.3 (1983).

100. Louisiana Rules of Professional Conduct Rule 4.3 (1986).

101. *Id.*

102. *Id.* The only change from the corresponding sentence in the ABA's comment is that Louisiana uses the term "non-represented" instead of "unrepresented." See Model Rules of Professional Conduct Rule 4.3 cmt.

103. See the discussion of "shall" and "should," *supra* note 96.

should have been included. But this section of the article considers something else. It identifies parts of the omitted materials that could not have been included in Louisiana's version of the rules, even if the Task Force had been more aggressive about such inclusions in general. This is so because some changes that were made to the Louisiana rules were inconsistent with statements in the omitted materials. Some examples will illustrate the point.

*1. Rule 1.8(f): Compensation from Third Party*

Rule 1.8(f) is a specialized conflict of interest rule that limits the lawyer's ability to represent clients while receiving compensation from a third party. The ABA version of the rule prohibits a lawyer from accepting compensation from someone other than the client unless the client consents, after consultation, and unless additional requirements have been satisfied.<sup>104</sup> Consistent with the language of the rule, the ABA comment states that "Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party."<sup>105</sup> This language from the comment would not have been a good fit in Louisiana's version of the rules because of a change to the text of Louisiana Rule 1.8(f).

In Louisiana, the black-letter rule was changed to omit the disclosure and consent requirements in cases where payment comes from an insurance company or a prepaid legal services plan.<sup>106</sup> The change seems sensible because a client who has paid for liability insurance or a legal services plan would certainly hope that legal fees would be paid by a third party when the legal matter at issue is covered by the policy or the plan. But the change was at odds with the language of the ABA comment, quoted above, referring to third-party payments. Because of the two exceptions set forth in the Louisiana rule, the Task Force would have had to modify the Model Rules comment; without modification, the Model Rules comment simply would not have fit.

*2. Rule 3.1: Improper Claims and Defenses*

Rule 3.1 deals with meritorious claims and defenses. The ABA version of the rule prohibits a lawyer from bringing or defending a "proceeding" or from taking a position with respect to an issue in a proceeding, "unless there is a basis for doing so that is not frivolous."<sup>107</sup> "Frivolous" is a word in want of definition, and the

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104. See Model Rule 1.8(f). The other requirements are: (1) that there be no interference with the lawyer's independent judgment or with the lawyer-client relationship and (2) that information otherwise subject to Rule 1.6 confidentiality protection be kept confidential according to Rule 1.6.

105. Model Rules of Professional Conduct Rule 1.8 cmt. (1983).

106. Louisiana Rules of Professional Conduct Rule 1.8(f)(1) (1986). The Task Force Report had recommended the change "to recognize the reality of liability insurance or prepaid legal service plans." Task Force Report: Proposed Rules, *supra* note 42, Rule 1.8 cmt.

107. Model Rules of Professional Conduct Rule 3.1 (1983).

comment to the ABA rule does not disappoint. An entire paragraph of the comment to Rule 3.1 is devoted to the purpose.<sup>108</sup>

This paragraph of the comment would not have applied with equal relevance to the Louisiana version of the rule, however, because the Louisiana rule substitutes a "good faith" requirement for the ABA's requirement that claims and defenses be "not frivolous."<sup>109</sup> Thus, the text of the Louisiana rule provides, in pertinent part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so in good faith, which includes a good faith argument for an extension, modification or reversal of existing law."<sup>110</sup> The Task Force recommended the change because it thought that the "not frivolous" standard was vague, and because it thought that there would be "relatively little question among the Bench and Bar about the meaning of good faith."<sup>111</sup> Of course, the vagueness problem would have been resolved, to some extent, if Louisiana had adopted the definitional portion of the rule's comment. But the change in the text of the rule created a barrier to comment adoption. Even if Louisiana had generally incorporated the ABA's comments into its version of the rules, a comment on good faith would have been appropriate under Rule 3.1, but not a comment on what "frivolous" means.

### 3. Rule 3.3: Lawyer Candor Toward the Tribunal

Rule 3.3 concerns candor toward the tribunal. Both the ABA and the Louisiana versions of the rule are hostile to false statements, false evidence, and inappropriate non-disclosures to the court.<sup>112</sup> Both versions of the rule require the lawyer to take some action if one of the prohibitions is violated. But the Louisiana version of the rule differs from the ABA model with respect to the temporal length of the lawyer's remedial obligations. The ABA model provides that the remedial duties

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108. *See id.* cmt.

109. Louisiana Rules of Professional Conduct Rule 3.1 (1986).

110. *Id.*

111. Task Force Report: Proposed Rules, *supra* note 42, Rule 3.1 cmt.

112. Both the Louisiana and the ABA versions of the rule include a list of four prohibitions. Three of the prohibitions are the same. They prohibit lawyers from (1) making false statements of material fact or law; (2) failing to disclose legal authority in the controlling jurisdiction that is known by the lawyer to be directly adverse to the position of the client, when that authority has not been disclosed by opposing counsel; and (3) offering evidence that the lawyer knows to be false. *See* Model Rules of Professional Conduct Rule 3.3(a)(1), (3) and (4) (1983); Louisiana Rules of Professional Conduct Rule 3.3 (a)(1), (3) and (4) (1986).

Louisiana departed from the ABA model with respect to prohibited factual omissions. ABA Model Rule 3.3(a)(2) prohibits the lawyer from failing to disclose a material fact when disclosure is necessary to avoid assisting a client's criminal or fraudulent act. Louisiana Rule 3.3(a)(2), in contrast, prohibits the lawyer from concealing or knowingly failing to disclose "that which he is required by law to reveal." It also provides that if the lawyer discovers that the client has perpetrated "a fraud on the tribunal," the lawyer must call on the client to rectify it. If the client does not, the rule requires the lawyer to reveal the fraud to the affected person or tribunal.

“continue to the conclusion of the proceeding.”<sup>113</sup> Consistent with this provision, the comment to the ABA rule states: “A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for termination of the obligation . . . .”<sup>114</sup>

The ABA comment would not have worked in connection with Louisiana’s version of the rule. The Louisiana Supreme Court approved a change to part (b) of Rule 3.3 and created two temporal standards regarding the lawyer’s duty to take remedial measures; one change, in fact, was not a “practical time limit” at all. In general, duties relating to client fraud and the offering of false evidence are subjected to an unlimited time period for rectification. A shorter time frame, namely, the end of a proceeding, applies to the rectification of false statements by the lawyer or the lawyer’s failure to disclose legal authority.<sup>115</sup> The relevant portion of Louisiana Rule 3.3(b) provides: “The duties stated in paragraph (a)(1) and (3) continue to the end of the hearing or proceeding. The duties stated in paragraph (a)(2) and (4) are unlimited in time.”<sup>116</sup> The Task Force Report did not explain this double standard. Perhaps the Task Force thought it was worse to have the tribunal tainted by false statements (or omissions) by the client than by false statements (or

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113. Model Rules of Professional Conduct Rule 3.3(b) (1983).

114. *Id.* cmt.

115. See Louisiana Rules of Professional Conduct Rule 3.3 (1986).

116. Louisiana Rules of Professional Conduct Rule 3.3(b) (1986). As originally adopted, Louisiana Rule 3.3(b) also provided that “[t]he duties stated in paragraph (a)(2) and (4) are unlimited in time and are subject to the provisions of Rule 1.6.” This formulation suggested that Rule 1.6, the confidentiality rule, trumped Rule 3.3. This was exactly the opposite of the ABA’s own formulation. The text of ABA Model Rule 3.3 made it clear that the disclosure duties under Model Rule 3.3 “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.” Model Rules of Professional Conduct Rule 3.3(b) (1983).

After the Louisiana Rules of Professional Conduct had been adopted, an “ethics professor” apparently pointed the problem out to Wood Brown III, who was one of the members of the Task Force. Mr. Brown agreed that there was a problem and wrote to other members of the Task Force as follows:

What we have done, therefore, is to take our strong provision in Rule 3.3(a)(2) and make it subject to the confidentiality rule set up in Rule 1.6. I don’t think we meant to do that. I think we meant to make the disclosure of a client’s perpetration of a fraud on the Court mandatory and under all circumstances. At least, that’s what I intended to do.

See Letter from Wood Brown III, Task Force Member, to the other members of the Task Force (June 26, 1987) (copy on file with author). Several proposals for fixing the rule were suggested. See *id.*; Letter from Robert E. Leake, Jr., Co-Chairman of the Task Force, to Wood Brown III, Task Force Member (August 4, 1987) (copy on file with author). In the end, the proposal that prevailed was one referenced in a letter by Thomas O. Collins, Jr., Executive Counsel to the bar association. He recommended that Louisiana Rule 3.3(b) incorporate the language from ABA Model Rule 3.3(b) concerning the priority of Rule 3.3 over Rule 1.6. See Letter from Thomas O. Collins, Jr., Executive Counsel to the bar association, to Wood Brown III, Task Force Member (July 10, 1987) (copy on file with the author). On January 12, 1988, Louisiana Rule 3.3(b) was amended to provide:

The duties stated in Paragraph (a)(1) and (3) continue to the end of the hearing or proceeding. The duties stated in Paragraph (a)(2) and (4) are unlimited in time and apply, even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Louisiana Rules of Professional Conduct Rule 3.3(b) (2000).

omissions) by the lawyer. If that is what the Task Force thought, it probably should have thought further about the matter. In any event, the discussion of a "practical time limit" in the ABA comment would not have cast much illumination on the Louisiana rule.

4. *Rule 7.2: Giving Things of Value for Recommending a Lawyer's Services*

The Louisiana version of Rule 7.2, which is about lawyer advertising, has been substantially modified since its initial adoption, most recently in 1996.<sup>117</sup> As a result of these modifications, the discussion in this part of the article is mostly of historical significance, but the discussion is still relevant to the theme that changes in Louisiana's version of the black-letter rules would have made it inappropriate to adopt all of the comments to the ABA's Model Rules.

One of the provisions of Rule 7.2 concerns the giving of value to persons for recommending a lawyer's services. The ABA version of this provision, found in Model Rule 7.2(c), states:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.<sup>118</sup>

A comment to the Model Rule elaborates a bit more on this. It expressly affirms the lawyer's ability "to pay for advertising permitted by this Rule" and "to pay the usual fees" charged by not-for-profit referral programs.<sup>119</sup> This comment would not have worked in Louisiana because Louisiana deleted all of the words after "services" in the above-quoted language from the text of Model Rule 7.2. The Task Force said this about the change: "The proposal of the task force as phrased is absolute. The ABA version was qualified by a number of matters which the task force do [sic] not deem appropriate."<sup>120</sup>

It is not entirely clear what the Task Force found wanting in the ABA version of the rule. One possibility is that the Task Force thought that the listed exceptions were unnecessary because they do not amount to the giving of value for recommending a lawyer's services. But this explanation seems weak, given the somewhat harsh tone of the Task Force's statement regarding the appropriateness of the qualifications to the ABA's rule, and given the fact that lawyer referral fees, at least, seem to involve giving value for recommending lawyer services. An alternative possibility is that the Task Force objected to the

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117. Amendments to the Louisiana Rules are reflected in "Historical and Statutory Notes" accompanying the text of the rules in La. R.S. 37, Ch. 4 App. (1998 & 2000 Supp.).

118. Model Rules of Professional Conduct Rule 7.2(c) (1983).

119. *Id.* Rule 7.2 cmt.

120. Task Force Report: Proposed Rules, *supra* note 42, Rule 7.2 cmt.

qualifications on the merits. The Task Force might have wanted it to be unethical for a lawyer to pay for otherwise permissible advertising or otherwise permissible participation in lawyer referral services. However, such a result would, as a practical matter, have foreclosed lawyer advertising and participation in lawyer referral services and otherwise undercut the balance of the rule. That would have been strange.

As noted above, however, this is mostly of historical relevance. The current version of the Louisiana Rule states:

A lawyer shall not give anything of value to a person for recommending the lawyer's services; provided, however, that a lawyer may pay the reasonable and customary costs of an advertisement or communication not in violation of these rules.<sup>121</sup>

Of course, even this rule does not expressly approve fees for lawyer referral services. The parallel portion of the ABA comment would still appear to be at odds with the Louisiana rule.

##### *5. Rule 7.3: Limits on Direct Contacts with Prospective Clients*

A further instance in which the Louisiana drafters could not comfortably have adopted a comment to a rule emerges in connection with Rule 7.3. In the ABA version and in the original Louisiana version, Rule 7.3 was about direct contact with prospective clients. Both versions have changed in the intervening years. Louisiana's rule has changed more substantially, and what we note here is, again, largely of historical relevance.

At the time the Task Force was doing its work, the ABA version of Rule 7.3 articulated a broad ban on lawyer solicitation of prospective clients, at least when a significant motive for the solicitation was the lawyer's pecuniary gain. The ban did not apply to people with whom the lawyer had a prior family or professional relationship. But it did apply to all direct contacts—"by mail, in-person, or otherwise."<sup>122</sup> A comment to the ABA rule spoke of the "dangers" of direct solicitation and about how "[d]irect mail solicitation cannot be effectively regulated by means less drastic than outright prohibition."<sup>123</sup>

This comment could not have been adopted in Louisiana because, subject to some qualifications, the initial Louisiana version of the rule permitted lawyers to send direct solicitation letters to individuals who were known to be in need of particular legal services.<sup>124</sup> It was written that way to avoid constitutional

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121. Louisiana Rules of Professional Conduct Rule 7.2(d) (2000).

122. Model Rules of Professional Conduct Rule 7.3 (1983).

123. *Id.* Rule 7.3 cmt.

124. Louisiana Rules of Professional Conduct Rule 7.3 (1986). The qualifications were that the letter had to be identified as advertising material and that the lawyer had to submit a copy of the letter to the Louisiana Bar Association. *See id.*

problems.<sup>125</sup> In the intervening years, the ABA has modified its rule and the comment to take constitutional considerations into account. The current version of the ABA rule permits targeted solicitation letters.<sup>126</sup> Louisiana's rule has also changed over the years. Indeed, the changes have been substantial enough that the Louisiana rule that covers direct contact with prospective clients is now Rule 7.2 rather than 7.3.

#### 6. Rule 8.3: Reporting Professional Misconduct

A final example of a comment that could not have been adopted in Louisiana appears in connection with Rule 8.3, which concerns reporting professional misconduct. The ABA rule requires lawyers to report known violations of the Rules of Professional Conduct to disciplinary authorities, but only when those violations raise "a substantial question as to [a] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>127</sup>

The ABA comment to the rule describes the standards for determining whether a violation is serious enough to be reported. It states in part:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.<sup>128</sup>

This comment could not have been adopted in Louisiana because the Louisiana rule requires broader reporting of rule violations. The Louisiana version of Rule 8.3 provides, in pertinent part: "A lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."<sup>129</sup>

This is essentially the same language that was used in the prior Code of Professional Responsibility.<sup>130</sup> The Task Force wanted to incorporate this language

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125. See *supra* discussion accompanying note 78.

126. See Model Rules of Professional Conduct Rule 7.3 (2000).

127. Model Rules of Professional Conduct Rule 8.3(a).

128. *Id.* cmt.

129. Louisiana Rules of Professional Conduct Rule 8.3(a).

130. See Model Code of Professional Responsibility DR 1-103. The reference to "unprivileged" knowledge was somewhat troublesome. Did this refer only to information that was not protected by an evidentiary privilege? See *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). Or did it refer, more broadly, to information that was not subject to the Code's formula for confidential information? See ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 341 (1975). It was not at all necessary to introduce this uncertainty into the text of the Louisiana rule. The word "unprivileged" should simply have been left out.

Part (c) of the Louisiana rule independently excludes, from the reporting requirement, "information otherwise protected by Rule 1.6." Rule 1.6, the confidentiality rule, generally protects all information "relating to representation of a client." As a result, the reporting exception in part (c) covers at least as

into Rule 8.3 because it preferred the old rule to the ABA's new one. Even though the Task Force Report acknowledged difficulties in the enforceability of the old rule,<sup>131</sup> it found the old rule "preferable, because a lawyer, making an evaluation whether to report a violation, should not be put in the position of making a subjective judgment as to whether the violation 'raised a substantial question as to the lawyer's honesty, trustworthiness and fitness as a lawyer.'"<sup>132</sup>

The Task Force thought it was better to put the burden on the lawyer to report all violations.<sup>133</sup> The Louisiana Supreme Court apparently agreed, and the result was a rule that was quite different from the ABA version—different enough so that the language quoted above from the ABA comment would have been inconsistent with the text of the Louisiana rule.<sup>134</sup>

### C. *Do the Omissions Matter?*

So far, in our look at the omitted materials, we have identified a few sentences from the omitted materials that were actually included in the Louisiana Rules. We have also identified other parts of the omitted materials that could not have been included. This section addresses a more important concern: whether the omission of the omitted materials matters. Initially we will see that, notwithstanding the failure to adopt the omitted materials, Louisiana courts have occasionally referred to them when it has been helpful to do so. That alone suggests that the fact of omission is not particularly consequential. But that should not be the end of our analysis. If we consider the content of the omitted materials, we will find a couple of instances in which Louisiana may be better off for having excluded them. We

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much ground, and probably more ground, than the "unprivileged" qualifier in part (a).

131. See Task Force Report: Proposed Rules, *supra* note 42, Rule 8.3 cmt. The enforceability problem, which was also referenced in the ABA's comment to Model Rule 8.3, may have been overstated. See Charles W. Wolfram, *Modern Legal Ethics* § 12.10.1 (1986):

Much has been made of the fact that the Code, in DR 1-103(A), becomes operative without apparent limitation when an observing lawyer has knowledge of a "violation" even if it is of a trivial nature. The fact, of course, is that no recorded instance exists of a lawyer disciplined under the Code for failure to report a trivial violation.

(footnote omitted).

132. Task Force Report: Proposed Rules, *supra* note 42, Rule 8.3 cmt.

133. See *id.*

134. As a practical matter, the difference between the ABA rule and the Louisiana rule may not matter all that much. Both the ABA Model Rules and the Louisiana Rules of Professional Conduct provide that Rule 8.3 "does not require disclosure of information otherwise protected by Rule 1.6." Rule 1.6, the confidentiality rule, essentially protects all information "relating to representation of a client." Most of the information that lawyers receive about the misdeeds of other lawyers comes as a result of client representation. It would be information covered by Rule 1.6. See Steven Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 786 (5th ed. 1998) ("It will be unusual for a lawyer to have knowledge of another lawyer's unethical conduct that is *not* based on protected information . . .") (emphasis in original). It is true that Rule 1.6 information could be disclosed with client consent, but Rule 8.3 does not require lawyers to try to get client consent for disclosure of misdeeds by other lawyers. The end result is that lawyers will usually not be obligated to report misconduct under Rule 8.3.



will also identify a number of instances in which adoption of the omitted materials would have been beneficial—sometimes very beneficial. Simply stated, the omissions do matter.

