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## ARTICLES

### RULES LAWYERS PLAY BY

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*In this Article, Richard Painter uses contractarian economic theory to demonstrate general trends in professional responsibility rules, including gradual migration away from standards and toward defined rules and increased use of default rules and opt-in rules. Many rules, however, remain broad standards, and immutable rules remain the principal mechanism for regulating conduct that affects third parties. This Article discusses how additional default rules and opt-in rules, if carefully chosen with protection of third parties in mind, could enrich professional responsibility codes enormously. This Article also proposes that the American Bar Association more clearly define opt-out mechanisms in existing default rules and in some cases make them easier to use earlier in representation of clients. In other cases, aspirational rules, including ethical considerations similar to those in the Model Code, could reinvigorate reputational enforcement of ethics norms, particularly if coupled with disclosure of information about lawyer compliance. Finally, this Article proposes that law firms be encouraged or perhaps required to adopt their own codes of professional responsibility. Law firm codes would fill gaps in the law, address agency problems within law firms, and enhance the quality of feedback that lawyers give to each other about ethics within firms.*

#### INTRODUCTION

Bar associations are revising the rules lawyers play by. In 2000, the American Law Institute (ALI) published the final bound version of its Restatement (Third) of the Law Governing Lawyers (Restatement) and, in 1998, 1999, and 2000, the American Bar Association (ABA) Ethics 2000 Commission held hearings on revisions to the

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Model Rules of Professional Conduct (Model Rules).<sup>1</sup> The ABA appointed another committee to consider relaxing restrictions on multidisciplinary practice.<sup>2</sup> Because these restatements, model codes, and committee reports are only precatory, state courts or bar regulators will have to approve any actual changes to professional responsibility rules.

This author has urged the Ethics 2000 Commission to amend conflicts rules,<sup>3</sup> as well as confidentiality rules,<sup>4</sup> so that lawyers and clients can choose in advance some of the rules that will govern their relationship. This author also has urged the ABA to permit lawyers and auditors to practice together in the same firm, provided that, if they simultaneously represent the same client, the client must agree *ex ante* that the lawyers will disclose to the auditors information that is material to the audit.<sup>5</sup> Mandatory standards always will be important in legal ethics, but standards set by voluntary agreement could add flexibility and clarity to professional responsibility rules.

The literature of contractarian law and economics discusses what types of rules should govern contracts,<sup>6</sup> corporate governance,<sup>7</sup> and securities regulation.<sup>8</sup> Occasionally, contractarian scholars analyze the legal profession,<sup>9</sup> although contractarians only recently have ex-

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<sup>1</sup> The Ethics 2000 Commission's proposed revisions and public comments are at <http://www.abanet.org/cpr/ethics2k.html> (last visited Apr. 16, 2001) [hereinafter Ethics 2000 Commission Web Page].

<sup>2</sup> See Report of the ABA Commission on Multidisciplinary Practice (1999), <http://www.abanet.org/cpr/mdpreport.html> (last visited Apr. 16, 2001). The American Bar Association (ABA) House of Delegates rejected this Commission's liberalization proposals in Recommendation 10 F, approved July 2000. See *id.*

<sup>3</sup> Richard W. Painter, Proposal to Amend Model Rules to Provide for Advance Consent to Conflicts, at <http://www.abanet.org/cpr/rpainter.html> (last visited Apr. 16, 2001) [hereinafter Painter, Proposal to Amend Model Rules] (proposing that ABA amend conflicts rules to allow advance waiver of conflicts if independent counsel represents client).

<sup>4</sup> Letter and Memorandum from Richard W. Painter, to the Ethics 2000 Commission (May 13, 1998), <http://www.abanet.org/cpr/painter.html> [hereinafter Painter, Ethics 2000 Letter] (proposing that ABA amend Model Rule 1.13 to require report of illegal or fraudulent conduct to corporate client's directors unless specified otherwise in client's articles of organization).

<sup>5</sup> Richard W. Painter, Lawyers' Rules, Auditors' Rules and the Psychology of Concealment, 84 Minn. L. Rev. 1399, 1436-37 (2000).

<sup>6</sup> See, e.g., Robert E. Scott, The Case for Market Damages: Revisiting the Lost Profits Puzzle, 57 U. Chi. L. Rev. 1155 (1990) (analyzing default rules for damages in contracts).

<sup>7</sup> See, e.g., Charles R. O'Kelley, Jr., Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis, 87 Nw. U. L. Rev. 216 (1992) (analyzing default rules for close corporations).

<sup>8</sup> See, e.g., Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 Yale L.J. 2359 (1998) (proposing that federal securities laws be default rules instead of immutable rules).

<sup>9</sup> See, e.g., John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative

amined specific rules of professional responsibility.<sup>10</sup> This Article discusses how some professional responsibility rules already contemplate contracting between lawyers and clients, and how rulemaking bodies could use contractarian principles to draft new rules.<sup>11</sup> When should rules governing lawyers be immutable (rules that cannot be changed contractually), and when should they be defaults (rules that can be changed contractually)? When default rules are used, should professional responsibility codes emphasize opt-in rules (rules that apply only if lawyers and clients affirmatively choose them or enter into a specific arrangement governed by those rules), or opt-out rules (rules that apply unless lawyers and clients agree otherwise)? Should professional responsibility codes emphasize majoritarian default rules (rules that most lawyers and clients would have chosen in hypothetical *ex ante* bargaining), or penalty default rules?<sup>12</sup> When should a lawyer not be governed by clearly defined rules, but instead by more general

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Actions, 86 *Colum. L. Rev.* 669 (1986) (analyzing economic incentives of plaintiffs' attorneys in class and derivative actions); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *Colum. L. Rev.* 509 (1994) [hereinafter Gilson & Mnookin, *Disputing Through Agents*] (analyzing economic incentives for cooperative conduct in litigation); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *Stan. L. Rev.* 313 (1985) [hereinafter Gilson & Mnookin, *How Partners Split Profits*] (analyzing economic incentives within law firms); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *U. Chi. L. Rev.* 1 (1991) (analyzing economic incentives to file frivolous derivative and class action lawsuits).

<sup>10</sup> See, e.g., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 *U. Chi. L. Rev.* 1 (1998) (evaluating confidentiality rules); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 *Iowa L. Rev.* 965 (1997) (evaluating conflicts rules); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 *Va. L. Rev.* 1707 (1998) (suggesting that many ethics rules protect vested interests, are inefficient, and should be default rules, instead of immutable rules). See generally George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 *Fordham L. Rev.* 273 (1998) (discussing how ethics rules and other laws governing lawyers attempt to address various agency problems and suggesting ways in which legal rules can serve as complimentary solutions to agency problems).

<sup>11</sup> Professor David Wilkins has written on the question of who should have authority to regulate lawyers, as well as the related question of what types of controls should be used. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *Harv. L. Rev.* 799, 805-09 (1992) (discussing four approaches to enforcing professional norms: disciplinary controls, liability controls, institutional controls, and legislative controls). This Article explores a separate question: Regardless of who makes and enforces the rules, what types of rules should be chosen in the first place?

<sup>12</sup> Penalty default rules are rules that a majority of contracting parties would not prefer. Parties are thus encouraged to contract around the rule for their own tailored rule. One objective of penalty default rules is to force parties to negotiate their own contract terms, and to disclose important information to each other in the process. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87, 91-93 (1989) (explaining penalty default rules).

standards against which the lawyer's conduct is measured *ex post* to ascertain whether her conduct conformed to those standards?<sup>13</sup>

The evolution of professional responsibility rules in the last century reveals several important trends. First, codes have migrated away from broad standards and toward clearly defined rules. Many states have followed the ABA in moving from the 1908 Canons of Professional Ethics (Canons)<sup>14</sup> to the 1969 Model Code of Professional Responsibility (Model Code),<sup>15</sup> and finally to the 1983 Model Rules.<sup>16</sup> Gone, for example, is the "appearance of impropriety"<sup>17</sup> standard that used to define conflicts jurisprudence.<sup>18</sup> This change, however, has not been all-encompassing, and many standards still prevail.<sup>19</sup> Second, when the subject matter of a rule is particularly controversial, the rule has tended to remain a standard that is so broad that it is unenforceable,<sup>20</sup> to be a discretion-laden rule (signified by frequent use of

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<sup>13</sup> See Frederick Schauer, *Playing by the Rules* 135-66 (1991) (discussing debate over rules and standards as regulatory devices); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22, 57-69 (1992) (same). Rules are designed by generalizing information from prior experiences, and are therefore cheaper than standards, which require context-specific information to be considered each time they are applied. Arguably, rules minimize adjudication costs, whereas standards minimize the amount of error in adjudication. See Schauer, *supra*, at 147-48. Because the Model Rules include both rules and standards, the term "rules" is used in this Article to denote both rules and standards, and where a distinction between the two is made, the terms "defined rules" and "standards" are used respectively.

<sup>14</sup> *Canons of Prof'l Ethics* (1908). From 1908 to 1969, the ABA's formal position on matters of legal ethics was embodied in the Canons.

<sup>15</sup> *Model Code of Prof'l Responsibility* (1969). The ABA subsequently amended the Model Code a number of times during the 1970s, principally in response to Supreme Court decisions concerning advertising and group legal services. The ABA has not amended the Model Code since the adoption of the Model Rules, but many jurisdictions still maintain parts of the Model Code.

<sup>16</sup> *Model Rules of Prof'l Conduct* (1983).

<sup>17</sup> See *Model Code of Prof'l Responsibility Canon 9* (1980) ("A lawyer should avoid even the appearance of impropriety."). The Model Rules contain no similar provision.

<sup>18</sup> See Charles W. Wolfram, *Former-Client Conflicts*, 10 *Geo. J. Legal Ethics* 677, 686-87 (1997) (discussing fortunate demise of appearance of impropriety standard in conflicts jurisprudence).

<sup>19</sup> Standards, for example, define required levels of competence, diligence, and communication with clients. The "reasonableness" standard is used, but with little guidance as to what conduct is and is not reasonable. See, e.g., *Model Rules of Prof'l Conduct R. 1.1* (1998) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *id.* R. 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.").

<sup>20</sup> See, e.g., *id.* R. 1.5(a) (stating that lawyer's fee must be reasonable, and listing eight factors to be considered in determining reasonableness, without discussion of which factors are most important).

the word “may” in codes of professional responsibility),<sup>21</sup> or to be phrased in aspirational language rather than language clearly stating what a lawyer must or must not do.<sup>22</sup> Third, professional responsibility codes, to some extent, have moved away from immutable rules toward default rules and opt-in rules.<sup>23</sup> This change, however, has taken place almost exclusively in rules governing lawyer conduct that affects clients, but not third parties. Immutable rules continue to define a lawyer’s obligations to nonclients with whom the lawyer does not have a contractual relationship.<sup>24</sup>

This Article argues that default rules should be used more extensively in professional responsibility codes. Clearly-defined default rules could, in some cases, replace the broad standards, permissive rules, or aspirational rules that now govern many controversial topics. In other cases, default rules could coexist with immutable rules that establish minimum standards of professional conduct. Some of the default rules proposed in this Article address responsibilities to clients; others recognize that lawyers’ responsibilities to third parties and the legal system also can be the subject of *ex ante* voluntary commitments made by lawyers and clients.

For subjects such as lawyer response to client fraud and to conflicts within organizations, immutable rules have not worked well, in part because the rules accommodate so many conflicting viewpoints that they are ambiguous.<sup>25</sup> Even if these immutable rules are left in place, consensus on additional default rules would enrich codes of professional responsibility. Clients and lawyers who disagree with a default rule—e.g., a rule that requires a lawyer to report a corporate client’s illegal acts to its full board of directors unless otherwise provided in the client’s articles of organization<sup>26</sup>—could opt out, so long as they do so *ex ante*, before obligations under the rule arise. An *ex ante* decision to opt out of a rule or into another rule should give

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<sup>21</sup> See, e.g., Model Code of Prof’l Responsibility DR 4-101(C) (1980) (providing that “[a] lawyer *may* reveal: . . . (3) The intention of [his client to commit a crime and the information necessary to prevent the crime” (emphasis added)).

<sup>22</sup> See, e.g., Model Rules of Prof’l Conduct R. 6.1 (1998) (“A lawyer should *aspire* to render at least (50) hours of pro bono publico legal services per year.” (emphasis added)).

<sup>23</sup> See *infra* text accompanying notes 156-63 (discussing broader range of contingent fee agreements and fee-splitting arrangements that are now permissible).

<sup>24</sup> See *infra* text accompanying notes 50-51 (discussing immutable rules governing conduct that affects third parties).

<sup>25</sup> See, e.g., Model Rules of Prof’l Conduct R. 1.13 (1998) (providing that lawyer for organization who knows that agent of organization has violated law “shall proceed as is reasonably necessary in the best interest of the organization”).

<sup>26</sup> See Painter, Ethics 2000 Letter, *supra* note 4 (defining “default rule”); see also *infra* text accompanying notes 271-73.

interested third parties ample time to anticipate how the lawyer will respond to various contingencies.<sup>27</sup>

Opt-in rules in other controversial areas, such as measures to remedy race discrimination in law firms,<sup>28</sup> are already being implemented by some state and local bar associations. This Article discusses how these opt-in rules extend the law governing lawyers to a broader range of subject matter. In still other areas, such as client conflicts, the ABA is deciding whether to change existing default rules.<sup>29</sup> Reform, however, should focus not just on changing the default rules, but also on more clearly defining the opting-out mechanisms and making them easier to use.<sup>30</sup> Finally, the ABA should consider whether encouraging or even requiring law firms to adopt their own codes of professional responsibility would fill gaps in the law and promote meaningful debate within firms about the relative importance of competing ethical principles.

