

1999

## The Dichotomy Between Standards and Rules

Mary C. Daly

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### Recommended Citation

Mary C. Daly, *The Dichotomy Between Standards and Rules*, 32 *Vanderbilt Law Review* 1117 (2021)  
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# The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers

Mary C. Daly\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1118
II.	FROM STANDARDS TO RULES: THE TRANSFORMATION OF THE LAWYER CODES OF CONDUCT, THE LAWYER DISCIPLINARY SYSTEM, AND LEGAL EDUCATION IN THE UNITED STATES.....	1124
A.	<i>From Canons to Code to Rules</i> .....	1125
1.	The 1908 Canons of Ethics .....	1125
2.	The 1969 Model Code of Professional Responsibility .....	1127
3.	The 1983 Model Rules of Professional Conduct .....	1130
B.	<i>How Changes in the Lawyer Disciplinary System Contributed to the Transition from Standards to Rules</i> .....	1134
C.	<i>How Legal Education Contributed to the Transition from Standards to Rules</i> .....	1138
D.	<i>How the Courts Contributed to the Transition from Standards to Rules</i> .....	1141
E.	<i>How Other Activities of the Organized Bar Contributed to the Transition from Standards to Rules</i> .....	1142

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\* James H. Quinn Professor of Law, Fordham University School of Law; J.D., 1972, Fordham University School of Law; LL.M., 1978, New York University School of Law. Professor Daly is the Director of the Stein Institute of Law and Ethics at Fordham University School of Law. The author would like to express her gratitude to the members of the Fordham Law School Faculty Colloquium whose suggestions and criticisms considerably enriched the evolution of the thoughts expressed in this article and to Professor Laurel S. Terry, Pennsylvania State University, Dickinson College of Law, for her generosity in reading and commenting upon an earlier draft.

III.	WHY A SIMILAR TRANSFORMATION HAS NOT OCCURRED IN THE CIVIL LAW COUNTRIES .....	1144
A.	<i>Legal Education and Professional Training</i> .....	1145
B.	<i>The Effect of the Divided Structure of the Legal Profession</i> .....	1148
C.	<i>The Conduct of Litigation</i> .....	1153
D.	<i>The Lawyer Disciplinary System</i> .....	1156
IV.	HOW AN UNDERSTANDING OF THE STANDARDS/RULES DICHOTOMY CAN CONTRIBUTE TO THE CREATION OF A CROSS-BORDER CODE OF LAWYER CONDUCT.....	1157
V.	CONCLUSION.....	1162

## I. INTRODUCTION

The dichotomy between standards and rules has generated an impressive body of scholarship in areas as diverse as constitutional,<sup>1</sup> contract,<sup>2</sup> labor,<sup>3</sup> property,<sup>4</sup> tort,<sup>5</sup> and criminal<sup>6</sup> law. This article argues that the dichotomy—in a somewhat modified form—helps to explain a fundamental difference in the way that U.S.

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1. See, e.g., David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829 (1993); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24 (1992). See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

2. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985). See also Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

3. See, e.g., Matthew W. Finkin, *Does Karl Klare Protest Too Much?*, 44 MD. L. REV. 1100 (1985); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Karl E. Klare, *Lost Opportunity: Concluding Thoughts on the Finkin Critique*, 44 MD. L. REV. 1111 (1985); Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985).

4. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

5. See, e.g., Joseph R. Grodin, *Are Rules Really Better than Standards?* 45 HASTINGS L.J. 569 (1994); see also Book Note, *The Bureaucrats of Rules and Standards*, 106 HARV. L. REV. 1685 (1993) (reviewing IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992)).

6. See, e.g., Al Katz & Lee E. Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1 (1978); Mark Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

and foreign lawyers, especially those educated in the civil law tradition,<sup>7</sup> perceive codes of lawyer conduct.<sup>8</sup>

This difference in perception is more than simply a matter of academic interest or curiosity. In December 1998, the Services Council of the World Trade Organization (WTO) adopted the

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7. For the purpose of this essay, "the civil law tradition" refers to a legal tradition that "is characterized by a particular interaction in its early formative period among Roman law, Germanic and local customs, canon law, the international law merchant, and, later, by a distinctive response to the break with feudalism and the rise of nation states, as well as by the specially important role it has accorded to legal science." MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 16 (2d ed. 1994). "Foreign lawyer" refers to a lawyer educated in the civil law tradition. The reflections in this essay and the descriptions of the legal education, professional training, and practice of lawyers educated in the civil law tradition are by necessity expressed at a considerable level of abstraction. To some extent, the reflections and descriptions apply generically. Whenever possible, I have cited to readily available English-language sources for specific examples. I also humbly acknowledge how much more there is to learn about foreign legal cultures. See generally Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 *STAN. J. INT'L L.* 65 (1996) (discussing the need for more research into the social and economic ramifications of the increasingly transnational world).

8. "Code of lawyer conduct" refers to a statement of ethical principles adopted by a jurisdiction's licensing authority to govern the conduct of lawyers admitted to practice before it. As discussed in a later section, the legal profession in most civil law countries is divided. See *infra* Part III.B. Unless noted otherwise, reference to a "code of lawyer conduct" with respect to lawyers trained in the civil law tradition will be to the code that governs the conduct of a lawyer with the right of audience. Full-text English versions of most foreign codes of lawyer conduct do not exist. Even if they did exist, their value would be questionable. First, there is the dual translation problem (*i.e.*, how to translate a legal concept—not simply words—from one language to another). Second, there is the outsider's dilemma (*i.e.*, how to appreciate the fullness of a legal concept anchored in the tangled roots of a country's legal history and professional culture).

The most comprehensive source for foreign codes of lawyer conduct in English is *CROSS BORDER PRACTICE COMPENDIUM* (D.M. Donald-Little ed., 1991 & Supp. 1997). It contains extended summaries of the codes of lawyer conduct and other regulatory provisions of the member states of the European Union and the recognized observer states. Also useful is *LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW* (Edwin Godfrey ed., 1995) [hereinafter *LAW WITHOUT FRONTIERS*]. Compiled under the auspices of the International Bar Association, *LAW WITHOUT FRONTIERS* contains a detailed overview of the ethical regimes of selected European countries, the European Union, Japan, Canada, and Australia. Unfortunately, it does not reproduce the exact text of the codes or statutes discussed. Its emphasis is on the regulatory barriers to cross-border practice that interfere with a lawyer's right to advise on the law of a jurisdiction in which the lawyer is not licensed or to provide legal services directly to a client in that jurisdiction. See also *THE LEGAL PROFESSIONS IN THE NEW EUROPE: A HANDBOOK FOR PRACTITIONERS* 85 (Alan Tyrrell & Zahd Yaquub eds., 2d ed. 1996) [hereinafter *THE LEGAL PROFESSIONS IN THE NEW EUROPE*]; Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *TUL. L. REV.* 443 (1989). See generally SIDNEY M. CONE, III, *INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE* (1996).

Disciplines on Domestic Regulation in the Accountancy Sector,<sup>9</sup> the purpose of which was to remove illegitimate regulatory barriers to trade in accountancy services. The Disciplines were the result of three years of intense study by the Working Party on Professional Services (WPPS), which was established by the General Agreement on Trade in Services (GATS) to which the United States is a signatory. The WPPS is charged with the task of examining qualification requirements, procedures, technical standards, and licensing requirements in the professional services sector to insure that they are no more trade-restrictive than necessary.<sup>10</sup> The WPPS is now turning its attention to the legal profession. As a first step in its review, the WPPS has issued a background paper and posed questions to the member states of the Organization for Economic Cooperation and Development (OECD) designed to identify barriers to trade in legal services rooted in the countries' regulatory and ethical regimes.<sup>11</sup>

Fearful that the WPPS will place too great an emphasis on the economic barriers created by professional licensing schemes and lawyer codes of conduct and too little on ethical values such as the independence of the bar, conflict-free representation, and client confidentiality, the American Bar Association (ABA), the Council of the Bars and Law Societies of the European Union (CCBE),<sup>12</sup> and

9. For the text of the Disciplines and general background information, see *WTO Adopts Disciplines on Domestic Regulation for the Accountancy Sector*, M2 Presswire, 1998 WL 24914185 (Dec. 16, 1998). See also Daniel Pruzin, *WTO Services Council Reaches Deal on Accounting Standards*, 15 INT'L TRADE REP. (BNA) 2143 (Dec. 23, 1998). See generally *World Trade Organization* (visited Aug. 2, 1999) <<http://www.wto.org>>.

10. See Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Argument Between the American Bar Association and the Brussels Bar*, 21 FORDHAM INT'L L.J. 1382, 1396 (1998) [hereinafter *A Case Study*].

11. See *Legal Services: Background Note by the Secretariat*, Council for Trade in Services, WTO (July 6, 1998) (on file with author). For an excellent introduction to lawyer regulation in cross-border practice, including a concise and comprehensible overview of the effect of GATS on legal services, see Terry, *supra* note 10, at 1393-96. See also Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?* 20 HAMLINE L. REV. 667 (1997); Orlando Flores, Note, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159 (1996); Michael J. Chapman & Paul J. Tauber, Note, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941 (1995).

12. For a description of the CCBE and its history, see CROSS BORDER PRACTICE COMPENDIUM, *supra* note 8, at 3-1 to 3-43. See also Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 5-7 (1993) [hereinafter *Part I*]; Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. L.J. 345 (1993) [hereinafter *Part II*]; John Toulmin, Q.C., *A Worldwide Common Code of Professional Ethics?*, in RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 207-18 (Mary C. Daly & Roger J. Goebel eds.

the Japan Federation of Bar Associations (JFBA) sponsored a Forum on Transnational Legal Practice in November 1998.<sup>13</sup> The sponsors invited the participation of the organized bars of the OECD member states, Asia, Africa, and South America. Bar leaders from twenty-five different countries attended the Forum, as did delegates from three of the major international bar associations. The attendees represented over sixty percent of the world's lawyers.<sup>14</sup> The two days of the Forum were almost exclusively devoted to regulatory issues. The discussions and submissions addressed the right of a lawyer occasionally to deliver legal services in a country in which the lawyer is not licensed to practice law, the right of a lawyer to establish the lawyer's practice in a country in which the lawyer is not licensed to practice law, and the advisability of countries adopting a foreign legal consultant regime.<sup>15</sup>

Interesting as these discussions and debates were, what were even more interesting were the occasions when the Forum's participants formally and informally turned their attention to lawyer codes of conduct. It was obvious that U.S. and foreign lawyers perceive their respective lawyer codes of conduct very differently.<sup>16</sup>

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1995) [hereinafter RIGHTS, LIABILITY, AND ETHICS]. See also *Council of the Bars and Law Societies of the European Union* (visited Aug. 24, 1999) <<http://www.ccbe.org>>.

13. The impetus for the Forum was a 1997 workshop sponsored by the OECD to assist WPPS. The workshop addressed issues of liberalization of trade in professional services, including such specific issues as limited liability partnerships among lawyers and foreign legal consultant regimes. See Donald H. Rivkin, *Transnational Legal Practice*, 32 INT'L LAW. 423, 425 (1998).

14. See Joint Closing Communique from the Forum on Transnational Practice for the Legal Profession, (Nov. 10, 1998) (on file with author). This author was an observer to the ABA delegation.

15. See Memorandum from Donald H. Rivkin to the Council concerning the Forum on Transnational Practice for the Legal Profession (Dec. 10, 1998) (on file with author); Discussion Papers Presented by the American Bar Association Section of International Law and Practice, the Council of the Bars and Law Societies of the European Community, and the Japan Federation of Bar Associations, Forum on Transnational Practice for the Legal Profession (Nov. 9 & 10, 1998) (on file with author). Professor Terry's articles supply a much needed comprehensive analysis of the myriad of regulatory issues associated with cross-border practice. See Terry, *A Case Study*, *supra* note 10; Terry, *Part I*, *supra* note 12; see also Roger J. Goebel, *Lawyers in the European Community: Progress Toward Community-Wide Rights of Practice*, in RIGHTS, LIABILITY, AND ETHICS, *supra* note 12, at 239.

In her article on cross-border legal practice, Professor Terry identifies five different regulatory models, each of which addresses issues of: (1) scope of practice; (2) forms of association; and (3) ethics and discipline. See Terry, *A Case Study*, *supra* note 10, at 1428. The discussions at the Paris forum constantly returned to these three sets of issues.

16. This was not the first time I had noticed the dissimilarity. I have been fortunate enough to teach and lecture outside the United States on several occasions and to have regular contact with foreign lawyers and law students. My observations at the Forum brought to mind the comments of distinguished comparative law

To U.S. trained lawyers, the codes of conduct are law or at least law-like, primarily because of their enforceability.<sup>17</sup> They are the yardsticks by which grievance committees measure a lawyer's behavior, judges grant or deny motions, and juries accept or reject allegations of malpractice or breach of fiduciary duty.<sup>18</sup> To non-U.S. trained lawyers, the codes of conduct are general norms of professional behavior.<sup>19</sup> The popular understanding is that the codes of conduct are less legalistic and less formal than their U.S. counterparts.<sup>20</sup> Professor Hazard has captured the spirit of this difference: "The English barristers thought it quaint that American lawyers felt in need of legal rules for their governance, but they recalled that Americans seemed to need rules for everything."<sup>21</sup> His comment has even greater force for lawyers trained in the civil law tradition.

This article will briefly identify some of the reasons for this difference in perception and speculate about its possible impact on the regulation of cross-border legal practice. Part II traces the transformation from standards to rules in the United States. Part III explores the historical, structural, and economic reasons why a similar transformation has not occurred in most foreign countries.

scholars that lawyers trained in the civil law tradition "see" the law very differently. See generally GLENDON ET AL., *supra* note 7, at 133; Mirjan Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363 (1968). Professor Vagts, in commenting upon the differences in litigation styles between U.S. and foreign lawyers, has hinted at this difference:

One could easily imagine the shock to British or Japanese arbitrators and a British or Japanese court at the approach used by some American litigators. They might applaud the fact that the rules of the French bar purport to make "delicateresse," "courtoisies" and "tact" essential principles of the lawyer's profession.

Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 260-61 (1996). For a fascinating study of the international impact of U.S. style lawyering, see YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

17. See *infra* notes 108-11, 131-32 and accompanying text.

18. The last two descriptions must not be taken too literally. I am well aware of the line of cases holding (1) that the lawyer codes of ethics are only "guidelines" for the courts in reviewing a lawyer's behavior; and (2) that breaches of the lawyer codes of ethics do not constitute a basis for civil liability. See MODEL RULES OF PROFESSIONAL CONDUCT, Scope (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1980); *Baxt v. Liloia*, 714 A.2d 271 (N.J. 1998).