### *1. Louisiana Courts and the Omitted Materials*

Even though the Louisiana Supreme Court approved only black-letter rules when it approved the Louisiana Rules of Professional Conduct, it did not foreclose the possibility of useful application of the omitted materials. After all, the Task Force Report suggested that the introductory materials, comments, and other materials in the ABA Model “be considered as precatory to any interpretation or application of the Louisiana version of the Model Rules.”<sup>135</sup> While the suggestion of the Task Force was not formally incorporated into the Louisiana Rules, and may not have survived in the memory of any court or disciplinary authority, Louisiana courts have sometimes referred to omitted materials (mostly comments to the Model rules) in written opinions that discuss legal ethics issues.

Indeed, the Louisiana Supreme Court itself has referred to omitted materials in several opinions.<sup>136</sup> In a 1994 case, for example, the supreme court considered whether lawyers who moved from government service to private practice were subject to the conflict of interest statutes that apply to state government employees generally, or whether Rule 1.11 of the Rules of Professional Conduct, dealing with attorney “revolving door” issues, provides the exclusive vehicle for lawyer regulation. In the course of its opinion, the supreme court stated:

The American Bar Association Model Rules of Professional Conduct, from which the pertinent part of Rule 1.11 is taken, contemplated the application of other laws in the area of successive government and private employment. Although the Comments to the Model Rules were not adopted by this Court, they are instructive here. The Model Rule Comment provides that a government lawyer is subject, not only to Rule 1.11, but “to statutes and government regulations regarding conflict of interest.” The Model Rule Comment also recognized that “statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.”<sup>137</sup>

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135. See Task Force Report: Report to the House of Delegate, *supra* note 42.

136. See *Midboe v. Commission on Ethics for Public Employees*, 646 So. 2d 351, 360 (La. 1994) (referring to comment to Model Rule 1.11); *Succession of Wallace*, 574 So. 2d 348, 351 (La. 1991) (referring to comment to Model Rule 1.16); *Louisiana State Bar Ass'n v. Williams*, 549 So. 2d 275, 278 (La. 1989) (referring to comment to Model Rule 1.3). See also *Farrington v. Law Firm of Sessions*, 687 So. 2d 997, 999 (La. 1997) (referring to what the court calls the “comments” to Model Rule 3.7; the reference is actually to a “Legal Background” annotation in the ABA’s Annotated Model Rules of Professional Conduct (3d ed. 1996); such annotations were not part of the Model Rules as adopted by the ABA); *Louisiana State Bar Ass'n v. Drury*, 455 So. 2d 1387, 1390 (La. 1984) (referring to comment to Model Rule 1.7 prior to Louisiana’s adoption of the Rules of Professional Conduct).

137. *Midboe v. Commission on Ethics for Pub. Employees*, 646 So. 2d 351, 360 (La. 1994).

The comment helped the court reach a conclusion that the conflict of interest statutes were applicable to attorneys in government service.

In another case, the Louisiana Supreme Court referred to a comment to the Model Rules to clarify the rule regarding the client's right to discharge a lawyer:

Rule 1.16(a)(3), the rule defining and regulating the client-attorney relationship most pertinent to the present case, provides unequivocally that "a lawyer . . . shall withdraw from the representation of a client if . . . the lawyer is discharged." The comment under the Rules of Professional Conduct Rule 1.16, explains that the rule means "[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."<sup>138</sup>

In this instance, the court failed to even mention that the comment was not part of the Louisiana Rules of Professional Conduct.

Courts at other levels have also referred to the comments to the Model Rules for guidance on the meaning of Louisiana's Rules of Professional Conduct.<sup>139</sup>

In short, Louisiana cases do not express disapproval of the omitted materials. To the contrary, courts that have referred to the omitted materials (mostly the comments) have implicitly or explicitly acknowledged their value.

## 2. Benefits of Omission

Louisiana's decision not to incorporate the omitted materials into the Louisiana Rules of Professional Conduct turns out to have been beneficial in some respects. One of the benefits is that the resulting rules are shorter than the ABA's Model Rules. As a result, they take up less space in a printed volume, they do not take as much time to read, and they focus attention on the essential rules that attorneys must obey in order to avoid discipline.

Another benefit is that the Louisiana Supreme Court and the Louisiana Bar Association do not have to be associated with some questionable statements contained in the omitted materials. The following are at least a couple of these.

### a. Lies

ABA Model Rule 4.1 is about "[t]ruthfulness in statements to others."<sup>140</sup> Part

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138. Succession of Wallace, 574 So. 2d 348, 351 (La. 1991) (omissions in original) (emphasis omitted).

139. See *Douglas v. Dyn McDermott Petroleum Operations Co.*, 163 F.3d 223, 237 (5th Cir. 1998) (Dennis, J., dissenting) (referring to Comment to Model Rule 1.6); *United States v. Brown*, 72 F.3d 25 (5th Cir. 1995) (referring to Comment to Model Rule 8.2); *Jenkins v. Wal-Mart Stores, Inc.*, 956 F. Supp. 695, 697 (W.D. La. 1997) (referring to Comment to Model Rule 4.2); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) (referring to Comment to Model Rule 4.2); *Miskell v. Ciervo*, 557 So. 2d 274, 275 (La. App. 4th Cir. 1990) (referring to Comment to Model Rule 1.3).

140. See Model Rules of Professional Conduct Rule 4.1 (1983).

(a) of the rule provides that a lawyer, in the course of representing a client, "shall not knowingly . . . make a false statement of material fact or law to a third person."<sup>141</sup> This is not a very shocking rule. Fraud is not good, and lawyers, like non-lawyers, ought not to engage in it. If anything, we might wonder why the rule does not require more.<sup>142</sup> The comment to the rule, however, takes a different tack. It countenances some false statements. The comment provides, in pertinent part:

141. See *id.* Rule 4.1(a).

142. Judge Alvin B. Rubin wrote: "It is scant comfort to observe here, as apologists for the profession usually do, that lawyers are as honest as other men. If it is an inevitable professional duty that they negotiate, then as professionals they can be expected to observe something more than the morality of the marketplace." Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 La. L. Rev. 577, 578-79 (1975) (footnote omitted).

Professor Gary Tobias Lowenthal has argued that the standard of Model Rule 4.1 is even lower than the standard that is generally applicable under tort and contract law:

The notion that a lie is unethical only if it relates to a "material" fact cannot be justified by the principles underlying the rules of liability for misrepresentation under the law of contracts or torts. . . . The materiality of the misrepresented fact is important in the law of contracts only in cases of *unintentional* misrepresentation. . . . On the other hand, contract avoidance is available as a remedy when a misrepresentation is intentional, regardless of materiality, because "the wrongdoer has accomplished his intended purpose."

. . . [T]he materiality of the misrepresentation is important in tort law only because it assists the trier of fact in determining whether the plaintiff actually relied on the misrepresentation and whether the plaintiff's reliance was justifiable—not because materiality is required for a misrepresentation to be fraudulent in character. If a lawyer-negotiator misrepresents facts to deceive another party, the ethics of the lawyer's conduct should not depend on whether the other party is actually deceived, or even whether a reasonable person would be deceived under the circumstances.

Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining By Lawyers*, 2 Geo. J. L. Eth. 411, 417-18 (1988) (footnotes omitted) (emphasis in original).

For other perspectives on lying in negotiations see Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 Rev. of Lit. 173 (1989) (Most interviewed attorneys would mislead the other side as part of the game of negotiations; many attorneys were in agreement about "the boundary of permissible deceit"); Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 Neg. J. 105, 106 (1985) (Includes a proposed memorandum to give to a new client that says: "I believe that it is not a sound practice to negotiate in a way that rewards deception, stubbornness, dirty tricks, and taking risks."); Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 S. Car. L. Rev. 181 (1981) (Standard conventions do not require strict truthfulness—they permit lawyers to make statements that are literally false; lawyers lack a common conception of fairness in negotiation; regulation of lawyer untrustworthiness cannot go much further than to proscribe fraud); Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 La. L. Rev. 447 (1995) (arguing that the "ethical basis of negotiations should be one of truth and fair dealing," and that the standard for ethical behavior in nonlitigation practice ought to be the same as that for litigation); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 A.B.F. Research J. 926, 927 (the negotiator is a poker player who must "facilitate his opponent's inaccurate assessment"; "careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions."); Gerald B. Wetlauffer, *The Ethics of Lying in Negotiations*, 75 Iowa L. Rev. 1219 (1990) ("[L]ying is a coherent and often effective strategy," but "we must grant a place to ethics, first in our discourse and then in our actions.").

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.<sup>143</sup>

The comment seems to be tethered to the common law notion of "puffing"—the notion that some sales talk is merely an expression of the seller's opinion, something to be discounted by the buyer, and not something on which a reasonable person would rely.<sup>144</sup> Thus, a car seller who engages in puffing might describe a car as a "dandy" or "the best in the American market."<sup>145</sup> But Prosser and Keeton have described the puffing rule as amounting to a "seller's privilege to lie his head off,

143. Model Rules of Professional Conduct Rule 4.1 cmt. (1983).

144. See W. Page Keeton et al., Prosser and Keeton on Torts 757 (5th ed. 1984). A "puffing" rule is also recognized under Louisiana law:

In the course of negotiating a transaction persons may indulge in expressions that deliberately exaggerate the quality of a thing, for example, or the reasonableness of a named price, or the uniqueness of a proposed bargain. Through a centuries-old tradition that has its roots in the Roman tolerance of the *dolus bonus*, such expressions are not regarded as the reflection of a fraudulent intent. Indeed, a seller who says to a prospective buyer, "This is the best thing you can get for your money," or "Nobody will sell this thing for less," though he knows that what he says is not true, does not say it with the intention to deceive the other person, but rather to persuade him to buy. If such a seller's conviction is that he is offering a reasonable deal, he then lacks the intention either to derive an unfair advantage for himself or to inflict a detriment to the other person, which shows the absence of the intentional element that defines "fraud." Louisiana courts call such expressions "sales talk" or "puffing," which at most could be taken as an innocuous opinion and not as a declaration of quality.

Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 68 (1989). Older versions of the Civil Code provided that false assertions of value would not invalidate agreements, if the person induced to enter into the agreement "might with ordinary attention have detected the falsehood." See, e.g., La. Civ. Code art. 1847(3) (1870). See also *Davis v. Lacaze*, 158 So. 626 (La. 1935) (Error as to value of land is an error of judgment, not fact; the law furnishes no relief, because the value could have been verified by inspection). On the other hand, "a false assertion of the value of cost, or quality" would invalidate the agreement if discovery of the truth required "particular skill or habit, or any difficult or inconvenient operation." See, e.g., La. Civ. Code art. 1847(4). See also *Overby v. Beach*, 55 So. 2d 873 (La. 1951) (Seller's misrepresentation about "collectible rentals" from apartments amounted to misrepresentation about quality and could support rescission). The current Civil Code simply provides: "Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill." See La. Civ. Code art. 1954.

While "puffing" may not amount to fraud, fraud itself does not get a good reception under Louisiana law. It is a "vice of consent"—something that may vitiate the consent that is needed for the formation of a contract. La. Civ. Code arts. 1927, 1948.

145. See W. Page Keeton et al., Prosser and Keeton on The Law of Torts 756 (5th ed. 1984).

so long as he says nothing specific" and have pointed out that the rule has not been a favored one.<sup>146</sup> Whatever enthusiasm there may be for puffing rules in tort or contract law, there seems to be some irony about incorporating one into a comment to an ethics rule.<sup>147</sup>

But irony is not the only issue. The comment informs us, among other things, that it is ordinarily all right for a lawyer to knowingly make false statements about estimates of price and value and the settlement intentions of a client. In short, it is "ethical" to lie, at least about those things. What about the things themselves? First, we should note that the word "estimates" may carry a lot of freight. Price and value are inevitably subject to change. At some level, it is possible to regard most calculations of price and value as estimates. So there would appear to be nothing wrong, according to the comment, for a lawyer, while knowing it to be false, to say: "The painting that was destroyed had a value of between \$175,000 and \$200,000." The comment also grants broad permission to knowingly make false statements about client intentions.<sup>148</sup> It would permit a lawyer to say, even when he or she knows it is false: "My client will pay no more than \$10,000 to settle this case;" or "My client will not settle this case for less than \$750,000." False statements like these might be tactically helpful in negotiations, especially against unskilled negotiators, but that is not a good justification for an ethics code to permit them.<sup>149</sup> Besides, there are ways to negotiate effectively that do not involve telling lies.<sup>150</sup>

146. See *id.* at 757.

147. See Lowenthal, *supra* note 142, at 422: "The irony of an ethics rule that permits puffing is that puffing is effective as a bargaining tactic *only* in circumstances in which it can fairly be described as dishonest."

148. Professors Hazard and Hodes offer the following observations regarding the language of the comment:

Kept within moral and responsible limits, the notion that "truth" can have somewhat different meanings in different contexts is sound. However, there is something seductive about a mandate to tell the truth that then redefines "truth." Lawyers should not suppose that qualifications about "mere puffing" or "not material" constitute a license to lie, for the Comment does not (and cannot) repeal the contemporary legal definition of misrepresentation. The dividing line is hard to draw, but it must approximate the point where a statement *will not mislead the opposing party*—the very point where "puffery" would have little practical effect anyway.

See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 4.1:202, at 716 (1998). The professors are right on target about the risk of redefining "truth." Their statement about the line being hard to draw is also well taken. But the comment to the rule itself does not articulate the same standard that they do when they tell us where the approximate point of the dividing line must be. The language of the comment does allow the lawyer to mislead.

149. Judge Alvin B. Rubin wrote: "Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar." Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 *L. L. Rev.* 577, 589 (1975).

150. "One can be a first-rate negotiator without misrepresenting facts or unlawfully concealing information, even in distributional bargaining. A scrupulously honest negotiator normally succeeds in zero sum negotiation by preparing thoroughly, establishing firm commitments to positions, and refusing to make concessions without adequate trade offs. . . . Moreover, even those who advocate highly

No doubt there are some "generally accepted" conventions about negotiations. For example, lawyers who negotiate, like non-lawyers who negotiate, understand that initial offers are normally not final offers, that there are advantages in not reacting with euphoria to offers that can reasonably be expected to be superseded by more favorable ones, and that it is not customary to voluntarily disclose all of the weaknesses in one's own position. There is indeed something of a "game" to negotiations, and it is a hard thing to draw all of the lines between what should and should not be permitted. However, it is not obvious that negotiation conventions do (or should) incorporate the sorts of untruths permitted by the comment to Rule 4.1.<sup>151</sup> Even if the conventions did so, we could doubt that an ethics code should.<sup>152</sup>

Many members of the public think that lawyers are dishonest. Maybe that perception results, at least in part, from lawyer dishonesty. Unfortunately, the comment to Rule 4.1 seems to encourage lawyers to tell some untruths. To the extent that ethics codes are teachers, Louisiana may be better off for not having adopted the comment to this rule.

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adversarial negotiation recognize the long-term importance of a negotiator's ability to maintain a reputation for honest dealing." Lowenthal, *supra* note 142, at 433.

151. Professor Lowenthal observed, on this point: "How or why the bar concludes that a negotiation morality that rewards dishonesty is 'generally accepted' is never stated. The conclusion is certainly not based on existing empirical evidence." Lowenthal, *supra* note 142, at 425. See also Deborah L. Rhode & David Luban, *Legal Ethics* 421 (2d ed. 1995) (discussing how in many instances lawyers disagree about the duty of candor in negotiation and there may be no generally accepted conventions); Dahl, *supra* note 142, at 193 (Almost all interviewed attorneys would refuse to lie about their settlement authority and "the client's bottom line."); Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 *Inside Litigation* 1 (1988) (giving examples of lawyers disagreeing about whether untruths are appropriate); Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 *U. Rich. L. Rev.* 99 (1982) (saying that it seems likely that there can be little agreement on the concept of truthfulness); White, *supra* note 142, at 934 (suspecting that many lawyers would say that lies about settlement authority and client intentions "are out of bounds and are not part of the rules of the game.").

152. See Lowenthal, *supra* note 142, at 425-26 ("[R]egardless of empirical verification, an ethics code should not condone conduct merely because it is 'generally accepted.'"). Professor Lowenthal suggests that one alternative that makes more sense than the bar's approach to lying in negotiation would be to modify the comment to Rule 4.1 to say that "there is no exception to the prohibition against knowingly misrepresenting facts when the facts in question refer to such matters as a negotiator's settlement authority or the legitimacy of a bargaining demand." *Id.* at 426.

It should be acknowledged, however, that even if an ethics code prohibits lying, larger "ethical" considerations might be called upon to justify the telling of lies in extreme situations. Examples that have appeared in the literature include "lying to Genghis Khan in order to save the city, lying in negotiations with terrorists, or lying to the wheat-hoarding monopolist in order to get a lower price so that one can buy more grain for the starving children." See Wetlaufer, *supra* note 142, at 1270. Although an ethics code may articulate practical rules of ethics, a person's own moral compass might point in a direction that is contrary to the provisions of the code. The Preamble to the Model Rules reminds us that "[t]he Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." Model Rules of Professional Conduct Preamble. But as long as we are going to have an ethics code, it seems preferable to stick with a rule that is hostile to mistruth in general, and leave exceptional cases to be resolved in light of the larger moral considerations that should attend the negotiator's decision.

*b. Adultery*

Model Rule 8.4 is the misconduct rule. It covers a lot of ground. Among other things, the rule provides that it is misconduct for a lawyer to violate any of the Rules of Professional Conduct by engaging in dishonesty, fraud, deceit, or misrepresentation or by committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to practice law.<sup>153</sup> The comment to the Model Rule elaborates on the nature of illegal conduct that amounts to misconduct:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category.<sup>154</sup>

There are some difficulties with this comment.

*i. Personal Morality*

The principal idea of the quoted language from the comment is that lawyers should be disciplined for criminal conduct that has a specific connection to the fitness to practice law. This is a useful idea,<sup>155</sup> but it is no easy matter to describe the offenses that meet (or do not meet) the standard. The comment rejects the use

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153. See Model Rules of Professional Conduct Rule 8.4 (1983).

154. Model Rules of Professional Conduct Rule 8.4 cmt. (1983).

155. However, the idea alone may not be a sufficient standard for discipline where criminal offenses are concerned. It would appear to be insufficient, in fact, if some of the words from the same paragraph of the comment can be read to say that the only offenses that show lack of characteristics relevant to law practice are offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice. Lawyers are officers of the court, with a special obligation to uphold the rule of law. It would be inappropriate to rule out discipline for lawyers who, with impunity, violate other laws that do not involve any of the four characteristics mentioned above. By way of example, a lawyer who, with impunity, regularly violates laws against speeding, or public nudity, would seem to be a good candidate for discipline.