The contractarian approach suggested here not only would improve the quality and clarity of professional responsibility rules, but also could enhance the role of lawyers' personal values in the practice of law.<sup>31</sup> Existing rules pay lip service to lawyers' personal convictions,<sup>32</sup> but few rules provide formal mechanisms for taking those con-

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<sup>27</sup> Cf. The American Lawyer's Code of Conduct R. 2.5 (The Roscoe Pound—Am. Trial Lawyers Found., Revised Draft 1982) [hereinafter American Lawyer's Code of Conduct] (allowing corporate clients to choose policies that their lawyers are required to follow in resolving conflicts of interest among board of directors, officers, and shareholders, but also requiring that chosen policies be disclosed to shareholders and corporate officers beforehand). The comment to Rule 2.5 points out that publication to shareholders puts the shareholders "in a position to approve or disapprove that policy, or to relinquish their shares." *Id.* R. 2.5 cmt.

<sup>28</sup> See *infra* text accompanying notes 290-99 (discussing voluntary affirmative action commitments made by law firms in New York and San Francisco).

<sup>29</sup> The Ethics 2000 Commission considered several proposals to revise the Model Rules, specifically Model Rule 1.7 (Conflict of Interest: General Rule), Model Rule 1.9 (Conflict of Interest: Former Client), Model Rule 1.10 (Imputed Disqualification: General Rule) and Model Rule 1.11 (Successive Government and Private Employment). Ethics 2000 Commission Web Page, *supra* note 1.

<sup>30</sup> Although clients "opt out" of conflicts rules through informed consent, such consent is rarely obtained in advance of the time the conflict becomes known. See *infra* text accompanying notes 208-15 (suggesting that professional conduct rules should allow advance consent to conflicts by clients represented by independent counsel).

<sup>31</sup> See John T. Noonan, Jr. & Richard W. Painter, Professional and Personal Responsibilities of the Lawyer, at vii, 13 (1997) (discussing distinction between professional standards set by bar associations and principles based on personal values).

<sup>32</sup> The ABA's Model Rules, to a much larger extent than the Model Code, "openly invite the lawyer to bring [her] personal values into play." Ted Schneyer, Moral Philosophy's Standard Misconception of Legal Ethics, 1984 Wis. L. Rev. 1529, 1566. This "invitation" comes, however, without much encouragement and without any mechanism by which a lawyer can reinforce her personal values against client pressures by committing herself *ex ante* to a particular standard of conduct.

victions into account. A lawyer may resign from representing a client whose objectives she finds morally repugnant,<sup>33</sup> refuse to represent a client to begin with,<sup>34</sup> or represent a particularly worthy client pro bono.<sup>35</sup> The lawyer pays the economic cost of these decisions, however, and often has difficulty increasing her reputational capital by signaling self-imposed standards to clients, other lawyers, and the public.<sup>36</sup> Under the Model Rules, a lawyer may exclude in her retainer agreement "objectives or means that the lawyer regards as repugnant or imprudent[ ]"<sup>37</sup> but very few lawyers do so, and the Model Rules do not suggest specific ways in which objectives or means could be limited. Furthermore, many lawyers believe the scope of representation to be immutable to the extent "a lawyer should represent a client zealously within the bounds of the law."<sup>38</sup> Finally, rarely is there an opportunity (other than the decision to join the bar in a particular jurisdiction) for a lawyer to select ahead of time the rules that govern her practice, bind herself to adhere to those rules, and then only represent clients who accept the rules the lawyer has selected. This Article suggests that default and opt-in rules should be used more aggressively to bridge the gap between professional responsibility codes and what many lawyers believe is the right thing to do.

Part I of this Article discusses the various rule prototypes that are important in contractarian analysis. Contractarianism usually assumes that, although not all actors are rational, irrational impulses cancel each other out, making the "rational" actor the preferred prototype.<sup>39</sup>

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<sup>33</sup> Model Rules of Prof'l Conduct R. 1.16(b)(3) (1998) (allowing withdrawal, even if client's interests will be adversely affected, if "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent").

<sup>34</sup> Id. R. 6.2 cmt. 2 (permitting lawyer to refuse court appointment to represent client whose character or cause lawyer regards as repugnant).

<sup>35</sup> Id. R. 6.1 (aspirational pro bono rule).

<sup>36</sup> Sometimes, however, lawyers do establish general reputations that are known to adversaries as well as to clients. See Gilson & Mnookin, *Disputing Through Agents*, *supra* note 9, at 546-48 (discussing evolution of cooperation within San Francisco Bay Area domestic relations bar).

<sup>37</sup> Model Rules of Prof'l Conduct R. 1.2 cmt. 4 (1998) (discussing scope of representation).

<sup>38</sup> Model Code of Prof'l Responsibility Canon 7 (1980). The Model Rules, however, substitute "reasonable diligence and promptness" for "zeal." Model Rules of Prof'l Conduct R. 1.3 (1998) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); id. R. 1.3 cmt. 1 (stating:

A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued).

<sup>39</sup> See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *Stan. L. Rev.* 1551, 1556-57 (1998) (arguing that, assuming irrational smokers respond ran-

Part I discusses why some rules of professional responsibility are immutable whereas others are default rules, why some rules are clearly defined whereas others embody more general standards, and how some rules would be more effective if they were default rules instead of immutable rules. Part I also recognizes that the rationality assumption of contractarian economics is sometimes negated by systematic cognitive biases. For example, because actors can be biased in favor of the status quo, default rules sometimes become contract terms simply because they are default rules, not because they are inherently superior.<sup>40</sup> Finally, Part I observes that reputational concerns underlie reciprocal interaction between lawyers, clients, and third parties.<sup>41</sup> Mutual expectations embodied in unenforced rules thus can be as powerful an influence on behavior as legally enforced rules.

Part II discusses the evolution of rules within the contractarian framework and then applies this framework to rules governing several hotly debated issues: (1) conflicts of interest; (2) lawyers' use of confidential client information; (3) contractual restrictions on practice; (4) lawyers' disclosure of client fraud; (5) remedial measures for race and sex discrimination; and (6) pro bono obligations. In some instances, this Article proposes to replace immutable rules with default rules. In other instances, this Article suggests that lawyers and clients be allowed to contract around existing default rules at an earlier point in a legal representation than is now the norm. In still other areas, this

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domly to increase in tax on cigarettes, "[i]f the distribution of these random behaviors has the same mean as the rational smokers' reaction to the tax, [then] the effect of the tax on the quantity demanded of cigarettes will be identical to what it would be if all cigarette consumers were rational"). But see Christine Jolls et al., *Theories and Tropes: A Reply to Posner and Kelman*, 50 *Stan. L. Rev.* 1593, 1599 (1998) ("[Judge Posner's argument] is a common response to behavioral economics, and conceivably it could be true; but there is absolutely no reason to think it is . . ."). Many of the rules discussed in this Article are based on the "rational actor" model. Others, however, such as the "sticky default rule," see *infra* text accompanying notes 114-16, draw on demonstrated cognitive biases. Cognitive biases do not always undermine the effectiveness of default rules and, indeed, rulemakers who understand cognitive biases can construct default rules that further public policy objectives. See *infra* text accompanying note 115 (discussing policy-preferred sticky default rules).

<sup>40</sup> Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 *Cornell L. Rev.* 608, 611-12 (1998) (arguing that once contract term is established as default rule, it may be preferred simply because it is status quo).

<sup>41</sup> Reciprocal interaction between lawyers sometimes is demonstrated with game theoretic models (usually prisoner's dilemma). See generally Gilson & Mnookin, *Disputing Through Agents*, *supra* note 9 (using prisoner's dilemma model to illustrate cooperation between opposing counsel in litigation); Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 *Fordham L. Rev.* 149 (1996) (using prisoner's dilemma model to illustrate cooperation between regulatory lawyers representing private clients and governmental agencies).



Article suggests that lawyers or law firms be encouraged to opt into enforceable commitments to clients, third parties, or the bar itself that can then be used to attract clients, recruit associates, or foster good will with regulators and the community. Finally, this Article argues that, for several of the specific subjects discussed in Part II, legally unenforced professional responsibility rules can be valuable tools for changing lawyer behavior.<sup>42</sup> The Model Code's Ethical Considerations, abandoned in the Model Rules, and similar aspirational rules, could thus have a more constructive role to play in professional responsibility than the ABA has acknowledged.

Part III discusses why law firms should be encouraged to adopt their own codes of professional responsibility to fill gaps in the contractarian framework. Law firm codes could opt out of default rules in bar association codes or opt into rules on topics not adequately addressed by the bar, such as use of client information, response to client fraud, and pro bono obligations.<sup>43</sup> Law firm codes of professional responsibility also could allow firms to send a positive signal to clients, regulators, prospective associates, and other third parties about a firm's professional standards. Finally, the opportunity to design self-imposed rules could encourage lawyers in firms to give each other meaningful feedback on compliance with those rules, as well as with the bar's rules.

This Article concludes that contractarian economics can contribute substantially to the work of bar associations and law firms that draft their own professional responsibility rules. Lawyers' pivotal role in our advocacy system,<sup>44</sup> and in our republican form of government,<sup>45</sup>

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<sup>42</sup> The Ethics 2000 Commission considered attaching statements of "best practice" to the Model Rules. See *infra* note 187.

<sup>43</sup> The written policies that many firms have for handling client conflicts are essentially law firm codes of professional responsibility. New York requires firms to have such policies. See N.Y. Code of Prof'l Responsibility DR 5-105(e) (2000) (providing that law firms "shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements"); *infra* text accompanying notes 341-43.

<sup>44</sup> See, e.g., Lon L. Fuller & John D. Randall, *The Lawyer's Service in the Administration and Development of the Law*, in Report of the Joint Conference on Professional Responsibility of the Association of American Law Schools and American Bar Association, 44 A.B.A. J. 1159 (1958) (discussing lawyer's role as advocate).

<sup>45</sup> See Alexis de Tocqueville, *On What Tempers the Tyranny of the Majority in the United States*, in *Democracy in America* 250, 251 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1835) (describing "the Spirit of the Lawyer in the United States" and "how it Serves as a Counterweight to Democracy"). Lawyers' influence in our democracy, however, is not always positive—for example, when lawyers make campaign contributions in order to receive government legal work. This Article suggests an opt-in rule that individual law firms could use to deal more effectively with this problem than by using the rules that the ABA has adopted. See *infra* text accompanying note 389.

underscores the need for thoughtful consideration of the rules lawyers play by.

## I

### THE CONTRACTARIAN FRAMEWORK

There are three broad categories of professional responsibility rules: rules that protect clients, rules that protect third parties, and rules that protect the legal system.<sup>46</sup> As discussed below, this distinction is often critical for determining where a rule belongs in the contractarian framework (see Figure 1).

The first important distinction in contractarian theory is between immutable rules and default rules. An *immutable rule* cannot be changed by contractual agreement. Many professional responsibility rules are immutable—for example, in most jurisdictions, a lawyer cannot negotiate for literary or media rights with a client before the end of a representation,<sup>47</sup> acquire a financial interest in the subject matter of litigation (other than a contingent fee),<sup>48</sup> or commingle client and lawyer funds.<sup>49</sup> Rules that protect third parties or the legal system—for example, the rule prohibiting lawyer assistance of client fraud<sup>50</sup>—are almost always immutable.<sup>51</sup>

There are two principal types of immutable rules: majoritarian immutable rules and tailored immutable rules. A *majoritarian immutable rule* is suitable for most lawyers in most situations, and usually can be adjusted with ex post tailoring mechanisms, such as judicially created exceptions to the rule. For example, most jurisdictions require a lawyer who discovers a client's perjury to disclose it to the

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<sup>46</sup> See, e.g., Model Rules of Prof'l Conduct, Preamble (1998) ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

<sup>47</sup> See id. R. 1.8(d) ("Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.").

<sup>48</sup> Id. R. 1.8(j) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: . . . (2) contract with a client for a reasonable contingent fee in a civil case.").

<sup>49</sup> Id. R. 1.15.

<sup>50</sup> Id. R. 1.2(d) (prohibiting lawyer from "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent").

<sup>51</sup> See, e.g., Restatement (Third) of the Law Governing Lawyers § 23 (2000) (stating: As between client and lawyer, a lawyer retains authority that may not be overridden by a contract with or an instruction from the client:

(1) to refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer reasonably believes to be unlawful;  
 (2) to make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal).

FIGURE 1

protect clients		protect third parties		protect legal system	
immutable rules  majoritarian      tailored		default rules			
		opt-up		opt-down	
		opt-out		opt-in	
		ex ante contracting		ex post contracting	
		contract w/client	contract w/third party	contract w/other lawyer	contract w/bar
		mutual choice	lawyer's initial choice		client's initial choice
		majoritarian	tailored	penalty	
		sticky (including policy-preferred sticky default)		flexible	
		defined rules		standards	
		legally enforced	reputationally enforced		aspirational

court.<sup>52</sup> This is a majoritarian rule—it is suitable for most lawyers in most circumstances. It is also an immutable rule—the lawyer cannot contract with the client, the court, or opposing counsel, to suborn perjury. However, the comment to Model Rule 3.3 acknowledges that, when applying the “general rule” to lawyers who represent criminal defendants, courts will construe the rule in light of constitutional due process provisions.<sup>53</sup> At a minimum, the criminal defense lawyer should have a very high degree of certainty that client perjury has

<sup>52</sup> See, e.g., Model Rules of Prof'l Conduct R. 3.3. Rule 3.3(b) of the Model Rules modified the Model Code, which had qualified this duty to reveal perjury with the language “except when the information is protected as a privileged communication.” Model Code of Prof'l Responsibility DR 7-102(B)(1) (1980).