19. See *infra* notes 199-203 and accompanying text.

20. See *id.*

21. Geoffrey C. Hazard, *Ethics*, NAT'L L.J., Mar. 30, 1992, at 13. See also H. Patrick Glenn, *Professional Structures and Professional Ethics*, 35 McGill L.J. 424, 428 (1990) (noting that British barristers and some European legal professions have little enthusiasm for written codes of ethics, believing "[r]ules are for others, who may reasonably be expected to ask precisely what they should do.>").

Finally, Part IV examines how an appreciation for the standards/rules dichotomy can contribute to a better understanding of the ethical obligations of lawyers in different legal systems and ultimately to the adoption of a code of conduct to govern the conduct of lawyers in cross-border transactions.

Contemporary interest in the rules/standards dichotomy springs principally from the writings of Duncan Kennedy<sup>22</sup> and other Critical Legal Studies scholars.<sup>23</sup> "Dichotomy" is really a misnomer. It is more accurate to speak of a continuum of discretion. At one end of the continuum are "rules," commands that constrict a decisionmaker's discretion.<sup>24</sup> They reflect a choice among competing values by a policy-maker who has the authority to cabin a decisionmaker's choices.<sup>25</sup> At the other end are "standards," general principles that allow the decisionmaker greater discretion in applying the designated values.<sup>26</sup> In his seminal law review article, Kennedy associated rules with Holmes' Bad Man, who is always looking to the limits of the law to determine precisely how far he can go in any endeavor without risking civil or criminal liability.<sup>27</sup> The virtues of rules—predictability and stability—are thus transformed into vices—excessive autonomy and alienated individualism.<sup>28</sup> Standards are less determinative than rules because they serve to promote the advancement of abstract ideals such as goodness and fairness. From the decisionmaker's perspective, standards are both a blessing and a burden; a blessing because they encourage and legitimize nuanced resolutions, a burden because they demand careful and honest reflection.<sup>29</sup> From the actor's perspective, rules are usually perceived as more conduct-specific than standards. In general, they are easier to enforce than standards, but they are also easier to defend against.<sup>30</sup> Building on Kennedy's work, Professor Rose has argued that the choice between

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22. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 *passim* (1976). Of course, the debate existed long before Professor Kennedy entered into it. See HENRY M. HART, JR. & ALBERT M. SACHS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 138-43 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

23. See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15-63 (1987).

24. See Sullivan, *supra* note 1, at 58.

25. See *id.*

26. See *id.*

27. See Kennedy, *supra* note 22, at 1744-745.

28. See Rose, *supra* note 4, at 592.

29. Professor Hazard has drawn a similar distinction among "law" (the norms formally promulgated by a political authority); "morals" (subjective conceptions of right and wrong); and "ethics" (shared norms based on reciprocal recognition). See Geoffrey C. Hazard, Jr., *Law, Morals, and Ethics*, 10 S. ILL. U. J. 447, 451-453 (1995).

30. See Grodin, *supra* note 5, at 570 (discussing a preference for rules by both the prosecutors and defense counsel in disciplinary proceedings).



rules and standards is a matter of metaphor or rhetoric, suggesting the different ways that individuals deal with members of their own immediate community and with strangers.<sup>31</sup>

While neither Kennedy's nor Rose's analysis of the standards/rules dichotomy is entirely satisfactory in explaining the core differences in perception between U.S. and foreign lawyers with respect to lawyer codes of conduct, their work identifies a new vocabulary for discussing those differences and a new paradigm for their analysis. Understanding the standards/rules dichotomy is an important first step in the creation of a cross-border code of lawyer conduct.

## II. FROM STANDARDS TO RULES: THE TRANSFORMATION OF THE LAWYER CODES OF CONDUCT, THE LAWYER DISCIPLINARY SYSTEM, AND LEGAL EDUCATION IN THE UNITED STATES

"Rules" as employed in this essay encompass phenomena as diverse as the lawyer codes of conduct, the decisions of courts, the opinions of state bar association ethics committees interpreting the codes' provisions, the professionalization of the lawyer disciplinary system, and even legal education.<sup>32</sup> "Rules" is a shorthand for the synergistic forces unleashed by the three overseers of the U.S. legal profession: the organized bar, the courts, and the law schools. The organized bar drafts lawyer codes of conduct, establishes committees that interpret them, and sponsors conferences, programs, and publications that debate, analyze, and apply them.<sup>33</sup> The courts, as regulators of the legal profession, formally adopt codes of conduct, require a separate bar examination in legal ethics for admission to the bar, demand continuing legal education in legal ethics throughout a lawyer's career, and enforce the codes' provisions through the disciplinary system.<sup>34</sup> The courts, as adjudicators, interpret lawyer codes of conduct in resolving cases and controversies.<sup>35</sup> The law schools, to satisfy accrediting

31. See Rose, *supra* note 4, at 600-10.

32. I cannot emphasize too strongly that I am defining the term "rules" quite broadly and in some respects quite differently than other scholars. See *supra* notes 1-6 and accompanying text. My use of the term, moreover, is in the context of a comparative analysis. I have no objection to the conclusion that when examined in isolation, many of the provisions of the Model Rules of Professional Conduct are "standards" as that term is discussed in the traditional literature. *Id.* For an insightful analysis on this point, see Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

33. See *infra* notes 133-43 and accompanying text.

34. See *infra* notes 125-32 and accompanying text.

35. See *id.*

standards, instruct their students in professional responsibility through required courses or a pervasive methodology.<sup>36</sup> They also sponsor conferences, programs, and publications that debate and analyze lawyer codes of conduct.

### A. *From Canons to Code to Rules*

This article can only sketch the broad outlines of how and why the format, substance, and spirit of the codes of conduct that govern the conduct of lawyers changed so radically in this century, a transformation poignantly captured by the metamorphosis of their titles—from Canons to Code to Rules.<sup>37</sup>

#### 1. The 1908 Canons of Ethics

The ABA's adoption of the Canons of Professional Ethics in 1908 (1908 Canons) was the result of the natural progression of the institutionalization of the legal profession in the United States that began in the 1870s.<sup>38</sup> The most knowledgeable academics entertain no doubt as to where to place the Canons on the divide between standards and rules. Professor Wolfram states that they rest on the assumption that "all lawyers are sufficiently homogenous to conform to common standards."<sup>39</sup> He has characterized them as "statements of professional solidarity . . . intended primarily to celebrate the ancient lineage of the bar's professional stature," and not to serve as templates for disciplinary actions.<sup>40</sup> The historian James Willard Hurst has commented upon the Canons' emphasis on "honorable relationships between individuals."<sup>41</sup> Professor Pearce has

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36. See *infra* notes 112-24 and accompanying text.

37. Professors Luban and Millemann have insightfully pointed out that the successive titles reflect a deliberate de-moralizing of the profession's ethics codes, leading to demoralizing legal ethics. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 41-46 (1995).

38. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 648-52 (2d ed. 1985); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 214-16 (1989); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 285-92, 329-30 (1950); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.6.2, at 53-54 (1986). See also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 62-65 (1976); HENRY S. DRINKER, *LEGAL ETHICS* 23-25 (1953); Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & Soc. Inquiry 1 (1999); Walter B. Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAW. 483 (1932).

39. WOLFRAM, *supra* note 38, § 2.6.2, at 54.

40. *Id.*

41. HURST, *supra* note 38, at 329-30.

demonstrated that they are firmly rooted in Republican ideology.<sup>42</sup> The drafters of the 1908 Canons lauded vagueness and feared specificity because “[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life.”<sup>43</sup>

The abstractness and imprecision of the Canons clearly mark them as standards within Professor Kennedy’s framework. Professor Rose’s observations about the different ways that individuals deal with members of their own immediate community and with strangers point to the same conclusion. While the process of stratification that would characterize the legal profession in subsequent years was already underway in 1908, lawyers still practiced within bounded legal communities, whether they were a country lawyer with a general practice, an office lawyer representing powerful industry or manufacturing clients, or a trial lawyer representing individual clients in routine civil and criminal matters in an urban metropolis.<sup>44</sup> Lawyers and judges knew one another by name and interacted on a regular basis.<sup>45</sup> Within the confines of relatively small geographic areas, groups of lawyers conducted their clients’ legal business, creating separate professional mini-communities. The composition of the groups reflected the nature of the representation, such as litigation, the transfer of real and personal property, the establishment and liquidation of businesses, and so forth. While lawyers generally acknowledged their membership in the larger “legal profession,” they primarily perceived themselves as members of smaller professional communities. Entry into these mini-communities was determined by class status (*e.g.*, elite, immigrant, etc.), area of practice (*e.g.*, corporate, personal injury, etc.), and ethnicity and religion (*e.g.*, WASP, Irish, Polish, Catholic, Jew).<sup>46</sup> Each mini-community had its own shared understandings of the ethical standards governing its members. Thus, a code of conduct expressed in standards suited the needs of the 1908 legal profession precisely because, in Rose’s words, they practiced “with members of the same community.”<sup>47</sup> Since they were not strangers, rules were unnecessary.

Intimately related to these shared understandings was the absence of a meaningful lawyer disciplinary system. The ABA’s adoption of the Canons in 1908 had no direct regulatory

42. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); see also Allison Martson, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998) (noting that the changing composition of the legal profession led to the belief that the unwritten code of professional etiquette would no longer suffice).

43. CANONS OF ETHICS, Preamble (1908).

44. See generally AUERBACH, *supra* note 33, at 40-62.

45. See generally *id.*

46. See generally *id.* at 50, 62, 73.

47. Rose, *supra* note 4, at 601-02.

consequences. State courts took a lackadaisical approach to the regulation of lawyer conduct; some courts formally adopted the Canons while others did not.<sup>48</sup> Most courts left lawyer discipline in the hands of local bar associations.<sup>49</sup> Enforcement was intermittent, haphazard, and often biased against solo and small firm practitioners who provided legal services to individuals. Too often the elite lawyers—members of one discrete mini-community sat in judgment on the conduct of lawyers belonging to a different, distinct mini-community.<sup>50</sup>

## 2. The 1969 Model Code of Professional Responsibility

As the U.S. economy grew increasingly centralized and urbanized, the Canons became increasingly irrelevant.<sup>51</sup> As early as 1934, Supreme Court Justice Harlan Fiske Stone lamented “the petty details of form and manners which have been so largely the subject of our codes of ethics . . . . Our canons of ethics for the most part are generalizations designed for an earlier era.”<sup>52</sup> The organized bar ignored Stone’s complaint. But by the late 1960s, the criticism had reached savage proportions: “glittering generalities . . . [that] lack a ‘body to kick and a soul to condemn;”<sup>53</sup> “vaporous platitudes . . . which have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room.”<sup>54</sup>

The practice of law had changed too much for the Canons to serve as a source of ethical guidance. Broad, sweeping statements about a lawyer’s duty to clients, courts, and the administration of justice were simply inadequate to guide decisionmaking in areas as complex as confidentiality, conflicts of interest, and trial publicity. From the New Deal legislation of the 1930s to the New Society legislation of the 1960s, the scope and detail of federal government regulation expanded exponentially. State and local oversight of commercial activities and civil rights legislation intruded upon the

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48. See WOLFRAM, *supra* note 38, at 55-56.

49. See *id.*

50. See AUERBACH, *supra* note 38, at 40-53, 103-29 (studying the response of elite lawyers to social change in the 20th Century).

51. See WOLFRAM, *supra* note 38, § 2.6.2 at 54-55 (discussing the critique of the Canons in light of an increasingly stratified bar membership).

52. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934) (discussing the public influence and the future of the Bar).

53. WOLFRAM, *supra* note 38, § 2.6.2 at 55 n. 29 (quoting Starrs, *Professional Responsibility: Three Basic Propositions*, 5 CRIM. L.Q. 17, 20 (Fall 1966)).

54. *Id.* (quoting A. Amsterdam (quoted in TIME Magazine, May 13, 1966, p. 81, from a letter to the Washington, D.C. grievance committee)).

legal lives of most citizens in an unprecedented degree. Lawyers accustomed to advising clients on the meaning and application of elaborate statutes and convoluted regulations were ill at ease with a code of conduct framed in vague generalities.<sup>55</sup> Lawyers' expectations had changed—they were looking for clearer, more sharply framed directives.<sup>56</sup> The Canons seemed incapable of predictable interpretation. They worked well only when applied to a set of simple facts. In short, too much imprecision and discretion produced ethical incoherence, or worse, paralysis. Rules, not standards, were needed.

Rules were also better suited to the changing institutions of corporate practice. The corporate law firm was now a well established figure on the legal landscape.<sup>57</sup> More lawyers than ever before were practicing in firms with ten or more lawyers.<sup>58</sup> Lawyers were beginning to join in-house legal departments in significant numbers.<sup>59</sup> The Canons, with their heavy emphasis on solo practitioners, small firms, and litigation practice, seemed increasingly irrelevant.

That the drafters of the 1969 Model Code<sup>60</sup> experienced the tension between rules and standards first-hand is perfectly apparent from the final structure of the text.<sup>61</sup> The Model Code is divided into nine parts, each of which is subdivided into three sections: a Canon, the Ethical Considerations, and the Disciplinary Rules. As the Preliminary Statement makes clear, each of these subsections plays

55. The principal draftsman of the Code described the Canons' "imprecision" as the primary reason for their downfall. See WOLFRAM, *supra* note 38, § 2.6.3 at 56 n.40 (citing CODE OF PROFESSIONAL RESPONSIBILITY, Preface (1969)).

56. See John F. Sutton, Jr., *Symposium—The American Bar Association Code of Professional Responsibility*, 48 TEX. L. REV. 257 (1970).

57. See Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 37-45 (Robert L. Nelson et al. eds., 1992) (discussing the structural changes in large law firms in the 1960s); see also FRIEDMAN, *supra* note 38, at 640-42, 687-95.

58. See Galanter & Palay, *supra* note 57, at 31, 37-38.

59. For a discussion of the growth in the power, prestige, and number of in-house counsel and how it impacts the delivery of legal services across national borders, see Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057 (1997).

60. The original document adopted by the ABA House of Delegates in 1969 was titled "Code of Professional Responsibility." As part of the settlement of a federal antitrust action in 1978, the ABA agreed to add the adjective "Model" to the title. Since "Model Code" is commonly used in professional responsibility parlance to refer to the 1969 Code including subsequent amendments, this article will employ that term. For the history of the adoption of the *Model Code*, see ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY at IX-XXI (Am. Bar Found. 1979); WOLFRAM, *supra* note 38, § 2.6.3 at 56-57.

61. The drafters deliberately decided not to keep a "legislative history." Thus, knowledge about the drafting process, policy debates and political compromises is scanty. See ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 60, at XI.

a different role.<sup>62</sup> A Canon is a general statement of "axiomatic norms, expressing in general terms *the standards* of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession."<sup>63</sup> In wording and in spirit, the Model Code Canons are the direct descendants of the 1908 Canons. The Ethical Considerations, too, are standards; they are "aspirational in character and represent[ing] the objectives toward which every member of the profession should strive. They constitute *a body of principles* upon which the lawyer can rely for guidance in many specific situations."<sup>64</sup>

The Canons and the Ethical Considerations both share the characteristics of standards, not rules.<sup>65</sup> They are vague, imprecise, and intended to assist a lawyer in exercising the lawyer's discretion. The Canons and the Ethical Considerations identify the values about which a lawyer should think in resolving an ethical dilemma, but they do not command a particular course of action.