The last sentence of the quoted paragraph from the comment indicates, in any event, that the comment should not be read so narrowly as to authorize discipline only if the criminal offense involves one of the four listed characteristics. It indicates that "[a] pattern of repeated offenses, even ones of minor significance," can be a basis for lawyer discipline. *Id.*

of "moral turpitude" as a litmus test for discipline because that standard encompasses some offenses that are thought to lack the relevant connection to fitness to practice, "such as adultery and comparable offenses."<sup>156</sup> The comment explains that these offenses are ones involving "personal morality."<sup>157</sup> In context, it appears that the "personal morality" label is relevant to the issue of whether or not a particular offense ought to be disciplinable. That is, the comment can be read to say that offenses involving personal morality are not disciplinable.<sup>158</sup> If that is what the comment means, it would be helpful to include some elaboration on the meaning of "personal morality." It is not a self-evident concept.

At one level, we might observe that all moral choices made by individuals are "personal," but that cannot be what the comment's reference to "personal morality" means. If that were the case, the designation would insulate lawyer criminal offenders from most, if not all, discipline based on the commission of crimes.

Nor can we understand the reference to "personal morality" to refer simply to offenses that are conducted in private. Some privately-conducted crimes, like murder, would normally involve violence, and others, like willfully cheating on tax returns, would involve dishonesty. And the comment tells us that crimes involving violence or dishonesty are crimes that can be the basis of discipline.

Another possibility is that crimes of "personal morality" are ones that have no victims. But there could be some disagreement as to whether the only specific example of a non-disciplinable crime that is given, the crime of adultery, is victimless. To be sure, where both parties to the adulterous encounter are willing participants, it might seem rather strange to consider either of them to be a victim. However, adultery that results from seduction might be thought to involve a victim. And once we move beyond the immediate participants, we might identify other potential victims as well. For example, it is not uncommon to refer to the non-participating spouse as someone who is "betrayed" by a partner's extramarital encounter. There is also a fair amount of evidence that the "innocent" spouse and children of the adulterer are sometimes injured by adulterous conduct.<sup>159</sup> We should

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156. *Id.*

157. The ABA's position appears to be somewhat analogous to the view, expressed by some commentators, that criminal sanctions should be imposed only when conduct causes harm to others, but not for harmless immoralities or harm to self. See *infra* discussion in note 170.

158. It seems that the personal morality label is intended to give substance to the category of offenses that ought not to be disciplinable. However, it is possible to read the language of the comment in a way that places less stress on the label. Instead of reading the comment to say that crimes involving personal morality should not be disciplinable, it is possible to read the language of the comment to indicate that crimes involving personal morality may or may not be disciplinable, depending on whether those crimes have a specific connection to fitness for the practice of law. In any event, the main point of the comment to Rule 8.4 is to shift the focus away from traditional moral considerations to characteristics that are thought to be relevant to the practice of law, such as violence, dishonesty, breach of trust, or serious interference with the administration of justice.

159. See, e.g., Samuel S. Janus & Cynthia L. Janus, *The Janus Report on Sexual Behavior* 392-94 (1993) (stating that the vast majority of surveyed individuals were convinced that extramarital affairs hurt their marriage relationships; interviewed man observes that extramarital affairs can be "devastating" for the betrayed spouse); Maggie Gallagher, *The Abolition of Marriage: How We Destroy*



also note that there appears to be a correlation between adultery and divorce,<sup>160</sup> and that divorce itself has been identified as contributing to problems for members of the affected family and for society.<sup>161</sup> It may be somewhat easier to identify

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Lasting Love 75 (1996) (stating that parental extramarital affairs produce various symptoms of insecurity in children and frequently lead to extreme behavior in adolescents.); Frank Pittman, *Private Lies, Infidelity and the Betrayal of Intimacy* 259, 262, 268 (1989) (stating that extramarital affairs betray the entire family; children pay heavy price for parental infidelities; catalogs various behavioral disorders that result from parental infidelity); Jenifer Hanrahan, *Sex, Lies & Adultery: What Prompts One of Us to Put Up with Our Partner's Philandering?*, Los Angeles Daily News, Oct. 13, 1998, at 1, available in 1998 WL 3872075 (referring to survey results showing that adultery is even more stressful than divorce); Judith S. Wallerstein & Joan Berlin Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* 21 (1980) (In some cases, revelation of infidelity creates rage, violence, severe depression, and suicide threats.). I am indebted to Professor Lynn D. Wardle for his unpublished manuscript: *How Children Suffer: Parental Infidelity and the "No-Harm" Custody Presumption*, which pointed me to several of the sources cited in this footnote.

160. See, e.g., Janus, *supra* note 159, at 194-95 (stating that extramarital affairs were reported to be the primary cause of their divorce by 22% of divorced women and 11% of divorced men.); Nancy Mayer, *Surviving Adultery*, Portland Oregonian, Aug. 19, 1998 (explaining that 65% of betrayed marriages end in divorce); Tony Pugh, *Family Needs Time to Heal, Experts Say*, Ft. Worth Star-Telegram, Aug. 19, 1998, at 1, available in 1998 WL 14920248 (noting that after "irreconcilable differences," adultery is the most frequently cited cause in divorce cases); cf. Laura Betzig, *Causes of Conjugal Dissolution: A Cross-cultural Study*, 30 *Current Anthropology* 654, 659, 661 (1989) (studying the causes of conjugal dissolution in various societies; reports that adultery was the most frequently-cited cause of conjugal dissolution and that adultery, more than anything else, compromises marriage).

161. See, e.g., Gallagher, *supra* note 159, at 14, 32, 34 ("[T]he best answer social science can give is that the collapse of marriage significantly heightens the risk that our children will end up poor, hungry, ill, ignorant, violent, or dead. The average child from a nonpoor family will suffer a 50 percent drop in income after divorce. The evidence is now overwhelming that the collapse of marriage is creating a whole generation of children less happy, less physically and mentally healthy, less equipped to deal with life or to produce at work, and more dangerous to themselves and others."); Christa Japel et al., *Early Parental Separation and the Psychosocial Development of Daughters 6-9 Years Old*, 69 *Am. J. Orthopsychiatry* 49 (1999) (noting that girls who experienced early "parental separation" showed significantly more types of disruptive behavior.); Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent* 3 (1994) ("Low income—and the sudden drop in income that often is associated with divorce—is the most important factor in children's lower achievement in single-parent homes, accounting for about half of the disadvantage."); Glenn T. Stanton, *Why Marriage Matters* 127-28, 133-39 (1997) (referring to studies showing physical, emotional and financial difficulties that result from divorce); Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* xii, xiv (1985) ("[O]n the average, divorced women and the minor children in their households experience a 73 percent decline in their standard of living in the first year after divorce." Divorced women and their children "have become the new poor."); cf. Paul R. Amato & Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* 220 (1997) ("[W]e conclude that the rise in marital disruption, although beneficial to some children, has, in balance, been detrimental to children."); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 *Demography* 641 (1988) (stating that the economic consequences of divorce are serious, but not likely to be as severe as Weitzman reports; the more likely reduction in economic status is 30%.); but see David H. Demo & Alan C. Acock, *The Impact of Divorce on Children*, 50 *J. of Marriage & the Fam.* 619 (1988) (stating that empirical evidence on the relationship between divorce and the well-being of children should be interpreted cautiously because of deficiencies in the studies on which the evidence is based).

potential victims of adultery than potential victims of the crime of failing to file a tax return, which the comment clearly classifies as a disciplinable offense. Thus, the victimless crime explanation for the personal morality label does not seem altogether satisfactory.

Yet another approach might be to say that offenses involving personal morality are offenses of a sexual nature. After all, the only example that is provided of these offenses is adultery. The comment's language about "comparable offenses" could quite easily be considered to include fornication, when it is a crime. But we would not want to paint with too broad a brush in the sex crimes area. Certainly we would not want to add rape and sexual assault to our list of offenses for which discipline is inappropriate.<sup>162</sup>

If we continue with the notion that the personal morality category concerns offenses involving sex, we might try to limit the offenses that are included in the category by applying the comment's later qualifying language about discipline being appropriate for offenses that involve violence, dishonesty, breach of trust, or serious interference with the administration of justice. The qualifying language would knock out conventional rape and sexual assault. But it might not knock out statutory rape with a willing minor. However, there is another problem. Once we start trying to define offenses involving "personal morality" by subjecting them to the comment's qualifying language about violence, dishonesty, breach of trust, and interference with the administration of justice, there is no reason not to do that with all sexual offenses, including adultery itself. From that perspective, we might suggest that although adultery is generally not disciplinable, it could be if the particular circumstances of its commission indicate lack of characteristics that are relevant to the practice of law. Thus, a lawyer who by misrepresentation, seduces a client and commits adultery might be disciplined, but a lawyer who commits adultery with a non-client neighbor might not.<sup>163</sup> However, once we subject all potential offenses in the personal morality category to the later qualifying language of the comment, we seem to lose any independent justification for the "personal

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162. Professor Hazard was the chief reporter for the Model Rules of Professional Conduct. A volume that he co-authored with W. William Hodes suggests that it would be appropriate to discipline lawyers for some sexual offenses. Thus, in discussing an argument that the commission of *any* crime reflects on a lawyer's fitness to practice, the authors state:

But this argument does not recognize, as the criminal law does, that even among serious crimes the degree of immorality involved may differ and so may implications about the offender's character. Certain sexual offenses illustrate the dividing line, and indicate that it is not merely the formal offense but the circumstances of its commission that may be relevant. Adultery or fornication with a mature consenting adult is a crime in many jurisdictions, and is considered to be immoral by many people. Yet such behavior by a lawyer tells little about whether he or she can be trusted to represent clients vigorously and without overreaching. On the other hand, if a lawyer were to take sexual advantage of a client suffering emotional upset in the course of a contested divorce, for example, it would indicate an inability to maintain a professional relationship.

2 Hazard & Hodes, *supra* note 148, at § 8.4:301.

163. Some support for this construction of the comment can be found in a discussion by Professors Hazard and Hodes in their treatise, *The Law of Lawyering*. See discussion *supra* note 162.

morality" label itself. We might as well eliminate the reference to personal morality and rely only on the later qualifying language for the resolution of all disciplinary matters involving crimes.

An alternative explanation for the "personal morality" classification might be that it includes offenses that may be criminal on the books but are not really regarded as criminal by society. Times change. Some offenses that might have been prosecuted in the past are no longer prosecuted because of changes in culture. To the extent that such offenses are no longer a matter of public criminal concern, they might be said to involve concerns of only personal morality.

This last explanation for the personal morality classification relates fairly well to the adultery example. It does not seem that many people are actually prosecuted for adultery, even in states in which it remains a crime. Further, many people, lawyers included, seem to commit it. Given the level of tolerance for adultery that exists in modern American society, there would be little enthusiasm for disciplining lawyer-adulterers.<sup>164</sup> But it remains unclear that this is what the comment means.

## ii. Dishonesty and Breach of Trust

There is another difficulty with the comment to Rule 8.4 that we should mention. The comment tells us that crimes involving dishonesty and breach of trust are among the types of crimes for which lawyers could be professionally answerable—crimes, in other words, that have some connection to the practice of law. But the comment also provides that adultery is an example of an offense that has no specific connection to the practice of law. There is some tension here. At least some adulterous activities could be said to involve a type of dishonesty or breach of trust. Certainly some adulterous relationships involve deception of the nonparticipating spouse.<sup>165</sup> Many married people believe that sexual fidelity is part of the marriage contract.<sup>166</sup> Indeed, the Louisiana Civil Code expressly provides that "[m]arried persons owe each other fidelity."<sup>167</sup> And the married relationship

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164. This state of affairs might change. If, at some future time, adultery were to be regarded as a significant societal problem that needed to be seriously addressed by criminal law enforcement authorities, then the offense would no longer be merely one of "personal morality," under the standard articulated here.

165. See Janus, *supra* note 160, at 197. The authors state that open marriage, which involves extramarital sexual encounters undertaken with the acquiescence and knowledge of one's spouse, has never been as prevalent as nonconsensual, clandestine, extramarital activities. *Id.* at 197-98. They also report survey results indicating that the vast majority of married individuals are convinced that extramarital affairs negatively affect the marriage relationship. *Id.* at 392-393. See also, e.g., Doe v. Doe, 712 A.2d 132 (Md. App. 1998) (holding that the husband's allegations that wife had had an adulterous affair, that two children had resulted from the affair, and that she had concealed the paternity of the children from him for three years, stated a claim for intentional infliction of severe emotional distress.).

166. See Weitzman, *supra* note 161, at 24.

167. La. Civ. Code art. 98. The entire article states: "Married persons owe each other fidelity, support, and assistance." The comments to the 1987 revision of this article state: "As used in this Article, the term 'fidelity' refers not only to the spouses' duty to refrain from adultery, but also to their

is occasionally characterized as one of trust.<sup>168</sup>

*iii. Language*

None of this is to suggest that it is high time to begin vigorous professional discipline of lawyers who commit adultery. What it does suggest, however, is that there are some problems with the language of the comment to Model Rule 8.4.

Maybe the problems could be alleviated by tinkering with the language. For example, if we consider the original comment's reference to personal morality to mean that we should not discipline lawyers for criminal offenses that are not thought to be within the practical purview of the criminal law, we might revise the "moral turpitude" paragraph to say:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept may be useful in insulating lawyers from discipline for trivial administrative infractions, such as instances of inadvertent overparking, that do not seriously call into question an individual's fitness to practice law. However, the concept can be construed to include offenses that some statutes may continue to define as criminal, but are no longer regarded by prosecutors and society as prosecutable criminal offenses. Adultery between consenting adults could be an example of such an offense. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law. Serious offenses involving violence, dishonesty, breach of trust, and interference with the administration of justice are clearly in that category. Lesser offenses could be in that category as well, especially when there is a pattern of repeated commission. But subpart (b) of the rule should not apply to isolated, trivial, administrative infractions or to offenses that are no longer regarded by prosecutors and society as prosecutable criminal offenses.

This formulation is not free from problems either. The qualifiers "serious" and "prosecutable" are rather vague. But they have the advantage of placing the

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mutual obligation to submit to each other's reasonable and normal sexual desires." La. Civ. Code art. 98 cmt. (b).

168. See, e.g., *Eubanks v. Eubanks*, 159 S.E.2d 562, 587 (N.C. 1968) ("Relationship between husband and wife is the most confidential of all relationships."); *Smith v. Smith* 438 S.E.2d 457, 459 (N.C. App. 1994) ("Relationship between married persons demands the highest level of integrity," but is not subject to "the strict duties of a business partnership."); Cal. Fam. Code § 1100(e) (West 2000) (describing family finances in a marital relationship as a fiduciary relationship); but cf. *Toups v. Toups*, 702 So. 2d 822, 824 (La. App. 3d Cir. 1997) ("Under current scheme of equal management, the spouses are not fiduciaries in the management of community property.").

disciplinary focus where it probably ought to be, at least where criminal offenses are concerned. This version of the comment at least tends to diminish the problem, referred to above, that adultery could be considered to be an offense that involves dishonesty or breach of trust. It may frequently involve such things, but if adultery is not considered to be a prosecutable criminal offense, adultery would not properly be the basis of discipline. The word "clearly" in the sentence about "offenses involving violence, dishonesty, breach of trust, and interference with the administration of justice" indicates that the characteristics mentioned there are merely illustrative rather than exclusive. That may be helpful to indicate, because it is true. No one would seriously argue that a lawyer who quietly uses poison to murder someone should not be disciplined because the victim died peacefully in his or her sleep.<sup>169</sup>

Perhaps the most salient point to make in this context is that it is rather difficult to come up with a totally satisfactory rule for disciplining lawyers who engage in criminal offenses. This discussion has identified some difficulties with the formulation set forth in the comment to Model Rule 8.4. It has not even begun to address the difficult and controversial matter of identifying the characteristics and conduct that render a lawyer unfit to practice.<sup>170</sup> Given the relative difficulty of the task, it is not surprising that the ABA elected to draft a comment that is rather vague.<sup>171</sup>

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169. This assumes that it is possible to have a nonviolent murder. It would not be unreasonable to think of murder as a violent crime, no matter how it is committed.

170. The analogous issue in the criminal law arena is identifying the types of conduct that ought to be criminalized. Some observers have claimed that the criminal laws are being used improperly to regulate offenses involving "morally neutral" conduct, and that such overcriminalization dilutes the value of criminal sanctions. See, e.g., Paul S. Robinson, *Moral Credibility and Crime*, Atl. Monthly, Mar. 1995, at 72, 77; Paul H. Robinson & John M. Darley, *Justice, Liability and Blame: Community Views and the Criminal Law 201-02* (1995). There has been disagreement among commentators over whether criminal sanctions are justified for immoral conduct that causes no harm, or only harms oneself. Cf., e.g., Patrick Devlin, *The Enforcement of Morals* 7, 13, 23-25 (1965) (stating that immoral conduct justifies criminal sanctions); Joel Feinberg, *Harm to Others* 11-13, 31-36 (1984) (sanctions are appropriate to prevent harm to others). My colleague Stuart P. Green has argued that the moral content of regulatory offenses is more complex than has been acknowledged. He has suggested that, in order to preserve the moral integrity of the criminal law, legislatures should stop enacting statutes that allow the same conduct to be dealt with criminally or civilly without indicating which sanction is preferred, and prosecutors should follow principled guidelines for choosing one remedy over another. See Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 Emory L.J. 1533, 1535 (1997). I am indebted to Professor Green for his thoughts on this subject, and for directing me to the sources mentioned in this footnote.

171. Professor Hazard, in a letter to the author, recalled some of the Kutak Commission's thinking about this rule and its comment. He observed that "the Kutak Commission felt it appropriate to eliminate 'moral turpitude' but also to keep a relatively open-ended residual provision on the subject; that we anticipated there would be regional differences in interpreting and applying the concept; and that we anticipated there would be change over time in interpreting and applying the concept." Letter from Geoffrey C. Hazard, Jr., Trustee Professor of Law, University of Pennsylvania, to the author (Mar. 17, 2000) (copy on file with author).

*iv. Uncomfortable Fit*

Louisiana avoided some of the difficulties referred to above by the simple expedient of not adopting the comments to the Model Rules. But Louisiana has also adopted a version of Rule 8.4 that is conceptually different from its ABA counterpart. As we have seen, the comment to Model Rule 8.4 strives to distinguish criminal offenses that could be the basis of discipline from those that should not. This is consistent with the language of Model Rule 8.4(b) itself, which qualifies the types of offenses for which discipline may be imposed. Thus, the ABA rule provides that “[i]t is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>172</sup> In contrast, the text of Louisiana Rule 8.4(b) provides that “[i]t is professional misconduct for a lawyer to . . . [c]ommit a criminal act, especially one that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>173</sup> The Louisiana rule was changed to permit discipline for the commission of *any* criminal act. In this respect, the quoted language from the ABA comment would not fit comfortably into Louisiana’s version of the rules. The fit would be bad for another reason as well. As we have seen, the ABA’s comment identifies adultery as a criminal offense that should not be disciplinable. As it turns out, adultery is not a criminal offense in Louisiana.