<sup>53</sup> Model Rules of Prof'l Conduct R. 3.3 cmt. 12 (1998).

occurred before disclosing it to the court.<sup>54</sup> Some courts further adjust the rule by allowing a criminal defense lawyer to put the client on the stand so long as the lawyer refrains from asking questions.<sup>55</sup>

A *tailored immutable rule* is an immutable rule designed for a specific subset of actors. Model Rule 3.8 (Special Responsibilities of a Prosecutor)<sup>56</sup> is one such rule. The Securities and Exchange Commission (SEC) and the Office of Thrift Supervision (OTS) impose tailored rules on securities<sup>57</sup> and banking<sup>58</sup> lawyers, respectively, and use disciplinary proceedings to enforce these rules in accordance with either the SEC's Rule 102(e)<sup>59</sup> or the OTS's regulatory control over "institution-affiliated parties."<sup>60</sup> The organized bar often resists tai-

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<sup>54</sup> See *United States v. Long*, 857 F.2d 436, 445 n.5 (8th Cir. 1988) ("Because of the gravity of a decision to notify a court of potential client perjury, a reasonable lawyer would only act on a firm factual basis.").

<sup>55</sup> See *Commonwealth v. Jermyn*, 620 A.2d 1128, 1131 (Pa. 1993) (holding that trial counsel acted reasonably when he asked his client, who was on trial for murder, to make general statement to jury but refrained from asking his client questions that he believed would be answered untruthfully). The ABA previously endorsed this narrative approach, see ABA Defense Function Standard 7.7 (1971), but it has since rejected it. See Model Rules of Prof'l Conduct R. 3.3 cmt. 9 (1998) (stating that narrative approach undermines lawyer's duty to client and lawyer's duty to tribunal); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 353 (1987) (stating that narrative approach is no longer justifiable).

<sup>56</sup> Model Rules of Prof'l Conduct R. 3.8 (1998) (requiring, among other things, that prosecutor in criminal case "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

<sup>57</sup> See Carter and Johnson, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (Feb. 28, 1981) (announcing prospectively obligations of securities lawyer whose client is failing to satisfy disclosure requirements).

<sup>58</sup> See Notice of Charges and Hearing, Fishbein, OTS AP-92-19 (Mar. 1, 1992) (setting forth obligations of counsel to federally-insured thrift institution and indicating how Kaye, Scholer, Fierman, Hays, and Handler (Kaye, Scholer) and several of its partners breached these obligations in representing Lincoln Savings and Loan); Order to Cease and Desist and for Affirmative Relief, Fishbein, OTS AP-92-24 (Mar. 11, 1992) (settling charges and imposing restrictions on Kaye, Scholer's future representation of depository institutions).

<sup>59</sup> See SEC Appearance and Practice Before the Commission, 17 C.F.R. § 201.102(e)(1)(ii) (2000) (providing that SEC may, for "unethical or improper professional conduct," temporarily or permanently deny to any person privilege of practicing before Commission after notice and opportunity for hearing).

<sup>60</sup> An "institution-affiliated party" is defined to include, *inter alia*:

- (1) any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;
- (2) any other person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency[;]
- (3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate Federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution; and
- (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in—

lored rules if they are used to impose additional obligations on lawyers.<sup>61</sup> Professor David Wilkins, however, suggests that context should be important in designing rules for specific practice areas, and that universally applicable rules governing all lawyers are sometimes inappropriate.<sup>62</sup> Although Wilkins does not use contractarian terminology, his context-specific rules are, in essence, tailored immutable rules for lawyers in specific practice areas.

Another major category of rules is the *default rule*; that is, a rule that may be changed contractually. For example, state corporate law includes many default rules. Shareholders may contract around corporate governance norms such as the liability,<sup>63</sup> and even the primacy,<sup>64</sup> of the board of directors. Some commentators, such as

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(A) any violation of any law or regulation;

(B) any breach of fiduciary duty; or

(C) any unsafe or unsound practice,

which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

12 U.S.C. § 1813(u) (1994).

<sup>61</sup> See, e.g., Am. B. Ass'n, Working Group on Lawyers' Representation of Regulated Clients Report to the House of Delegates 2 (1993) (responding to OTS action in *Kaye*, Scholer matter); ABA Report to the House of Delegates, Section on Corporation, Banking and Business Law Recommendation, reprinted in Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising With Respect to the Compliance by Clients With Laws Administered by the Securities and Exchange Commission, 31 Bus. Law. 543, 545-46 (1975) (responding to SEC initiatives to enhance disclosure obligations of lawyers).

<sup>62</sup> See David B. Wilkins, How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation, 65 Fordham L. Rev. 465, 482-91 (1996) (discussing “why context counts”); see generally David B. Wilkins, Making Context Count: Regulating Lawyers After *Kaye*, Scholer, 66 S. Cal. L. Rev. 1145 (1993) [hereinafter Wilkins, Making Context Count] (same). But see Martha Minow & Elizabeth V. Spelman, In Context, 63 S. Cal. L. Rev. 1597 (1990) (discussing problems with context-specific rules generally); Thomas D. Morgan & Robert W. Tuttle, Legal Representation in a Pluralist Society, 63 Geo. Wash. L. Rev. 984, 998-99 n.77 (1995) (arguing that context-specific “middle-level principles,” like those suggested by Professor Wilkins, suffer from following problems: They do not adequately take into account fact that much of legal practice cuts across practice area boundaries; they do not specify which middle-level principles will regulate such conduct; they run risk of being captured by lawyers in particular practice area; and, finally, they may not adequately accommodate significant commonalities cutting across profession).

<sup>63</sup> See, e.g., Del. Code Ann. tit. 8, § 102(b)(7) (1991) (providing that certificate of incorporation may contain provision eliminating or limiting personal liability of directors to corporation for breach of fiduciary duty in some circumstances); cf. Model Bus. Corp. Act § 2.02(b)(4) (1999) (allowing for exculpation of directors in even broader range of circumstances).

<sup>64</sup> See, e.g., Del. Code Ann. tit. 8, §§ 341-56 (1991) (codifying special opt-in provisions for close corporations); cf. Model Bus. Corp. Act Ann. §§ 7.32(a)-(d) (Supp. 1999) (providing that shareholders of corporation may, by unanimous agreement effective for ten years, eliminate or restrict discretion of board of directors, but that such agreements shall cease to be effective when shares of corporation are listed on exchange or are publicly traded);

Roberta Romano,<sup>65</sup> Daniel Fischel, and Frank Easterbrook,<sup>66</sup> vigorously advocate such default rules. Other commentators, however, are concerned about proliferation of default rules premised on real or perceived contracts between fiduciaries and their entrustors.<sup>67</sup> Tamar Frankel, for example, argues that “[w]e should reject the view that all rules applicable to public fiduciaries are default rules, no matter how tenuous the ‘contract’ bargain around [those] rules.”<sup>68</sup>

Because lawyers are fiduciaries for their clients, similar caveats warn against making too many professional responsibility rules into default rules. Immutable rules are justified when there is information asymmetry or unequal bargaining power between lawyers and clients. For example, reasonableness of fees<sup>69</sup> and protection of client funds<sup>70</sup> are governed by immutable rules. On the other hand, lawyers are allowed to contract around other rules, such as rules governing client conflicts, if the client consents “after consultation.”<sup>71</sup> Default rules are particularly attractive if they only allow lawyers to opt for a higher level of professional responsibility than that required by the rule (an *opt-up rule*<sup>72</sup>), although many default rules are *opt-down rules*<sup>73</sup> because they contemplate opting into a lower level of responsibility.

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Model Bus. Corp. Act Ann., Model Statutory Close Corp. Supp. § 20 (Supp. 1999) (providing for similar agreements).

<sup>65</sup> Roberta Romano, *The Genius of American Corporate Law* 1, 48-51 (1993) (discussing efficiency of corporate law based primarily on default rules).

<sup>66</sup> Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (1991) (discussing corporate law in context of contractarian economics).

<sup>67</sup> See, e.g., William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 *Stan. L. Rev.* 1471 (1989) (criticizing contractarian view of law firm and overemphasis on default rules); William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 *Cornell L. Rev.* 407 (1989) (same).

<sup>68</sup> Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 *Or. L. Rev.* 1209, 1267 (1995).

<sup>69</sup> See Model Rules of Prof'l Conduct R. 1.5(a) (1998) (reasonableness of fees).

<sup>70</sup> See *id.* R. 1.15 (safekeeping of client and third-party funds).

<sup>71</sup> See, e.g., *id.* R. 1.7 (concurrent conflicts); *id.* R. 1.9 (successive conflicts).

<sup>72</sup> For example, a referring lawyer ordinarily is not responsible for a matter that has been turned over entirely to another law firm. *Id.* R. 5.1(a) (making partner in law firm responsible for supervising conduct of lawyers *in her own firm*); *id.* R. 5.1(b) (imposing responsibilities on lawyer having *direct supervisory authority* over another lawyer). Under Model Rule 1.5(e), however, two lawyers not practicing in the same firm may not share a fee in a matter unless each lawyer assumes joint responsibility for the matter. A referring lawyer, in order to share the fee in a matter, must opt up to a higher level of responsibility for the matter. *Id.* R. 1.5(e).

<sup>73</sup> See, e.g., *id.* R. 1.7 (concurrent conflicts); *id.* R. 1.9 (successive conflicts). With client consent after consultation, the lawyer can accept a conflicting representation that she otherwise would have to turn down.

Opt-down default rules sometimes are coupled with immutable rules requiring that minimum standards be observed.<sup>74</sup>

It is also possible to include third-party interests in a lawyer-client contract, for example, if a lawyer has a direct relationship with a non-client (for example, an opinion letter addressed to a third party),<sup>75</sup> or a lawyer-client contract vests enforceable rights in others (for example, an opinion letter addressed to a client on which third parties intended to rely).<sup>76</sup> Lawyers also can contract with their clients to opt up into professional responsibility rules that enhance lawyers' responsibilities to third parties.<sup>77</sup> In many circumstances, however, allowing lawyers to contract around rules that protect third parties could result in suboptimal rules, particularly if a lawyer and client collude to choose a rule that imposes negative externalities on others.

Default rules are usually phrased as *opt-out rules* (i.e., the code states a rule that applies unless the parties opt out). If the parties opt out, another rule applies. For example, Model Rule 1.7 states that a lawyer may not represent a client having interests adverse to those of an existing client, unless the existing client consents after consultation (an opt-out default rule).<sup>78</sup>

Some rules, however, are *opt-in rules* (i.e., if the parties don't opt in, another rule applies). For example, Model Rule 1.15 requires a lawyer to deliver an accounting for client or third-party funds at the request of the client or third party (if there is no request, the accounting need not be given).<sup>79</sup> Model Rule 2.2 requires a lawyer to with-

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<sup>74</sup> For example, conflicts rules require that client consent be informed and that the lawyer reasonably believe that she can represent both clients. See *infra* text accompanying notes 194-95 (discussing Model Rules 1.7 and 1.9).

<sup>75</sup> Although the relationship created by an opinion letter is not technically a contract, the third party may have legal recourse against the lawyer if the opinion is incorrect or misleading. See Richard R. Howe, *The Duties and Liabilities of Attorneys in Rendering Legal Opinions*, 1989 Colum. Bus. L. Rev. 283, 291-92 (1989) (discussing cases in which lawyers were held liable to third-party recipients of opinion letters for misrepresentations in such letters); Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. Tex. L. Rev. 1147, 1157 (1996) (same).

<sup>76</sup> Another example would be an arrangement whereby a lawyer agrees to hold third-party funds.

<sup>77</sup> See *infra* note 97 (discussing efforts by federal banking regulators to induce depository institutions and their lawyers to opt into professional responsibility standards through attorney letter). Another example would be a more general opt-in lawyer whistleblowing rule. See *infra* Part II.D (discussing whistleblowing rules).

<sup>78</sup> Model Rules of Prof'l Conduct R. 1.7(a) (1998). If the lawyer agrees to represent both clients and both clients consent, Rule 1.7 states that the lawyer may represent the second client, but only if the lawyer "reasonably believes the representation will not adversely affect the relationship with the other client." *Id.* R. 1.7(a)(1). This part of the rule is immutable because the lawyer cannot represent the new client—with or without the first client's consent—unless this minimum condition is satisfied.

<sup>79</sup> *Id.* R. 1.15(b).

draw from acting as an intermediary for multiple clients, and not to continue representing any of the clients in the same matter, "if any of the clients so requests" (if the client does not so request, the lawyer's representation of both clients may continue).<sup>80</sup> The lawyer cannot prevent the client from opting in, but the lawyer can refuse to enter a relationship to which the opt-in rule might apply. For example, a lawyer can refuse to take custody of funds belonging to a client or third party, and a lawyer can refuse to act as an intermediary under Model Rule 2.2, thereby retaining the option of representing one of the clients for as long as that client wishes. A lawyer usually also can refuse to represent a client at the start.<sup>81</sup> Indeed, a person opts into the entire body of law governing lawyers by choosing to become, and remain, a lawyer in a particular jurisdiction.

Another important distinction is *when* the contracting parties are allowed to opt out of the default rule or opt into another rule. *Ex ante contracting*, an essential feature of both contract law and corporate law, is completed before all or most of the relevant facts become known. For example, corporate shareholders, directors, and officers rarely know what the future will hold, but often agree *ex ante* to provisions in articles, bylaws, and shareholder agreements, and are bound by those contractual commitments *ex post*.<sup>82</sup> In a lawyer-client relationship, however, a client might not know enough information at the beginning of a representation to fully understand the subject matter of a contract.<sup>83</sup> For this reason, rules that include the term "consent after consultation" sometimes are interpreted to refer only to *ex post contracting*. For example, most conflict waivers are not obtained when the first client retains counsel but when the second client seeks

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<sup>80</sup> Id. R. 2.2(c).

<sup>81</sup> The principal exception is a representation carried out under court appointment. See id. R. 6.2(c) (providing that lawyer can avoid court appointment to represent person if lawyer believes client or cause is so repugnant as to impair representation).