The Disciplinary Rules stand in sharp contrast. The drafter's language excludes discretion or multiple interpretative possibilities. They are described as "mandatory in character . . . stat[ing] the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."<sup>66</sup> In language equally suitable for a criminal statute, the drafters cautioned: "Within the framework of a fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."<sup>67</sup> In sum, as Professor Hazard has so ably captured, the 1908 Canons representing "fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations."<sup>68</sup>

62. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement at 2-4.

63. *Id.* at 2-3 (emphasis added).

64. *Id.* (footnote omitted & emphasis added). The footnote to this statement offers even further support for their characterization as standards. Quoting at length from an ABA study of professional responsibility in 1958, it observes:

The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capabilities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.

*Id.* (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958)).

65. See *id.* at 3.

66. *Id.*

67. *Id.*

68. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249 (1991).

### 3. The 1983 Model Rules of Professional Conduct

Over sixty years lapsed between the adoption of the Canons in 1908 and its replacement by the Model Code in 1969. Barely thirteen years lapsed between the adoption of the Model Code and its replacement by the Model Rules of Professional Conduct (Model Rules) in 1983.<sup>69</sup> Three weaknesses in the Model Code were especially glaring. First, the Model Code provisions were excessively concerned with the dilemmas of the courtroom lawyer and paid little or no attention to those of the business or corporate lawyer. The lawyer's role as advisor, counselor, and negotiator was generally ignored as were the lawyer's obligations to third parties. Second, the Model Code had not envisioned the emergence of the corporate law firm in which fifty to a hundred lawyers would practice together, offering a wide range of legal services to multistate and multinational business clients. Consequently, it failed to address ethical issues unique to this practice setting in any significant way. Third, the Model Code contained no provision to guide ethical decisionmaking in matters involving subsequent representation adverse to the interests of a former client.<sup>70</sup>

It was not just these flaws in the Model Code that led to its rejection. The demographic profile of the legal profession was changing dramatically between 1969 and 1983.<sup>71</sup> Each year, U.S. law schools were graduating an ever-increasing number of students. In 1970, 15,000 applicants applied for admission to the bar.<sup>72</sup> By 1980, the number rose to 30,000.<sup>73</sup> In 1971, the U.S. lawyer population was one-third of a million.<sup>74</sup> In 1980, it was close to half a million.<sup>75</sup> In gender, race, and socio-economic background, these new entrants differed from previous cohorts. More women, minority group members, and individuals from the blue-collar strata of the middle class were joining the profession.<sup>76</sup> In sum, heterogeneity

69. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 18.

70. See GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 13-15 (2d ed. 1994); WOLFRAM, *supra* note 38, at 56-59, 60-63.

71. See BARBARA A. CURRAN & CLARA N. NELSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988 1-14 (1992).

72. See *id.* at 1.

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.* See generally RICHARD L. ABEL, AMERICAN LAWYERS 87-111 (1989); Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, in LAWYERS: A CRITICAL READER 20, 20-26 (Richard L. Abel ed. 1997) (examining demographic shift in the U.S. legal profession in the 20th century). While more minorities were entering the profession, their progress was limited. See also DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 89-97 (2d ed. 1995); American Bar Association Task Force on Minorities in the Legal

was changing the profession's demographic profile, as previously excluded "strangers" entered the legal community.<sup>77</sup>

The transition from standards to rules was also a response to the increasing presence of out-of-state lawyers and law firms in markets previously reserved to local lawyer mini-communities. Advances in telecommunications and transportation enabled lawyers to communicate with clients and other lawyers across the country and to travel with relative ease from one part of the United States to another. The introduction of the multistate bar examination encouraged recent graduates and even experienced lawyers to obtain a license to practice law in more than one jurisdiction. Thus, new "strangers" in the form of out-of-state lawyers and law firms disrupted long standing, fraternal mini-communities across the United States in the late 1960s, 1970s, and early 1980s.<sup>78</sup>

Law firms, especially the larger ones, were also undergoing changes in structure, culture, and identity during this period.<sup>79</sup> To fuel their expansion, large law firms for the first time began to hire from second-tier law schools and to recruit lateral hires in large numbers.<sup>80</sup> The presence of these "strangers" became a routine occurrence at the firms' meetings. At a meta level, rules hold out the promise of stability and familiarity for law firms in flux: stability because all the firm's lawyers are subject to the same ethical

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Profession, Report with Recommendations (1986); American Bar Association Task Force on Minorities and Achieving Justice in a Diverse America at 20-28 (1992).

77. In commenting upon the growth of the legal profession, Professor Wilkins has protested "the idea that all 800,000 American lawyers share a common professional culture capable of producing uniform answers to ethical problems strains credibility." David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 488 (1990). His solution is to propose a new model for lawyer regulation, suggesting the move "[f]rom partisanship to purposivism" in which "[c]ontext must replace universality as the touchstone of system design." *Id.* at 505, 515. He advocates for a set of mid-level principles (*i.e.*, between standards and rules) that would be context specific. *See id.* at 505-15.

78. Making a similar observation and discussing similar forces, Professor Hazard described the bar as becoming a "community of strangers." *See Hazard, The Future of Legal Ethics*, *supra* note 68, at 1259-60.

79. While the precise cause and effect relationship is uncertain, the movement from standards to rules was undoubtedly also influenced by the shift in the balance of power between corporate counsel and outside law firms. *See Daly, supra* note 59, at 1059-67. Rules make it easier for clients, especially sophisticated ones, to have settled expectations and to monitor and evaluate the conduct of their lawyers. By lessening the discretion available to lawyers, rules provide clients with a clearer set of benchmarks. In terms of the relative ease of enforceability, rules favor clients more than standards do. As more foreign clients gain exposure to a U.S. style of lawyering and the rules-orientation of the lawyer codes of conduct, they may affirmatively encourage a shift from standards to rules in their own countries.

80. *See Galanter & Palay, supra* note 57, at 50-54.



obligations; familiarity because all the lawyers have a similar understanding of those obligations. The legal profession's embrace of rules and jettison of standards was partly a response to the need of large law firms for a clearer, more direct set of professional norms that reduced the permissible range of a lawyer's ethical discretion.

The drafting and adoption of the Model Rules was a tortured process.<sup>81</sup> Its final conformation bore almost no resemblance to that of either the 1908 Canons or the Model Code. The drafters completely abandoned the Model Code's tripartite structure—*i.e.*, Canons, Ethical Considerations, and Disciplinary Rules—in favor of a binary structure modeled on the Restatements of Laws' black letter rule and commentary.<sup>82</sup> The selection of the Restatement format is a telling detail of the transition from standards to rules. The Restatements, of course, are carefully drafted digests of *law*, not standards.<sup>83</sup>

It would be a serious mistake in judgment to assume that each Model Rule is a "rule" in the sense of the standards/rule dichotomy. The Scope section identifies three different types of rules: "Some . . . are imperatives, cast in the terms 'shall' or 'shall not.' . . . Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion. . . . Other Rules define the nature of relationships between the lawyer and others."<sup>84</sup>

As this language evidences, the drafters did not entirely banish standards from the Model Rules. The overwhelming majority of the Model Rules, however, are cast in the imperative. Moreover, even those that employ permissive language are more detailed and precise than provisions in the 1908 Canons and Model Code. Most of the standards-like language can be found in the Comments to the rules whose function is to "provide guidance for practicing in compliance with the Rules,"<sup>85</sup> not to add obligations. While certain Rules acknowledge the lawyer's professional discretion, they bind

81. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 1989 L. & SOC. INQUIRY 677, 678. See generally ABA CENTER FOR PROFESSIONAL RESPONSIBILITY: THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT (1987).

82. See Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 953 ("[T]he model rules deliberately eschew references to ethics; they are at least in form more a set of detailed requirements for a regulated industry than a set of ethical principles.").

83. See *infra* notes 138-43 and accompanying text. See also Lawrence J. Lattó, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 712 (1998) (discussing the evolution of the Restatement).

84. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 18, Scope. See also WOLFRAM, *supra* note 38, § 2.6.4 at 63. Professor Zacharias has suggested that the relationship among the three different types of rules can be measured by the benchmark of a "specificity continuum." Zacharias, *supra* note 32, at 244.

85. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 18, Scope at 11.

that discretion more tightly.<sup>86</sup> The purpose of the Model Rules was to command the conduct of lawyers, not to recommend the consideration of vague and imprecise values in ethical decisionmaking. In short, despite the lingering presence of some sentiments associated with standards in the Model Rules, their adoption was a watershed in the transition from standards to rules that took place over the course of almost one hundred years.

With the widespread adoption of the Model Rules,<sup>87</sup> the battle between standards and rules is largely over in the United States.<sup>88</sup>

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86. See *id.*

87. Approximately forty-one states have adopted the Model Rules. See LAWS. MANUAL ON PROF. CONDUCT (ABA/BNA) 01:3 to 01:4 (1999). A number of states, however, have modified the provisions relating to confidentiality, conflicts of interest, advertising, and solicitation.

88. The academic support for this proposition is very strong. See, e.g., Hazard, *The Future of Legal Ethics*, *supra* note 68, at 1241 (“[O]ver the last twenty-five years or so the traditional norms have undergone important changes. One important development is that those norms have become ‘legalized.’ The rules of ethics have ceased to be internal to the profession; they have instead become a code of public law enforced by formal adjudicative disciplinary process.”); Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-contact and Subpoena Rules*, 53 U. PITT L. REV. 291, 300 (1992) (“Since about 1930, with accelerating speed since 1970, ethical codes have developed into law.”) (citing *id.*; Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953.); Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater or Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 322 (1987) (commenting on “[t]he trend toward more comprehensive and mandatory codification.”); Zacharias, *supra* note 32, at 223 (“Over time, the professional codes governing lawyer behavior have become statutory in form.”); *infra* notes 138-43 and accompanying text (discussing the rule-like approach of the RESTATEMENT OF THE LAW GOVERNING LAWYERS).

If there is any lingering doubt about the validity of this proposition, the amendments to the Model Rules being proposed by the Ethics 2000 Commission and the Reporter’s Explanation of Changes might dispel that doubt. See <<http://www.abanet.org/cpr/ethics2k.html>> (visited Aug. 2, 1999). The use of standards in connection with lawyer regulation has not entirely disappeared, however. In response to a long litany of complaints about lawyer civility and professionalism, the ABA, state bar associations, and the federal and state courts have adopted a variety of lawyer civility codes. These codes neither replace nor supplement existing codes of lawyer conduct. Most of them explicitly state that a violation of a provision may not be a basis for discipline. Their purpose is entirely aspirational. Their tone and format are clearly those of standards, not rules. See PROFESSIONALISM COMM., AMERICAN BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM (1996); ILLINOIS STATE BAR ASSOC. SPECIAL COMM. ON PROFESSIONALISM, THE BAR, THE BENCH AND PROFESSIONALISM IN ILLINOIS: PROUD TRADITIONS, TOUGH NEW PROBLEMS, CURRENT CHOICES (1987); Symposium, *Legal Professionalism*, 32 WAKE FOREST L. REV. 613 (1997); Mark A. Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 115 (1995); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 956 (1995). See also Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809 (1998).

Rules are the new tools of measurement for lawyer conduct. In many respects, the courts and disciplinary authorities apply them just as they would other codes of law.<sup>89</sup>

*B. How Changes in the Lawyer Disciplinary System  
Contributed to the Transition from Standards to Rules*

Lawyer discipline in the United States has always been an embarrassment. Prior to the 1870s and the institutionalization of the legal profession, no formal mechanisms for discipline appear to have existed.<sup>90</sup> To the extent discipline was imposed at all, it took place locally and informally. Presumably, a lawyer who violated the norms of the community within which she practiced suffered informal exclusion by its members.<sup>91</sup> On occasion, she may have been formally exiled from the community by disbarment or censure. In general, however, there were no formal mechanisms for lawyer discipline just as there were no formal mechanisms for the admission of lawyers, such as state-wide judicially administered procedures.<sup>92</sup>

89. Many courts, especially in the context of disqualification motions, have pointedly stated that lawyer codes of conduct are "guidelines" to inform their decisionmaking, freeing the courts from the interpretative restraints associated with statutes. See, e.g., *Niesig v. Team 1*, 558 N.E.2d 1030, 1032 (N.Y. 1990). While such statements are correct, they do not diminish the observation that the courts generally treat lawyer codes as "rules," routinely employing the interpretive techniques associated with statutory construction such as incorporating caselaw, disciplinary opinions, legislative history, academic literature, and public policy into the process of decisionmaking. See, e.g., *United States v. Hammad*, 846 F.2d 854, 859 (2d Cir. 1988), *rev'd*, 858 F.2d 834, 837 (2d Cir. 1988). For an illuminating discussion of the problems associated with interpreting lawyer codes of conduct, see Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989), and Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 313-17 (1988). See also Robert P. Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 688 (arguing that the Disciplinary Rules should be "interpreted as a statute").

90. See Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (1994). Before the 1870s,

[l]awyers [were] subject to the summary power of the judges in whose courts they practiced but the proceedings were ad hoc, i.e., dependent upon those judges to initiate them. Thus, it is not surprising that, [d]iscipline by the courts was invoked only in rare and extreme cases.'

*Id.* at 917 (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 185 (1953)). See generally THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA (W. Gawalt, ed. 1984); Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 J. AM. LEGAL HIST. 269 (1971).

91. See RHODE & LUBAN, *supra* note 76, at 847 (noting "[c]ommunity disapproval was the primary sanction for professional misconduct . . ."). In smaller communities, this is still true, at least for professionalism-type violations such as incivility. See DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 9-11, 16-17, 142-45 (1990).

92. See generally Devlin, *supra* note 90.

Lawyer disciplinary systems became somewhat more formalized in the early twentieth century, especially in those jurisdictions that had unified bars.<sup>93</sup> In almost all states, however, bar association grievance committees were the engines of the disciplinary system. Committee members conducted investigations, heard the testimony of witnesses, and rendered judgments.<sup>94</sup> Depending on the severity of the sanction imposed, a formal court approval might be necessary for the sanction to become effective.<sup>95</sup> On occasion, these committees abused their authority by disciplining lawyers for their political beliefs or social activism.<sup>96</sup>

The sorry state of discipline became a matter of public scandal in the early 1970s, when the ABA released a nation-wide study prepared by a blue-ribbon commission chaired by former Supreme Court Justice Tom Clark. The Clark Commission did not mince words, describing the state of lawyer discipline as a "scandalous situation."<sup>97</sup> Discipline in most states was erratic. Investigations took too long. Relying on volunteers produced flawed outcomes. Local grievance committees too often indulged their members' biases, engaged in rampant favoritism, and meted out widely different sanctions in the same jurisdiction for comparable offenses. Sanctions for similar conduct also differed greatly from state to state. Regardless of whether a lawyer's conduct was measured by standards or rules, the disciplinary system was in shambles.<sup>98</sup>

The impetus for overhaul increased as a result of several Supreme Court decisions in which the Court held that the Sherman

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93. See *id.* at 920; RHODE & LUBAN, *supra* note 76, at 847-48.