Louisiana’s version of the rule does open the door to a potential problem. Because lawyers could, in theory, be subject to discipline for the commission of any criminal offense, the Louisiana version of the rule would seem to permit lawyer discipline based upon fairly trivial conduct. However, the Louisiana rule recognizes that all criminal offenses are not equal. Because disciplinary resources are not infinite, it is not likely, as a practical matter, that the disciplinary counsel would devote many resources to lawyer discipline for trivial criminal infractions.

If Louisiana was seriously to consider the adoption of comments to its own version of the rules, the text of Louisiana Rule 8.4(b) would invite consideration of the factors that make some criminal offenses better targets for professional discipline than others. That invitation could well extend to some of the same matters that are discussed in the ABA’s comment to Model Rule 8.4. Of course a Louisiana-centered comment to Rule 8.4 would not need to mention adultery as a nondisciplinable offense because the Louisiana Criminal Code does not criminalize that conduct. And Louisiana would probably do well to avoid incorporating the troublesome concept of “personal morality” that is featured in the ABA’s comment to the rule.

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172. See Model Rules of Professional Conduct Rule 8.4(c) (1983).

173. See Louisiana Rules of Professional Conduct Rule 8.4(b) (1986).

### 3. *Detriments of Omission*

The foregoing section of the article identified some benefits associated with Louisiana's non-adoption of the omitted materials. This section looks at some detriments.

#### *a. Inaccessibility*

The most obvious detriment is a practical one. Even though Louisiana courts have indicated that there are some valuable things in the omitted materials, and that at least some parts of the omitted materials can be helpful in interpreting and applying the rules, those benefits are not readily available to Louisiana lawyers. Because the omitted materials are, in fact, omitted from Louisiana's version of the Rules of Professional Conduct, Louisiana practitioners do not have ready access to them. The omitted materials are not found in the Louisiana Rules of Court volume, in the various volumes of West's Louisiana Statutes Annotated, or in other Louisiana-tethered books that include the Rules of Professional Conduct. Of course, there are books and on-line databases that include the ABA version of the rules, but not all Louisiana lawyers may have immediate access to these resources. A lawyer who needs to make a quick decision about an ethics problem may not be able to take advantage of the help that the omitted materials could provide.

There are other access barriers as well. First, it is likely that many Louisiana lawyers do not know that the ABA Model Rules contain comments and prefatory materials. Those who are unaware might not think to look at the ABA's model. Second, even if a Louisiana lawyer happens to know that the form of the Model Rules is different from the form of the Louisiana Rules, he or she may well be unaware of statements in Louisiana Supreme Court decisions that point to the value of the omitted materials. The lawyer may see little reason to consult them. Finally, even a Louisiana lawyer who knows about the ABA Model Rules, and knows that Louisiana courts have occasionally referred to parts of the omitted materials with approval, will not be sure whether particular statements in the omitted materials would meet with the approval of Louisiana disciplinary authorities. The lawyer would probably be unwilling, at least, to bet his or her professional license on some statement in the omitted materials.

#### *b. Lost Value*

Formal adoption of the omitted materials would not only have facilitated their accessibility, it would also have given them an authoritative status. Adoption would have sent a message to Louisiana lawyers and to Louisiana disciplinary authorities that it would be worthwhile to consider what the omitted materials say, that they had value, and that they could be relied on.

Some of the value of the omitted materials arises from explanations that could help lawyers make professionally responsible decisions. Some of the omitted

materials reflect principles of lawyering that are higher than the minimum standards of conduct—principles that might encourage lawyers to be better than they are. Some omitted materials actually contain helpful substantive rules, and some parts of the omitted materials teach useful lessons about the nature of legal ethics. There is value in the omitted materials. Unfortunately much of that value remains unrealized in Louisiana.<sup>174</sup>

*i. Valuable Explanations*

Many of the comments to the Model Rules contain excellent explanations of concepts that are sometimes difficult to grasp. If the comments were to be approved by the Louisiana Supreme Court, and if they were to be made more readily available to Louisiana lawyers, Louisiana lawyers might become better informed about their professional responsibilities. What follows is an illustrative, rather than an exhaustive, collection of references to comments that could be of assistance to practitioners.

*(1) Comment to Rule 1.6*

Lawyers, and even judges, are sometimes confused about the difference between the attorney-client privilege and the duty of confidentiality. A brief, but good, discussion of the difference between these two concepts is found in the ABA comment to Model Rule 1.6:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.<sup>175</sup>

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174. Some value has been realized as a result of court decisions that refer to parts of the omitted materials to clarify the meaning or application of black-letter rules, but this value is rather limited. The few decisions that have made these references have cited only a few portions of the omitted materials. Besides, as we will see, the omitted materials do more than assist with rule interpretation and application.

175. See Model Rules of Professional Conduct Rule 1.6 cmt. (1983).



Thus, the attorney-client privilege is the source of an evidentiary shield in legal proceedings, while the duty of confidentiality generally requires the lawyer to keep his or her lip buttoned about client matters. The duty has a much broader scope than the privilege. It also has a different orientation. While one might reasonably take issue with the statement about the work product doctrine being included within the attorney-client privilege,<sup>176</sup> the comment is, otherwise, helpful in explaining the essential difference between the nature of the attorney-client privilege and the duty of confidentiality. That is a useful thing for a lawyer to know.

*(2) Comment to Rule 1.8*

Model Rule 1.8(a) states the basic prohibition against lawyers entering into business transactions with their clients. Lawyers cannot do this unless: (1) the transaction and its terms are fair and reasonable to the client and are communicated to the client in an understandable writing, (2) the client is given reasonable opportunity to obtain independent legal advice, and (3) the client consents to the transaction in writing. This is an important rule. It also seems to be quite expansive. How far does it go? Would it prohibit a lawyer from purchasing a product or service from a client who is engaged in the business of providing such products or services? It would be rather silly to require a lawyer to jump through the various hoops in Rule 1.8(a) in order to purchase artichokes from a client who is a grocer and silly as well to require a lawyer to satisfy Rule 1.8(a) when the lawyer desires to purchase an automobile from a car dealership that the lawyer represents. Fortunately, the comment to Model Rule 1.8 offers a useful clarification:

Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.<sup>177</sup>

The clarification helps avoid silly applications of the basic rule. It is too bad that Louisiana lawyers do not have ready access to it.

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176. Both are evidentiary privileges, but they are rather different. In general, the attorney-client privilege arises when a client and an attorney engage in a confidential communication for the purpose of facilitating the giving or receiving of legal advice. In general, the work product doctrine arises when an attorney prepares a document in anticipation of litigation.

177. See Model Rules of Professional Conduct Rule 1.8 cmt. (1983).

(3) *Comment to Rule 3.3*

Rule 3.3 deals with the lawyer's duty of candor to the tribunal. Among other things, the rule is concerned with client perjury—one of the most difficult ethical problems a lawyer can face. The comment offers some useful information to a criminal defense lawyer who becomes aware that his or her client has lied on the witness stand. For example, the comment explains that three different "resolutions" of the perjury problem have been proposed, and it explains why the Model Rules favor a resolution that, ultimately, may require the attorney to disclose the perjury to the court. But the comment also warns the attorney not to be too precipitate about disclosure. First, the comment indicates that the lawyer should first attempt remedial measures that do not involve disclosure<sup>178</sup> because disclosure would harm the interests of the client. If other remedial measures succeed, disclosure need not be made. Second, the comment indicates that the lawyer's ethical duty "may be qualified by constitutional provisions for due process and the right to counsel in criminal cases."<sup>179</sup> This is certainly worth pointing out. A criminal defense lawyer who discloses client perjury to a judge who is trying the case without a jury might be found to have provided ineffective assistance of counsel.<sup>180</sup>

The Model Rules' approach to client perjury is not without its critics,<sup>181</sup> and it does not answer all the questions that might be asked about perjury.<sup>182</sup> Nevertheless, the Louisiana version of Rule 3.3 is very similar to Model Rule 3.3, and the comments to the ABA Rule could be of help to a Louisiana lawyer who is faced with a difficult client perjury problem.<sup>183</sup>

(4) *Comment to Rule 8.1*

A fourth illustrative example is found in the comment to Rule 8.1—a rule about statements that are made in connection with bar admission applications and disciplinary matters. The rule prohibits false statements of material fact, nondisclosure of facts necessary to correct known misapprehensions, and

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178. See Model Rules of Professional Conduct Rule 3.3 cmt. (1983). The comment mentions remonstrating with the client and seeking to withdraw. *Id.*

179. *Id.*

180. See *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978).

181. See, e.g., *Freedman*, *supra* note 50, at 129-32, 141.

182. For example, it is not clear whether the lawyer's remedial duties are engaged when the perjurious testimony is elicited by another advocate in the same proceeding. See Charles A. Wolfram, *Modern Legal Ethics* § 12.5.3 (1986). Neither is it totally clear what the expression "conclusion of the proceeding" means, with respect to the duration of the lawyer's remedial obligation. See 1 Hazard & Hodes, *supra* note 148, at § 3.3:301 (arguing "that the 'proceeding' should be considered still open while it is on appeal or still appealable"). And, there are some important constitutional law issues relating to client perjury that are not easy to resolve. See *Freedman*, *supra* note 50, at 130-41.

183. Not all of the comment to Model Rule 3.3 could be adopted in Louisiana. See discussion of Model Rule 3.3 *supra* Part III(B).

knowing failure to respond to lawful demands for information. The only stated exception to the rule is that the rule "does not require disclosure of information otherwise protected by Rule 1.6"—the confidentiality rule.<sup>184</sup>

But the comment to the rule identifies another exception, of sorts. It states: "This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution."<sup>185</sup> The comment may not be necessary. Lawyers should appreciate the fact that if there is a conflict between the provisions of an ethics rule and the provisions of the Constitution, the provisions of the ethics rule ought to yield. Nevertheless, reminders of this hierarchy are a good idea. Here, the comment alerts lawyers to the possibility that Fifth Amendment issues might come up in connection with requests for information that are subject to this rule, and it reminds lawyers to preserve relevant constitutional rights.

## ii. Professional Ideals

In recent years, the Louisiana Supreme Court has been interested in encouraging professionalism among Louisiana lawyers, especially to the extent that "professionalism" incorporates the idea of civility. In May 1997, the court issued a rule for mandatory continuing legal education that requires Louisiana lawyers to include at least one hour of professionalism in their annual continuing legal education instruction.<sup>186</sup> The CLE rule encourages instruction in such matters as the duty of lawyers to the courts, the public, clients, and other attorneys. It also encourages instruction in lawyer pro bono obligations. In August 1997, the supreme court adopted a voluntary "Code of Professionalism in the Courts," and directed that it be published as Section 11 of the Louisiana Supreme Court Administrative Rules.<sup>187</sup> The court's order states that "civility and professionalism among judges and lawyers should be the bedrock upon which fair and impartial judicial proceedings are built."<sup>188</sup> In a preamble to the new code, the court identified professionalism and civility as "hallmarks of a learned profession dedicated to public service."<sup>189</sup> And the code itself sets forth a number of standards of behavior to which judges and lawyers are encouraged to aspire.<sup>190</sup>

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184. See Model Rules of Professional Conduct Rule 8.1(b) (1983).

185. See *id.* Rule 8.1 cmt.

186. See Rules of Supreme Court of Louisiana, Rule XXX, Rules for Continuing Legal Education, Rule 3, in 8 La. R.S. (1991 and 2000 Supp.).

187. See Order of Aug. 5, 1997.

188. *Id.*

189. *Id.*

190. For example, the "duties" for lawyers include the following:

We will speak and write civilly and respectfully in all communications with the court. . . .

We will not engage in any conduct that brings disorder or disruption to the courtroom. . . .

We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they too, are an integral part of the judicial system.

*Id.*

Similar themes of professionalism and/or civility could have been articulated by the Louisiana Supreme Court more than ten years earlier, if it had adopted the Preamble to the Model Rules of Professional Conduct. Many of the statements in that Preamble, which, of course, is a preamble to an "ethics" code, are statements that the Louisiana Supreme Court might today characterize as statements about "professionalism."

Among other things, the Preamble provides that:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. . . . A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

There are other parts of the omitted materials that express similar ideas. For example, the comment to Model Rule 3.5, about conduct in litigation, sounds a civility theme:

Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.<sup>191</sup>

These words express sound professional ideals. It would be surprising if any member of the Louisiana Supreme Court would disagree with any of them. But none of these statements made it into the version of the Rules of Professional Conduct that was adopted by the court in 1986. If "professionalism" codes have any value at all, and the supreme court must believe that they do, then some of that value could have been realized years ago with the incorporation of the omitted materials into Louisiana's version of the Rules of Professional Conduct.<sup>192</sup>

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191. Model Rules of Professional Conduct Rule 3.5 cmt. (1983).

192. It is worth noting here, however, that there would be something of a language barrier to overcome if the Louisiana Supreme Court were to consider adoption of these statements on professional ideals from the Model Rules. The barrier was created by the supreme court's 1997 order that required lawyers to take an hour of professionalism coursework as part of their annual CLE obligations.

The 1997 order drew a sharp distinction between legal ethics and professionalism. The order stated

### iii. "Hidden" Rules

Some of the omitted materials, especially some of the comments, do more than explain the rules or offer examples of rule application. Some of them actually contain substantive rules. This is not what one would expect to find, based on the structure of the Model Rules. The Scope section of the Model Rules explains that "[t]he comments are intended as guides to interpretation, but the text of each Rule is authoritative."<sup>193</sup> Nevertheless, many substantive elements are found in the omitted materials anyway. Maybe these "hidden" rules are not as "authoritative" as the black-letter rules themselves, but they certainly amount to more than "guides to interpretation."<sup>194</sup> The hidden rules probably should have been moved into the black-letter text from the beginning.

#### (1) *When the Lawyer's Duty of Confidentiality Arises*

The text of Model Rule 1.6—the confidentiality rule—does not expressly state when the duty of confidentiality arises.<sup>195</sup> However, since the rule's confidentiality

that legal ethics "sets forth the standard of professional conduct and responsibility required of a lawyer." This includes courses in legal malpractice. In contrast, "professionalism" was said to entail "what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations." If legal ethics and professionalism are distinct things, and legal ethics does not include professionalism, there would seem to be a problem with a code of ethics that incorporates professionalism ideals. Unless the court were willing to rethink the "legal ethics versus professionalism" dichotomy (and it should), it would not be very tidy for the supreme court to modify the Rules of Professional Conduct, which are generally thought to be "ethics" rules, to incorporate standards from the realm of professionalism.

193. See Model Rules of Professional Conduct Scope (1983).

194. It may well be, as the Scope says, that the text of the rules is authoritative, but when there is a comment that serves up a substantive rule that is not inconsistent with the text of a black-letter rule, it makes sense to regard the comment as having some authoritative impact.

195. Model Rules of Professional Conduct Rule 1.8:

#### Rule 1.8 Conflict of Interest: Prohibited Transactions

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. Furthermore, a lawyer may not exploit his representation of a client or information relating to the representation to the client's disadvantage. Examples of violations include, but are not limited to, the following:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) The client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the

obligation applies to "information relating to representation of a client," it might reasonably be supposed that the duty of confidentiality does not apply until an attorney-client relationship has been formed. It might be thought, then, that an attorney owes no duty of confidentiality to a person whom the attorney declines to represent. However, that would be a bad result being harmful to the prospective client who provides the attorney with sensitive information in an initial meeting. At the very least, it would be unseemly for the attorney to be able to turn around and use that information, on behalf of another client, against the very person who initially provided it to the attorney in hopes of establishing an attorney-client relationship.

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lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client consents after consultation, or the compensation, is provided by contract with a third persons such as an insurance contract or a prepaid legal service plan.

(2) There is no interference with the lawyer's independent or professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client, except that the lawyer may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) Contract with a client for a reasonable contingent fee in a civil case.

Something in the Scope section of the Model Rules helps. It explains that:

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.<sup>196</sup>

This is, of course, the right rule, and it would be good for lawyers to know about it. A lawyer who does not may fail to maintain the confidentiality of information obtained from an individual who sought, but did not secure, representation. An uninformed lawyer may also stumble into a conflict of interest by taking on representation that is directly adverse to a person who engaged in an initial communication with the lawyer. Sophisticated lawyers are aware that prospective client "beauty contests" carry the risk of serious conflicts of interest.<sup>197</sup> A less-sophisticated lawyer who does not have easy access to the Scope section of the Model Rules may have to learn about the problem the hard way.

### *(2) A Self-Defense Exception to the Duty of Confidentiality*

Rule 1.6 imposes a duty on lawyers to maintain the confidentiality of "information relating to representation of a client."<sup>198</sup> An explanatory comment says that the "rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."<sup>199</sup> There are several exceptions to the duty of confidentiality stated in the text of Rule 1.6, but there are other exceptions that are not. One of these exceptions relates to the matter of lawyer self-defense, and it is articulated in a comment to the rule.

Rule 1.6 itself permits the lawyer to use otherwise confidential information:

to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.<sup>200</sup>

Rule 1.6 is not particularly generous with exceptions to the duty of confidentiality, but this part of the rule offers some that are quite helpful to lawyers. The

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196. See Model Rules of Professional Conduct Scope (1983).

197. See Thomas D. Morgan & Ronald D. Rotunda, *Problems and Materials on Professional Responsibility* 192 (6th ed. 1995).

198. See Model Rules of Professional Conduct Rule 1.6(a) (1983).

199. See *id.* Rule 1.6 cmt.

200. See *id.* Rule 1.6(b)(2).

comment to Model Rule 1.6 offers even more help, at least when the lawyer becomes innocently involved in the client's bad conduct. The relevant situation could arise when a third party makes an assertion that the lawyer has participated in the client's evil scheme. Must the lawyer await the filing of criminal charges or a civil action before disclosure is permitted? The comment answers no:

The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.<sup>201</sup>

The text of the rule indicates that the confidentiality exception kicks in when the lawyer is faced with a criminal charge or a civil claim, but the comment engages the exception at an earlier time. That potential engagement is worth noting, because it might help the lawyer avoid discipline or monetary liability.