<sup>82</sup> Some corporate law scholars, however, sharply criticize "incomplete" *ex ante* contracts in corporate governance. See William W. Bratton, Corporate Finance: Dividends, Noncontractibility, and Corporate Law, 19 Cardozo L. Rev. 409, 410 (1997) ("[T]he incomplete contracts models suggest that information asymmetries—in particular problems of *ex post* observation and verification—structurally delimit the class [of] subject matter suited to travel on this track of evolutionary improvement.").

<sup>83</sup> Critics of the shift toward the primacy of contract in corporate law also have pointed out this problem with *ex ante* contracting. See id. at 422-23 (stating:

[T]o have 'contract' terms that govern future states, those contingent states must be specified and the future outcomes must be computable. Since some future states of nature clearly are not computable, transacting parties as a result will lack the technology necessary to enable the negotiation and composition of a contract term *ex ante*).



representation.<sup>84</sup> Also, the law in nearly all jurisdictions does not permit a prospective waiver of malpractice liability.<sup>85</sup>

Perhaps ironically, when *ex ante* contracting is allowed, the contract sometimes is subject to *less* scrutiny than an *ex post* contract, on the theory that the lawyer is not yet a fiduciary of the client at the time the contract is made.<sup>86</sup> This reduced scrutiny, based on a formalistic determination of exactly when a fiduciary relationship begins, can leave clients exposed to lawyer overreaching early in a representation when clients have access to the least information. Legal fees, for example, are routinely governed by *ex ante* contracting in retainer agreements that are subject to relatively little judicial scrutiny, although immutable rules at least theoretically limit those fees.<sup>87</sup> *Ex ante* contracting with respect to lawyers' contingent fees has been criticized on just these grounds.<sup>88</sup>

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<sup>84</sup> See *infra* text accompanying notes 197-205 (discussing problems of enforcing conflict waiver). Conflict of interest problems in corporate law also are generally resolved with *ex post* contracting. See Model Bus. Corp. Act §§ 8.60, 8.62, 8.63 (1999) (providing for approval of director's self-dealing transaction by majority of disinterested directors or shareholders, but only after full disclosure by director of existence and nature of conflicting interest).

<sup>85</sup> See Restatement (Third) of the Law Governing Lawyers § 54(2) (2000) ("An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable."); *infra* note 161 (discussing this rule).

<sup>86</sup> See *id.* § 18(1)(a) (providing that "if [a] contract or modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter (see § 38(1) [governing lawyers' fees]), the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client"); see also *id.* cmt. d (noting that while Section 38 does not independently limit enforceability of contracts made at outset of representation, other law may protect clients who enter into such contracts); *id.* reporter's note to cmt. d (stating that there is conflicting authority on whether lawyer-client contracts reached before representation should be treated as arm's-length contracts).

<sup>87</sup> See, e.g., Model Rules of Prof'l Conduct R. 1.5 (1998) (requiring fees to be reasonable). Fee contracts are more likely to be enforceable against the client if concluded early in the representation. See Restatement (Third) of the Law Governing Lawyers § 38(1) (2000) (requiring lawyer "[b]efore or within a reasonable time after beginning to represent a client in a matter," to communicate basis for fee unless lawyer has previously represented client on same basis or rate); *id.* § 42 reporter's note to cmt. c (citing authority holding that lawyer has burden of showing reasonableness of fee contract made during representation).

<sup>88</sup> See Lester Brickman, *Contingent Fees without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 127 (1989) (criticizing widespread price gouging in contingent fee contracts); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 Chi.-Kent L. Rev. 625, 668-87 (1995) [hereinafter Painter, *Litigating on a Contingency*] (describing incentives that can arise out of contingent fee arrangement and prospect of overcharging); Richard W. Painter, *The New American Rule: A First Amendment to the Client's Bill of Rights*, Civ. Just. Rep., Mar. 2000, at 1, 2-5, [http://www.manhattan-institute.org/html/cjr\\_1.htm](http://www.manhattan-institute.org/html/cjr_1.htm) (recommending that contingent-fee lawyers be required to choose for each case, and then disclose to client, dollars-per-hour limit on how high contingent fee can go).

Retainer agreements sometimes also address issues besides the lawyer's fee, such as the scope or objectives of the representation.<sup>89</sup> In some instances, retainer agreements could be used more creatively to devise *ex ante* solutions to problems that heretofore have been addressed with *ex post* contracting or immutable rules.<sup>90</sup> At the same time, *ex ante* contracting is unsettling if the lawyer is contracting for a lower level of responsibility to the client rather than for a higher one, and the client is contracting at a time when she does not know many of the relevant facts.

Yet another important distinction is the identity of the parties that choose to contract around a default rule. Lawyers usually contract with their *clients*, but they sometimes contract with *third parties* (for example, in an opinion letter,<sup>91</sup> in an agreement to hold third-party funds,<sup>92</sup> or in an agreement not to sue a particular defendant<sup>93</sup>), with *other lawyers* (for example, in seeking permission from another lawyer to contact her client<sup>94</sup>), and with *the bar as a whole* (for example, in agreeing to abide by a jurisdiction's code of professional responsibility upon admission *pro hac vice*, or in agreeing to voluntary affirmative action goals set by a local bar association).<sup>95</sup>

Often, one of the parties to a contract around a rule is the person whom the rule was intended to protect (for example, a client who consents to a conflict).<sup>96</sup> If not, one of the contracting parties may look after the interests of a person with whom she stands in a fiduciary relationship (for example, a lawyer who opts out of Model Rule 4.2 by

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<sup>89</sup> See Model Rules of Prof'l Conduct R. 1.2(c) (1998) (permitting limitation of objectives of representation if client consents after consultation).

<sup>90</sup> See *infra* text accompanying notes 206-15 (discussing possible framework for enforceable *ex ante* conflict waivers); see also *infra* Part II.D.

<sup>91</sup> See Model Rules of Prof'l Conduct R. 2.3 (1998) (allowing lawyer, with client's permission, to "undertake an evaluation of a matter affecting a client for the use of someone other than the client"); *id.* R. 2.3 cmt. 1 (pointing out that, while such evaluation is performed at client's direction, it may be "for the primary purpose of establishing information for the benefit of third parties"). The lawyer undertaking such an evaluation opts out of the default rule that lawyers generally are not liable for negligence to persons who are not their clients.

<sup>92</sup> See *id.* R. 1.15 (requiring lawyer to render accounting for such funds on demand).

<sup>93</sup> See *infra* Part II.C (discussing whether covenants not to sue are enforceable). But see Model Rules of Prof'l Conduct R. 5.6(b) (1998) (prohibiting contractual restrictions on lawyer's practice).

<sup>94</sup> See Model Rules of Prof'l Conduct R. 4.2 (1998) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

<sup>95</sup> See *infra* Part II.E.

<sup>96</sup> See Model Rules of Prof'l Conduct R. 1.7(a)(2) (1998) (providing that client may consent to concurrent conflicts after consultation); *id.* R. 1.9(b) (same as to successive conflicts).

allowing another lawyer to contact her client after the other lawyer agrees to certain conditions). In other situations, noncontracting parties pressure the contracting parties to choose a different rule. For example, bank regulators in the early 1990s impliedly threatened to intensify scrutiny of depository institutions that failed to ask their lawyers to comply with the regulators' interpretation of professional responsibility rules.<sup>97</sup> Sometimes, however, noncontracting parties are unprotected. If so, the case for default rules is weak unless lawyers are permitted only to opt up to a higher level of responsibility to third parties,<sup>98</sup> or the default rule requires a higher level of responsibility than an immutable rule that is left in place to establish a floor beneath which lawyer conduct may not descend.<sup>99</sup>

When lawyers and their clients are the contracting parties, they often contract through *mutual rule choice*. For example, when a conflict is waived, the lawyer and both clients agree that the representation may proceed. A lawyer and two or more clients also mutually decide whether to opt into an arrangement in which the lawyer acts as intermediary.<sup>100</sup> Sometimes, however, *lawyer choice* or *client choice* is the first step taken in choosing the rule, with the other party then manifesting assent simply by agreeing to enter into the lawyer-client relationship.

The client is often in the best position to choose the rule. For example, an organizational client knows which rules are suitable to its internal governance mechanisms, and may be in a better position than the lawyer to publicize the chosen rule to affected third parties. Thus the American Trial Lawyers' Code of Conduct Rule 2.5 allows corporate clients to choose policies that their lawyers are required to follow

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<sup>97</sup> From July 1994 to August 1995, OTS required a depository institution to send to its attorney a "revised attorney letter" asking the lawyer to confirm that the attorney would respond in accordance with applicable rules of professional conduct to any issue that might arise in connection with conflicts of interest, the institution's compliance with laws or regulations, and fiduciary duties or principles of safety and soundness. The attorney legally was not required to agree to the letter's terms, but the letter specifically provided that if the attorney did not provide the requested confirmations, the examiner would take this failure into account in its evaluation of the institution. See Revised Attorney Letter, OTS Transmittal No. 113, at 3 (June 24, 1994), reprinted in Ad Hoc Comm. on OTS Attorney Inquiry Letters, Guidance for Lawyers Responding to the OTS Revised Attorney Letter, 50 Bus. Law. 607 app. at 629 (1995).

<sup>98</sup> For example, the opt-in affirmative action goals established by San Francisco and New York City bar associations require law firms to observe a level of responsibility to minority lawyers that is higher than that required by immutable nondiscrimination laws. See *infra* text accompanying notes 290-99.

<sup>99</sup> For example, immutable nondiscrimination laws apply whether or not a firm opts into an affirmative action program. See *infra* text accompanying notes 302-08.

<sup>100</sup> See Model Rules of Prof'l Conduct R. 2.2 (1998) (indicating when lawyer may act as intermediary).

in resolving conflicts of interest among the board of directors, officers, and shareholders, but also requires that the chosen policies be disclosed to shareholders beforehand.<sup>101</sup> Client rule choice is ideal in circumstances in which the lawyer has no general philosophical preference for one rule over another, but the chosen rule is particularly important to the client. The lawyer then can decide whether to represent the client, and usually can opt out of an existing lawyer-client relationship by withdrawing.<sup>102</sup>

Lawyer choice is more limited. By choosing a jurisdiction in which to practice, a lawyer chooses a body of rules, but a lawyer cannot choose among the rules of different jurisdictions (for example, by choosing that her Illinois practice be governed by the conflicts rules of New York and the confidentiality rules of New Jersey). Lawyers generally also do not design their own rules, advertise them, and then represent clients willing to agree to the given rules, even though such a system might expand the options available to clients. Lawyer rule choice has obvious pitfalls, particularly if there is unequal bargaining power or asymmetry of information between lawyers and clients. On the other hand, expanding lawyer choice would be appealing in contexts in which individual lawyers have strong philosophical predispositions to play by a particular rule that offers expanded protection to clients or third parties (usually an opt-up rule).<sup>103</sup>

The content of a default rule usually falls into one of three general categories: majoritarian default rules, tailored default rules, or penalty default rules. A *majoritarian default rule* is a rule that most lawyers and clients would choose if they bargained for the rule, but that some lawyers and clients would not choose. Majoritarian rules save transaction costs because the majority prefers the rule and does not have to contract around the default. For example, Professors Jonathan R. Macey and Geoffrey P. Miller suggest that rules gov-

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<sup>101</sup> American Lawyer's Code of Conduct, *supra* note 27, R. 2.5.

<sup>102</sup> See Model Rules of Prof'l Conduct R. 1.16 (1998) (permitting lawyer to withdraw from representation in wide range of circumstances).

<sup>103</sup> For example, lawyers in other jurisdictions should be allowed to opt into the mandatory whistleblowing rules adopted in New Jersey and Florida, if the client is advised of the choice when the lawyer is retained. See *infra* text accompanying notes 279-81; see also Fla. Stat. Ann. §§ 4-1.6(b)(1)-(2) (West 1994) (requiring lawyer to reveal client's intent to commit crime); N.J. Ct. R. app. RPC 1.6(b)(1) (same). New Jersey and Florida, on the other hand, would probably object—and for good reason—if a lawyer practicing in those states tried to opt into the narrower disclosure rule in Model Rule 1.6. See Model Rules of Prof'l Conduct R. 1.6 (1998) (prohibiting disclosure unless client crime is likely to result in death or serious bodily harm).

erning client conflicts are the rules that lawyers and clients would have bargained for in most situations.<sup>104</sup>

*Tailored default rules* are designed to reflect the likely outcome of hypothetical bargaining among specific subgroups of lawyers and clients. For example, a tailored default rule (Model Rule 1.11) governs successive conflicts for lawyers with prior government service.<sup>105</sup> Rule 1.11 is more permissive than the rules for successive conflicts between two private sector clients because Rule 1.11 specifically allows screening of a former government lawyer so his entire firm will not be disqualified.<sup>106</sup> Rule 1.11 is also more stringent in that it prohibits congruent interest conflicts, not just adverse interest conflicts.<sup>107</sup> This tailored rule for former government lawyers, like the majoritarian rules for other lawyers, is a default rule because the government agency may consent to the conflict after consultation.<sup>108</sup>

A *penalty default rule* is a rule that most lawyers and clients would *not* prefer, but which is used to force lawyers to disclose impor-

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<sup>104</sup> Macey & Miller, *supra* note 10, at 997-1004 (discussing client conflict provisions in Model Rules and Model Code).

<sup>105</sup> Model Rules of Prof'l Conduct R. 1.11 (1998). There are "unique problems presented in cases of public employment," including the fact that a lawyer will not agree to work for the government if she is subject to broad disqualification rules that "spread to the firm with which [she] becomes associated." *United States v. Standard Oil Co.*, 136 F. Supp. 345, 362-63 (S.D.N.Y. 1955). A rule permitting law firms to screen former government lawyers is presumably something a government lawyer would bargain for in advance if she knew that imputed disqualification could seriously harm his future employment chances. On the other hand, the government would probably bargain for a rule barring congruent as well as adverse interest representations because a former government lawyer could undermine the government's credibility, and cast doubt on its motivations for bringing lawsuits, by representing a private plaintiff in matters related to matters she worked on while in government service (for example, leaving the Justice Department Microsoft team to represent a private plaintiff suing Microsoft under the antitrust laws).