94. See Devlin, *supra* note 90, at 919; see also ABA SPECIAL COMM. ON EVAL. OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS 5-6 (1970) [hereinafter COMM. ON EVAL. OF DISCIPLINARY ENFORCEMENT].

95. See Devlin, *supra* note 90, at 919.

96. In describing the disciplinary system in the 1960s, Auerbach observed:

Discipline still reflected the ethnic and economic divisions within the bar: those who administered discipline remained a class apart from those who received it. Professional associations still represented a 'white, wealthy, and politically conservative' constituency that was determined to resist the political activism of those who were often not white, usually not wealthy, and invariable not politically conservative.

AUERBACH, *supra* note 38, at 292 (citing Christopher S. Lyman, *State Bar Discipline and the Activist Lawyer*, 8 HARV. C.R.-C.L. L. REV., 384-85, 392 (1973)); David N. Rockwell, Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 301-03, 309, 312-14 (1970).

97. See COMM. ON EVAL. OF DISCIPLINARY ENFORCEMENT, *supra* note 94, at 1. See generally WOLFRAM, *supra* note 38, § 3.1 at 80.

98. See COMM. ON EVAL. OF DISCIPLINARY ENFORCEMENT, *supra* note 94, at 25-27, 30-33, 48-54.

Antitrust Act applied to professions.<sup>99</sup> The Court's decision in *Goldfarb v. Virginia State Bar*<sup>100</sup> particularly alarmed bar association grievance committees. In that case, the Court held that a bar association's maintenance of a suggested fee schedule for routine legal services, such as residential house closings, violated the Sherman Act.<sup>101</sup> It seemed only a matter of time until a similar claim was successfully raised about other bar association activities including disciplinary enforcement.<sup>102</sup> In many states, it was questionable whether the members of bar association grievance committees qualified as state actors entitled to immunity from the antitrust laws.<sup>103</sup>

Adding to the bar associations' concern about potential liability and treble damages awards in private antitrust actions was the clearly expressed interest of the Federal Trade Commission and the Antitrust Division of the Department of Justice in bar association activities. Both government agencies took a dim view of activities having an anti-competitive impact, including the adoption and enforcement of specific provisions in lawyer codes of conduct.<sup>104</sup>

The stinging criticisms of the Clark report, the failure of the bar associations' informal systems of lawyer discipline, and the associations' fear of possible antitrust liability eventually led to the establishment of formal regulatory systems for lawyer discipline. In most states, the courts assumed the responsibility for administering the new systems. The process of discipline became regularized, and due process values were incorporated in the system's procedures.<sup>105</sup> Most importantly, the disciplinary agencies hired a full-time staff of lawyers to investigate and prosecute cases. The professional standing of these lawyers within the legal community legitimized the disciplinary process in a way that the informal system had not.<sup>106</sup> The creation of this cadre ultimately led to the establishment of two

99. See, e.g., *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *National Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

100. 421 U.S. 773 (1975).

101. *Id.*

102. See, e.g., Paul H. Francis & Jennifer J. Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 WILLAMETTE L.J. 221 (1977); Douglas V. Rigler, *Professional Codes of Conduct after Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185 (1975).

103. See, e.g., *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See also WOLFRAM, *supra* note 38, § 2.4.2 at 42-43.

104. For a detailed chronology of their actions, see Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, \_\_ GEO. J. LEGAL ETHICS \_\_ n. 139 (forthcoming, 2000). See also WOLFRAM, *supra* note 38, § 2.4.1 at 38-41, nn. 40-41.

105. See Devlin, *supra* note 90, at 928-29.

106. See *id.* at 926.

separate professional associations of bar counsel and of lawyers who regularly defend attorneys in disciplinary proceedings.<sup>107</sup>

The regularization and professionalization of the disciplinary system contributed significantly to the move from standards to rules.<sup>108</sup> Prosecuting lawyers for violating rules is more just than prosecuting them for violating standards for three reasons. First, it gives the bar counsel objective measures by which to judge the conduct of the lawyer during the investigative phase of the disciplinary process. Rules cabin the bar counsel's discretion far better than standards. Second, the rules' specificity and detail facilitate a vigorous defense by providing non-ambiguous measurements by which to test the bar counsel's allegations.<sup>109</sup> Third, prosecuting lawyers for violating rules circumscribes the scope of deliberation by the trier of fact.

Determining guilt by measuring the lawyer's conduct against a set of rules promotes objectivity in an environment where objectivity is often difficult to maintain.<sup>110</sup> In a multitude of ways, a

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107. They are, respectively, the National Organization of Bar Counsel, see COMM. ON EVAL. OF DISCIPLINARY ENFORCEMENT, *supra* note 94, at 98, and the Association of Professional Responsibility Lawyers (APRL), see Seth Rosner, *APRL in Paris*, 7 PROF. LAW., Aug. 1996, at 15; Seth Rosner, *A Decade of Professionalism*, 6 PROF. LAW., Aug. 1995, at 2.

108. Precisely how successful they have been in improving the efficiency of the disciplinary system is not all together clear. See AMERICAN BAR ASS'N COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT TO THE HOUSE OF DELEGATES x-xii, 36, 40-41 (1991); AMERICAN BAR ASS'N COMM'N ON PROFESSIONS IN THE PUB. SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10-19 (1986); Timothy K. McPike & Mark I. Harrison, *Lawyer Discipline Since 1970*, in ALI-ABA COMM. ON CONTINUING PROF. EDUC., LAW PRACTICE QUALITY EVALUATION: AN APPRAISAL OF PEER REVIEW AND OTHER MEASURES TO ENHANCE PROFESSIONAL PERFORMANCE 197-98 (1987).

109. Professor Zacharias has made a similar point in discussing disciplinary proceedings:

The ability to establish code violations and uphold convictions depends on the presence of a rule with sufficient scope to cover the offending conduct, but which defines the elements of the offense in a way susceptible of proof. The more objective the elements and the easier it is for enforcers to find evidence . . . the more likely it is that enforcers will seek and be able to maintain a conviction. The enforceability of professional regulations, therefore, should vary directly—though perhaps not proportionally—with the specificity of the regulations.

Zacharias, *supra* note 32, at 252-53.

110. As Professor Wolfram has observed:

Unnecessary breadth is to be regretted in professional rules that can be used to deprive a person of his or her means of livelihood through sanctions that are universally regarded as stigmatizing. Vague mandatory rules for lawyers create several difficulties. Plainly, they can be applied corruptly or for reasons of impermissible bias. For example, vague rules have fed charges, whether true or not, that the lawyer codes are used selectively against

disciplinary proceeding is a trial by one's peers. Other lawyers are the trier of fact and law as well as the sanctioning body. The decisionmaker and the lawyer-respondent are linked by common professional training, namely, law school. Depending upon the circumstances of the charges, they may share practice experiences (*e.g.*, trial work, transactional representation, etc.) practice settings (*e.g.*, solo, small firm, large firm, etc.) and areas of concentration (*e.g.*, criminal, family, real estate law, etc.). They frequently practice in the same geographic area (*e.g.*, county, town, city). In many instances, the trier approaches the task of fact finding and sanctioning with a sentiment best expressed as "there but for the grace of God, go I."<sup>111</sup> Using rules rather than standards to measure the lawyer's conduct encourages the trier of fact to disregard these common ties. It facilitates a more objective evaluation.

In short, the transition from standards to rules was a synergistic process in which the changes in the lawyer disciplinary system played an important role. Transferring responsibility for administering the system from bar association committees to the courts ultimately resulted in significant changes in the procedures used to discipline lawyers and in the substance of the charges brought against them. It diminished the possibility of impermissible bias in the commencement of the proceedings and in the investigative, fact-finding, and sanctioning stages. Formal judicial oversight of the disciplinary system led to the creation of a cadre of professional bar counsel.

### *C. How Legal Education Contributed to the Transition from Standards to Rules*

For most of the twentieth century, legal educators did not regard professional responsibility as a subject meriting serious study.<sup>112</sup> An occasional law school offered a course in legal ethics,

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lawyers who defend unpopular causes or clients. Vague phrases are also objectionable because they substantially dilute the procedural protections that otherwise narrow the area within which agencies could act arbitrarily or mistakenly.

WOLFRAM, *supra* note 38, § 3.3.1 at 87 (footnotes omitted).

111. I can personally attest to the pervasiveness of the sentiment, having served for six years as a member of a disciplinary committee in New York. In all candor, I must also acknowledge whole-heartedly sharing in the sentiment during a number of proceedings.

112. See Russel G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 722 (1998) (explaining that limited attention has been given to the instruction of legal ethics in the twentieth century).

but it was not mandatory.<sup>113</sup> At its best, the course consisted of a rote introduction to a code of lawyer conduct and, at its worst, of the tired war stories of a distinguished local lawyer, judge, or alumnus. The course lacked any semblance of serious intellectual content. Moreover, scholarly interest in the area was virtually nil.<sup>114</sup> In sum, neither the full-time faculty nor the student body took professional responsibility seriously.

The notorious involvement of lawyers in the Watergate scandal prompted the ABA to amend its accrediting standards in 1974 to "require for all student candidates for a professional degree instruction in the duties and responsibilities of the legal profession."<sup>115</sup> Initially, legal educators were generally hostile to the amendment, viewing it as an intrusion into their jealously guarded prerogative of academic freedom.<sup>116</sup> In a response that Freudian analysts would undoubtedly characterize as passive aggressive behavior, law school deans and faculties signaled their displeasure by offering professional responsibility as a one-credit course. Frequently, it was taught by local lawyers or judges as adjunct faculty members or by full-time junior faculty members as a rite-of-passage. Not surprisingly, surveys showed that the students viewed legal ethics courses as "requiring less time, as substantially easier, as less well taught, and as a less valuable use of class time" than their other courses.<sup>117</sup>

The hostility of the deans, faculty members, and students ultimately diminished. Today, professional responsibility is a flourishing academic enterprise. The Section on Professional Responsibility is one of the largest sections of the American Association of Law Schools (AALS). The AALS and law schools regularly sponsor conferences devoted to legal ethics issues. Law

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113. See Geoffrey C. Hazard, Jr., *Foreword: The Legal Profession: The Impact of Law and Legal Theory*, 67 *FORDHAM L. REV.* 239, 240 (1998) (citing Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 *J. LEGAL EDUC.* 31, 31 (1992); Pearce, *supra* note 112, at 722-25 (discussing the role of legal ethics in legal education in the twentieth century). See generally ROBERT BOCKING STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

114. For an insightful history of the teaching of professional responsibility in U.S. law schools, see James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprenticeship System in the Academic Atmosphere*, 60 *U. CIN. L. REV.* 83 (1991) and Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 *J. LEGAL EDUC.* 31 (1992).

115. STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(a)(iii) (A.B.A. 1974).

116. The accrediting standards make no mention of any other required subject matter. See K.C. Cole Jansenn, "We'll Murder Them in August": *Who Decides How Ethics Should be Taught?*, 4 *JURIS DR.* 19, 20 (Jul.-Aug. 1974).

117. See Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 *AM. B. FOUND. RES. J.* 247, 258.



reviews include single articles devoted to the subject as part of their regular issues<sup>118</sup> and publish entire volumes devoted to it.<sup>119</sup> Five law journals publish only articles on professional responsibility.<sup>120</sup> Academics write treatises on it<sup>121</sup> and casebooks abound.<sup>122</sup> The ultimate proof of its academic respectability may be the recent acknowledgment of professional responsibility as a subject worthy of game theory<sup>123</sup> and law and economic<sup>124</sup> analysis.

All of this activity has contributed enormously to the transition from standards to rules. The more seriously the academic

118. See, e.g., Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65 (1997); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991).

119. See, e.g., Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998); Special Issue, *Institutional Choices in the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996); Symposium, *W.M. Keck Foundation Forum on the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 1 (1996); Symposium, *Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. Summer-Autumn 1995, 1; Symposium, *Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995); Symposium, *The Future of the Legal Profession*, 44 CASE W. RES. L. REV. 333 (1994).

120. They are *The Georgetown Journal of Legal Ethics*, *The Journal of the Legal Profession*, *The Journal of the Institute for the Study of Legal Ethics*, *The Notre Dame Journal of Law, Ethics, and Public Policy*, and *The Professional Lawyer*.

121. See, e.g., GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* (2d ed. 1990 & 1998 Supp.); WOLFRAM, *supra* note 38.

122. See, e.g., NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* (1996); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* (5th ed. 1998); HAZARD ET AL., *supra*, note 70; THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (6th ed. 1995); JOHN THOMAS NOONAN & RICHARD W. PAINTER, *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* (1997); RHODE & LUBAN, *supra* note 76.

123. See, e.g., Ian Ayres, *Response to Painter*, 65 FORDHAM L. REV. 201 (1996); Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 FORDHAM L. REV. 149 (1996).

124. See, e.g., George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273 (1998); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990); Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1 (1995); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123 (1988). Law and economics scholars are also beginning to study the regulation of the legal profession in Europe. See *REGULATION OF THE PROFESSIONS: A LAW AND ECONOMICS APPROACH TO THE REGULATION OF ATTORNEYS AND PHYSICIANS IN THE U.S., BELGIUM, THE NETHERLANDS, GERMANY, AND THE U.K.* (Michael Faure et al. eds. 1993).

community treats legal ethics, the more it is perceived *as law, as rules*.

D. *How the Courts Contributed to the Transition from Standards to Rules*<sup>125</sup>

The courts perform two distinct functions with respect to lawyer codes of conduct and the regulation of the legal profession. First, as noted above, they bear the principal responsibility for the codes' adoption and enforcement.<sup>126</sup> In short, they command and control. Their contribution to the transition from standards to rules, however, extends beyond those responsibilities. Forty-seven states require that applicants for admission to the bar pass the MultiState Professional Responsibility Examination (MPRE).<sup>127</sup> Until March 1999, the MPRE tested a candidate's knowledge only of the Model Code, Model Rules, and the ABA Model Code of Judicial Conduct.<sup>128</sup> Thus, the courts seized upon demonstrated knowledge of the lawyer codes as being a unique marker of fitness to practice law. A review of the test-preparation literature published by the National Conference of Bar Examiners and the study aids produced by the commercial bar study companies show that they approach the MPRE as a rules-based test. The courts' regulatory insistence on the importance of familiarity with the lawyer codes does not end with the admission process. Approximately thirty-seven states now require that lawyers participate in Continuing Legal Education (CLE) programs as a condition of licensure.<sup>129</sup> A state-by-state survey indicates that instruction in legal ethics is a mandatory requirement in each jurisdiction.<sup>130</sup>

Second, the courts interpret the codes in the course of ancillary proceedings related to the adjudication of disputes between parties

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125. Unless otherwise indicated references to "courts" will be to the state courts. From a historical perspective, the federal courts have played a diminished role in the adoption and the enforcement of lawyer codes of conduct. *See generally* Green, *supra* note 118.