### (3) *Another Exception to the Duty of Confidentiality: Court Ordered Disclosure*

The Model Code of Professional Responsibility included an express exception to the duty of confidentiality for disclosures that were "required by law or court order."<sup>202</sup> A comparable provision had been recommended for inclusion in the text of Model Rule 1.6, but it was rejected by the ABA's House of Delegates.<sup>203</sup> This was a strange result. A lawyer who ultimately loses on an attorney-client privilege claim, and who is ordered by a court to testify about his or her client's affairs, would be under legal compulsion to testify, but the text of Model Rule 1.6 would not permit the testimony.

In discussing the problem, Professors Hazard and Hodes have said:

[I]t is inconceivable that a legal system which has just *ordered* a lawyer to testify—after the expenditure of considerable judicial resources—would suddenly contradict itself and require instead that he refuse. The court order creates a "forced" exception to confidentiality, regardless of what the text of the rule provides. . . . The short of the matter is that every case in which a lawyer is "required by law" to disclose

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201. See *id.* Rule 1.6 cmt.

202. See Model Code of Professional Responsibility DR 4-101(c)(2) (1983).

203. See 1 Hazard & Hodes, *supra* note 148, at § 1.6:112. The key amendment, which also eliminated other confidentiality exceptions, was sponsored by the American College of Trial Lawyers. See *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 48-50* (1987). Supporters of the amendment argued that the Kutak Commission's proposal transformed the lawyer into a "policeman" for the client, and that narrowing the exceptions to the duty of confidentiality would encourage better communications between lawyer and client. See *id.*



information is also a case in which he *cannot* be prohibited from doing so.<sup>204</sup>

The ABA's House of Delegates should have included an express exception to confidentiality in the text of Model Rule 1.6 for court-ordered disclosures. It did not do that. But it did include exception language in the comment to the rule. The comment states in part:

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.<sup>205</sup>

This is a substantive rule, one that provides some useful guidance to a lawyer who might be struggling with confidentiality and attorney-client privilege issues. Unfortunately, Louisiana's omission of the comments to the Model Rules resulted in the omission of the rule itself.

(4) *Yet Another Exception to the Duty of Confidentiality:  
Noisy Withdrawal*

There is another exception to the confidentiality obligation that is set forth in the comment to Rule 1.6. It permits a withdrawing lawyer to signal that his or her client has been involved in criminal or fraudulent conduct. The comment to the Rule provides in pertinent part:

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.<sup>206</sup>

The comment permits a lawyer who withdraws from representation to disassociate himself or herself from client fraud by signaling to third parties that something is

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204. See 1 Hazard & Hodes, *supra* note 148. The new *Restatement of the Law Governing Lawyers* does not suffer from this problem. It has a provision permitting the lawyer to disclose what it calls "confidential client information" when such disclosure is "required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure." See 1 *Restatement of the Law Governing Lawyers* § 63 (2000).

205. See Model Rules of Professional Conduct Rule 1.6 cmt. (1983).

206. *Id.*

wrong.<sup>207</sup> It permits a "noisy withdrawal."<sup>208</sup>

The comment about noisy withdrawal represents a kind of political compromise. The original Kutak Commission draft of Rule 1.6 included a subsection that permitted lawyers to reveal client information "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used."<sup>209</sup> But the proposal generated considerable controversy,<sup>210</sup> and the ABA House of Delegates rejected it at the February 1983 midyear meeting.<sup>211</sup> At the same time, the House of Delegates approved an exception to confidentiality that would permit a lawyer to collect an unpaid fee.<sup>212</sup> These developments were much criticized.<sup>213</sup> Thereafter a proposal was generated to amend the comment to Rule 1.6 to allow the lawyer to give notice of his or her withdrawal.<sup>214</sup> Members of the Kutak Commission who had opposed the actions in the February meeting accepted this proposal as a compromise.<sup>215</sup> Commission members had originally thought that a noisy notice of withdrawal would constitute a breach of client confidences, and needed to be recognized as an express exception to confidentiality, but that was apparently not the view of the House of Delegates.<sup>216</sup>

207. See 1 Hazard & Hodes, *supra* note 148, at § 1.6:312 n.1; Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L.J. 271 (1984).

208. Rule 1.6 itself is not about withdrawal from representation, as such. That is covered by Rule 1.16. But withdrawal is important to the application of the comment to Rule 1.6.

209. The Kutak Commission draft said, in pertinent part:

(b) A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used. . . .

1982 Draft of Model Rule 1.6, *reprinted in* Gillers & Simon, *supra* note 82, at 73.

210. The Commission apparently considered the proposed language to be a fair statement of then-existing law, *see* Geoffrey C. Hazard, Jr., et al., *The Law and Ethics of Lawyering* 297 (2d ed. 1994), but critics attacked it as calling for radical change. *See, e.g.*, Monroe H. Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A.J. 428, 432 (1982) ("The model rules' provisions on client confidences are radical, poorly drafted, misleading, inconsistent, and unconstitutional."). Critics contended that the proposed Rule would undermine confidentiality, make clients less candid with their lawyers, and impair client compliance with law. *See* Hazard, *supra*, at 298. They also argued that the proposed Rule would open the door to expanded civil liability against lawyers who decided not to disclose client information. *See id.*

211. *See* Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Or. L. Rev. 455, 471 (1984).

212. *See id.* The language of this provision permitted the lawyer to reveal client information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved." *Id.*

213. *See id.* at 474 ("Public outcry greeted the February 1983 actions.").

214. *See id.* at 478-79.

215. *See id.* at 481.

216. *See id.* At least some proponents of amended rule 1.6 "took the position that waving a red flag at the time of withdrawal did not involve a disclosure of confidential client information because

However, as one observer noted, "[t]his notice of withdrawal appears to amount to disclosure and thus accomplishes indirectly what the original Kutak draft sought to accomplish directly."<sup>217</sup>

Whatever the House of Delegates may have thought, noisy withdrawal does involve a disclosure of "information relating to representation."<sup>218</sup> The implicit message of such signaling is that the client has been engaged in some sort of criminal or fraudulent conduct. Further, the comment permits the lawyer to point to an "opinion, document, affirmation or the like" that incorporates the evil. A reasonably sophisticated person who is on the receiving end of such a signal should understand that the withdrawing lawyer is saying, in a kind of code: "There is something fraudulent about this transaction. Watch out!" That is a pretty significant disclosure.<sup>219</sup> What is being disclosed, through code language, is information "relating to representation of a client."

Why might a lawyer want to take advantage of a noisy withdrawal option? The option offers some protection to a lawyer who has been innocently involved in a client's evil scheme, and it enables the lawyer to give third parties enough information about the existence of a problem to enable them to make further inquiry.<sup>220</sup> Noisy withdrawal might help a lawyer avoid liability or sanction, and it

the permitted actions, such as withdrawing a legal opinion, do not reveal a lawyer's knowledge of the details of the client's fraud." See Hazard, *supra* note 207, at 299.

217. See *id.* (footnote omitted).

218. Several commentators have taken the position that noisy withdrawal amounts to an exception to the confidentiality rule. See, e.g., Hazard, *supra* note 207, at 303-06; see also Rotunda, *supra* note 211, at 481. Professors Hazard and Hodes have written about the provision for noisy withdrawal:

One final exception to Rule 1.6 is not contained in the text of the rule. This exception, buried disingenuously in the final version of the Comment, has potentially broad scope. Indeed, unless it is narrowed by interpretation, or ignored as simply inconsistent with the text of the rule, it could create an exception broader than any proposed by the Kutak Commission.

1 Hazard & Hodes, *supra* note 148, at § 1.6:312.

A 1992 opinion of the ABA Committee on Ethics and Professional Responsibility acknowledges that noisy withdrawal represents an exception to the lawyer's obligations under Rule 1.6:

[A] lawyer's explicit disaffirmance of work product prepared by the lawyer in the course of the representation, may well be understood as amounting to a representation by the lawyer that the client information on which the disaffirmed document relied is untrustworthy, thereby necessitating the withdrawal. . . . Every lawyer and every individual or entity involved in the transaction which has had occasion to rely upon those documents is likely to so interpret their unilateral disaffirmance by the lawyer who prepared them. It must be recognized, therefore, that a "noisy" withdrawal may result in a disclosure of "information relating to representation" that is generally prohibited by Rule 1.6.

See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992). But the ABA committee also opined that the noisy withdrawal comment to Rule 1.6 allowed disaffirmance only when the lawyer's withdrawal is ethically required because of the client's intention to use the lawyer's services in a fraud. See *id.*

219. Professor Hazard said, on this point: "What the ABA has done is loudly to proclaim that a lawyer may not blow the whistle, but quietly to affirm that he may wave a flag." Hazard, *supra* note 207, at 304.

220. By giving such notice, the lawyer "guards against a later charge of facilitating the client's

might help innocent parties avoid fraud. It seems a useful thing.

The comment about noisy withdrawal is more than a guide to interpretation of Model Rule 1.6. It articulates a substantive exception to the confidentiality rule.<sup>221</sup> In not adopting the comments to the Model Rules, Louisiana did not adopt the exception. Louisiana lawyers who wish to engage in noisy withdrawals are much more at risk than lawyers in jurisdictions that have at least adopted the comments to the Model Rules.

### (5) *The Duty to Expedite Litigation*

Model Rule 3.2 is about expediting litigation. It is hostile to delay. It requires a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client."<sup>222</sup> This makes sense—lawyers are, after all, supposed to be officers of the court, not just advocates for their clients. But there seems to be a problem. The duty to expedite litigation appears to be subordinate to the lawyer's duty to advance the interests of the client. What if the interests of the client are in delay itself? For example, would it be all right for the lawyer to engage in delaying tactics if the delay will likely induce the opponent to agree to more favorable settlement terms? The comment to the rule offers a clarifying answer: No.

The comment provides: "Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."<sup>223</sup> The comment thus provides an important substantive limitation on the scope of the rule. A lawyer who is unaware of the limitation might believe that he or she is justified in behaving in a way that is exactly opposite to the intent of the rule.

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wrongful behavior." See Rotunda, *supra* note 211, at 480; Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. Miami L. Rev. 669 (1981).

221. Professor Ronald Rotunda has argued that the noisy withdrawal concept helps to achieve a consistency in the Model Rules that would not otherwise be present, and that that role "undermines any expected argument that the Comment is not authoritative." See Rotunda, *supra* note 211, at 482. He describes the problem as follows:

Consider Model Rule 4.1. It provides, in subsection (b), that while representing a client the lawyer may not knowingly "fail to disclose a material fact . . . when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6.*" Rule 4.1 appears to state that when disclosure is prohibited by Rule 1.6, the lawyer must keep secret material facts even if such nondisclosure would assist a client's criminal or fraudulent act. But if the lawyer does assist in such an act through his or her nondisclosure, the lawyer will be held liable by other law. Such nondisclosure also appears to violate Rule 1.2(d). The Comment to Rule 1.2 makes clear that a "lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required." The remedy for the apparent inconsistency may be found in the concept of filing a notice of withdrawal.

*Id.* at 483 (footnotes omitted).

222. Model Rules of Professional Conduct Rule 3.2 (1983).

223. *Id.* Rule 3.2 cmt. Not all delays are improper, of course. A delay in proceedings that would accommodate a sick witness, for example, would not violate the rule.

(6) *Contact with Employees of a Represented Entity*

Another rule that has a comment with substantive impact is Rule 4.2, which concerns communications with persons who are represented by counsel. The text of Model Rule 4.2 is fairly straightforward. As originally adopted, it stated: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."<sup>224</sup>

The rule is intended to prevent overreaching by lawyers. It seeks to prevent them from taking advantage of opposing parties without the knowledge of their own attorneys. As applied to opponents who are individuals, the application of the rule seems clear enough.<sup>225</sup> But how does the rule work when the opposing party is a corporation?

One portion of the comment to Rule 4.2 addresses that issue. In doing so, it articulates a substantive rule:

In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.<sup>226</sup>

How Rule 4.2 works with respect to corporations is an important question. The comment addresses the issue directly. It does not answer all the questions that can arise,<sup>227</sup> but it is surely helpful in engaging an issue that the text of the rule itself does not even mention.<sup>228</sup>

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224. *Id.* Rule 4.2. As a result of a 1995 amendment, the current version of the Model Rule refers to "person" instead of "party." See Gillers & Simon, *supra* note 82, at 270, 273-76. The change in the ABA version of the rule is hostile to the practice of privately interviewing prospective adversaries, who are represented by counsel, immediately before filing suit. See 2 Hazard & Hodes, *supra* 148, at § 4.2:105. Louisiana's version of the rule still refers to "party." See Louisiana Rules of Professional Conduct Rule 4.2 (2000).

225. Although the "authorized by law" exception to the rule is rather ambiguous. See 2 Hazard & Hodes, *supra* note 148, at § 4.2:109-1.

226. Model Rules of Professional Conduct Rule 4.2 cmt. (1983).

227. As a practical matter, "the rules of *respondeat superior* and vicarious admissions against interest are notoriously fuzzy." See 2 Hazard & Hodes, *supra* note 148, at § 4.2:105. And, even though the comment to the rule does not expressly cover former corporate employees, it may be that some of them should be off limits. See *id.* § 4.2:107 (describing an example of former managerial employee who is helping the corporation's lawyer gather information about the case).

228. A Louisiana appellate court cited the comment to Model Rule 4.2 in considering whether Louisiana's version of the rule prohibited *ex parte* contacts with former corporate employees, but it did not place direct reliance upon it. See *Schmidt v. Gregorio*, 705 So. 2d 742 (La. App. 2d Cir. 1993). The court noted that the Louisiana rule was "essentially the same" as Model Rule 4.2, but "it lacks the

(7) *A Duty to Provide Unsought Advice*

Model Rule 2.1, which is about the lawyer's role as an advisor, requires the lawyer to "exercise independent professional judgment and render candid advice." It also provides that a lawyer who gives advice "may" refer to moral, social and other considerations that may be relevant to the client's situation.<sup>229</sup> The rule is not very shocking. A lawyer who has been engaged to represent a client certainly should not be prohibited from offering decent advice about the subject matter of the representation. However, the comment to the rule goes further and offers a substantive rule about advice beyond the subject matter of the representation.

Initially, the comment says that a lawyer is generally "not expected to give advice unless asked by the client." But it also refers to a situation in which a lawyer may have a duty to provide unsought advice:

However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation.<sup>230</sup>

It seems clear enough from the context of the comment that the "act" that the lawyer may be required to undertake is the act of providing advice. The comment says that this act may be required under Rule 1.4. But that rule concerns the requirement that a lawyer keep his or her client reasonably informed about the client's matter; it is not a rule about providing advice. So here we have a comment to Rule 2.1 that says that the lawyer may be required to provide unsought advice because of the duty to keep the client informed under Rule 1.4. The comment does more than explain Rule 2.1 and 1.4. It sets forth a substantive rule concerning when a duty to provide unsought advice arises.

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... ABA clarifying comment." Relying on an opinion by the ABA's ethics committee, Formal Opinion 91-359, the court concluded that Louisiana Rule 4.2 did not bar ex parte communications with former employees. *See id.*

The comment to Model Rule 4.2 has also been cited in a couple of opinions issued by federal courts sitting in Louisiana. *See Jenkins v. Wal-Mart Stores, Inc.*, 956 F. Supp. 695, 697 (W.D. La. 1997) (stating, based on the language of the comment, that ex parte contacts with former employees is not prohibited by the rule, but ex parte contacts with current employees may be); *In re Shell Oil Refinery*, 143 F.R.D. 105, 107 (E.D. La.), *amended on reh'g*, 144 F.R.D. 73 (E.D. La. 1992) (citing the comment for the proposition that there are three categories of corporate employees that should be treated as parties for purposes of the rule).

229. The pertinent language from both the ABA and the Louisiana versions of the rule is: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Model Rules of Professional Conduct Rule 2.1(1983); Louisiana Rules of Professional Conduct Rule 2.1 (1986).

230. Model Rules of Professional Conduct Rule 2.1 cmt. (1983). Rule 1.4, which is referred to in the quoted language from the comment, is a rule that requires the lawyer to keep the client "reasonably informed."

(8) *Migratory Lawyers and Imputed Conflicts of Interest*

One of the most difficult conflict-of-interest problems is the problem of the migratory lawyer—the lawyer who moves from one law firm to another. There are provisions in the Model Rules of Professional Conduct that are relevant to the problem,<sup>231</sup> and some of the comments address it as well, but the rules and the comments are difficult to understand. More importantly, for present purposes, it turns out that there is a substantive rule about imputed disqualification that is buried in the comments to the Model Rules.

A situation in which the problem arises might look like this:

Associate A in Old Firm is assigned to do some work on Corporation One's litigation against Corporation Two. Corporation One is Old Firm's client. After doing some work on the matter, Associate A moves to New Firm, which represents Corporation Two in the litigation against Corporation One.

This situation presents issues of disqualification for both the migrating lawyer and for the new law firm. Can Associate A work on the Corporation Two litigation team at New Firm? Can other lawyers at New Firm continue to represent Corporation Two in the litigation against Corporation One?

These sorts of questions provoked a fair amount of controversy in the ABA's deliberations on the Model Rules, and different resolutions were proposed.<sup>232</sup> In the end, the ABA crafted provisions that dealt with the moving lawyer, the old law firm, and the new law firm. These were incorporated into Model Rule 1.10—the imputed disqualification rule. However, there was some dissatisfaction with the structure of the rule. Because most imputed disqualification issues involving migratory lawyers can be characterized as issues involving former clients, like Corporation One in the above hypothetical, it was thought that those issues ought to be dealt with under Model Rule 1.9, which deals with former client conflicts of interest.<sup>233</sup> So, in 1989 the ABA shifted some of the language of Model Rule 1.10 to Model Rule 1.9.<sup>234</sup>

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231. The pertinent rules are Model Rule 1.9 and 1.10.

232. See 1 Hazard & Holdes, *supra* note 148, at § 1.10:207.

233. See *id.* § 1.9:102.

234. Professors Hazard and Hodes have described the 1989 changes in this way:

Technically, the revision was accomplished as follows: moved most of what formerly was Rule 1.10(b) into Rule 1.9 as new Rule 1.9(b); redesignated what formerly was Rule 1.9(b) as new Rule 1.9(c); and then modified that redesignated subsection in two ways. First, the new subsection was harmonized with other aspects of Rules 1.9 and 1.10 by adding a reference to prior representation by a lawyer's *firm* as well as to representation by the lawyer individually. Second, Rule 1.9(c) now refers separately to both adverse use of and disclosure of confidential client information, making it consistent with Rules 1.6 and 1.8(b).

See *id.* § 1.9:102.

The change did not represent an improvement to the Model Rules,<sup>235</sup> and Louisiana did not amend its Rules of Professional Conduct to follow the ABA's lead. In any event, as with most of the other sections of this article, references to the Model Rules, and their comments, will be to the 1983 version of the Model Rules. We should now turn to the rules themselves.