<sup>106</sup> Compare Model Rules of Prof'l Conduct R. 1.10 (1998) (Imputed Disqualification: General Rule) (giving no allowance for screening), with *id.* R. 1.11 (Successive Government and Private Employment) (permitting lawyer's firm to participate in matter if disqualified lawyer is properly screened, receives no portion of fee therefrom, and appropriate government agency is given written notice to allow it to ascertain compliance with rule).

<sup>107</sup> Compare *id.* R. 1.9 (Conflict of Interest: Former Client) (prohibiting lawyer who has formerly represented client in matter from representing another person in "a substantially related matter in which that person's interests are materially adverse to the interests of the former client"), with *id.* R. 1.11 (providing that "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee" regardless of whether subsequent representation is adverse to government).

<sup>108</sup> See *id.* R. 1.9 (providing that representation may proceed with consent of former client after consultation); *id.* R. 1.11 (providing that representation may proceed with consent of government agency after consultation).

tant information to clients when they contract around the default.<sup>109</sup> For example, Model Rule 1.7, which prohibits lawyers from concurrently representing clients with adverse interests, even in unrelated matters,<sup>110</sup> is arguably a penalty default rule for transactional lawyers who routinely seek, and are routinely granted, permission to represent another client on the opposite side of a deal from a client whom they represent in other matters. A majoritarian rule thus probably would permit the concurrent adverse representation, unless one of the two clients objects. Instead, Model Rule 1.7 bars the representation unless consent is obtained, thereby forcing the lawyer to disclose information about the two representations in order to enable the clients to make informed decisions about waiver.

If a default rule is used instead of an immutable rule, does it matter what the default rule is? Transaction costs can be reduced with majoritarian default rules, and information asymmetry sometimes justifies penalty default rules, but apart from these market imperfections, a default rule's content appears not to matter. Lawyers and clients simply can contract around the rule.<sup>111</sup> There are, however, instances in which lawyers do not contract around a default rule even when it is advantageous for them to do so,<sup>112</sup> and transaction costs and informa-

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<sup>109</sup> See Ayres & Gertner, *supra* note 12, at 91 (discussing how penalty default rules can force contracting parties to share information).

<sup>110</sup> See Model Rules of Prof'l Conduct R. 1.7(a) (1998) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client" unless lawyer reasonably believes it will not adversely affect relationship with other client and each client consents after consultation).

<sup>111</sup> The Coase theorem holds that, assuming certain conditions are met—including no transaction costs, perfect information, and rationality—it does not matter which default rule is chosen. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 15-16 (1960).

<sup>112</sup> See, e.g., *Wieder v. Skala*, 609 N.E.2d 105 (1992) (N.Y. 1992). In *Wieder*, the New York Court of Appeals found an implied-in-fact covenant between a law firm and an associate prohibiting the firm from firing the associate for the associate's refusal to violate rules of professional responsibility. This is probably the rule that most associates and firms would agree upon in hypothetical bargaining, but others might agree instead upon employment-at-will in order to diminish the firm's exposure to strike suits by dismissed associates. Before *Wieder*, this issue was unresolved in New York, but few, if any, firms contracted with their associates for a less ambiguous rule, whether the pure employment-at-will rule or assurance that an associate would not be fired for refusal to violate rules of professional conduct. Either rule easily could have been inserted in an employee manual or hiring letter, but was not. After *Wieder*, law firms have made no discernable attempt to contract around New York's new exception to employment-at-will (some may believe it to be an immutable rule). At the same time, in jurisdictions such as Illinois where courts have rejected the *Wieder* approach in favor of pure employment-at-will (which is not an immutable rule), few, if any, law firms are contracting with their associates into the *Wieder* rule, even though, once again, a simple assurance in a letter or employee manual would suffice. See *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 109-10 (Ill. 1991) (finding that lawyer fired for insisting that his client's manufacture of defective dialyzers be reported when human life

tion asymmetries may not explain the whole story. Reluctance to contract around a default rule could result from transaction costs of a psychological nature (for example, the attitudinal negotiation costs<sup>113</sup> created by bringing up an unpleasant future contingency) or from a cognitive “status quo bias” in favor of the default rule, regardless of what that rule might be.<sup>114</sup> Whether “sticky” default rules are caused by transaction costs (economic or psychological), informational asymmetries, or cognitive bias, the rule initially selected by the legal system may remain in place whether or not it is the rule that the parties would have selected had they bargained for their own rule. Thus, initial rule choice by rulemakers sometimes does matter. When it does, the default rule is a *sticky default rule* rather than the *flexible default rule* more readily contemplated by Coasian economics.

Courts and other rule givers that are aware of sticky default rules may choose an immutable rule instead, believing that the sticky default rule functions much like an immutable rule anyway. In some situations, however, the rulemaker might choose a *policy-preferred sticky default rule* that the rulemaker prefers for public policy reasons and knows the parties are very unlikely to contract around, regardless of what the parties prefer.<sup>115</sup> The rule is more flexible than an immutable rule because parties with a very good reason to contract around the rule still can do so, but the rule will control in most cases, favoring

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was endangered—as required by Illinois’s version of Model Rule 1.6(b)—has no cause of action for wrongful discharge). Regardless of what rule the courts give on this issue, very little effort is thus made to contract around it. See Richard W. Painter, *Professional Responsibility Rules as Implied Contract Terms*, 34 Ga. L. Rev. 953, 960-63 (1999) (discussing reluctance of lawyers to contract on this issue).

<sup>113</sup> Edward Bernstein defines “attitudinal negotiation cost” as “a decrease in value or increase in cost that results from an attitudinal change that either causes a party to revise his expectation of the probability of performance or the assertion of invalid claims, or that in fact affects one of these probabilities.” Edward A. Bernstein, *Law & Economics and the Structure of Value Adding Contracts: A Contract Lawyer’s View of the Law & Economics Literature*, 74 Or. L. Rev. 189, 229 (1995). For example, when a couple chooses not to enter into a prenuptial agreement, “it is often because the attitudinal negotiation cost exceeds the benefit of doing so.” *Id.* at 231-32.

<sup>114</sup> Parties bargaining over legal rules may ask more to give up a legal right, such as the impossibility excuse to performance on a contract, than they would pay to gain that right. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608, 642-44 (1998). More likely than not, this status quo bias also causes the initial assignment of a legal entitlement to be the outcome of bargaining over that entitlement. See Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 Wash. U. L.Q. 59, 99 (1993).

<sup>115</sup> While sticky default rules are now widely recognized, see Korobkin, *supra* note 114, at 673-75, to this author’s knowledge sticky default rules selected by rulemakers for public policy reasons have not yet been discussed in the contractarian literature.

the preferences of the rulemaker over those of parties who hold their preferences less strongly.<sup>116</sup>

All of the above rules also fall somewhere on a spectrum between two other categories: defined rules and standards.<sup>117</sup> *Defined rules* state ex ante precisely what a lawyer must, may, or may not do. For example, most jurisdictions provide that an agreement for a contingent fee must be in writing.<sup>118</sup> This defined rule is highly objective because a fee agreement either is or is not in writing; there is little room in between. *Standards*, by contrast, use subjective language, and rely on ex post judicial or administrative decisions to determine when specific conduct meets a standard, and when it does not. For example, most jurisdictions require that lawyers' fees shall be reasonable.<sup>119</sup> Both the Model Rules and the Model Code list eight factors for determining reasonableness,<sup>120</sup> and a large body of highly subjective case

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<sup>116</sup> Although one could interpret the *Wieder* rule, see supra note 112, to be immutable, it could also be a highly effective policy-preferred sticky default rule. To date, no New York law firm has publicized a policy of contracting around the rule, even though pure employment-at-will remains the controlling rule in other jurisdictions. See Painter, supra note 112, at 961 (indicating that almost no firms have "contracted with their associates for a less ambiguous rule, whether in the form of a pure employment-at-will rule or assurance that an associate would not be fired for refusal to violate rules of professional conduct").

<sup>117</sup> See supra note 13 (contrasting rules with standards in general).

<sup>118</sup> Model Rules of Prof'l Conduct R. 1.5(c) (1998).

<sup>119</sup> Model Rules of Prof'l Conduct R. 1.5(a) (1998) ("A lawyer's fee shall be reasonable."); see also Model Code of Prof'l Responsibility DR 2-106(A) (1980) (providing that lawyer shall not charge a "clearly excessive fee"); id. DR 2-106(B) (providing that "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee" and listing eight factors to be weighed in determining reasonableness of fee). The tailored standard for securities class-action lawyers links reasonableness to the amount of damages. See Private Securities Litigation Reform Act § 101(b), 15 U.S.C. § 77z-1(a)(6) (Supp. II 1996) (requiring that fees must be "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

<sup>120</sup> Compare Model Rules of Prof'l Conduct R. 1.5(a) (1998) (stating:

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent).

with Model Code of Prof'l Responsibility DR 2-106(B) (1980) (listing substantially similar factors for determining reasonableness).



law defines when fees are and are not "reasonable."<sup>121</sup> A few jurisdictions, apparently frustrated with indeterminate standards for fees, have experimented with defined rules,<sup>122</sup> but the bar's preference in this area is clearly for standards.<sup>123</sup> This is not surprising, given the fact that disputes over standards for fees are usually resolved in favor of lawyers.<sup>124</sup>

In other areas, a standard is used because a defined rule's prohibitions might sweep too broadly. Transactions between a lawyer and client, for example, must be "fully disclosed" and be "fair and reasonable" to the client (a standard),<sup>125</sup> but are not prohibited per se (which would be a defined rule). Oregon flatly prohibits sexual relations between a lawyer and client<sup>126</sup> (presumably<sup>127</sup> a defined rule),

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<sup>121</sup> See, e.g., *McKenzie Constr. v. Maynard*, 823 F.2d 43, 45, 48-49 (3d Cir. 1987) (holding contingent fee not unreasonable where attorney earned \$790 per hour rather than his usual hourly rate of \$60 per hour); *Anderson v. Kenelly*, 547 P.2d 260, 260-61 (Colo. Ct. App. 1975) (holding that lawyer unreasonably charged one-third contingent fee to assist widow in collection of claim from life insurance company in which lawyer's only action was to inform insurer of date widow's deceased husband enlisted in Air Force). The Third Circuit looks for reasonableness both ex ante and ex post. "Although reasonableness at the time of contracting is relevant, consideration should also be given to whether events occurred after the fee arrangement was made which rendered a contract fair at the time unfair in its enforcement." *McKenzie Constr.*, 823 F.2d at 45.

<sup>122</sup> See N.J. Ct. R. 1:21-7(c) (providing for schedule of contingent fees allowing "(1) 33 1/3% on the first \$500,000 recovered; (2) 30% on the next \$500,000 recovered; (3) 25% on the next \$500,000 recovered; (4) 20% on the next \$500,000 recovered" and on all additional amounts reasonable fee by application to court).

<sup>123</sup> See *Am. Trial Lawyers Ass'n v. N.J. Supreme Court*, 330 A.2d 350, 355 (N.J. 1974) (holding, against challenge by state bar, that New Jersey Supreme Court had constitutional authority to establish schedule for contingent fees).

<sup>124</sup> See *Brickman*, supra note 88, at 127 (stating that ex post judicial decisionmaking under reasonableness standard fails to protect clients from excessive contingent fees). Professor Brickman and his colleagues have proposed a more clearly defined rule: When a defendant makes an early settlement offer that is subsequently rejected by a plaintiff, the plaintiff's lawyer should be permitted to charge only an hourly rate on work done before the settlement offer, plus a percentage of any recovery in excess of the offer. *Lester Brickman et al., Rethinking Contingency Fees* 28 (1994). Brickman's proposal was included in a California ballot measure, but was opposed by plaintiffs' lawyers and rejected by voters. California, like most jurisdictions, thus fell back on the reasonableness standard. See B. Drummond Ayres, Jr., *Cougars and Lawyers Win in California Ballot Measures*, N.Y. Times, Mar. 28, 1996, at B12.

<sup>125</sup> Model Rules of Prof'l Conduct R. 1.8 (a)(1) (1998). Model Rule 1.8(a)(1)-(3) does have some defined rule components—for example, the requirement that the disclosure to the client be in writing, that the client be "given a reasonable opportunity to seek the advice of independent counsel in the transaction," and that the client's consent to the transaction be in writing.

<sup>126</sup> Or. Code of Prof'l Responsibility DR 5-110(A)-(C) (1992) (stating:  
(A) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer/client relationship commenced. . . .

...  
(C) For purposes of DR 5-110 'sexual relations' means:

and New York prohibits sexual relations between a lawyer and a matrimonial client<sup>128</sup> (a tailored defined rule). Most states, however, only prohibit sexual relations that adversely affect the lawyer's representation of a client (a standard).<sup>129</sup>

Sometimes the bar prefers that an immutable rule be a standard rather than a defined rule if there is substantial disagreement over what the rule should be. Because immutable rules are inflexible *ex ante* (they cannot be contracted around), rulemakers who disagree on basic principles underlying a rule are not likely to select an immutable rule that is so well defined that it is also inflexible *ex post* (preventing an adjudicator from tailoring the rule to adjust for circumstances). Thus, although the Model Rules replaced some standards in the Model Code with defined rules,<sup>130</sup> in many particularly controversial areas, such as rules governing lawyers' fees,<sup>131</sup> lawyer competence and diligence,<sup>132</sup> and disclosure of fraud and illegal acts within an organizational client,<sup>133</sup> standards were retained.

On the other hand, defined rules often are used for less controversial subject matter, particularly if enforcement is vigorous and pen-

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(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party).