126. *See supra* notes 33-34 and accompanying text.

127. NATIONAL CONFERENCE OF BAR EXAMINERS, MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION: 1999 INFORMATION BULLETIN 1 (1998).

128. In response to the repeated criticism that the MPRE's coverage was too limited, the National Conference of Bar Examiners agreed to modify the examination by including new subject matter areas. *See id.* at 29-31; Memorandum from Erica Moeser to Law School Deans (Aug. 21, 1997) (on file with author). The first examination to test on the new areas was administered in March, 1999. *See Moeser, Memorandum, supra*. For a thoughtful criticism of the MPRE, see Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 397 (1998).

129. *See* ABA/BNA LAW. MANUAL ON PROF. CONDUCT 21:3001-13 (1999).

130. *See* Interview with Arthur Garwin, Professionalism Counsel, ABA Center on Professional Responsibility, February 12, 1999.

in a litigation (e.g., motions to disqualify, impose sanctions, or approve fees, etc.) or in the course of primary proceedings related to the adjudication of disputes between lawyers and their clients (e.g., an action to recover fees or an action for malpractice or breach of a fiduciary duty, etc.)<sup>131</sup> Code provisions thus directly enter the judicial arena where litigants can debate their application and meaning; trial courts can interpret them; appellate courts can review that interpretation; and scholarly authors can comment upon the courts' interpretation and review.<sup>132</sup> The extensive "judicialization" of professional responsibility is a distinctive feature of the U.S. legal system and has influenced the transition from standards to rules.

*E. How Other Activities of the Organized Bar Contributed  
to the Transition from Standards to Rules*

The ABA, state and local bar associations, and the American Law Institute (ALI) have contributed to the transition from standards to rules in a variety of ways. The ABA's establishment and support of the Center on Professional Responsibility (Center) has played a critical role. The ABA generally addresses substantive issues within different practice areas through the activities of its thirty-four sections, standing committees, and special committees and commissions. Their subject matters run the gamut from Air Force law to zoning.<sup>133</sup> From time to time, the ABA appoints commissions to study matters of urgency cutting across the interests of several sections or of particular importance to the legal profession.<sup>134</sup>

131. Cf. WOLFRAM, *supra* note 38, § 2.6.1 at 48-53 (describing the most common nondisciplinary uses of lawyer codes of conduct).

132. See, e.g., Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71 (1996); Susan R. Martyn, *Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green*, 65 FORDHAM L. REV. 131 (1996); Kenneth L. Penegar, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831 (1995).

133. See 1997-1998 ABA DIRECTORY viii-ix (1997).

134. For example, in August 1998, the President of the ABA appointed a Commission on Multidisciplinary Practice to study, *inter alia*, whether and to what extent the Model Rules should be amended to permit lawyers to enter into partnerships with non-lawyers for the delivery of legal services and to share legal fees with nonlawyers. See ABA COMM. ON MULTIDISCIPLINARY PRACTICE, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS (visited July 26, 1999) <<http://www.abanet.org/cpr/multicomreport0199.html>>. For a complete description of the issues involved in multidisciplinary practice, the Commission's proceedings, and its Report with Recommendation, see Daly, *supra* note 104.

In large measure, the establishment of the Commission was prompted by the activities of the Big 5 accounting firms outside the United States. In many other parts of the world, lawyers and nonlawyers may enter into business, financial, and employment relationships related to the delivery of legal services that U.S. codes of conduct prohibit. See *id.* See also Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 747-48 (1994); John Gibeaut, *Squeeze Play: As Accountants*

Only professional responsibility, however, is sufficiently important to be separately housed in its own center within the ABA. The Center sponsors conferences, publishes books, and supports numerous ABA initiatives related to legal ethics. It maintains an ethics hotline that lawyers may call for assistance in resolving ethical dilemmas. Moreover, the Center's leadership role extends to the entire U.S. professional responsibility community since it works closely with state bar associations and state courts in a wide variety of ethics-related activities.<sup>135</sup> The Center has played an important role in persuading the states to adopt the Model Rules and regularly publishes high quality materials relating to their application and interpretation.<sup>136</sup> In addition, the ABA sponsors standing committees on professional discipline.

Many state and local bar associations support at least one committee whose function is to respond to inquiries from lawyers about current ethical dilemmas.<sup>137</sup> Most committees issue both informal and formal opinions; some also sponsor an ethics hotline to answer telephone inquiries. In addition, larger bar associations may also appoint separate committees on lawyer discipline and professional responsibility. Bar association journals publish articles or regular columns on ethics, professionalism, and malpractice. These topics are often the single subject of bar association programs. Programs devoted to other subjects often include

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*Edge into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault but Also Limited by Professional Rules*, A.B.A.J., Feb. 1998, at 24; David M. Trubek, et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 434-35 (1994); Gianluca Morello, Note, *Big Six Accounting Firms Shop World Wide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190 (1997). For an overview of recent developments concerning lawyer-accountant multidisciplinary practices, see Laurel S. Terry, *What If . . . ? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership Bans*, at nn. 13-28 in PRIVATE INVESTMENTS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1998 (1998).

135. For a more complete description of the Center's activities, see <<http://www.abanet.org/cpr/cpr.html>> (visited Aug. 4, 1999).

136. E.g., MODEL RULES OF PROFESSIONAL CONDUCT, *supra*, note 18; ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (1999).

137. One telling indicia of the importance the organized bar attaches to the work of these committees is the extent to which the opinions are published and the ease with which they can be accessed. See Zacharias, *supra* note 32, at 238 n.45. The full texts of the opinions are published in *The National Reporter on Legal Ethics and Professional Responsibility*, on bar association web sites, and in the Westlaw and Lexis electronic databases. The ABA/BNA *Lawyers' Manual on Professional Conduct* reprints the full text of the ABA Committee on Ethics and Professional Responsibility and a synopsis of state and local opinions. In addition, there are specialized treatises devoted to the opinions. E.g., THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY: OPINIONS, COMMENTARY, AND CASELAW (Mary C. Daly ed. 1997 & 1999 Supp.).

professional responsibility as a special, carve-out topic. Viewed as a whole, these activities stress the importance of knowledge of the *rules of ethics*.

In addition to the ABA and state and local bar associations, the ALI has also contributed significantly to the transformation from standards to rules.<sup>138</sup> Continuously over the course of the last thirteen years, the ALI has brought together leading scholars, judges, and practicing lawyers for the purposes of drafting the Restatement of the Law Governing Lawyers.<sup>139</sup> This task has not been an easy one. Their proposals have received wide-spread publicity and have been scrutinized by academics, bar groups, and lawyers from all practice settings.<sup>140</sup> By its very existence, the ALI project reflects the fact of the transformation. After all, it is engaged in *restating the law*, not standards.<sup>141</sup> Even Professor Wolfram, the Reporter of the Restatement, has expressed a certain uneasiness with its rules' schema.<sup>142</sup> He has warned that the Restatement "will and should disturb those who are concerned with legal ethics" because it omits "every sort of normative statement or quality ascription that one might apply to the actions of a lawyer or law firm except narrowly legal statements or ascriptions."<sup>143</sup>

### III. WHY A SIMILAR TRANSFORMATION HAS NOT OCCURRED IN THE CIVIL LAW COUNTRIES

The thesis elaborated in this article is nuanced. By no stretch of the imagination does the thesis advance the proposition that non-

138. See generally Symposium, *The American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 567 (1998) (discussing the role of the American Law Institute and the Restatements in the development of American law).

139. See Latta, *supra* note 83, at 699-700.

140. See, e.g., Symposium, *Restatement of the Law Governing Lawyers*, 10 GEO. J. LEGAL ETHICS 541 (1997); Stephen M. Bainbridge, *Insider Trading Under the Restatement of the Law Governing Lawyers*, 19 J. Corp. L. 1 (1993); Latta, *supra* note 83; Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903 (1993).

141. The Director of the ALI is Geoffrey C. Hazard, one of the most distinguished academics in the United States in the field of professional responsibility. In his Foreword to the Proposed Final Draft No. 1, Professor Hazard acknowledges the rule-like character of the MODEL CODE and MODEL RULES. See RESTATEMENT OF THE LAW GOVERNING LAWYERS xxii-xxiii (Proposed Final Draft No. 1 1996). See also Zacharias, *supra* note 32, at 223 ("Over time, the professional codes governing lawyer behavior have become statutory in form. Modern codes increasingly tell lawyers how they must act.").

142. See Charles W. Wolfram, *Legal Ethics and the Restatement Process—The Sometimes—Uncomfortable Fit*, 46 OKLA. L. REV. 13, 13 (1993).

143. *Id.*

U.S.-trained lawyers are unethical or even insensitive to ethical issues. It argues rather that the standards and rules of legal ethics<sup>144</sup> are not as central to the identity and training of legal professionals in the civil law countries as they are in the United States. In certain respects, this assertion rests on negative inferences drawn from observations about foreign legal education, litigation, and disciplinary systems. As discussed above, professional responsibility is a "crown jewel" of the U.S. legal system. It is taught in law schools, fought over in the courts, and enforced through court-supervised agencies staffed by professionals.<sup>145</sup> Legal ethics does not occupy this privileged position in other parts of the world.<sup>146</sup>

### A. *Legal Education and Professional Training*

The legal education of almost all foreign lawyers begins at the university level, where law is taught as an undergraduate major.<sup>147</sup> The overwhelming majority of graduates who earn a degree in law do

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144. See *supra* notes 22-31, 32-36 and accompanying text.

145. Of course, in the real world, the "crown jewel" is blemished. Too often lawyers ignore professional codes of conduct or fail to interpret them correctly; courts overlook ethical violations; disciplinary authorities are understaffed and underfunded; and some law schools still send the wrong message about the subject's importance by assigning professional responsibility courses to junior or adjunct faculty who fail to teach with the appropriate degree of academic rigor.

146. I am deliberately excluding from the scope of this essay any observations about the codes of conduct that govern lawyers licensed to practice in the Eastern European countries and the member states of the Confederation of Independent States. The professional challenges faced by lawyers in these countries merits a separate article. See, e.g., Lisa A. Granik, *Legal Education in Post-Soviet Russia and Ukraine*, 72 OR. L. REV. 963 (1993); William D. Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 LAW & POLY INT'L BUS. 1019 (1995); Andras Sajo, *The Role of Lawyers in Social Change: Hungary*, 25 CASE W. RES. J. INT'L L. 137 (1993). For a fascinating account of the drafting of a lawyer's code of conduct in an Eastern European country, see Ronald D. Rotunda, *Legal Ethics, The Czech Republic and the Rule of Law*, 7 PROF. LAW. at 1, Aug. 1996. See also Michael Burrage, *Advokatura: In Search of Professionalism and Pluralism in Moscow and Leningrad*, 15 L. & SOC. INQUIRY 433 (1990); George A. Critchlow, *Teaching Law in Transylvania: Notes on Romanian Legal Education*, 44 J. LEGAL EDUC. 157 (1994).

147. See GLENDON ET AL., *supra* note 7, at 130-33; RUDOLPH B. SCHESINGER ET AL., *COMPARATIVE LAW* (5th ed. 1988); Jutta Brunnée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399, 401 (1992); Francis H. Heller & John C. Peck, *American Law Teachers in an Austrian University: Some Observations Gleaned from a Decade of the Kansas-Vienna Exchange Program*, 42 U. KAN. L. REV. 507, 512 n. 16 (1994); Juergen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301 (1993).

not become practicing lawyers.<sup>148</sup> Most of them pursue careers in business or government where they make extensive use of their legal knowledge.<sup>149</sup> Undergraduate education in law is almost entirely theoretical, and practice-related perspectives are largely unknown.<sup>150</sup> Students leave the university with a "facility in the 'grammar of law' . . . and a nodding familiarity with the practice aspects of law."<sup>151</sup> Given the structure and goals of the undergraduate program, therefore, it is not surprising to learn that legal ethics seems to play little or no role in the graduates' education at most institutions.<sup>152</sup> Occasionally, undergraduates pursuing a law degree may enroll in a deontology course. Deontology, however, is the theory or study of moral obligation.<sup>153</sup> In spirit and in substance, it is much closer to a course in jurisprudence in a U.S. law school than to a course in professional responsibility.

Students who want to become practicing lawyers must pursue professional training. In some countries, these students begin their professional training after completing their undergraduate degree.<sup>154</sup> In other countries, they can enroll in a specialized series of training

148. See generally Brunnée, *supra* note 147, at 400-26.

149. I have explored elsewhere how this pool of law-trained graduates has impacted the delivery of legal services outside the United States. See generally Daly, *supra* note 59, at 1100-02. See also LAWYERS IN SOCIETY: AN OVERVIEW 134, 165 n. 25, 299-303 (Richard L. Abel & Philip S. C. Lewis eds., 1995).

150. See Daly, *supra* note 59, at 1101.

151. GLENDON ET AL., *supra* note 7, at 78.

152. There appears to be no central repository housing the curricula of foreign law schools. However, I have examined two exhaustive compilations and found no significant entries to suggest that courses similar to U.S. law school offerings in legal ethics or professional responsibility are required or even available in most civil law countries. See THE EUROPEAN LAW STUDENTS' ASSOCIATION, GUIDE TO LEGAL STUDIES IN EUROPE 1996-1997 (1996); THE LAW ASSOCIATION FOR ASIA AND THE PACIFIC, DIRECTORY OF LAW COURSES IN THE ASIA AND WEST PACIFIC REGIONS (6th ed. 1997). See also Hilmar Fenge et al., *Legal Education and Training in Europe: Germany*, 2 INT'L J. LEGAL PROF. 95 (1995); Tom Latrup-Pedersen, *Legal Education and Training in Europe: Denmark*, 2 INT'L J. LEGAL PROF. 79 (1995); Jean-Claude Masclat et al., *Legal Education and Training in Europe: France*, 2 INT'L J. LEGAL PROF. 7 (1995); Joe Verhoeven & Henri Simonart, *Legal Education and Training in Europe: Belgium* 2 INT'L J. LEGAL PROF. 25 (1995).

The Netherlands is an exception to this observation. As part of the advocate's professional training, the candidate for admission must take a mandatory course in "rules of conduct." See Jaap E. Doek, *Legal Education and Training in Europe: The Netherlands*, 2 INT'L J. LEGAL PROF. 25, 37-38 (1995). Several German universities have established the Institute für Anwaltsrecht (Institute for Lawyer Law) that offers instruction in legal ethics as a component substantive law offerings. See Letter from Laurel S. Terry to Mary C. Daly (Feb. 15, 1999) (on file with the author). In Professor Terry's view, professional responsibility instruction "is a continuum, Europe is behind us, but moving in our direction . . ." *Id.*

153. See OXFORD ENGLISH DICTIONARY (15th ed. 1994). See generally Symposium, *Legal Ethics in Europe*, 4 INT'L J. LEGAL PROF. 5 (1997).