We should first refer to Model Rule 1.9, which states the general rule on former client conflicts of interest. It provides in part:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.<sup>236</sup>

This part of the rule does not speak directly to the situation of the migratory lawyer, and it is not clear from the above text whether or not we should apply Rule 1.9 in such a context. However, if we do apply the rule to our hypothetical involving Associate A, we would conclude that Associate A should not represent Corporation Two at New Firm. The interests of Corporation One and Corporation Two are materially adverse, and it is the same matter that Associate A worked on at Old Firm. Associate A has simply "switched sides."

What about the other lawyers in New Firm? Rule 1.9 says nothing about them. We must turn to Model Rule 1.10 for help with respect to them. Model Rule 1.10(a) offers the following:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.<sup>237</sup>

We should note the cross-reference here to Rule 1.9. Rule 1.10 provides that if the individual lawyer would be disqualified under Rule 1.9, the other lawyers in the firm would be disqualified as well. As applied to our migratory lawyer hypothetical, then, we would say that if Associate A is individually prohibited from taking on representation of Corporation Two at New Firm, the other lawyers at New Firm would also be disqualified. At least that is the apparent implication of the literal language of Model Rule 1.10(a).

235. Professors Hazard and Hodes have observed:

[E]ven after the revision Rule 1.9 focusses [sic] on the former client and the moving lawyer's *personal* disability or disqualification with respect to that client. The *imputation* consequences of a personal disqualification continue to be treated in Rule 1.10, and reference to that rule is still necessary to a complete analysis. Thus, the 1989 revision may have been ill advised, for the new text added little to overall clarity and virtually nothing of substance. . . .

See *id.* § 1.9:102. Indeed, a good case could be made that the 1989 change actually *subtracted* from overall clarity.

236. Model Rules of Professional Conduct Rule 1.9 (1983).

237. Model Rules of Professional Conduct Rule 1.10(a) (1983).



But there is reason to think that Model Rule 1.10(a) should not apply to the situation of the migratory lawyer. Model Rule 1.10(a) talks about lawyers who “are associated in a firm.” This expression contrasts with other words in Model Rule 1.10(b) that clearly refer to a migratory lawyer:

When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.<sup>238</sup>

As applied to the facts of our hypothetical, Rule 1.10(b) rules out New Firm’s representation of Corporation Two if, while working at Old Firm, A obtained confidential information<sup>239</sup> about Corporation One that is material to the matter. The end result—disqualification of New Firm—is the same one that we obtained when we tried to apply Model Rule 1.9 and Model Rule 1.10(a) to our hypothetical. But if we are to give effect to the plain language of Model Rule 1.10(b), the end result should be different if we imagine that Associate A performs only limited legal research functions on Corporation One’s matter while working at Old Firm and acquires no material confidential information about Corporation One. In that case, Model Rule 1.10(b) would seem to permit New Firm to represent Corporation Two against Corporation One but Model Rule 1.10(a) would not. It looks like Model Rule 1.10(b), not 1.10(a), should apply in the case of migratory lawyers.

At this point, it might be helpful to consider whether the comments to the Model Rules confirm our tentative conclusions about how the rules work. Fortunately, they do offer some help. For example, one part of the comment to Model Rule 1.10 provides:

The second aspect of loyalty to client is the lawyer’s obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been

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238. *Id.* Rule 1.10(b).

239. Throughout this section of the article, I am using “confidential information” as a shorthand expression for “information relating to representation of a client” under Model Rule 1.6.

met.<sup>240</sup>

This language seems to answer one of the questions raised earlier. It indicates that Model Rule 1.9(a) can apply to the case of a migratory lawyer. It also indicates that the migratory lawyer would be disqualified from representing a client at the new law firm if (1) the lawyer previously represented another (former) client in the same or a substantially related matter, and if (2) the interests of the two clients are materially adverse.<sup>241</sup>

The language from the comment also tends to confirm that disqualification of the individual migratory lawyer does not necessarily mean the disqualification of other lawyers at the new law firm. Translated into the structure of Model Rule 1.10, the comment suggests that Model Rule 1.10(a) does not apply to the situation of the migratory lawyer. Another part of the comment to Model Rule 1.10 confirms this even more directly. It explains: "Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c)."<sup>242</sup> In other words, as indicated earlier, disqualification depends on whether or not the "conditions of Rule 1.10(b) and (c) concerning confidentiality have been met."<sup>243</sup>

What are these "conditions concerning confidentiality"? Another portion of the comment to Model Rule 1.10 offers this instruction:

Paragraph (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later

240. We have not discussed Model Rule 1.9(c) before. It provides:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Model Rules of Professional Conduct Rule 1.9(c) (1983).

241. "[U]nless the former client consents after consultation." *See id.* Rule 1.9.

242. *See* Model Rules of Professional Conduct Rule 1.10 cmt. (1983).

243. There is a small problem with this part of the comment. It refers not only to disqualification "conditions" set forth in Model Rule 1.10(b), but also to conditions set forth in subpart (c). However, subpart (c) has nothing to do with the new law firm that the migratory lawyer joins. It deals with the law firm that the migratory lawyer left behind. That part of the rule provides:

When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

*See* Model Rules of Professional Conduct Rule 1.10(c) (1983).

joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.<sup>244</sup>

This last-quoted language reinforces what we have already learned about when a new law firm would be disqualified, but it also adds something new. It adds something new about the circumstances under which the individual lawyer will be disqualified. At first glance, the language of the comment might seem to do little more than confirm the basic notion, implicit in the black-letter text of Model Rules 1.9 and 1.10, that a moving lawyer will not be disqualified if he or she did not work on the relevant client's matter at the prior law firm and, therefore, obtained no confidential information about it. Thus, in the context of our hypothetical involving Corporation One and Corporation Two, Associate A would not be disqualified from working on Corporation Two's matter at New Firm simply because he or she happened to have been employed at Old Firm at a time when other lawyers at the firm were working on Corporation One's matter. Imputed disqualification does not go that far. However, the quoted language also suggests a less obvious proposition. It suggests that Associate A might not be disqualified even if he or she happened to work on Corporation One's matter at Old Firm, so long as Associate A "acquired no knowledge of information" that is material to Corporation One's matter.

This latter possibility is not an outcome one would necessarily expect in light of the black-letter provisions of Model Rules 1.9 and 1.10. According to a portion of the comment to Model Rule 1.10 that we have previously discussed, the migratory lawyer is subject to individual disqualification under the general rule about former clients that is articulated in Model Rule 1.9. That is, absent client consent, the individual lawyer would be disqualified if the lawyer previously worked on the same or a substantially related matter and if the interests of the two clients are materially adverse. The literal language of Model Rule 1.9(a) can be read to say that if the lawyer did the work, the disqualification kicks in, whether or not the lawyer acquired confidential material information about the former client. But the above-quoted language from the comment to Model Rule 1.10 says something quite different. In doing so, it appears to give voice to a hidden rule about lawyer disqualification.

But how much substance does this hidden rule actually have? To give it some meaning in the imputed disqualification context, we would have to imagine a situation in which the individual lawyer might otherwise be disqualified under the literal language of Model Rule 1.9, but would not be disqualified because of the "hidden" rule. One such situation might look like this:

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244. See Model Rules of Professional Conduct Rule 1.10 cmt. (1983). The reference to paragraph (c) is to Model Rule 1.10(c). That part of the rule describes the circumstances in which the law firm from which the migratory lawyer departed (the "Old Firm" in our hypothetical) can take on representation adverse to the client that the migratory lawyer represented at the Old Firm before he or she left.

Associate A in Old Firm is assigned to do some legal research on an issue related to Corporation One's litigation against Corporation Two. Corporation One is Old Firm's client. A learns no facts about the underlying dispute. After doing the research, A moves to New Firm, which represents Corporation Two in the litigation with Corporation One.

In this case, it appears that A has literally represented Corporation One and represented Corporation One in the same matter that New Firm is working on. Under the language of Model Rule 1.9(a), it does not appear that A could work on Corporation Two's matter at New Firm, absent appropriate client consent. Under the language of the comment, however, A could do so.

This hidden rule is reminiscent of the Second Circuit Court of Appeal's approach to disqualification in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*<sup>245</sup> In that case, an associate did some work for Chrysler at a large law firm then moved to a smaller firm where he became a partner and apparently participated in representation against Chrysler. Chrysler sought disqualification, contending, in part, that the migratory lawyer had worked on matters that were substantially related to the matter currently in litigation. However, the court did not disqualify the lawyer or the new law firm. The evidence indicated that the lawyer's involvement in Chrysler matters at the previous firm was "at most, limited to brief, informal discussions on a procedural matter or research on a specific point of law."<sup>246</sup> This was not enough to justify disqualification.<sup>247</sup>

The rule from the comment seems sensible enough, even though its scope is rather limited. There seems to be little virtue in disqualifying an individual migratory lawyer if he or she acquires no knowledge of material information relating to the client in question. In some instances it might be difficult to determine whether the migratory lawyer satisfies the "no knowledge" standard, but the law regularly deals with difficult determinations, so that is not alone reason enough to reject the rule.<sup>248</sup>

What are we to make of all this? First, we should acknowledge that the comment to Model Rule 1.10 provides considerable help with respect to difficult disqualification issues involving migratory lawyers. The comment teaches us some useful things about the relationship between Model Rule 1.9 and Model Rule 1.10, and it clarifies some matters that are not altogether clear from the text of the rules. It would be beneficial if these teachings and clarifications were more readily available to Louisiana lawyers. In addition, the comment to Model Rule 1.10

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245. 518 F.2d 751 (2d Cir. 1975).

246. *Id.* at 756.

247. See also Hazard, *supra* note 210, at 707.

248. In *Silver Chrysler*, the migratory attorney submitted an affidavit that detailed the nature of his responsibilities in various Chrysler matters. He also submitted affidavits about the nature of his work from two former colleagues at the old law firm. See 518 F.2d at 756. The court noted that Chrysler was in a position to submit time records or affidavits by the lawyer's former supervisors in an effort to refute his claim of peripheral involvement, but Chrysler had approached the matter "in largely conclusory terms." See *id.* at 757.

articulates a disqualification rule relating to migratory lawyers that is neither stated in the text of that rule nor in the text of Model Rule 1.9. Although this hidden rule is rather narrow, it appears to be sensible enough, and there is no reason why it should not be adopted in Louisiana.

(9) *The Omitted Materials and Substantive Rules*

Shortly after the promulgation of the Model Rules, a commentator suggested that there could be problems in the relationship between the comments and the text of the rules:

Other problems can be identified. For example, it is not clear how the text of the Rules and the Comments will interact. The preamble states that the "Comments are intended as guides to interpretation, but the text of each Rule is authoritative." However, the Comments might provide a sufficient basis from which to infer a mandatory duty apart from the language of the Rules.<sup>249</sup>

The commentator was right. There are statements in the comments (and at least one in the Scope section of the Model Rules) that are more than guides to interpretation. They amount to hidden substantive rules. This is not exactly an ideal state of affairs. In some circumstances, a lawyer might be faced with discipline based upon an obligation that is unexpectedly articulated in a comment instead of in the text of the rules. Of course, this risk would be remote in Louisiana, on account of nonadoption of the omitted materials.

On the other hand, Louisiana lawyers are not in a good position to take advantage of hidden rules that might be of use to them. Louisiana lawyers ought to be able to look to the Rules of Professional Conduct for guidance concerning professional responsibility problems. Sound substantive rules, whether they are articulated in the text, or in the comments, could provide the sort of guidance that would enable a lawyer to better serve his or her clients and the system of justice. One would hope that the main value of a code of lawyer conduct would not be as a tool for discipline but as a teacher for lawyers who are trying to do the right thing. The 1986 omission of the ABA comments and prefatory materials took some of the teaching tools out of the Louisiana code.

Besides, not all of the hidden rules that we have discussed carry a disciplinary threat. Some of them, like the noisy withdrawal rule, articulate exceptions to general rules that would make discipline less likely. Others, like the hidden rule on imputed disqualification for migratory lawyers, temper the otherwise potentially harsh implications of the black-letter rules.

What kind of status do these hidden rules enjoy in Louisiana? Not much. Any substantive rules that may be lurking in the omitted materials can hardly be

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249. Roger N. Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 443, 469 (1985).

expected to be given authoritative status in a state that did not even adopt them. What about as guides to interpretation or application of other rules? As noted earlier, the Louisiana Supreme Court has sometimes cited comments to the Model Rules for precisely those purposes in its published opinions. However, substantive rules found in the omitted materials are probably not as useful as guides to interpreting other substantive rules as are comments that were actually written with that purpose in mind. At most, the hidden rules enjoy a limbo status in Louisiana—they may have some utility to the limited extent that they might shed light on the meaning and application of some other rule.

The result is some missed opportunities. Not only do Louisiana lawyers miss the opportunity to have ready access to materials that might help them interpret and apply the rules of conduct and resolve professional responsibility problems, they also lack accessible information about some substantive rules of conduct. Most Louisiana lawyers are probably unaware that there are substantive rules in the omitted materials. Even if they were aware, that awareness would probably yield little more than uncertainty. A Louisiana lawyer who is knowledgeable enough to be aware of the substantive rules that are hidden in the omitted materials would also be aware that they have not been adopted by the Louisiana Supreme Court. The lawyer would likely be hesitant to rely upon them. This is too bad, because there is value in the hidden rules.

#### *iv. A Message about Legal Ethics*

Louisiana's decision to omit the preliminary sections and comments from the Rules of Professional Conduct represents another missed opportunity as well: a modest opportunity to say something instructive about the nature of legal ethics.

In its broadest sense, legal ethics is a subset of ethics in general.<sup>250</sup> There is a connection between legal ethics and moral philosophy, between legal ethics and questions of good and bad, right and wrong.<sup>251</sup> Professors Deborah Rhode and David Luban have written that "legal ethics cuts more deeply than legal regulation:

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250. Charles Wolfram has observed that the term "legal ethics" is used in at least two ways. The first is as a description of the "so-called self-regulatory system out of which the legal profession's codes emerge." Charles W. Wolfram, *Modern Legal Ethics* v (1986). The second is "in the quite different sense of applied moral philosophy in the field of legal service." *Id.* Professors Deborah Rhode and David Luban have written that, in this second, broader sense, legal ethics represents "a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion." Rhode & Luban, *supra* note 151, at 3.

251. See *Ethics and the Legal Profession* 23 (Michael Davis & Frederick A. Elliston, eds., 1986). The editors wrote:

As "moral philosophy," that is, the study of the norms that should guide the conduct of rational agents, ethics is concerned with what makes acts right or wrong, good or bad, virtuous or vicious, and with the reasons properly offered to justify conduct. Ethics makes explicit our understanding of norms, opening them to criticism and revision. Although ethics cannot make people good, it can help people to see better what the good is.

it concerns the fundamentals of our moral lives as lawyers. As Socrates noted about the subject of ethics, it 'is not about just any question, but about the way one should live."<sup>252</sup>

One might expect a code of legal ethics to reflect this broader perspective. It can be seen, to some extent at least, in the American Bar Association codes that antedated the Model Rules of Professional Conduct. The earlier codes articulated a vision of legal ethics that expressly incorporated moral virtues and exhorted lawyers to do more than comply with minimal standards of discipline.

The 1908 Canons, as I have already mentioned,<sup>253</sup> had an aspirational or hortatory thrust, rather than a disciplinary focus. Many of the expressions found in the canons had an overt moral dimension. By way of example, Canon 17 provided that, in trial, "it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side."<sup>254</sup> Canon 22 said that "[i]t is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes."<sup>255</sup> The same canon described inappropriate evidentiary practices as "unworthy of an officer of the law."<sup>256</sup> Canon 32 said that "a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."<sup>257</sup> Canon 18 intoned that the "client cannot be made the keeper of the lawyer's conscience."<sup>258</sup>

The 1969 Model Code of Professional Responsibility incorporated a number of "Ethical Considerations" that had overtly aspirational, and sometimes moral, dimensions. Among other things, the Ethical Considerations said that a lawyer "should be temperate and dignified,"<sup>259</sup> and "should refrain from all illegal and morally reprehensible conduct."<sup>260</sup> They exhorted the lawyer to "be courteous to opposing counsel,"<sup>261</sup> to "uphold the integrity and honor of his profession,"<sup>262</sup> and "to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public."<sup>263</sup> The Ethical Considerations also said that the lawyer owes a solemn duty "to strive to avoid not only professional impropriety, but also the appearance of impropriety."<sup>264</sup>

252. See, Rhode & Luban, *supra* note 151, at 3 (quoting from Plato, *The Republic of Plato* 31 (Allan Bloom trans., 1968)).

253. See *supra* Part II(A)(1)(a).

254. Canons of Professional Ethics, Canon 17 (1908).

255. *Id.* Canon 22.

256. *See id.*

257. *Id.* Canon 32.

258. *Id.* Canon 18.

259. See Model Code of Professional Responsibility, EC 1-5 (1983).

260. *See id.*

261. *See id.* EC 7-38.

262. *See id.* EC 9-6.

263. *See id.*

264. *See id.*

In contrast to these earlier codes, the ABA's Model Rules of Professional Conduct are much more focused on disciplinary standards themselves. However, the Model Rules contain a few statements that acknowledge the larger world of ethical and moral considerations to which disciplinary standards relate, and they contain a few statements of aspirational ideals for the profession itself. Almost all of these statements are found in the Preamble and Scope sections of the Model Rules.

One example of a reference to the connection between moral considerations and disciplinary standards is found in this statement from the Scope:

The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.<sup>265</sup>

The Preamble to the Model Rules provides in part:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service. . . . Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.<sup>266</sup>

The Preamble to the Model Rules includes several statements about the higher ideals of the profession, including the following:

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.<sup>267</sup>

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265. Model Rules of Professional Conduct Scope.

266. Model Rules of Professional Conduct Preamble. Many of the "basic principles" referred to in the Preamble are set forth in comments to the Rules.

267. *Id.*



A couple of the rules themselves should also be mentioned. Model Rule 2.1, which is about giving advice to clients, permits (but does not require) a lawyer who is giving legal advice to a client to refer to "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."<sup>268</sup> Model Rule 6.1 encourages lawyers to provide pro bono publico service.

The Model Rules thus say a few things about the relationship of legal ethics to ethics in general, and about the higher ideal of the legal profession, but they do not say as much about these things as the earlier American Bar Association codes. Because of the omission of the ABA's prefatory materials, the Louisiana Rules of Professional Conduct say even less. Even more than the ABA's model, the Louisiana Rules of Professional Conduct focus on what a lawyer must do, or not do, to avoid discipline.