<sup>127</sup> "Presumably" because there is always room to argue over what constitutes "sexual relations." See White House Response to Report of the Office of Independent Counsel, Sept. 11, 1998, reprinted in Excerpts From White House Response to Starr Report, L.A. Times, Sept. 12, 1998, at S11 (reprinting White House statement that President Clinton's encounters with Monica Lewinsky "did not consist of 'sexual relations' as [President Clinton] understood that term to be defined at his [Paula] Jones deposition on January 17, 1998"). Oregon's definition includes some subjective components (e.g., "arousing or gratifying the sexual desire of either party"). Or. Code of Prof'l Responsibility DR 5-110(C)(2) (1992).

<sup>128</sup> See N.Y. Code of Prof'l Responsibility DR 5-111 (2000) ("A lawyer shall not: . . . [i]n domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.").

<sup>129</sup> See Model Rules of Prof'l Conduct R. 1.7(b) (1998) ("A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."); see also *id.* R. 1.7 cmt. 11 ("Relevant factors in determining whether there is potential or adverse effect include the duration and intimacy of the lawyer's relationship with the client . . .").

<sup>130</sup> See *infra* text accompanying notes 145-55 (discussing specific examples).

<sup>131</sup> Model Rules of Prof'l Conduct R. 1.5 (1998) (setting forth factors to be weighed by lawyer in determining reasonableness of fees).

<sup>132</sup> *Id.* R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

<sup>133</sup> *Id.* R. 1.13(b) (setting forth obligation to lawyer when she knows of potential illegal activities by employee of organization).

alties harsh, putting predictability at a premium. For example, rules requiring segregation of client funds are precisely defined.<sup>134</sup> The bar also worries that standards can be applied *ex post* to penalize lawyers whose conduct a fact finder dislikes. Standards, such as the requirement in Canon 9 that “[a] lawyer should avoid even the appearance of professional impropriety[.]”<sup>135</sup> have thus been dropped from the Model Rules.<sup>136</sup>

Finally, all of these rules draw upon a range of incentives for compliance.<sup>137</sup> Some rules are *legally enforced* through discipline, criminal penalties, civil penalties, and civil suits by clients or third parties.<sup>138</sup> Some rules are enforced more sporadically, or the penalties are less severe, while other rules are not enforced at all. Whether or not a rule is legally enforced, it can be *reputationally enforced* if breach of the rule is detectable and likely to harm a lawyer’s reputa-

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<sup>134</sup> See *id.* R. 1.15(a) (providing that if lawyer comes into possession of property of client or third person, lawyer must hold property separately from lawyer’s own property; that funds shall be kept in separate account in state where lawyer’s office is situated, or elsewhere with consent of client or third person; that other property shall be identified as such and appropriately safeguarded; and that record of such accounts and property shall be kept by lawyer for period of five years after termination of representation). With the exception of the requirement that the account be in the state where the lawyer’s office is situated, this rule is immutable.

<sup>135</sup> Model Code of Prof’l Responsibility Canon 9 (1980).

<sup>136</sup> See, e.g., Model Rules of Prof’l Conduct R. 1.7, 1.9 (1998) (establishing functional tests for conflicts without “appearance of impropriety” standard); *id.* R. 1.9 cmt. 5 (criticizing Model Code “appearance of impropriety” standard because “the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious[.]” and “since ‘impropriety’ is undefined [in the Code], the term ‘appearance of impropriety’ is question-begging”).

<sup>137</sup> The Model Rules themselves recognize these three categories of enforcement. *Id.* scope 14 (“Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.”). Nonetheless, with the exception of Model Rule 6.1, all of the Model Rules are designed, at least in principle, to be legally enforced.

<sup>138</sup> The drafters of the Model Rules insisted that “[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached[.]” and that “nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.” *Id.* scope 18. This language, however, does not preclude use of the Rules as evidence that a lawyer *has* complied with requisite standards in her profession. Furthermore, rules of professional responsibility are regularly used for offensive and defensive purposes in malpractice litigation. See John Leubsdorf, Legal Malpractice and Professional Responsibility, 48 Rutgers L. Rev. 101, 117-20, 157-59 (1995) (discussing relevance of professional responsibility rules in malpractice actions); Gary A. Munneke & Anthony E. Davis, The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?, 27 J. Legal Prof. 33, 81-84 (1997-1998) (same); Charles W. Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C. L. Rev. 281, 291-95 (1979) (same); Note, The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard, 109 Harv. L. Rev. 1102, 1118-19 (1996) (same).

tion.<sup>139</sup> The reputational paradigm can be powerful,<sup>140</sup> particularly for those lawyers whose reputations are a highly prized capital asset.<sup>141</sup> Some lawyers observe rules of professional responsibility, and even subscribe to self-imposed opt-in rules above and beyond the minimum requirements, knowing what is expected of them and that, if they “defect,” their reputational capital will erode.<sup>142</sup> In some cases, however, reputational penalties are weak or nonexistent, and a rule is merely *aspirational*.<sup>143</sup> An aspirational rule lacks coercive force of any kind until such time as the bar, clients, or third parties attach sufficient importance to the rule that reputational capital can be acquired and retained by complying with its terms.

## II

### EVOLUTION OF RULES WITHIN THE CONTRACTARIAN FRAMEWORK

Over time, some rules have changed form (e.g., some immutable rules have become default rules). Other rules that did not exist in earlier codes initially emerged in one form, and then changed to another (for example, some new standards later became defined rules). Rules sometimes appear in different forms depending on the jurisdiction, reflecting disagreement over the type of rule that should be used to address a particular problem.<sup>144</sup> Although the form of rules is constantly changing, some overall trends are discernable.

A significant number of rules have shifted from “standards” toward “defined rules” (although many of them only partially). This trend is especially noticeable when comparing the ABA’s Canons with the Model Code, and again with the Model Rules. The “appearance of impropriety”<sup>145</sup> standard that used to define conflicts jurispru-

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<sup>139</sup> Reputational penalties for breach of legally enforced rules are likely to be higher if enforcement proceedings are public.

<sup>140</sup> See Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. Pol. Econ. 615, 629-33, 635-36 (1981) (developing reputational capital paradigm as economic model).

<sup>141</sup> See Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 Or. L. Rev. 15, 32-33 (1995) (discussing importance of reputational capital to securities lawyers).

<sup>142</sup> See Gilson & Mnookin, *Disputing Through Agents*, *supra* note 9, at 543-46, 547 (describing evolution of cooperative relationships among lawyers in San Francisco Bay Area domestic relations bar).

<sup>143</sup> Model Rule 6.1, for example, contains an aspirational pro bono requirement. Model Rules of Prof'l Conduct R. 6.1 (1998) (providing that lawyer should “aspire to render at least (50) hours of pro bono publico legal services per year”).

<sup>144</sup> Rules prohibiting sexual relations with clients are a good example. See *supra* notes 126-29.

<sup>145</sup> Model Code of Prof'l Responsibility Canon 9 (1969) (“A lawyer should avoid even the appearance of impropriety[.]”).

dence<sup>146</sup> is gone in the Model Rules, and is only rarely mentioned by courts deciding conflicts cases.<sup>147</sup> The standard for defining a “conflicting interest” in Canon 6<sup>148</sup> was ambiguous, and the “differing interests” standard in the Model Code was not much clearer.<sup>149</sup> An “adverse interest” under Model Rule 1.7 is not always easy to identify, but the rule at least focuses attention on adversity as the determinative criteria for a conflict.<sup>150</sup>

The Model Code also relied exclusively on standards to address lawyer-client business transactions.<sup>151</sup> Although Model Rule 1.8 imposes a “reasonableness” standard on lawyer-client transactions, it also includes some defined rules, such as the requirement that disclo-

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<sup>146</sup> See, e.g., *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 648-52 (2d Cir. 1974) (applying “appearance of impropriety” standard to disqualify former government lawyer who substantially participated in bringing of antitrust suit by Justice Department from representing private plaintiff in similar antitrust suit against same defendant).

<sup>147</sup> See Wolfram, *supra* note 18, at 686-87 (“[T]he mostly dead dog of appearance of impropriety[ ] . . . plays only a minor, if irritating and potentially distorting, role in modern conflicts opinions.”); see also Model Rules of Prof'l Conduct R. 1.9 cmt. 5 (1998) (stating that, although Canon 9 was formerly used to deal with motions to disqualify lawyer because of conflicts, “since ‘impropriety’ is undefined, the term ‘appearance of impropriety’ is question-begging”); *id.* R. 1.9 cmt. 6 (stating that “a rule based on a functional analysis is more appropriate for determining the question of disqualification”).

<sup>148</sup> Canons of Prof'l Ethics Canon 6 (1908) (providing that “a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose”). Canon 6 provided that “[i]t is unprofessional to represent conflicting interests, except by express consent of all concerned given after full disclosure of the facts.” *Id.*

<sup>149</sup> Model Code of Prof'l Responsibility DR 5-105(A) (1980) (providing that “[a] lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)” (footnotes omitted)); *id.* DR 5-105(C) (providing that “a lawyer may represent multiple clients if it is obvious that [she] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each”).

<sup>150</sup> See Model Rules of Prof'l Conduct R. 1.7 (1998) (concurrent conflicts). The comment provides some guidance as to what adversity means. *Id.* R. 1.7 cmt. 3 (stating: “Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients”).

<sup>151</sup> Model Code of Prof'l Responsibility DR 5-104(A) (1969) (providing that lawyers “shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure”). The Code’s Ethical Considerations provide that “[a] lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.” *Id.* EC 5-3.

sure to the client be in writing, that the client be given a reasonable opportunity to seek independent legal advice, and that the client consent in writing.<sup>152</sup> The 1908 Canons set forth rules prohibiting the commingling of lawyer and client funds.<sup>153</sup> The Model Code and Model Rules defined the rules set forth in the Canons with even greater precision.<sup>154</sup> The Restatement continues this trend toward defined rules by setting forth specific requirements for fee contracts.<sup>155</sup>

There also has been a trend toward replacing immutable rules with default rules and opt-in rules. Common law prohibitions on contingent fees, for example, were judicially repealed in the late nineteenth century,<sup>156</sup> although the bar still pays lip service to the immutable rule that these *ex ante* contracts must be "reasonable."<sup>157</sup>

<sup>152</sup> Model Rules of Prof'l Conduct R. 1.8(a)(1)-(3) (1998).

<sup>153</sup> Canon 11, for example, provided that client funds or other trust property "should be reported promptly, and except with the client's knowledge and consent should not be commingled with [the lawyer's] private property or be used by him." Canons of Prof'l Ethics Canon 11 (1908).

<sup>154</sup> The Model Code specifically requires, among other things, that client funds be kept in "one or more identifiable bank accounts maintained in the state in which the law office is situated[.]" that no funds belonging to the lawyer be deposited therein except those necessary to pay bank charges and funds belonging in part to the client, and that the lawyer "[m]aintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer[.]" Model Code of Prof'l Responsibility DR 9-102(A), 9-102(B)(3) (1980). Model Rule 1.15 extends many of these requirements to property belonging to third persons and requires the lawyer to keep records for a specific period of time (five years is suggested) after termination of the representation. Model Rules of Prof'l Conduct R. 1.15(a) (1998).

<sup>155</sup> Restatement (Third) of the Law Governing Lawyers § 38 (2000) (providing:

(1) Before or within a reasonable time after beginning to represent a client in a matter, a lawyer must communicate to the client, in writing when applicable rules so provide, the basis or rate of the fee, unless the communication is unnecessary for the client because the lawyer has previously represented that client on the same basis or at the same rate.

...

(3) Unless a contract construed in the circumstances indicates otherwise:

(a) a lawyer may not charge separately for the lawyer's general office and overhead expenses;

(b) payments that the law requires an opposing party or that party's lawyer to pay as attorney-fee awards or sanctions are credited to the client, not the client's lawyer, absent a contrary statute or court order; and

(c) when a lawyer requests and receives a fee payment that is not for services already rendered, that payment is to be credited against whatever fee the lawyer is entitled to collect).

<sup>156</sup> See Painter, *Litigating on a Contingency*, *supra* note 88, at 639-40 (discussing repeal, in New York's 1848 Field Code, of statutes prohibiting contingent fees).

<sup>157</sup> See Model Rules of Prof'l Conduct R. 1.5(c) (1998) (requiring fees to be reasonable and stating that fee may be contingent upon outcome of matter, provided agreement is in writing and states method by which fee shall be determined). The Restatement takes the same position as the Model Rules. Restatement (Third) of the Law Governing Lawyers § 35 (2000) (same). In the absence of a fee contract, the default rule under the Restate-

Although the Model Code requires the client ultimately to reimburse the lawyer for court costs and other expenses, the Model Rules permit the client's liability for these expenses to be made contingent upon the outcome.<sup>158</sup> Whereas the Model Code imposes immutable restrictions on division of fees among unaffiliated lawyers, the Model Rules lift these restrictions if the lawyers assume joint responsibility for the representation, and if the client consents.<sup>159</sup> The Model Code prohibits an agreement with the client prospectively limiting the attorney's liability for malpractice,<sup>160</sup> but the Model Rules allow a lawyer to make such an agreement if permitted by law, and if the client is separately represented by counsel.<sup>161</sup> These changes reflect a greater willingness to allow lawyers and clients to define contractually their relationship, usually with the proviso that the contract be in writing<sup>162</sup> and that the

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ment is that a lawyer shall be compensated for "the fair value of the lawyer's services." *Id.* § 39.

<sup>158</sup> Compare Model Code of Prof'l Responsibility DR 5-103(B) (1980) (requiring that client ultimately be responsible for costs and expenses), with Model Rules of Prof'l Conduct R. 1.8(e)(1) (1998) (stating that lawyer may advance costs and expenses, repayment of which is contingent on the outcome of litigation), and Restatement (Third) of the Law Governing Lawyers § 36(2) (2000) (substantially similar to Model Rule 1.8(e)(1)).