154. See Daly, *supra* note 59, at 1101.

courses after two or more years of undergraduate education.<sup>155</sup> Thus, whatever study of legal ethics takes place usually occurs during the period of the students' professional training. The influence of the bar over the structure and content of the professional training stage is generally far greater than that of the university.<sup>156</sup> Comparatively little or no academic energy is spent in instructing future lawyers about their professional responsibilities. The absence of such instruction sends a clear message about the importance the scholarly community attaches to the subject matter, as does the absence of treatises and journals devoted to it. Moreover, these absences rob the legal profession of a powerful tool for reflection, self-evaluation, and, if needed, reform. The U.S. legal academic community has made weighty contributions to the debates on the role of lawyers in society and the rules that should govern their conduct. Significantly, it has made these contributions by serving the profession both as an "outside agitator," for example, Professor Freedman's work on the ethical dilemmas of criminal defense lawyers<sup>157</sup> and as "inside advisor," for example, the work of Professors Morgan, Leubsdorf, and Wolfram as reporters for the Restatement of the Law Governing Lawyers, and Professor Hazard as a reporter for the Special Commission on Professional Standards.<sup>158</sup> Moreover, the presence of professional responsibility teachers in the classroom during law students' formative years contributes to a healthy skepticism about and questioning of the legal profession's sometimes too lofty rhetoric in defense of its own self-interest.

This skepticism and questioning appears to be lacking during the period of professional training of foreign lawyers. "Ethics" training seems to be sporadic and primarily concerned with technical code provisions relating to record keeping, mandatory insurance requirements, and the application of mandatory fee

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155. See generally CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 115-16 (1993); 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* (Richard L. Abel & Philip S. C. Lewis 1988); *THE LEGAL PROFESSIONS IN THE NEW EUROPE* (Alan Tyrrell & Zahid Yaqub eds. 1993); Brunnée, *supra* note 147, at 400-26; Ostertag, *supra* note 147, at 301.

156. See generally Symposium, *Legal Education and Training in Europe*, 2 *INT'L J. LEGAL PROF.* 5 (1995).

157. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *MICH. L. REV.* 1469 (1966). For an appreciation of Professor Freedman's contributions, see Charles W. Wolfram, *The U.S. Law of Client Confidentiality: Framework for an International Perspective in RIGHTS, LIABILITY, AND ETHICS*, *supra* note 12, at 141-45.

158. See *supra* notes 138-43 (discussing the Restatement) and WOLFRAM, *supra* note 38, § 2.6.4, at 60-63 (discussing the contribution of the Special Commission to the drafting of drafting the Model Rules).



schedules.<sup>159</sup> One noted German commentator observed in 1997, "German advocates tend to know little about professional and particularly ethical rules . . . ."<sup>160</sup>

### B. *The Effect of the Divided Structure of the Legal Profession*

How the rules/standards dichotomy influences the perception of codes of lawyer conduct is not fully understandable without an appreciation of the divided structure of the legal profession and the geographic and jurisdictional limitations on the right to practice commonly found in the civil law countries. As a distinguished sociologist of the legal profession has insisted, context is the "deciding influence [on codes of lawyer conduct]. In the European context there is a clear division between the civil law and common law countries and the different approaches that each [has] to rules of conduct and the business of professional discipline."<sup>161</sup> There is no single "legal profession" in most civil law countries. The functions typically associated with the practice of law in the United States such as advocacy in court, counseling on business transactions, and facilitating the transfer of real and personal property are generally divided among at least three different categories of legal professions: (1) those with the "right of audience" who may represent clients in court (*e.g.*, *advocats* in France, *dikigoros* in Greece, and *rechtsanwalts* in Germany);<sup>162</sup> (2) those who

159. See Symposium, *supra* note 153 (*passim*).

160. Ulrike Schultz, *Legal Ethics in Germany*, 4 INT'L J. LEGAL PROF. 55, 77 (1997). Professor Terry has expressed some reservations about the breadth of Schultz's comment. In Professor Terry's view, German lawyers are more aware of their ethical obligations than Schultz suggests. See Letter of Laurel S. Terry, *supra* note 152.

An observation similar to Schultz's has been made about legal education in the United Kingdom:

[T]he majority of legal practitioners and law students in America "groan" when the subject of ethics comes up. In England there is no groaning for one primary reason, the topic of legal ethics is rarely debated. Whilst lawyers and academics in the United States write, read, study, and discuss their legal ethics extensively, in Great Britain there is almost no professional or academic literature concerning legal ethics. The only ethics offering I could discover at any English university was a single course and the topic was concerning United States legal ethics. In researching for this paper I went to all the major law bookshops and libraries in London only to find the cupboard was bare.

Karen L.K. Miller, *Zip to Nil? A Comparison of American and English Lawyers' Standards of Professional Conduct*, CA32 ALI-ABA 199, 208 (1995).

161. Avrom Sherr, *Dinners, Library Seats, Wigs and Relatives*, 4 INT'L J. LEGAL PROF. 5, 6 (1997).

162. See Anne Boigeol, *The French Bar: The Difficulties of Unifying a Divided Profession*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD, *supra* note 155, at 259;

advise on and document the transfer of real and personal property (e.g., *notaires* in France, Italy, and Spain);<sup>163</sup> and (3) those who counsel clients on business transactions (e.g., the former *avouees* and *conseil juridique* in France).<sup>164</sup> Consequently, at least two or more codes of conduct separately govern the conduct of legal professionals within each country.<sup>165</sup> What is commonly referred to as a “lawyer’s code of conduct” is generally the code applicable only to a lawyer with the right of audience. Furthermore, its contents are often vague. For example, in France, the rules of professional conduct “are nowhere as finely tuned as those in effect in the United

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Takis Kommatas, *The Legal Profession in Greece*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155, at 154; Gerhard Manz & Susan Padman-Reich, *The Legal Profession in Germany*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155, at 131.

163. See *THE FRENCH LEGAL SYSTEM*, *supra* note 155, at 125-29; Luis Algor Cableran, *The Legal Professions in Spain*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155, at 280-99; Rem Danovi, *The Legal Professions in Italy*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155, at 193-211; Pierre Sanglade, *The Legal Professions in France*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155; 116-29 (discussing the legal profession in France); Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 *HASTINGS INT’L & COMP. L. REV.* 389 (1996). See also Stewart Baker & Theodore Barassi, *The International Notarial Practitioner*, 24 *A.B.A. INT’L L. NEWS*, Fall 1995, at 1.

164. See *THE FRENCH LEGAL SYSTEM*, *supra* note 155, at 127-29; Haimo Schack, *Private Lawyers in Contemporary Society: Germany*, 25 *CASE W. RES. J. INT’L L.* 187, 188-90 (1993); Ronald P. Sokol, *Reforming the French Legal Profession*, 26 *INT’L LAW.* 1025 (1992); Terry, *Part I*, *supra* note 12, at 10-11 (discussing the legal profession in Austria). Recent reforms in France resulted in the consolidation of the *avoue*, *conseil juridique*, and *avocat* into the single profession of “*avocat*.” See generally 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD*, *supra* note 155; *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155. However, despite the single title, in the day-to-day practice of law, the distinction between a legal professional who advises businesses on a wide range of commercial matters and the legal professional with a right of audience has not been disturbed. See *THE FRENCH LEGAL SYSTEM*, *supra* note 155, at 122-23, 128. For an excellent introduction to the sociological importance of these distinctions, see Trubek, et al., *supra* note 134; see also Abel, *Transnational Legal Practice*, *supra* note 134.

165. In comparing the duty of loyalty in the U.S. and French legal systems, one commentator noted that “in France the work done by U.S. lawyers is done by eight different professions, including the profession of *notaire*.” Olivier d’Ormesson, *French Perspectives on the Duty of Loyalty: Comparisons with the American View*, in *RIGHTS, LIABILITY, AND ETHICS*, *supra* note 12, at 29. He went on to point out that:

[t]he Code of Conduct governing the notarial attorneys has no specific provisions on conflicts of interest. The notarial attorney simply has to put the interest of his client before his own interest. That is a very general notion, and it does not provide and precise guidance on conflicts of interest. Thus, it is quite common for notarial attorneys in France to represent in the same transaction the seller and the buyer with different and opposing interests.

*Id.* at 30.

States, which still boasts the most developed professional conduct rules in the world."<sup>166</sup> In the close-knit legal communities of the civil law countries, an individual lawyer's decision about how to resolve an ethical dilemma is generally respected—or at least not formally challenged—by the lawyer's "brothers and sisters at the bar."<sup>167</sup> Perfectly capturing the spirit of this professional culture is the observation "conflicts are a matter of [personal] ethics, not law. Conflicts are a matter of your relationship with your client."<sup>168</sup>

Identifying the controlling norms for these lawyers is not an easy task. In some countries, the rules of professional conduct "are handed down from generation to generation as some kind of 'oral law', uncodified and restricted to prohibitions of the most obvious conflicts of interest."<sup>169</sup> In others, such as Italy, the rules of professional conduct "are not clearly specified in any code or statute but are based on a combination of laws, ethical principles, and accepted professional practice."<sup>170</sup> In Mexico, no code exists to govern the conduct of all lawyers admitted to practice in that country.<sup>171</sup> Although the Mexican Bar Association has adopted a code of professional ethics, it governs only the conduct of lawyers who join that voluntary organization and does not have the force of law.<sup>172</sup>

Not only is membership in the legal profession in the civil law countries divided by function,<sup>173</sup> but until recently territorial and jurisdictional limitations were also common in the member states of the European Union, restricting where and in what courts a lawyer could litigate. From a market perspective, these limitations impeded

166. Philippe Sarrailhe, *Application of Professional Conduct Rules in Transnational Affairs*, in SOUTHWESTERN LEGAL FOUNDATION, PRIVATE INVESTMENTS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1995 2-7 (1995).

167. See *infra* note 200 and accompanying text.

168. Justin Castillo, *International Law Practice in the 1990s: Issues of Law, Policy, and Professional Ethics*, 86 AM. SOC'Y INT'L L. PROC. 272, 283 (1992).

169. IVO CAYTAS, TRANSNATIONAL LEGAL PRACTICE: CONFLICTS OF INTEREST IN PROFESSIONAL RESPONSIBILITY 19 (1992). Knowledgeable commentators have made similar observations about the United Kingdom. See Miller, *supra* note 160, at 217 ("English lawyers' ethics are largely unarticulated, they are not rules, rather standards, and even the standards may not be formally expressed.").

170. Stefano Agostini, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach Their Profession Differently*, 10 TEMP. INT'L & COMP. L.J. 329, 337 (1996). While the author characterizes the combination as rules, they are actually standards in the context of this article.

171. See Rona R. Mears, *Ethics and Due Diligence: A Lawyer's Perspective on Doing Business with Mexico*, 22 ST. MARY'S L.J. 605, 611 (1991).

172. See *id.*

173. See generally Leny E. De Groot-Van Leeuwen, *Polishing the Bar: The Legal Ethics Code and Disciplinary System of the Netherlands, and a Comparison with the United States*, 4 INT'L J. LEGAL PROF. 9, 10 (1997); Vittorio Olgiati, *Self-Regulation of Legal Professions in Contemporary Italy*, 4 INT'L J. LEGAL PROF. 89, 91-95 (1997); Schultz, *supra* note 160, at 55-56.

the expansion of individual lawyers' practices and discouraged the growth of law firms.<sup>174</sup> From a cultural perspective, they created mini-communities of lawyers with strong fraternal ties to one another. Traditionally, admission to the bar in a civil law country did not permit a lawyer to exercise his profession throughout a country or in all of its courts. A lawyer was admitted to a particular bar (e.g., the bar of Paris or the bar of Hamburg) and the requirement of singular admission often confined the lawyer's services to a single court (e.g., trial or first appellate level).<sup>175</sup> Partnership among lawyers admitted to different bars was discouraged or even forbidden, making the establishment of national law firms virtually impossible.<sup>176</sup> Many of these restrictions recently have been repealed or rescinded in response to the decisions of the European Court of Justice that facilitated the cross-border delivery of legal services.<sup>177</sup> The German Constitutional Court has also played an important role in loosing the stranglehold of the principal of locality.<sup>178</sup> The practical effect of these decisions was to exempt

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174. Even though there are territorial and jurisdictional limitations on the practice of law in the United States, they have not had the same effect. The ABA Committee on Professional Ethics played a key role in facilitating the growth of interstate law firms. See Mary C. Daly, *Resolving Ethical Conflicts in Multi-Jurisdictional Practice—Is Model Rule 8.5 The Answer, An Answer or No Answer At All?*, 36 S. TX. L. REV. 715, 743-45 (1995). See also Galanter & Palay, *supra* note 57.

175. See generally Andreas G. Junius, *The German System*, in RIGHTS, LIABILITY, AND ETHICS, *supra* note 12, at 59-60 (describing the localization requirement, the singular admission requirement, the residence requirement, and the law office requirement).

176. Lawyers in Italy were forbidden to practice in partnerships, a restriction that clearly impeded the establishment of national law firms. See *infra*, note 181. A ban on branch offices and on national partnerships accomplished a similar result in Germany. See Junius, *supra* note 175, at 60.

177. See Case 107/83, *Ordre des Avocats au Barreau de Paris v. Rechtsanwalt Klopp*, 1984 E.C.R. 2971, [1985] 1 C.M.L.R. 99 (1984) (holding invalid France's limiting lawyer's right of establishment to single Member State); Case 33/74, *J. H. M. van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 298 (1974) (holding that lawyers could directly rely on the EC Treaty provisions relating to establishment (Article 52) and services (Article 59) without need for implementing legislation); *Jean Reyners v. Belgium*, Case 2/74, 1974 E.C.R. 631 [1974], 1974 2 C.M.L.R. 305 (1974) (holding that Article 55's exception for activities relating to "the exercise of official authority" does not permit Member States to deny right of establishment without exception to lawyers from other Member States). For a comprehensive overview of the French rule that was struck down see Jeffrey Mendelsohn, *Recent Development, European Court of Justice: Paris Bar Rule Violates Right of Establishment*, 26 HARV. INT'L L.J. 562, 562-68 (1985). See also Philippe Watson, Annotation, Case 107/83 *Ordre des Avocats au Barreau de Paris v. Onno Klopp*, Judgment of 12 July, 1984, 22 COMMON MKT. L. REV. 736 (1985).