The problem with this is in what the code teaches, or in what it does not teach. Ethics codes are teachers. If the code articulates a concept of legal ethics that is basically limited to things lawyers must do, or not do, to avoid discipline, then that may be what lawyers learn about legal ethics. Such a code will not teach that legal ethics has an aspirational dimension or that it is a subset of ethics in general. Such a code will not teach that legal ethics is tied in with fundamental moral issues of right and wrong, and that lawyers should pay attention to those fundamental issues as they negotiate their way through the difficulties that come up in the practice of law.<sup>269</sup>

These are not merely academic concerns. A number of recent books,<sup>270</sup> articles,<sup>271</sup> and bar association reports<sup>272</sup> have concluded that there are serious problems with the American legal profession. The conventional wisdom is that there has been a decline in professionalism.<sup>273</sup>

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268. See Model Rules of Professional Conduct Rule 2.1 (1983).

269. Professor Tanina Rostain has argued that "[b]y eliding central normative issues and focusing exclusively on controlling 'bad' lawyers . . . regulatory legal ethics creates the danger that it will be mistaken for the whole of legal ethics. This may be why the popular impression is growing that lawyers are simply 'bad men' in disguise." See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. Cal. L. Rev. 1273, 1326 (1998).

270. See, e.g., Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (1994); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994).

271. See, e.g., Carl T. Bogus, *The Death of an Honorable Profession*, 71 Ind. L.J. 911 (1996); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 Val. U. L. Rev. 563 (1994); Warren E. Burger, *The Decline of Professionalism*, 61 Tenn. L. Rev. 1 (1993); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 St. John's L. Rev. 85 (1994).

272. See, e.g., American Bar Association Section of Legal Education and Admissions to the Bar, *Teaching and Learning Professionalism, Report of the Professionalism Committee* (1996); "... In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism, Report of the Commission on Professionalism, reprinted in 112 F.R.D. 243 (1987).

273. But see, Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism."* 41 Emory

Although the causes and the symptoms of the decline have been variously expressed, some common themes that have been identified are a loss of understanding of law practice as a "calling," economic changes that have "converted law practice from a profession to a business," a "loss of civility," and a "loss of a sense of the ultimate purpose of lawyers."<sup>274</sup> Another way to express this might be that too many lawyers have strayed from the path of professional virtue. It might be helpful if the path were more clearly marked.

The current emphasis on "professionalism" is a response to this state of affairs. In Louisiana, the results, so far, include the generation of a couple of codes of professionalism and the issuance of a court order that requires Louisiana lawyers to take one hour of professionalism as part of their annual continuing legal education curriculum.<sup>275</sup> These, and similar initiatives will probably do some good, but it is doubtful that professionalism will provide all of the answers. Indeed, if the Louisiana Supreme Court's order about continuing legal education and professionalism is an indicator, the emphasis on professionalism could cause some harm.

The 1997 order on continuing legal education made it clear that the required hour of "professionalism" was to be in addition to, and different from, the existing mandatory hour of "legal ethics." The court sought to distinguish the two terms. In defining "professionalism," the court said: "Professionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good. . . . It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations."<sup>276</sup> In defining legal ethics, the court said: "Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer. It includes courses on professional responsibility and malpractice. . . . Legal ethics sets forth the standards of conduct required of a lawyer; professionalism includes what is more broadly expected."<sup>277</sup>

Unfortunately, the court's order on continuing legal education serves up a version of legal ethics that is limited to legal malpractice and required standards of

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L.J. 403, 432 (1992) ("[T]he truth of the matter is that lawyers today accept and honor the basic values of professionalism as much as they ever have.").

Most of the illustrations that are offered to show departures from professionalism feature instances of incivility, abusive conduct in litigation, and questionable advertisements by lawyers. See Roger C. Cramton, *On Giving Meaning to "Professionalism,"* Symposium Proceedings, Teaching and Learning Professionalism 9 (ABA 1997).

274. American Bar Association Section of Legal Education and Admissions to the Bar, *Teaching and Learning Professionalism*, 3-4 (1996).

275. See Code of Professionalism in the Courts, General Administrative Rules, R. La. Sup. Ct., Part G, § 11 (adopted by order of the Louisiana Supreme Court on Aug. 5, 1997); Louisiana Code of Professionalism (voluntary code; text reproduced at 43 La. B.J. 370 (1995)); Rules for Continuing Legal Education, La. Sup. Ct. Rule 30 (2000) (The CLE rules were amended on May 23, 1997 to incorporate professionalism requirements.). The CLE rule on professionalism is discussed in N. Gregory Smith, *Ethics v. Professionalism and the Louisiana Supreme Court*, 58 La. L. Rev. 539 (1998).

276. Rules for Continuing Legal Education, La. Sup. Ct. Rule 30 CLE Rule 3(c) (2000).

277. *Id.*

behavior. The message is that legal ethics is what lawyers must do, or not do, to avoid liability or sanctions. It does not include ideals of behavior that reach beyond those minimums. It is not part of the larger realm of ethics in general. In contrast, "professionalism" does have a broader reach. But "professionalism" itself is a rather elusive concept with uncertain meaning.<sup>278</sup> Moreover, there is nothing in the Louisiana Supreme Court's order to connect professionalism with ethics, as broadly defined.

This is too bad, and it is too bad that the Louisiana version of the Rules of Professional Conduct does not offer much in the way of a moral context for the practice of law. If the profession is in trouble, and if lawyers are misbehaving, it might be useful to remind lawyers, through whatever teaching methods that are reasonably available, that law practice ought to be conducted against a background of moral values. A modest opportunity to teach that lesson was missed when the Louisiana Supreme Court omitted the ABA's Preamble from its version of the Rules of Professional Conduct.

#### IV. CONCLUSION

The Louisiana Supreme Court's 1986 decision to adopt only the black-letter provisions of the Model Rules resulted in some missed opportunities. The preliminary sections and the comments to the ABA's Model Rules of Professional Conduct, all of which were omitted from Louisiana's version of the rule, offer much that is good. The omitted materials include helpful information about the meaning and application of the black-letter rules. They contain some useful substantive rules on lawyer conduct. They articulate some important professional values. And they include statements about the moral framework for the practice of law. Codes are teachers, and the lessons taught by the Louisiana code might have been better if Louisiana lawyers had been provided with teachings that are more elevated than those set forth in the black-letter provisions of the Model Rules.

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278. In a 1986 report, the American Bar Association Commission on Professionalism observed that "[p]rofessionalism' is an elastic concept the meaning and application of which are hard to pin down." American Bar Association Commission on Professionalism, ". . . In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism, *reprinted in* 112 F.R.D. 243, 261 (1986). Professor Roger Cramton has said:

[A]lthough everyone talks about professionalism as an icon or goal of lawyering, no one has been able to define it in ways that others could accept. The result is that bar pronouncements rely on abstractions of immense generality—concepts so vague and uncertain that they lack the power to guide lawyer conduct in particular situations or to motivate commitment by a would-be believer. . . .

[I]n today's world of moral relativism, deconstruction and denial of foundational truth it is not enough to be for "justice" and "the public good" because they lack agreed-upon content. Cramton, *supra* note 273, at 8, 13.

I discuss the problems with the Louisiana Supreme Court's CLE rule on professionalism in greater detail in Smith, *supra* note 275.

A few court decisions have acknowledged the value of some of the omitted materials in interpreting the black-letter rules, but these isolated judicial statements of approval are no substitute for incorporation of the omitted materials into the code itself. Nor do the judicial statements support application of the several substantive rules that are hidden in the omitted materials. In any event, Louisiana practitioners do not have ready access to the omitted materials. Many of them are probably unaware of their existence.

Not all of the omitted materials should be included in the Louisiana Rules. Some parts of the omitted materials are not a good fit for Louisiana black-letter rules that depart from the ABA model. Some parts of the omitted materials have been beneficially amended by the ABA House of Delegates since 1983. Other parts, like the statement about personal morality and criminal offenses in the comment to Model Rule 8.4, should probably be kept out on the merits. If Louisiana were disposed to adopt any or all of the omitted materials, it would be well to consider how they have been amended over time.

The publication of the new *Restatement of the Law Governing Lawyers* and the newly-issued report of the Ethics 2000 Commission, should provide the Louisiana Supreme Court, and interested members of the bar, with a good opportunity to take another look at the rules that govern lawyer conduct in Louisiana. It is an opportunity that ought not to be missed. The *Restatement* reflects years of thoughtful work about rules governing the conduct of lawyers, and the Ethics 2000 Commission has offered some valuable insights. With some thoughtful work, Louisiana should be able to take advantage of these more recent developments, and should be able, as well, to recover some of what was lost in the 1986 adoption of the Rules of Professional Conduct.

## APPENDIX

## A FEW OBSERVATIONS ABOUT AMENDMENTS TO THE MODEL RULES

Because the focus of this article has been on opportunities that were missed in connection with Louisiana's adoption of the Rules of Professional Conduct in 1986, I have not said much about the amendments to the Model Rules that have been generated since that time. Perhaps a few things should be said at this point. If, as I hope, the Louisiana Supreme Court and the Louisiana State Bar Association could be persuaded to take another look at the materials from the Model Rules that were omitted when Louisiana adopted its own version of the Rules of Professional Conduct, the focus would most likely, and most sensibly, be on the most current version of the ABA's model. What I would like to do, then, in this appendix, is to highlight the more significant amendments that have been made to the ABA's comments to the Model Rules.

*A. Rules 1.9 and 1.10*

I have previously discussed the interplay between Model Rule 1.9, which is about former clients, and Model Rule 1.10, which is about imputed disqualification. The rules and their associated comments were not all that easy to understand in the 1983 version of the Model Rules. Both of these rules and the comments to them were amended in 1989. Unfortunately, the amendments did not improve the clarity of the rules.

At the February 1989 Mid-Year Meeting, the House of Delegates approved an amendment that moved the pre-existing text of Model Rule 1.10(b) to Model Rule 1.9(b), renumbered the former Model Rule 1.9(b) as 1.9(c), and renumbered the former Model Rule 1.10(c) as 1.10(b). In addition, a few words were added to new Model Rule 1.9(c). The House also moved a few paragraphs of the comment to Model Rule 1.10 over to the comment to 1.9, with some minor modifications in language.<sup>279</sup>

These amendments did not involve the introduction of shocking new substantive rules. The new language that was added to Model Rule 1.9(c) merely confirmed the confidentiality of information about former clients.<sup>280</sup> However, the major change—movement of parts of the black-letter text and comments from Rule 1.10 to 1.9—invites confusion.

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279. See Gillers & Simon, *supra* note 82, at 115-22, 124-28.

280. The new language states that a "lawyer who had formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client. See Model Rules of Professional Conduct Rule 1.9(c)(2) (2000). The change seems to do nothing more than confirm the existence of a confidentiality obligation already set forth in Rule 1.6 itself.

According to Professors Hazard and Hodes:

[t]he idea animating the revision was that the most common and most important imputed disqualification scenarios arise when lawyers move from firm to firm, after they or their firms have represented particular clients in particular matters; since those scenarios present questions of loyalty to former clients, they should be treated in Rule 1.9 rather than Rule 1.10.<sup>281</sup>

But these authors also note that the revision “may have been ill advised.”<sup>282</sup> Even after the 1989 change there is nothing in the black-letter provisions of Rule 1.9 that deals expressly with imputed disqualification—that matter continues to be dealt with in the text of Rule 1.10. As a result, even though Model Rule 1.9 now includes a provision dealing with migratory lawyers, the imputed disqualification analysis related to migratory lawyers still requires reference to Model Rule 1.10.

However, that is not the only problem with the 1989 amendment. There is also a problem with the comments to amended Rule 1.9, the “former client” rule. As mentioned above, the House of Delegates approved a relocation of some of the comments to Model Rule 1.10 to Model Rule 1.9. Some of those comments are about imputed disqualification.<sup>283</sup> So we have a situation where some of the comments to Model Rule 1.9 deal with a concept that is addressed in the black-letter text of Model Rule 1.10.

At least from the standpoint of migratory lawyers and imputed disqualification, the rules were better before the 1989 change.

#### B. Rule 1.14

At the 1997 Mid-Year Meeting, the ABA’s House of Delegates approved a significant change to the comment to Model Rule 1.14, which is about disabled clients. The change was the addition of two new paragraphs that tell what a lawyer should do when an emergency threatens the interests of a disabled person who is not yet a client. The basic thrust of the change is discernible from the first sentence of the added language:

In an emergency where the health, safety, or a financial interest of a person under disability is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the disabled person or another acting in good faith on that person’s behalf has consulted the lawyer.<sup>284</sup>

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281. See 1 Hazard & Hodes, *supra* note 148, at § 1.9:102.

282. See *id.*

283. See Model Rules of Professional Conduct Rule 1.9 cmt. (2000).

284. Model Rules of Professional Conduct Rule 1.14 cmt. (2000).

The balance of the new language deals with limitations on the scope of this sort of representation, confidentiality considerations, and other matters pertinent to the protection of disabled individuals.<sup>285</sup>

In effect, the 1997 change invites lawyers to provide legal services on behalf of a limited class of nonclients. Because Rule 1.14 itself is about representation of "clients" under disability, the new language of the comment adds a new substantive rule of legal ethics. Because the new rule is also permissive, rather than mandatory, it offers potential comfort to a lawyer who encounters the type of emergency the comment describes.

*C. Rule 1.17 (and Rules 5.4 & 7.2)*

Rule 1.17 is about the sale of a law practice. It was added to the Model Rules at the ABA's February 1990 Mid-Year Meeting. The rule permits the sale of a law practice, including good will, so long as several conditions are satisfied. The most significant of these conditions are that the seller must cease to engage in private law practice in the place<sup>286</sup> where the practice had been conducted, the practice must be sold as an entirety, and written notice of the change must be provided to the seller's clients.<sup>287</sup> At the time Model Rule 1.17 was adopted, the ABA also made a modest conforming amendment to Model Rule 5.4, which deals with the professional independence of the lawyer,<sup>288</sup> and Model Rule 7.2, which is about lawyer advertising.<sup>289</sup>

An extensive comment elaborates on the matters referenced in the black-letter text of Rule 1.17.<sup>290</sup> The comment also includes at least one substantive rule relative to the sale of a law practice. Although the black-letter text of the rule requires the seller to cease to engage in practice in the area where the practice has been conducted, the comment to the Model Rule says that "a return to private practice as a result of an unanticipated change in circumstances" does not amount to a rule violation.<sup>291</sup> Neither the rule, nor its associated comment, have been adopted in Louisiana. If the Louisiana Supreme Court were disposed to consider

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285. *See id.*

286. The ABA model offers two options with respect to place. Part (a) of the rule provides: "The seller ceases to engage in the private practice of law [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted." Model Rules of Professional Conduct Rule 1.17(a) (1998).

287. *See* Model Rules of Professional Conduct Rule 1.17 (2000).

288. The House rewrote (a)(2) of Model Rule 1.17 to implicate the provisions of Model Rule 1.17 when a lawyer purchases the practice of a deceased, disabled, or missing lawyer. *See* Model Rules of Professional Conduct Rule 5.4(a)(2) (2000).

289. The House added subparagraph 7.2(c)(3), and added some language to the comment to Model Rule 7.2, to confirm that a lawyer may pay for a law practice pursuant to Model Rule 1.17 without violating the Model Rule 7.2's proscription against giving value to persons for recommending the lawyer's services. *See* Model Rules of Professional Conduct Rule 7.2(c)(3) & cmt. (2000).

290. *See id.* cmt.

291. *See* Model Rules of Professional Conduct Rule 1.17 cmt. (2000).

other changes in the Rules of Professional Conduct, it would be worthwhile to consider inclusion of these provisions on sale of a law practice.

#### D. Rule 3.6 (and Rule 3.8)

The ABA House of Delegates substantially amended Model Rule 3.6, on trial publicity, at the August 1994 Annual Meeting. The amendments came about after the United States Supreme Court decided *Gentile v. Nevada State Bar*,<sup>292</sup> a decision that raised questions about the constitutionality of parts of pre-existing Model Rule 3.6.<sup>293</sup> The comment to the rule was amended as well, and conforming changes were made in Model Rule 3.8, which deals with the special responsibilities of prosecutors.

The changes to Model Rule 3.6, and its accompanying comment, set forth a revised listing of the types of information that a lawyer may disclose outside of the courtroom, notwithstanding the general ban against extrajudicial statements that might materially prejudice court proceedings. They also establish a new safe harbor for extrajudicial statements by lawyers that are made to protect clients against the prejudicial effect of recent adverse publicity.<sup>294</sup>

Louisiana has not yet made post-*Gentile* changes to its version of Rule 3.6, but it ought to do so. The 1994 amendments to Model Rule 3.6 and its accompanying comment are helpful resources for potential change.

#### E. Rule 4.2

Rule 4.2, the “no contact” rule, prohibits lawyers from communicating about the subject matter of the representation with individuals who are represented by other lawyers. Before 1995, the Model Rule prohibited such communications with “a party” represented by other counsel. However, at the 1995 Annual Meeting, the ABA House of Delegates amended Model Rule 4.2 by changing the word “party” to “person” in the black-letter text and by substantially altering the comment to the rule. The change was sponsored by the ABA Standing Committee on Ethics and Professional Responsibility. In a report that was issued in support of the change, the Standing Committee said:

[I]t seems clear to the Committee that the appropriate operative term is “person,” and not “party,” for neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those

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292. 501 U.S. 1030, 111 S. Ct. 2720 (1991).

293. The *Gentile* case concerned a First Amendment challenge to the Nevada version of Rule 3.6. The Court’s decision rejected a facial challenge to the Nevada rule, but it concluded that parts of the rule were too vague to satisfy First Amendment standards in their application. *See id.*

294. *See* Model Rules of Professional Conduct Rule 3.6 & cmt. (2000).



circumstances where the represented person is a party to an adjudicative or other formal proceeding.<sup>295</sup>

The revised comment to the Model Rule makes it clear that the "no contact" rule is a broad one. It says, in part, that the rule "applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates."<sup>296</sup>

The changes to the rule were overwhelmingly approved by the ABA House of Delegates.<sup>297</sup> Comparable changes should be made in Louisiana.

#### F. Rule 5.7

Model Rule 5.7 and its accompanying comment are about providing law-related services. The history of Model Rule 5.7 is rather unusual. In 1991, by a very close vote, the House of Delegates adopted a version of Rule 5.7 that permitted law firms to provide ancillary business services.<sup>298</sup> But in 1992, again on a close vote, the House of Delegates voted to delete the rule.<sup>299</sup> The current version of Rule 5.7 resulted from a 237-183 vote of the House of Delegates at the February 1994 Mid-Year Meeting.<sup>300</sup>

Model Rule 5.7, as it currently stands, provides that a lawyer who provides "law-related services" is subject to the Rules of Professional Conduct with respect to the provision of those services in two situations. The first is a situation in which the law-related services are provided in circumstances that "are not distinct" from the lawyer's provision of normal legal services. The second is a situation in which the law-related services are provided by a separate entity controlled by the lawyer, or others, if the lawyer does not take "reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist."<sup>301</sup> In the terminology of the rule, "law-related services" are, basically, services that are in substance related to legal services but are, nonetheless, services that can be carried out by non-lawyers without running afoul of the restrictions against unauthorized practice of law.<sup>302</sup> In short, Rule 5.7 permits lawyers to act as non-lawyers in the provision of law-related services, but it makes those services subject to the Rules of Professional Conduct in circumstances in which recipients might be confused about whether the lawyer is acting as a lawyer or not.