<sup>159</sup> Compare Model Code of Prof'l Responsibility DR 2-107(A)(2) (1980) (prohibiting unaffiliated lawyers from dividing fees except in proportion to work they actually perform for client), with Model Rules of Prof'l Conduct R. 1.5(e)(1) (1998) (permitting fee division either on basis of services actually performed or if "by written agreement with the client, each lawyer assumes joint responsibility for the representation").

<sup>160</sup> Model Code of Prof'l Responsibility DR 6-102(A) (1980) ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.").

<sup>161</sup> Model Rules of Prof'l Conduct R. 1.8(h) (1998). *Contra*, Restatement (Third) of the Law Governing Lawyers § 54 (2000) ("An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable."). In this area, the ABA's contractarianism has gone ahead of prevailing law, and the ALI Reporter points out that the Restatement provision states "essentially the rule that would result in every jurisdiction from application of ABA Model Rule 1.8(h)." *Id.* reporter's note to cmt. b. However, comment b also points out that "[a] client and lawyer may agree in advance . . . to arbitrate claims for legal malpractice, provided that the client receives proper notice of the scope and effect of the agreement and if the relevant jurisdiction's law applicable to providers of professional services renders such agreements enforceable." *Id.*

<sup>162</sup> See, e.g., Model Rules of Prof'l Conduct R. 1.5(c) (1998) (requiring that contingent fee agreement be in writing); Restatement (Third) of the Law Governing Lawyers § 38 cmt. b (2000) (observing that "[m]ost states require that contingent-fee contracts be in writing" and that "[e]ven when there is no such requirement, tribunals are reluctant to uphold oral contingent-fee contracts"). The Ethics 2000 Commission has recommended that client consent to conflicting representations under Model Rule 1.7 be in writing. See Proposed Rule 1.7 (Public Discussion Draft 1999), <http://www.abanet.org/cpr/c2k/rule17draft.html> (striking limitation that lawyer shall not represent client if there is conflict of interest, in favor of language allowing such representation "if each affected client gives informed consent in writing").

lawyer consult with her client about the consequences of contracting around the default rule.<sup>163</sup>

The Restatement reflects this guarded shift toward a contractarian outlook on the lawyer-client relationship. Section 19 (Agreements Limiting Client or Lawyer Duties) states:

(1) Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if:

- (a) the client is adequately informed and consents; and
- (b) the terms of the limitation are reasonable in the circumstances.

(2) A lawyer may agree to waive a client's duty to pay or other duty owed to the lawyer.<sup>164</sup>

Although this appears to be a broad endorsement of lawyer-client contracting, the words "subject to other requirements stated in this Restatement" clearly subordinate Section 19 to immutable provisions elsewhere in the Restatement. Comment a to Section 19 explains:

This section provides default rules that apply when no other, more specific rule of the Restatement applies. Thus, its rules are subject to other provisions, such as those that concern allowing, restricting or forbidding client consent to the disclosure of confidential information, waiver of conflicts of interest, and arbitration of fee disputes. The Section should be applied in view of the prohibition against advance waiver by the client of the lawyer's civil liability.<sup>165</sup>

The Restatement thus recognizes the benefits of contractual freedom, but it is concerned about a lawyer and a client opting down from rules defining the lawyer's responsibilities to the client. The comments and illustrations following Section 19 show that the Restatement drafters are more comfortable with contracts in some areas, such as the scope of a representation, business transactions with clients, resolution of fee disputes, and, to a limited extent, contracts around conflicts rules, than they are with contracts in other areas, such as waiver of legal malpractice claims and disclosure of client confidences.<sup>166</sup> Comment b explains:

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<sup>163</sup> See, e.g., Model Rules of Prof'l Conduct R. 1.7 (1998) (requiring consent after consultation); id. R. 1.8(f) (same); id. R. 1.9 (same); id. R. 1.11 (same).

<sup>164</sup> Restatement (Third) of the Law Governing Lawyers § 19 (2000); see also id. § 21 (providing that lawyer and client may agree which of them will make specified decisions in representation, subject to other provisions of Restatement governing enforcement of lawyer-client contracts and allocation of authority between lawyer and client in representation).

<sup>165</sup> Id. § 19 cmt. a (Scope and Cross References) (citations omitted).

<sup>166</sup> Specific examples of Restatement provisions to which Section 19 is subject are listed in comment a. Id. Illustration 1 in comment c involves the inside legal counsel of a corporation who wants to litigate a case within a limited budget, and agrees with outside counsel



Restrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others. On the one hand, for some clients the costs of more extensive services may outweigh their benefits. A client might reasonably choose to forgo some of the protection against conflicts of interest, for example, in order to get the help of an especially able or inexpensive lawyer or a lawyer already familiar to the client.

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On the other hand, there are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers. Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly.<sup>167</sup>

Concerns about opting down to lower standards of professional conduct also are heightened if the lawyer initially chooses a rule that

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to conduct limited discovery, even though this could materially lessen the chances of success. Illustration 2 involves a legal clinic that, for a small fee, offers a half-hour consultation with a client about the client's tax return, after disclosure that this limited review may not find important tax matters and that clients can have a more complete consideration of their returns only if they arrange for a second meeting for an additional fee. Both of these arrangements are permissible according to the comment. Illustration 3 involves a lawyer who offers to provide inexpensive tax advice even though she has little knowledge of tax law, and asks occasional tax clients to waive the requirement of reasonable competence. This arrangement, according to the comment, is impermissible. *Id.* § 19 cmt. c. Section 19 thus gives qualified support for so-called "limited performance agreements," at least if they cover the *scope* of legal services (i.e., which tasks the lawyer will perform) rather than the *quality* of the services to be provided (i.e., how well the lawyer will perform a particular task).

Because strict interpretations of competence and diligence requirements arguably cut off persons of limited means from any legal services at all, limited performance agreements have received considerable support in the academic literature. See David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 *Geo. J. Legal Ethics* 959, 973 (1998) (proposing that ethics rules only require that nature of services to be performed be described accurately and completely to client); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 *Geo. J. Legal Ethics* 915, 915-17 (1998) (proposing abolition of disciplinary rules that discourage lawyers from providing services in accordance with clients' willingness to pay). Another related issue is "ghostwriting" arrangements whereby a lawyer agrees to assist a pro se party with drafting pleadings, but does not sign the pleadings herself. Many courts are hostile to agreements of this sort. See *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1075 (E.D. Va. 1997) (holding that "attorneys' practice of ghostwriting complaints was inconsistent with procedural, ethical and substantive rules of the Court"); *Somerset Pharm., Inc. v. Kimball*, 168 F.R.D. 69, 72-73 (D. Fla. 1996) (finding that filing of pro se pleadings that are actually prepared by attorneys "taints" legal practice); see also Elizabeth J. Cohen, *Afraid of Ghosts: Lawyers May Face Real Trouble When They "Sort Of" Represent Someone*, A.B.A. J., Dec. 1997, at 80 (raising ethical questions about practice of ghostwriting).

<sup>167</sup> Restatement (Third) of the Law Governing Lawyers § 19 cmt. b (2000) (citations omitted).

is then imposed on all the lawyer's clients.<sup>168</sup> Finally, the Restatement encourages arrangements by which the lawyer opts up to increase the lawyer's duties to the client, but it is concerned about situations in which, in doing so, the lawyer opts down from obligations to future clients or to third parties.<sup>169</sup>

The Ethics 2000 Commission takes a somewhat different approach from the Restatement's broad statements in Section 19, and chooses instead to define more precisely how client consent mechanisms should be used in rules that already contemplate lawyer-client contracting around a default rule. The Commission thus proposes replacing the words "consent after consultation" throughout the Model Rules with "gives informed consent."<sup>170</sup> A definition of "informed consent," taken in part from the client conflicts provisions of the Restatement,<sup>171</sup> is to appear in a new subsection c of Model Rule 1.4:

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<sup>168</sup> Comment b continues:

In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

Id.

<sup>169</sup> As comment e explains:

The general principles set forth in this Section apply also to contracts calling for more onerous obligations on the lawyer's part. A lawyer or law firm might, for example, properly agree to provide the services of a tax expert, to make an unusually large number of lawyers available for a case, or to take unusual precautions to protect the confidentiality of papers. Such a contract may not infringe the rights of others, for example by binding a lawyer to aid an unlawful act (see § 23) or to use for one client another client's secrets in a manner forbidden by § 62. Nor could the contract contravene public policy, for example by forbidding a lawyer ever to represent a category of plaintiffs even were there no valid conflict-of-interest bar (see § 13) or by forbidding the lawyer to speak on matters of public concern whenever the client disapproves.

Id. § 19 cmt. e (Contracts to increase lawyer's duties) (citing id. § 23 (providing that lawyer retains "authority that may not be overridden by a contract" to refuse to perform, counsel, or assist conduct lawyer believes to be unlawful, and to take action that lawyer reasonably believes to be required by law or an order of tribunal); id. § 13 (providing that lawyer may not enter into law firm agreement or settlement of claim that restricts right of lawyer to practice law, including right to take action on behalf of other clients); id. § 62 (providing that lawyer may use or disclose client information only when client consents after being adequately informed)); see *infra* text accompanying notes 250-54 (discussing and criticizing this last restriction on lawyer contracting).

<sup>170</sup> Proposed Rule 1.4 (Public Discussion Draft 1999), <http://www.abanet.org/cpr/e2k/rule14draft.html>.

<sup>171</sup> The Restatement defines "informed consent" in Section 122(1), its provision governing conflicts of interest in representations. Restatement (Third) of the Law Governing Lawyers § 122(1) (2000) ("Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.").

As used in these Rules, “informed consent” denotes the agreement of a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation regarding the material risks of and reasonably available alternatives to the proposed course of conduct.<sup>172</sup>

A proposed comment to Model Rule 1.4 states that factors to be considered in determining whether information given was “reasonably adequate” include the client’s sophistication and in “some circumstances” whether the client was independently represented at the time the consent was obtained.<sup>173</sup> Although the Ethics 2000 Commission’s definition of “informed consent” is still more of a standard than a defined rule, it is intended to provide guidance on relevant issues a lawyer should consider—the sophistication of the client, the presence of independent counsel, etc. This amendment reflects not only a willingness to accommodate lawyer-client contracting in appropriate circumstances, but it also reflects the bar’s broader shift toward, where possible, lending some definitional content to open-ended standards.<sup>174</sup>

Despite this general, but guarded, shift toward a more contractarian outlook on the lawyer-client relationship both in the Model

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<sup>172</sup> Proposed Rule 1.4(c) (Public Discussion Draft 1999), <http://www.abanet.org/cpr/e2k/rule14draft.html>. The Ethics 2000 Commission states that the change is for clarification purposes. See Model Rule 1.4, Reporter’s Explanations of Changes, <http://www.abanet.org/cpr/e2k/rule14memo.html> (Mar. 23, 1999) (stating:

The Commission recommends that throughout the Rules, the phrase “consent after consultation” be replaced with “gives informed consent.” The Commission believes that “consultation” is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term “informed consent,” which is familiar from its use in other contexts, is more likely to convey to lawyers what is required under the Rules. The definition is largely based on . . . the Restatement).

<sup>173</sup> Proposed Rule 1.4 cmt. 5 (Public Discussion Draft 1999), <http://www.abanet.org/cpr/e2k/rule14draft.html> (stating:

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person before accepting or continuing representation or pursuing a course of conduct. See, e.g., [Model Rules of Prof’l Conduct R.] 1.6-1.12. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need for disclosure. The lawyer must make reasonable efforts to assure that the client possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client to seek the advice of other counsel . . .).

<sup>174</sup> See *supra* text accompanying notes 145-55 (discussing general shift in professional responsibility codes toward defined rules).

Rules and in the Restatement, it is important to note that in a few areas the bar has gone in the opposite direction and introduced new immutable (but usually well-defined) rules for situations in which there is likely to be asymmetry of information or unequal bargaining power between lawyers and clients. The Model Code, the Model Rules, and the Restatement all provide that an attorney may not contract with a client for literary or media rights relating to a representation prior to its conclusion.<sup>175</sup> The Canons contain no such specific prohibition.<sup>176</sup> Oregon's immutable ban on sexual relations between attorneys and clients<sup>177</sup> is a new immutable rule that has been endorsed by the Ethics 2000 Commission in its recommendations,<sup>178</sup> although most states have no such ban.<sup>179</sup> Some of these defined rules in professional responsibility codes previously were reflected in standards imposed by courts,<sup>180</sup> but the new immutable rules now make specific types of lawyer overreaching in relationships with clients more likely to be the subject of discipline.

Finally, the bar has been deeply ambivalent about rules that rely exclusively on reputational incentives to promote compliance, as well as about rules that are merely aspirational.<sup>181</sup> The Model Code relied on Ethical Considerations to supplement its Disciplinary Rules, but the Ethical Considerations have been deleted from the Model Rules, presumably because the bar feared that the Ethical Considerations

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<sup>175</sup> Model Rules of Prof'l Conduct R. 1.8(d) (1998) ("Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."); Restatement (Third) of the Law Governing Lawyers § 36(3) (2000) (same); cf. Model Code of Prof'l Responsibility DR 5-104(B) (1980) (referring to "publication rights" instead of "literary or media rights").

<sup>176</sup> Canon 11 states that "[t]he lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client." Canons of Prof'l Ethics Canon 11 (1956). Canon 38 states that "a lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure." *Id.* Canon 38.

<sup>177</sup> Or. Code of Prof'l Responsibility DR 5-110(A) (1992).

<sup>178</sup> The Commission proposes to add a new paragraph (k) to Rule 1.8 that prohibits "sexual relations" between a lawyer and a client, unless a consensual sexual relationship existed at the time the client-lawyer relationship began. Proposed Rule 1.8 (Public Discussion Draft 1999), <http://www.abanet.org/cpr/e2k/rule18draft.html>.