178. See generally Wolgan Kuhn, *Dramatic Developments in the Legal Profession in the Federal Republic of Germany*, 14 INT'L LEGAL PRAC. 94 (1989). See also Wolfgang Kuhn, *New Professional Rules for Attorneys in Germany: The European Court and the*

lawyers licensed in one member state, the home state, from the residence and law office requirements of another member state, the host state. These decisions, of course, put the host state lawyers at a competitive disadvantage. A German-national lawyer admitted to the bar of Hamburg, for example, could provide legal services in Paris and Lyons, but not in Bremen. A French-national lawyer admitted to the bar of Paris could provide legal services in Hamburg, but not in Lyons. To establish a level playing field between national and foreign lawyers, many licensing authorities abolished these traditional practice restrictions, thereby allowing a lawyer to be admitted to the bar of more than one jurisdiction within the member state of which he was a national. The abolition encouraged the rapid expansion of law firms both within the member states and across their borders.

The divided structure and the territorial restrictions obviously had a significant economic impact by limiting the markets in which legal professionals could offer services. Highly restrictive rules on advertising further limited client development.<sup>179</sup> Moreover, the doctrine of incompatible professions acted as an entrepreneurial straightjacket. The doctrine prohibited legal professionals from engaging in any commercial activity that would detract from their standing as a member of a liberal profession. In most countries, the doctrine effectively barred lawyers from having an active ownership interest in any business or being an employee of any business.<sup>180</sup> The cumulative effect of the different restraints was to shrink

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*Federal Constitutional Court Shake the Profession*, 14 INT'L LEGAL PRAC. 48, 51 (1989). For a detailed description of the changes in Germany, see Roger G. Goebel, *Lawyers in the European Community: Progress Toward Community-Wide Rights of Practice*, in RIGHTS, LIABILITY AND ETHICS, *supra* note 12, at 244-45, 259-61; Chris Darbyshire, *Frankfurt: The Next Outpost of Anglo-Saxon Empires*, INT'L FIN. L. REV., Feb. 1991, at 17.

179. See De Groot-Van Leeuwen, *supra* note 173, at 12; Lauren Dobrowski, *Maintaining the Dignity of the Profession: An International Perspective on Lawyer Advertising and Solicitation*, 12 DICK. J. INT'L L. 367 (1994); Schultz, *supra* note 160, at 63. See also LAW WITHOUT FRONTIERS, *supra* note 8, at 85 (Germany); Agostini, *supra* note 170, at 343; Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed but Barriers Remain*, 29 GEO. WASH. J. INT'L L. & ECON. 381, 383 (1995); Albert Tanghe, *Publish and Be Damned - Local Bar Publicity Restrictions*, 1 L. IN EUR. 3 (1990). See generally Barbara Galli, *Italian Firms Face Foreign Invasion*, INT'L FIN. L. REV., May 1998, at 32, 33; Robert Lever, *American Attorneys in Paris*, NAT'L L.J., June 22, 1987, at 1, 42; Sarah Marks, *Finnish Lawyers Face up to Competition*, INT'L Fin. L. Rev., May 1995, at 20, 21; Samantha Wigham, *Foreign Influence Pushes German Lawyers into New Mergers*, INT'L FIN. L. REV., Jan. 1997, at 41, 43; *Austria Bar Dispute*, INT'L FIN. L. REV., June 1994, at 3.

180. See Agostini, *supra* note 170, at 336-37; Daly, *supra* note 59, at 1097-99; Schultz, *supra* note 160, at 66, 68.

considerably the opportunities available to legal professionals to develop and expand their practices.<sup>181</sup>

In sum, the divided structure of the legal profession and the various territorial and jurisdictional restrictions combined in the civil law countries to create mini-communities of practitioners with strong fraternal bonds. As Professor Rose has pointed out, choosing between standards and rules is to some extent deciding how to treat members of an immediate community and strangers.<sup>182</sup> Since it was virtually impossible until recently for “strangers”—either foreign or domestic—to practice in these mini-communities, standards sufficed to guide ethical decisionmaking. Over the course of time, as the courts and licensing authorities lowered the entry barriers, more “strangers” disrupted those communities.” In significant measure, the adoption of the CCBE Code of Conduct is a rule-like response to the strangers’ presence.<sup>183</sup>

### C. *The Conduct of Litigation*

Just as legal ethics does not occupy a privileged position in the curricula of foreign law schools, neither does it occupy a privileged position in the litigation of disputes in foreign courts. For better or for worse, lawyers in the United States routinely invoke the rules of professional responsibility in myriads of state and federal court cases. Motions to disqualify based on alleged conflicts of interests are the most obvious example of the rules’ pronounced presence in the litigation process. Courts regularly struggle with the prohibitions against simultaneous and successive adverse representation. Issues involving the ethical duty of confidentiality and the attorney-client privilege draw their attention as well. Fee disputes trigger the judicial analysis of the rules governing contingent fee arrangements, the requirement of reasonableness, and the limitations on fee-splitting. The list could go on and on. The important point, however, is that these issues are brought before judges for resolution and that the judges’ decisions are public records, frequently accessible in published caselaw reporters and electronic retrieval systems, and even on the Internet.

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181. Other restrictions also contributed to limiting the opportunities. For example, in Italy lawyers may only form “professional associations,” not partnerships, and only individual lawyers, not law firms, may provide legal services. See Agostini, *supra* note 170, at 335-36. A survey of Italian law firms in 1993 revealed that only five firms had more than forty lawyers and only ten had more than twenty. Sandra Burke, *Italy: Triumph of the Tiny Firm*, LAW. INT’L, Mar. 1993, at 12.

182. See Rose, *supra* note 4, at 601-05.

183. See *infra* notes 218-33 and accompanying text.

The civil law tradition is, of course, inquisitorial not adversarial. For the purposes of this article, the distinction between the two rests in how the courts resolve disputes. In the civil law tradition, the judge dominates the courtroom proceedings, often taking testimony directly from witnesses with limited or no questioning by the parties' lawyers. Testimony in the form of affidavits is also common. There is no proceeding analogous to a motion to disqualify. Complaints about the conduct of lawyers are regarded as matters for discipline by the bar, not for judicial relief by the courts. Comparatively few issues regarding the ethical duty of confidentiality are ever raised because the judges' oral questioning and the affidavits are more circumscribed than lawyers' questioning of witnesses in the United States. Witness preparation as conducted in U.S. litigation is virtually non-existent.<sup>184</sup> Conflicts of interest issues are resolved by the bar associations, not the courts.<sup>185</sup> Disputes over fees from a comparative perspective are few and far between. As was the case in the United States before *Goldfarb*,<sup>186</sup> local or national bar associations frequently adopt fee schedules.<sup>187</sup> In some instances, deviations are not permitted. In others, the schedule is merely advisory; however, the universal practice in the legal community is not to depart from it. In a system of fixed fees, disputes are less likely.<sup>188</sup> Moreover, fee disputes too are often the province of bar discipline not the judiciary.<sup>189</sup>

Inextricably intertwined with these differences is the relative absence of a rules-like jurisprudence of malpractice or breach of fiduciary duty. In 1995, the International Bar Association published the results of an extensive survey it had conducted into the malpractice regimes of approximately fifty-nine jurisdictions around the world.<sup>190</sup> That survey showed that until recently malpractice

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184. This is also true in the common law countries, as the following vignette illustrates.

During a recent visit to the International Criminal Tribunal for the former Yugoslavia, I met one of the staff lawyers who explained that in discussing preparation of the witnesses for cross-examination during trial several lawyers from different countries expressed opposing views on the ethics questions involved. An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer's view was that not to prepare a witness would be malpractice.

Miller, *supra* note 160, at 204.

185. See d'Ormesson, *supra* note 165, at 31.

186. 421 U.S. at 773. See *supra* notes 99-103 and accompanying text.

187. See, e.g., Agostini, *supra* note 170, at 340-41.

188. See Schultz, *supra* note 160, at 60.

189. See, e.g., Agostini, *supra* note 170, at 338-39.

190. See LIABILITY OF LAWYERS AND INDEMNITY INSURANCE 75-240 (Albert Rogers et al. eds. 1995).

claims against lawyers were extremely rare in the civil law countries,<sup>191</sup> a situation still true in some South American and Eastern European countries,<sup>192</sup> but less so in other parts of the world. Nonetheless the survey concluded that “[p]rofessional liability is still a relatively new subject, that is to say as a subject of legal publications and case law.”<sup>193</sup> To the extent they exist, malpractice claims in civil law countries usually have been confined to relatively straightforward acts of negligence, such as the failure to file an action before the expiration of the statute of limitations. The development of the law, moreover, has been hindered by the unwillingness of lawyers to testify against one another.<sup>194</sup> Finally, civil law countries lack a developed malpractice regime not only because of a general cultural reluctance on clients’ part to sue lawyers but also because in many countries, unlike the United States, lawyers may ethically limit their liability to clients.<sup>195</sup> Furthermore, since malpractice insurance is required in many jurisdictions,<sup>196</sup> it may be that claims are settled without the need for judicial intervention.

The appropriate role of the codes of lawyer conduct in malpractice actions in the United States is the subject of dispute. Nevertheless, the fact remains that the Rules influence the development of the law of malpractice and breach of fiduciary duty either directly, as, for example, when a court admits expert

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191. *See id.*

192. *See id.* at 15.

193. *Id.* at 25.

194. *See* Sarrailhe, *supra* note 166, at 2-8. Furthermore, in some jurisdictions, a lawyer may not commence a malpractice action against another lawyer without the approval of the bar association that has disciplinary authority over the targeted defendant-lawyer. *See id.*

195. *See, e.g.,* LIABILITY OF LAWYERS AND INDEMNITY INSURANCE, *supra* note 190, at 108 (Ecuador); *id.* at 134 (Guatemala); *id.* at 159 (Luxembourg). As the survey makes clear, limitations on liability although theoretically available may not in fact be used by lawyers. In other countries, the legal status of such limitations may be unclear. *See, e.g., id.* at 129-30 (Germany).

196. *See id.* Malpractice insurance is *arguably mandatory* in all EU jurisdictions in those situations in which an EU lawyer interacts with a lawyer from a different EU country or a CCBE Observer State. As Professor Terry has pointed out, the mandatory malpractice insurance requirement was one of the few new substantive requirements established in the CCBE Code. Terry, *Part I, supra* note 12, at n. 145. The qualifier “*arguably mandatory*” is appropriate because the CCBE has, in fact, no direct authority to issue binding regulations. *Compare id.* at 35 (“thus, by agreeing to adopt the CCBE’s rule, transforming the CCBE *recommendation* for malpractice insurance into a mandatory *requirement*, each member of the CCBE has agreed to adopt for its cross-border practice situations a mandatory malpractice insurance requirement.”), *with id.* at 11-12 (explaining that the CCBE lacks authority to adopt a binding code, that the CCBE Code signatories agreed to adopt the Code in their countries, and that the methods of adoption and their enforceability differ among CCBE Member States).



testimony about the Rules' scope and content, or indirectly, as, for example, when a court permits an expert to rely on the Rules as a component of a duty of reasonable care.<sup>197</sup> Up until now, the malpractice catalyst has been missing in the civil law countries, although that may be changing.

#### D. *The Lawyer Disciplinary System*

The regulatory system for lawyer discipline in most civil law countries resembles that which prevailed in the United States before the states implemented the Clark Commission reforms.<sup>198</sup> No independent agency is charged with investigating or prosecuting lawyer misconduct. Rather, enforcement responsibility is vested in the local bar association. Just as lawyers are admitted to practice within a local judicial district, the bar association for the local judicial district is charged with policing its members' conduct.<sup>199</sup> One commentator describing the system of lawyer discipline in France has aptly captured the difference between the civil law countries and the United States:

These [disciplinary] proceedings are, as a general rule, heard in chambers; the French Bar considers such affairs to be 'internal,' thereby emphasizing the mutual protection of the members. This stems from the 'brotherhood' principle, and is in direct contrast to the transparency of the various American state bars. . . .

[C]omplaints against a lawyer are treated as a family affair . . . .<sup>200</sup>

Moreover, the president of the local bar association often plays a critical role in the lawyer disciplinary system.<sup>201</sup> A highly respected member of the bar distinguished by his reputation for integrity and honesty, the president possesses a unique moral authority within the local legal community. For example, in the Netherlands,

Complaints about lawyers concern all kinds of aspects of their legal services, such as financial wrongdoings, non-appearance in court or ignoring of deadlines. . . . In Dutch procedure complaints are filed

197. See generally RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* 14.4 (4th ed. 1996 & Supp. 1998) (stating "where fiduciary breaches are involved, disciplinary rules may be persuasive regarding the basic standard governing ethical conduct.").

198. See *supra* notes 90-98 and accompanying text.

199. See *THE FRENCH LEGAL SYSTEM*, *supra* note 155, at 119-20; *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155, at 196, 199-200, 205-07 (Italy), 286-87 (Spain); 123-24 (France); Agostini, *supra* note 170, at 331-33, 337-38; Christian Raoult, *The French System*, in *RIGHTS, LIABILITY, AND ETHICS*, *supra* note 12, at 54-56.

200. See Sarrailhe, *supra* note 166, at 2-8. While the commentator notes the transparency of the U.S. system, it should be noted that in many states, the disciplinary authorities conduct the initial investigation and fact finding in secret.

201. See *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 155, at 74, 119, 125, 127, 256-57; Geoffrey Hazard, *Taking French Lessons*, *NAT'L L.J.*, Apr. 17, 1995, at A21; Raoult, *supra* note 199, at 55-56.

with the Bar Association's presidents of the legal districts, who operate as a first sieve. A president may try to reach a settlement or appease parties in other informal ways . . . . Yearly reports of the Bar Association of the Netherlands indicate that during the 1990/1993 75 to 90% of the filed complaints were dealt with by presidents.<sup>202</sup>

The executive committee of the Chamber of Advocates in Germany performs a similar role.<sup>203</sup>

#### IV. HOW AN UNDERSTANDING OF THE STANDARDS/RULES DICHOTOMY CAN CONTRIBUTE TO THE CREATION OF A CROSS-BORDER CODE OF LAWYER CONDUCT

As goods, services, and capital move at an ever-accelerating pace across national borders and around the globe, contacts between lawyers trained in different legal traditions are correspondingly on the rise. While the mega law firms in the United States and the United Kingdom presently dominate cross-border practice in terms of the revenue they generate,<sup>204</sup> smaller law firms and corporate counsel employed by organizations of all sizes are increasingly being asked by their clients for legal advice relating to the production, sale, and purchase of goods and services in other countries.<sup>205</sup> To represent their clients competently, U.S. lawyers must appreciate that their foreign opposing counsel and even the foreign lawyers retained to represent their clients<sup>206</sup> are likely to

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202. See De Groot-Van Leeuwen, *supra* note 173, at 14.