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295. See ABA Report Explaining 1995 Amendment, excerpt reprinted in Gillers & Simon, *supra* note 82, at 273-74.

296. See Model Rules of Professional Conduct Rule 4.2 cmt. (2000).

297. See Gillers & Simon, *supra* note 82, at 273.

298. See *id.* at 315-16.

299. See *id.* at 316-17.

300. See *id.* at 317.

301. See Model Rules of Professional Conduct Rule 5.7 (2000).

302. See *id.* Rule 5.7(b).

The comment to Rule 5.7 indicates the reason for the rule. It also offers significant information about the rule's application:

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibition against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case. Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed.<sup>303</sup>

The comment thus stresses two important things about the rule: the rule applies when a client might misunderstand the nature of the services that the lawyer is providing, and the rule may apply even when the lawyer is not providing legal services to a client.

There is no counterpart to Model Rule 5.7 in the Louisiana Rules of Professional Conduct. The rule and its accompanying comment should be considered in connection with any initiative to revise the Louisiana rules.

### G. Rule 6.1

Model Rule 6.1, which deals with pro bono publico services, was substantially amended in 1993. One of the amendments to the text of the rule converted what had been a general exhortation about providing pro bono services into a specific urging that the lawyer provide at least 50 hours of pro bono publico services each year. The 1993 changes also set up a hierarchy of approved pro bono services. Although the rule identified a number of ways in which a lawyer could meet the pro bono goal, it provided that a substantial majority of the 50 hours of service should be allocated either to persons of limited means or to organizations in matters "designed primarily to address the needs of persons of limited means."<sup>304</sup> The pre-existing version of the rule had permitted lawyers to satisfy their pro bono "obligations" through financial contributions. In 1993, the rule was changed to indicate that while financial support for legal services organizations is a good thing, it is not a substitute for pro bono services themselves.

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303. *See id.* cmt. The comment gives some examples of these services, including title insurance, accounting, financial planning, trust services, legislative lobbying, economic analysis, social work, and different types of counseling. *See id.*

304. *See* Model Rules of Professional Conduct Rule 1.6(a) (2000).

The comment to Model Rule 6.1 was entirely rewritten in 1993.<sup>305</sup> The comment, more than the text of the rule itself, indicates how seriously the American Bar Association views lawyer pro bono obligations. Thus, the first sentence of the comment says that "[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay."<sup>306</sup> The comment also offers some particulars about qualified beneficiaries. It describes them as "those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel."<sup>307</sup> But the comment also confirms the voluntary nature of the pro bono obligation. It says that the "responsibility set forth in this Rule is not intended to be enforced through disciplinary process."<sup>308</sup>

Notwithstanding the voluntary nature of the rule, the 1993 amendments were very controversial. They passed the House of Delegates on a vote of 228-215.<sup>309</sup> The 1993 changes to the Model Rule have not been adopted in Louisiana. It is doubtful that they could be adopted without considerable controversy, which may not be worth incurring for a rule that is entirely voluntary.<sup>310</sup>

#### H. Rules 7.2, 7.3, and 7.4

There have been several amendments to the Model Rules on advertising and information about legal services. Most of the changes were made to conform rules 7.2, 7.3, and 7.4, and their respective comments, to decisions of the United States Supreme Court on lawyer free speech.<sup>311</sup> As a result of the amendments, the Model

305. See Gillers & Simon, *supra* note 82, at 319, 323.

306. See Model Rules of Professional Conduct Rule 6.1 cmt. (2000).

307. See *id.*

308. See Model Rules of Professional Conduct Rule 6.1 cmt. (2000).

309. See Gillers & Simon, *supra* note 82, at 323.

310. The more significant issue with respect to pro bono publico service is whether it ought to be mandatory. Mandatory pro bono is an even more controversial issue than the 1993 amendments to Model Rule 6.1. Of course, a proposal's controversy is not necessarily a good reason to reject it, but there are some good arguments on both sides of this issue. See, e.g., Hazard, *supra* note 210, at 1045-48.

311. For example, in 1989 the House of Delegates amended Model Rules 7.2 and 7.3, to take into account the United States Supreme Court's decision in *Shapiro v. Kentucky Bar Association*, 486 U.S. 466, 108 S. Ct. 1916 (1988). That decision held that a blanket prohibition against targeted mail solicitation either, but the House of Delegates approved amendments to both the black-letter rule and its accompanying comment to reflect the new constitutional wisdom. The House also approved some minor conforming changes to the text of Model Rule 7.3. Comparable changes were not required in the black-letter text of the Louisiana rules, because the constitutional issue had already been addressed when Louisiana adopted its version of the Rules of Professional Conduct in 1986. See the discussion *supra* Part II(B)(3) of this article. Since then, Louisiana has made further changes in its rules on advertising and solicitation.

Rules are fairly forgiving about lawyer advertisements of speciality practice areas and they permit targeted direct mail solicitation of potential clients.

Louisiana has made significant changes to its rules in this area as well, but many of the changes have not been based on corresponding ABA models. Because of the differences in the rules, it would not be possible for Louisiana to adopt, in their entirety, the comments to the corresponding ABA Model Rules.

There is something about Model Rule 7.4 that warrants discussion. This rule concerns communications regarding fields of practice—identifying oneself as a specialist, and so on. The ABA House of Delegates has amended the rule on three occasions. The first amendment to Model Rule 7.4 came in 1989 when the House acted to delete some language from the comment to the rule that prohibited a lawyer from stating that his or her practice was “limited to” or “concentrated in” particular fields of law practice. An ABA committee report that supported the change indicated that it had been precipitated by attorney free speech decisions of the United States Supreme Court.<sup>312</sup>

The second amendment to Rule 7.4, in 1992, changed both the black-letter text of the rule and the comment to conform them to the Supreme Court’s decision in *Peel v. Attorney Registration and Disciplinary Commission*.<sup>313</sup> That case had held that states may not ban truthful communications in which lawyers indicate that they are certified as specialists by bona fide private certifying organizations.<sup>314</sup>

The third amendment, which came in 1994, added a sentence to both the black-letter text of the rule and to its comment. The amendment removed a disclaimer requirement, with respect to certification procedures, when the certification in question is by an organization accredited by the American Bar Association.

As a result of these amendments, Model Rule 7.4 is considerably more elaborate than Louisiana Rule 7.4. The Louisiana rule states in its entirety:

A lawyer shall not state or imply that the lawyer is certified, or is a specialist or an expert, in a particular area of law, unless such certification, specialization or expertise has been recognized or approved in accordance with the rules and procedures established by the Louisiana Board of Legal Specialization.<sup>315</sup>

The ABA Model is also more generous than the Louisiana rule concerning what a lawyer may advertise about his or her areas of practice. Thus, the comment to the ABA rule states in part:

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312. See ABA Committee Report Explaining 1989 Amendment to Rule 7.4, *partially reprinted* in Gillers & Simon, *supra* note 82, at 375-76. The committee report referred to *In re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929 (1982) and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S. Ct. 2265 (1985), which it said “made clear that a state may not prohibit truthful descriptions of a lawyer’s practice merely because the terms raise an inference for a reader that the lawyer has some expertise in the designated fields of practice.” See *id.*

313. 496 U.S. 91, 110 S. Ct. 2281 (1990).

314. See *id.*; see also Gillers & Simon, *supra* note 82, at 376-77.

315. See Louisiana Rules of Professional Conduct Rule 7.4 (2000).

This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

However, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule<sup>316</sup>

The ABA's comment draws a distinction between an advertisement that describes the lawyer as a "specialist" and one that describes the lawyer as "certified as a specialist." The Louisiana rule conflates the two and, as a result, limits the ability of a lawyer to identify himself as a specialist.

There is a constitutional issue here. In the case of *In re R.M.J.*,<sup>317</sup> the Supreme Court considered the appropriateness of discipline for a lawyer who had advertised the areas of his practice using practice descriptions that deviated from an approved list contained in an ethics rule.<sup>318</sup> Reversing a disciplinary decision of the Missouri Supreme Court, the United States Supreme Court proclaimed that because the non-conforming practice descriptions used by the lawyer had not been shown to be misleading, and because no substantial interest appeared to support the rule's narrow restrictions, the Constitution permitted the lawyer to describe his practice as he did.

In *Peel v. Attorney Registration and Disciplinary Commission*,<sup>319</sup> the Court held that the State of Illinois had violated the First Amendment by absolutely prohibiting a lawyer from advertising his certification as a trial specialist by a private professional organization.<sup>320</sup> Justice Marshall, who provided the fifth vote in a concurring opinion, agreed with the plurality that a state could not impose a total ban against advertisements that listed speciality certifications by private certifying organizations. But he was of the view that a state could impose lesser requirements such as disclaimers, or explanatory supplements, to assure that the

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316. Model Rules of Professional Conduct Rule 7.4 cmt. (2000).

317. 455 U.S. 191, 102 S. Ct. 929 (1982).

318. Among other things, the lawyer's advertisement listed "personal injury" and "real estate" as practice areas, instead of "tort law" and "property law," as the rule required. It also identified several practice areas that had no analogues at all under the relevant ethics rule. See 455 U.S. at 197, 102 S. Ct. at 934.

319. 496 U.S. 91, 110 S. Ct. 2281 (1990).

320. The applicable ethics rule permitted a lawyer to designate areas of the law in which he concentrates or limits his practice, but it prohibited the lawyer from holding himself out as certified or as a specialist except in patent, trademark or admiralty law. Peel's professional letterhead contained a truthful statement that he had been designated as a "Certified Civil Trial Specialist" by the National Board of Trial Advocacy. See *id.* at 96-97, 110 S. Ct. at 2285-86.

consumer is not misled.<sup>321</sup>

A complete analysis of the constitutional issues concerning lawyer representations of specialization is beyond the scope of this article. At the threshold level of analysis, however, it is clear that the comment to ABA Model Rule 7.4 is more permissive than the text of the Louisiana rule. Moreover, there appears to be some tension between the text of the Louisiana rule and some statements in the two Supreme Court cases referenced above. For example, the Louisiana rule, as currently configured, is prohibitory in nature; it is not a rule that incorporates the sort of disclaimer or supplemental information requirements referred to by Justice Marshall in his concurring opinion in *Peel*. In any event, as things stand now, there are parts of the amended comment to Model Rule 7.4 that could not be adopted in Louisiana. If the comment articulates the correct constitutional standard,<sup>322</sup> the Louisiana rule is on shaky ground.

### I. Rule 7.6

In February of 2000, the ABA's House of Delegates approved the addition of new Rule 7.6 to the Rules of Professional Conduct.<sup>323</sup> The new rule deals with "pay to play" activities by lawyers. "Pay to play" refers to the practice of making (or soliciting) campaign contributions in order to obtain favorable consideration from government officials in the allocation of government legal work.

The new rule states:

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.<sup>324</sup>

The comment to the rule acknowledges that lawyers have the right to participate "fully" in the political process. However, it also says that "the integrity of the profession is undermined" when the public can legitimately question whether lawyers who are engaged to perform government legal work "are selected on the basis of competence and merit."<sup>325</sup>

Opponents of the new rule contended that it would unconstitutionally infringe on the right of lawyers to participate in the electoral process.<sup>326</sup> But proponents argued that the rule does not prohibit political contributions; instead, it prohibits lawyers from accepting legal engagements that are inappropriately connected to

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321. See *id.* at 116, 110 S. Ct. at 2296.

322. The comment may be more permissive than the Supreme Court cases, but, as is often true with respect to constitutional law issues, the boundaries of the pertinent legal rules are not fully established.

323. See James Podgers, A New Ethics No-No, A.B.A.J. Apr. 2000, at 96.

324. See Model Rules of Professional Conduct Rule 7.6 (2000).

325. *Id.* cmt.

326. See Podgers, *supra* note 323, at 96.

their campaign contributions.<sup>327</sup>

The comment to the new rule expresses several significant limitations on its scope. For example, the comment says that the expression "political contribution" does not include "uncompensated service."<sup>328</sup> It would seem, then, that a lawyer could serve as a volunteer campaign worker without running afoul of the rule. The comment also provides that political contributions in "initiative and referendum elections" are not covered by the rule.<sup>329</sup> And it further indicates that the rule does not reach (1) "engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions"; or (2) "engagements or appointments made on a rotational basis from a list compiled without regard to political contributions."<sup>330</sup>

The comment contains other useful statements.<sup>331</sup> If the Louisiana Supreme Court were inclined to adopt the new rule, it should give serious consideration to the language of the comment as well.

#### J. Rule 8.4

There has been a recent amendment to the comment to Model Rule 8.4, which is the basic misconduct rule. The text of Model Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."<sup>332</sup> In 1998, the ABA made a change in the comment to the rule that appears to incorporate a substantive element:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.<sup>333</sup>

Previous proposals to include similar language in the comment had come under fire on First Amendment grounds.<sup>334</sup> One can anticipate that a lawyer who is faced with discipline based on this language might assert that it suffers from problems of

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327. *See id.*

328. *See* Model Rules of Professional Conduct Rule 7.6 cmt. (2000).

329. *See id.*

330. *See id.*

331. One of the usual provisions of the comment is a discussion of how objective circumstances could support an inference that a political contribution was made for the purpose of obtaining a government legal engagement. *See id.*

332. Model Rules of Professional Conduct Rule 8.4(d) (2000).

333. Model Rules of Professional Conduct Rule 8.4 cmt. (2000).

334. *See Legal News*, U.S.L.W., Dec. 9, 1997, at 2343.

vagueness and overbreadth.

Putting constitutional questions aside, on the merits it is hard to argue with the general proposition that lawyers ought not to manifest bias or prejudice, as those terms are conventionally understood, when doing so is prejudicial to the administration of justice. There are significant problems with such manifestations in our society, and they have no legitimate place in our legal system. But there is some potential for abuse associated with this kind of rule. A witness, opponent, or other individual who is offended by a lawyer's conduct might perceive impermissible bias or prejudice in conduct that was not intended to manifest it. The "manifestation" in question might be altogether misunderstood, or it might be a manifestation of permissible dislike of personality.

The adverb "knowingly" offers some defensive help to the innocent lawyer in these situations, but maybe not much help. Presumably the standard for rule violation would be objective, rather than entirely subjective, or the rule would never get much traction. Indeed, the Terminology section of the Model Rules indicates, with respect to the word "knowingly," that "[a] person's knowledge may be inferred from circumstances."<sup>335</sup> What the lawyer actually intends in connection with particular words or conduct may not prove to be as critical as what is perceived by others.

Other defensive help might come from the limiting phrase "when such actions are prejudicial to the administration of justice," but this help may be limited as well. Prejudice to the administration of justice is not likely to be found in the words or conduct of the lawyer alone; it will probably arise, at least in part, because of the reactions of others to the words or conduct. If a person perceives a manifestation of bias or prejudice in the lawyer's words or conduct, and if that person's reaction is a volatile one, sufficient prejudice to the administration of justice might be found. In some instances, the volatility of the reaction might derive more from the unreasonable reaction of the perceiving person than from what the lawyer actually said or did. It would be unfortunate if the new language of the comment resulted in the discipline of innocent attorneys.

It should be noted that there is a somewhat similar anti-bias provision in the ABA Model Code of Judicial Conduct. Canon 3(B)(6) enjoins judges to require lawyers who appear before them to "refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others."<sup>336</sup> The Canon, like the comment to Rule 8.4, includes a provision permitting "legitimate advocacy" with respect to the listed factors.<sup>337</sup>

Louisiana has patterned its Code of Judicial Conduct on the ABA code, but the Louisiana version is not entirely faithful to the ABA model. In particular, the anti-bias provision of the Louisiana Code of Judicial Conduct simply enjoins judges to "require lawyers in proceedings before the judge to refrain from manifesting, by

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335. Model Rules of Professional Conduct Terminology (2000).

336. See Model Code of Judicial Conduct Canon 3(B)(G) (1990).

337. *Id.*



words or conduct, bias or prejudice against parties, witnesses, counsel or others.”<sup>338</sup> If the Louisiana Supreme Court were to approve, in concept, the idea of adopting comments to the Rules of Professional Conduct, and if the court were willing to include an anti-bias paragraph in the comment to Rule 8.4, it would not be surprising if the court were to depart from the ABA’s model in favor of a more general statement, as it did in the adoption of the Code of Judicial Conduct.

#### K. Rule 8.5

The ABA House of Delegates approved some changes in Model Rule 8.5, and its comment, during the August 1993 Annual Meeting.<sup>339</sup> Model Rule 8.5, as amended, deals with the jurisdiction of disciplinary authorities and choice-of-law considerations for the application of disciplinary rules. The general rule, of course, is that a lawyer is subject to discipline in the jurisdiction in which he or she is licensed to practice.<sup>340</sup> But choice-of-law issues can arise, and the amended rule offers guidance as to the appropriate disciplinary rules to apply when a lawyer is licensed to practice in more than one jurisdiction or if the conduct in question occurs in a court sitting in a jurisdiction other than that in which the lawyer is licensed. By way of justification for the choice of law provisions, the amended comment to Model Rule 8.5 observes that “[i]n the past, decisions have not developed clear or consistent guidance as to which rules to apply.”<sup>341</sup> The comment also explains how the rule works.

If the Louisiana Supreme Court should decide to adopt the amended text of Model Rule 8.5, it would also be a good idea to adopt the helpful comment to the rule. A change would be appropriate. The current Louisiana rule contains no choice-of-law provisions at all. It is limited to a simple statement that lawyers who are admitted to practice in “this jurisdiction” are subject to the jurisdiction’s disciplinary authority.<sup>342</sup>

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338. Louisiana Code of Judicial Conduct Canon 3(A)(5). The Louisiana Supreme Court has issued no explanation for the departure. However, it may be worth pointing out that the language in the Louisiana Code of Judicial Conduct avoids the need to give express approval to each of the separately listed grounds of bias and prejudice that are identified in the ABA’s code. In particular, the Louisiana version avoids the potentially controversial issue of adopting an express provision regarding bias and prejudice based on “sexual orientation.”

339. See Gillers & Simon, *supra* note 82, at 414-18.

340. See Model Rules of Professional Conduct Rule 8.5(a) (2000).

341. See *id.*

342. See Louisiana Rules of Professional Conduct Rule 8.5 (2000).