203. See Schultz, *supra* note 160, at 75-76.

204. See Paul Lee, *Setting the Law Firm Standard*, INT'L FIN. L. REV., Nov. 1997, at 16 (examining the international strategies at the fifty largest law firms); John McGrath, *Global Law and the English Lawyer*, INT'L FIN. L. REV., Aug. 1994, at 23 (discussing international expansion for London lawyers); John E. Morris, *The Global 50*, AM. LAW., Nov. 1998, at 45, 47 (charting the top law firms by revenue); *International Firms Outperform Domestic Rivals*, INT'L FIN. L. REV., Oct. 1996, at 16 (arguing that law firms with substantial international practices are more profitable than law firms without them).

205. See Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COM. 301, 313 (1998) (discussing special legal problems faced by in-house counsel); Daly, *supra* note 59, at 1065-66; Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, in 1995 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 123 (1995).

206. See generally Robert W. Hillman, *Providing Effective Legal Representation in International Business Transactions*, 19 INT'L LAW. 3, 11-17 (1985) (examining how business lawyers can provide competent representation in transactions involving foreign law); M.W. Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Lawyers*, 16 INT'L LAW. 693, 698-704 (1982); Robert E. Lutz, *American Perspectives on the Duty of Competence: Special Problems and Risks In Advising on Foreign Law*, in RIGHTS, LIABILITY, AND ETHICS, *supra* note 12, at 81.

possess fundamentally different perceptions of codes of lawyer conduct.

The importance of this understanding transcends individual instances of cooperation among lawyers trained in different legal systems. As noted earlier, the WTO takes a dim view of provisions in professional standards that act as barriers to the free movement of goods and services across national borders.<sup>207</sup> A general consensus exists among the bar associations of the industrialized countries that the legal profession should adopt a common code of conduct for lawyers engaged in cross-border practice before the WTO prunes the existing ones and discards the ethical provisions it considers to be "trade-barrier" norms. While significant disagreement may exist among the members of the legal professions in different countries on the scope and content of a given ethical value, such as conflict-free representation, approval or disapproval of contingent-fee representation, and without-prejudice communications, there is agreement that the role the legal profession plays in checking the power of the state and in ordering private relationships is too important to be left in the hands of trade officials (no matter how well intentioned they are or how frequently they publicly acknowledge the contribution of lawyers to a democratic society).

On three separate occasions, the members of the international legal community have attempted to create such a code of conduct. In 1956, the International Bar Association (IBA) adopted The IBA International Code of Ethics (IBA Code).<sup>208</sup> The document falls clearly on the standards side of the standards/rules dichotomy. To begin with, the IBA Code possesses no law-like characteristics. The IBA is a federation of national bar associations and law societies, not a licensing body.<sup>209</sup> Although the IBA Code purports to apply "to any lawyer of one jurisdiction in relation to his contacts with a lawyer of another jurisdiction or to his activities in another jurisdiction,"<sup>210</sup> it enjoys no police power whatsoever. The police power to which it lays claim is purely derivative. If infractions are reported, "[t]he International Bar Association may bring incidents of alleged violations to the attention of relevant [disciplinary authorities]."<sup>211</sup> As the preamble makes clear, the IBA Code is simply "a guide as to what the International Bar Association considers to be a desirable

207. See *supra* notes 9-11 and accompanying text.

208. See LAW WITHOUT FRONTIERS, *supra* note 8, at 360-64.

209. The ABA is not a licensing body either. However, the ABA has played a much larger role in the articulation and adoption of professional standards in each of the fifty states than the IBA has played in the countries whose bar associations and law societies are IBA members.

210. LAW WITHOUT FRONTIERS, *supra* note 8, at 360.

211. *Id.*

course of conduct by all lawyers engaged in the international practice of law."<sup>212</sup> Consisting of twenty-one "Rules," the IBA Code is essentially a statement of norms evidencing a professional culture similar to that found in the 1908 Canons and the Model Code.<sup>213</sup> Lawyers are admonished to "maintain the honour and dignity of their profession . . . treat their professional colleagues with the utmost courtesy and fairness . . . . Give clients a candid opinion on any case . . . never stir up litigation . . . ." <sup>214</sup> The IBA Code contains no provision relating to conflicts of interest other than a general admonition that "[l]awyers shall preserve independence in the discharge of their professional duty."<sup>215</sup> The IBA Code never achieved a status other than that of an aspirational statement of norms intended to guide decisionmaking by lawyers engaged in cross-border practice.

The international legal community made a second feeble attempt at creating a cross-border code of conduct in 1977 when the CCBE issued The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community (Declaration of Perugia).<sup>216</sup> The Declaration of Perugia was linked in style and format with the IBA Code. Consisting of eight brief ethical pronouncements that were clearly standards by any measurement, it was

neither a full Code of Conduct, nor a binding set of rules, but a short discourse on the function of a lawyer in society, on the nature of the rules of professional conduct, and on some of the more important relevant principles of ethics such as integrity, confidentiality, independence, the corporate spirit of the profession and respect for the rules of other Bars and Law Societies.<sup>217</sup>

The third and ultimately successful attempt to formalize a set of ethics rules occurred in 1988 when the CCBE adopted the Code of Conduct for Lawyers in the European Community (CCBE Code).<sup>218</sup> Because the CCBE Code has been extensively analyzed elsewhere,<sup>219</sup> this article shall only briefly touch upon its history and organization. As noted earlier, the CCBE is an umbrella organization comprising of the bars and law societies of the member

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212. *Id.*

213. See CANONS OF ETHICS, *supra* note 43; MODEL CODE OF PROFESSIONAL CONDUCT, *supra* note 18.

214. LAW WITHOUT FRONTIERS, *supra* note 8, at 361-62.

215. *Id.* at 361.

216. CCBE COMPENDIUM, *supra* note 8, ch. 4, at 10-12.

217. *Id.*

218. For the text of the Code, see RIGHTS, LIABILITY, AND ETHICS, *supra* note 12 at 379-91; Terry, *Part I*, *supra* note 12, at 63-87 (containing the CCBE and accompanying Explanatory Memorandum).

219. See Terry, *Part I*, *supra* note 12; Toulmin, *supra* note 12, at 207.

states of the European Union.<sup>220</sup> The CCBE has representative status on behalf of the legal profession before the European Commission, the European Court of Justice, and the European Court of Human Rights.<sup>221</sup> When it became apparent that legal professionals in the member states would be able to claim the protection of the guarantees of the movement of persons and services established in the Treaty of Rome, the lawyers who engaged in cross-border practice realized that there was no accepted answer to the troubling question, "which member state's code of ethics should be applied, if a lawyer is providing services in a jurisdiction where the lawyer is not licensed to practice law?" Rather than abandoning lawyers to the uncertainties and intellectual contortions of conflict of law principles,<sup>222</sup> the CCBE appointed a working group of distinguished lawyers from member states with different legal traditions to draft a common code of conduct.<sup>223</sup> The code was intended to supersede national codes of conduct "in relation to [the lawyers'] cross-border practice."<sup>224</sup> Moreover, it applied only to identified categories of legal professionals.<sup>225</sup>

In contrast to the IBA Code, the CCBE Code explicitly claims to be a compendium of rules not standards, stating that "[t]he failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction."<sup>226</sup> Although the text itself lacks the force

220. See CCBE COMPENDIUM, *supra* note 8, ch. 3, at 1.

221. See *id.* ch. 3, at 2.

222. The federal structure of the United States creates a similar problem for lawyers who wish to deliver legal services in states where they are not licensed and for those who are licensed in more than one state. The ABA has attempted to solve this problem in Model Rule 8.5, a choice of law provision. I have expressed serious reservations about the Rule's helpfulness. See Daly, *supra* note 174, at 715. The comment to Rule 8.5 explicitly states: "[t]he choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law." MODEL RULE OF PROFESSIONAL CONDUCT, Rule 8.5 cmt.

223. See Terry, *Part I*, *supra* note 12, at 5-10.

224. CCBE Code Art. 1.3.1, *reprinted in* Terry, *Part I*, *supra* note 12, at 65.

225. See CCBE, EXPLANATORY MEMORANDUM AND COMMENTARY ON THE CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY, *reprinted in* RIGHTS, LIABILITY AND ETHICS, *supra* note 12, at 393-94; Terry, *Part I*, *supra* note 12, at 60-87 (containing the CCBE and accompanying Explanatory Memorandum). According to CCBE Rule 1.4, the legal professionals covered by the CCBE Code are those legal professionals identified in European Community Directive 77/249, also known as the "Legal Services" Directive. See Terry, *Part I*, *supra* note 12 and nn. 67-70 and accompanying text (listing those professionals identified in Directive 77/249 and noting that many U.S. lawyers might be surprised by the exclusion of in-house counsel).

226. CCBE CODE Rule 1.2.1. For an excellent introduction to lawyer discipline under the CCBE Code, see Terry, *Part II*, *supra* note 12, at 345. As Professor Terry has pointed out, however, the issue of when the CCBE Code applies is not quite as simple as CCBE Rule 1.5 might make it appear. See *generally id.* at 19 n. 66 (noting the relationship of CCBE Code Rules 1.5 and 2.4). The issue Professor Terry flags is

of law, the CCBE Code has been formally adopted in the member states, precisely as the CCBE intended, and now governs the "cross-border activities" of lawyers.<sup>227</sup> It consists of thirty-five detailed rules of professional responsibility on topics as diverse as incompatible occupations, conflicts of interest, and fee sharing with non-lawyers.<sup>228</sup> It justifies the shift from "rudimentary rules" to "refined and detailed rules" as necessary to "meet more complex circumstances."<sup>229</sup> Not all the rules, however, establish substantive obligations or restraints. Some are conflicts of law provisions designed to assist a lawyer in choosing between conflicting ethics rules in the lawyer's home and host jurisdiction.<sup>230</sup>

It would be tempting but incorrect to see the adoption of the CCBE Code as signaling an irreversible shift from standards to rules. The CCBE Code is clearly more rules-like than the IBA Code in its articulation of ethical principles and by virtue of its formal adoption by the individual member states. On the other hand, the drafters seem noticeably uneasy with the shift.

Codes themselves, however, have limitations. They have more often a dissuasive effect than a positive impetus. They help us to avoid rather than to fulfill. They are attempts to capture on paper an approved pattern of behavior, a desired moral climate, an answer to all questions of conduct—which cannot be adequately captured on paper.<sup>231</sup>

Further evidence of their unease can be gleaned in the CCBE Code's endorsement of the "[c]orporate spirit of the profession," its emphasis on the obligation of "training young lawyers," and its encouragement of collegial resolution of disputes among lawyers—each of which is more consistent with standards than rules.<sup>232</sup>

whether the CCBE Code is intended as a self-contained document, exclusively defining the cross-border activities to which it applies, or whether the CCBE Code itself requires the application of substantive EU law in order to determine the applicability of the CCBE Code. *See id.* at 357.

227. "Cross-border activities" is defined as

- (a) all professional contacts with lawyers of Member States other than his own; and
- (b) the professional activities of the lawyer in a Member State other than his own, whether or not the lawyer is physically present in that Member State.

CCBE CODE, Art. 1.5, *reprinted in Terry, Part I, supra* note 12, at 66.

228. *See* CCBE CODE Arts. 2.5, 3.2, & 3.6, *reprinted in Terry, Part I, supra* note 12, at 67-70.

229. CCBE COMPENDIUM, *supra* note 8, ch. 4, at 9.

230. *See, e.g.,* CCBE CODE Rules 2.5-2.6 *reprinted in Terry, Part I, supra* note 12, at 67-68; *see* Terry, *Part I, supra* note 12, at 7.

231. Terry, *Part I, supra* note 12, at 16.

232. CCBE CODE Arts. 5.1, 5.8-5.9, *reprinted in Terry, Part I, supra* note 12, at 73, 75. Professor Terry has concluded that there are three ways in which the CCBE

Moreover, the adoption of the CCBE Code can hardly be labeled a shift from standards to rules in light of the absence of the other critical accouterments discussed earlier such as serious academic training in legal ethics at the university level and a professional disciplinary system that is independent of the organized bar.<sup>233</sup>

In the end, the greatest contribution of the CCBE Code is the proof it offers that lawyers from legal traditions as different as those of the United Kingdom and Ireland, on the one hand, and France, Germany, and Denmark, on the other, can agree on specific core values and elaborate on their application. The CCBE Code lays the groundwork for a subsequent code that bar regulators and cross-border practitioners around the globe would embrace. It moves the marker on the standards/rules continuum in the civil law countries closer to the side of the rules.

## V. CONCLUSION

As this article observed at the outset, the differences in perception between U.S. and foreign lawyer codes of conduct is more than simply a matter of academic interest or curiosity. It is only a matter of time until the WTO turns its attention to the codes, examining whether and to what extent they create illegitimate regulatory barriers to trade in legal services. As the participants in the Forum on Transnational Legal Practice have come to realize, if the legal profession is to play a meaningful role in cross-border regulation, it must seize the initiative, much as the CCBE did in 1988 with the adoption of the CCBE Code.<sup>234</sup> Waiting for a proposal from the WTO is a reactive strategy with little chance of success. To avoid being marginalized in the formative stages of WTO review, the ABA, CCBE, JFBA, and other organized bars must come to grips

Code and the Model Rules differ with respect to their treatment of these "corporate spirit" provisions: (1) the CCBE Code, unlike the Model Rules, has a separate section devoted entirely to lawyers' relationships with one another; (2) the CCBE Code, seemingly without embarrassment or dissimulation, contains provisions that appear to protect lawyers' own interests, rather than the needs of the client or public; and (3) the CCBE Code defines differently the person(s) to whom a lawyer owes a duty in certain multilateral relationships. With respect to (3), Professor Terry points to CCBE Rule 5.5, the counterpart to ABA Model Rule 4.2, regulating communications with the opposing party. She argues that the CCBE Code characterizes the duty as being owed to the opposing *lawyer*, rather than to a third person, such as the opposing *party*. Professor Terry attributes at least some of these dissimilarities to the differing conception of the role of the lawyer and "independence" in the United States and in many civil law countries.

233. See *supra* Section II.C. (discussing the rise of an emphasis on professional responsibility in U.S. legal education).

234. See *supra* notes 218-30 and accompanying text (discussing the creation and adoption of the CCBE CODE).

with the substantive and cultural differences in their respective codes of lawyer conduct. They must direct their efforts first to achieving a consensus on shared core values and second to understanding the dichotomy between standards and rules that divides their perceptions of lawyer codes. The first task is not an impossible one. Here, again, the CCBE Code points the way, demonstrating that the ethical divide between the civil and common law countries can most often be bridged and that where it cannot, an agreement can be reached on a conflicts of law resolution. The second task is more complex, demanding the disentanglement of deeply rooted understandings of the function of lawyer codes of conduct, the mechanisms of their enforcement, their place in legal education, and their promotion by the organized bar. In the end, the real dichotomy is not between standards and rules but between the perceptions of U.S. and foreign lawyers about the role of codes of conduct.



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## TOPIC VII

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### Comparative Vehicles for Ownership and Administration

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