<sup>179</sup> Most state codes simply do not specifically regulate attorney-client sex. New York's rule is narrowly tailored to cover domestic relations clients only. N.Y. Code of Prof'l Responsibility DR 5-111 (2000).

<sup>180</sup> See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531, 559-60 (1994) (citing growing body of caselaw on sexual relations between lawyers and individual clients, including *People v. Gibbons*, 685 P.2d 168, 175 (Colo. 1984), *In re Marriage of Kantar*, 581 N.E.2d 6, 15-16 (Ill. App. Ct. 1991), and *Drucker's Case*, 577 A.2d 1198, 1203 (N.H. 1990), all of which found conflict of interest in relationship).

<sup>181</sup> See *supra* note 137 (observing that only one of Model Rules is aspirational).

would be used by courts and bar disciplinary committees to interpret the Disciplinary Rules. The ABA incorporated into the commentary to the Model Rules only those ethical considerations that it believed should be used to interpret legally enforced rules, while the remaining ethical considerations were jettisoned entirely. On the other hand, the ABA and some states recently returned to aspirational rules for one controversial subject: the lawyer's obligation to work pro bono publico.<sup>182</sup> In a few jurisdictions, the aspirational rule is coupled with a legally enforced pro bono reporting requirement<sup>183</sup> that should, in turn, create reputational incentives to comply with the rule.

Should the overall trend toward defined rules and default rules continue? Should the Model Rules' omission of reputationally-enforced and aspirational rules (in areas other than pro bono) be reconsidered? Should lawyers be required to report on their compliance with rules of all types so reputational enforcement can be enhanced? The Ethics 2000 Commission considered proposals to enlist both immutable rules and default rules in controversial areas as diverse as client crime or fraud,<sup>184</sup> client conflicts,<sup>185</sup> and pro bono legal services.<sup>186</sup> The Commission also considered reintroducing reputationally enforced and aspirational ethical considerations by adding statements of "best practices" to the Model Rules.<sup>187</sup> Proposals made to the Commission in a few important areas are discussed below.

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<sup>182</sup> See, e.g., Model Rules of Prof'l Conduct R. 6.1 (1983) (amended 1993) (providing that lawyer should "aspire to render at least (50) hours of pro bono publico legal services per year").

<sup>183</sup> See, e.g., Rules Regulating the Florida Bar R. 4-6.1 (1994) (containing aspirational rule encouraging twenty hours of pro bono work each year or annual donation of \$350 to legal aid organization, and requiring lawyers to report their annual pro bono service or payments made in lieu of service).

<sup>184</sup> See, e.g., Painter, Ethics 2000 Letter, *supra* note 4 (proposing default rule that lawyer must report organizational client's prospective crime or fraud to its board of directors); Written Testimony of Robert E. O'Malley (May 26, 1998), <http://www.abanet.org/cpr/omalley.html> (proposing that comment 15 to Model Rule 1.6 be amended to provide:

If the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, or if the client has used the lawyer's services to perpetrate a crime or a fraud, the lawyer may (but is not required to) withdraw, as stated in Rule 1.16(b)(1) and (2)).

<sup>185</sup> See, e.g., Painter, Proposal to Amend Model Rules, *supra* note 3 (proposing that lawyers and clients be permitted contractually to waive conflicts *ex ante* under certain circumstances).

<sup>186</sup> See, e.g., Written Testimony of Richard Zitrin (May 29, 1998), <http://www.abanet.org/cpr/zitrin.html> (proposing that each law firm be required to spend forty hours per year per lawyer to serve needs of people who otherwise would not be represented).

<sup>187</sup> See Minutes of October 17-18, 1997 Ethics 2000 Meeting, Ethics 2000 Commission Web Page, *supra* note 1 (stating:

The Committee also discussed whether the Reporters should continue to draft a "best practice" section in the Comment section of the Rules. Some members

### A. *Client Conflicts*

Arguably, if lawyers and clients were to bargain for their own rules governing client conflicts, they would agree upon rules substantially similar to the default provisions in the Model Rules (in other words the Model Rules are *majoritarian* default rules).<sup>188</sup> On the other hand, conflicts rules based on Model Rule 1.7—which prohibits lawyers from concurrently representing clients with adverse interests, even in unrelated matters<sup>189</sup>—may be *penalty default rules*. In transactional representations in particular, lawyers routinely seek, and are granted, waivers from conflicts after they furnish clients with relevant information about concurrent representations.<sup>190</sup> In one other respect, most conflicts rules are penalty default rules: ambiguous standards for determining whether a matter is “substantially” related<sup>191</sup> or an interest is “adverse”<sup>192</sup> force lawyers to obtain client consent to conflicts even in situations where the conflict prohibitions arguably do not apply.<sup>193</sup> Furthermore, conflicts rules, while default rules, have an

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questioned how much value a “best practice” section adds to the rules and expressed concern about the effect of such standards on malpractice standards of care. The Committee agreed that looking at “best practice” is helpful and a good exercise, and agreed to reconsider the issue after looking at a few more rules);

Minutes of July 31 to August 1, 1998 Ethics 2000 Meeting, *id.* (“The Commission tentatively decided to abandon attempts to include a ‘best practice’ section in the Rules in light of comments made at the Advisory Council meeting. Discussion of ‘best practice’ in a separate document remains a possibility.”).

<sup>188</sup> Macey & Miller, *supra* note 10, at 972-73, 997 (stating that, in many cases, “efficiency considerations suggest that the government’s role should ordinarily be to supply reasonable ‘gap-filling’ or default terms that the parties likely would have agreed to if they had bargained over the issue *ex ante*” (footnote omitted)). The rules governing former government attorneys, however, are more precisely described as *tailored majoritarian* default rules that are in some respects more stringent and in other respects more lenient than the rules governing conflicts between private sector clients. See *supra* text accompanying notes 105-08 (comparing Model Rule 1.11 with Model Rules 1.9 and 1.10).

<sup>189</sup> Model Rules of Prof’l Conduct R. 1.7 (1998).

<sup>190</sup> See *supra* text accompanying note 110.

<sup>191</sup> Model Rules of Prof’l Conduct R. 1.9 (1998) (Conflict of Interest: Former Client); Wolfram, *supra* note 18, at 681, 727-28 (discussing ambiguities in “substantial relationship” standard used to evaluate former client conflicts).

<sup>192</sup> Model Rules of Prof’l Conduct R. 1.7 (1998) (requiring that representation be “directly adverse” to trigger impermissible conflict); *id.* R. 1.9 (requiring that representation be “materially adverse” to trigger impermissible conflict).

<sup>193</sup> Jason Scott Johnston observes that a contingent *ex post* entitlement bestowed by an ambiguous default standard in some instances will facilitate bargaining around the default because the party possessing the entitlement has less incentive to hold out and delay, if not permanently stall, negotiations than does a party holding a definite *ex ante* entitlement from a defined default rule. The risk of losing the right entirely through erroneous judicial interpretation of a standard instead creates an incentive to negotiate. Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. Econ. & Org. 256, 267-69 (1995). The ambiguous standards used in conflicts rules illustrate this point well. Lawyers

immutable component, itself comprised of ambiguous standards, such as whether the lawyer obtained a client's consent "after consultation"<sup>194</sup> or (for concurrent conflicts) whether the lawyer "reasonably" believed that she could represent both clients.<sup>195</sup> Client conflicts thus frequently are litigated, and judges often rely upon expert testimony to determine whether or not an impermissible conflict exists.<sup>196</sup>

A principal obstacle to the contractarian paradigm working effectively in this area is that conflicts rules poorly accommodate *ex ante* contracting through "advance consent."<sup>197</sup> Because the words "consent after consultation" suggest that the consenting client should know all, or most, of the relevant facts about a conflict, advance consents may not even be enforceable.<sup>198</sup> In almost all cases, lawyers thus ask their clients for conflict waivers only after the second client seeks representation, when most relevant facts about the conflict are known. Rarely is a waiver contracted for in advance.

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have a contingent *ex post* entitlement to represent a client whose interests are not "adverse" to another client, and (in conflicts with former clients) if the second matter is not "substantially related" to the first. In close cases, however, these ambiguous default standards facilitate bargaining around the default through consultation with clients who either agree to affirm the default rule (give consent), or seek to change it (persuade the lawyer not to go ahead with the representation although it appears that the lawyer is entitled to proceed). Lawyers who do not seek client consent in close cases risk an erroneous *ex post* judicial determination that their assessment of factors such as adversity or substantial relationship was wrong.

<sup>194</sup> Model Rules of Prof'l Conduct R. 1.7 (1998) (requiring "consent after consultation"); *id.* R. 1.9 (same).

<sup>195</sup> *Id.* R. 1.7 (requiring that "the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client").

<sup>196</sup> For several decades, it has been recognized that "disqualification motions have become 'common tools of the litigation process, being used . . . for purely strategic purposes[.]'" *Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977) (quoting Judge Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View* (Part II), N.Y. L.J., July 20, 1977, at 1). Firms practicing in specialty areas, such as mergers and acquisitions, are particularly likely to be subjected to these motions. See George D. Raycraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 *Hastings L.J.* 605, 607 (1988) (observing that "the [mergers and acquisitions] specialty firm inevitably faces frequent and recurring conflicts of interest between present and former clients with adverse or potentially adverse interests. These conflicts often result in lawsuits to disqualify the law firm and, in some instances, in actions for malpractice." (citations omitted)). Parties to these lawsuits in turn often retain expert witnesses. See Monroe Freedman, *Crusading for Legal Ethics*, *Legal Times*, July 10, 1995, at 25 ("Expert witnesses on lawyers' and judges' ethics charge as much as \$500 an hour for their time, and some law professors double and triple their academic salaries by consulting and testifying about ethics.").

<sup>197</sup> For a more detailed discussion on this subject, see generally Richard W. Painter, *Advance Waiver of Conflicts*, 8 *Geo. J. Legal Ethics* 289 (2000).

<sup>198</sup> See generally Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 *Mich. L. Rev.* 1074 (1981) (discussing caselaw on enforceability of advance consents).

Many courts are skeptical of *ex ante* conflict waivers.<sup>199</sup> Some recent cases, however, endorse a more flexible approach.<sup>200</sup> Most of these decisions are not based on straightforward endorsement of advance consent, but instead on the murkier principle of estoppel,<sup>201</sup> or a finding that confidential information was not conveyed to the lawyer by the client who consented to the conflict.<sup>202</sup> One ABA Formal Opinion states that it is permissible for lawyers to seek advance consents in some circumstances.<sup>203</sup> The Opinion, however, makes no promises as to their enforceability.<sup>204</sup> In concluding, the Opinion states that "one principle seems certain: No lawyer can rely with ethical certainty on a prospective waiver of objection to future adverse representations simply because the client has executed a written document to that effect."<sup>205</sup> Under this approach, lawyers and clients gain relatively little from including advance consent terms in their retainer agreements.

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<sup>199</sup> *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 229 (7th Cir. 1978) (refusing to enforce alleged understanding between Gulf and law firm hired by Gulf that firm could continue to represent another longstanding client with potentially adverse interests to Gulf if dispute between two should arise); *In re Boone*, 9 F. 793, 794-95 (N.D. Cal. 1898) (refusing to honor claimed agreement in disbarment proceeding in circumstances in which lawyer's trustworthiness also had been brought into question).

<sup>200</sup> See *Fisons Corp. v. Atochem N. Am., Inc.*, No. 90 Civ. 1080 (JMC), 1990 WL 180551, at \*8 (S.D.N.Y. Nov. 14, 1990) (approving of advance consent).

<sup>201</sup> See, e.g., *Unified Sewerage Agency of Wash. County v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981) (holding that client's "longstanding" consent to conflict coupled with reliance by others can amount to estoppel).

<sup>202</sup> See, e.g., *Interstate Prop. v. Pyramid Co. of Utica*, 547 F. Supp. 178, 183 (S.D.N.Y. 1982) (finding that there was little evidence that client communicated confidential information to law firm and that terms of client's waiver itself "can be read to eliminate any possibility, however slight, that confidential information might have been acquired from [client] during its relationship with [law firm] that will now be used to [client's] disadvantage"). These and other cases on advance waivers are discussed more extensively in Painter, *supra* note 197, at 297-311.

<sup>203</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993) (Waivers of Future Conflicts of Interest).

<sup>204</sup> The Opinion states:

It is the view of the Committee that it is not ordinarily impermissible to seek such prospective waivers; that the mere existence of a prospective waiver will not necessarily be dispositive of the question whether the waiver is effective; that such waiver will ordinarily be effective only in circumstances in which the lawyer determines that there is no adverse effect on the first representation from undertaking the second representation and that the particular future conflict of interest as to which the waiver is invoked was reasonably contemplated at the time the waiver was given; and that consent to a conflicting representation does not in itself constitute consent to the lawyer's disclosure, or use against the client's interest, of information relating to the representation under Rule 1.6. It is also the Committee's view that any such waiver should be in writing.

*Id.*

<sup>205</sup> *Id.*



The ABA Ethics 2000 Commission has proposed adding a comment on advance consent to Model Rule 1.7. This comment, based on a similar comment in the Restatement,<sup>206</sup> shows some added flexibility:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [of Model Rule 1.7]. If the consent is general and open-ended (i.e., the client agrees to consent to any future conflict that might arise), then the consent ordinarily will be ineffective because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is a sophisticated user of the legal services involved and agrees to consent to a particular type of conflict with which the client is already familiar, then the consent should be effective with regard to that type of conflict. For example, a bank that hires a lawyer to defend it in litigation might be willing to agree in advance to have the lawyer represent borrowers in loan transactions but not in resisting collection proceedings brought by the bank. The propriety of the client's consent must be determined not only at the time it is first given but also at the time when the waiver is sought to be implemented to determine if the circumstances at the time of the conflict are what was earlier expected.<sup>207</sup>

This proposed comment, while more accommodating than the ABA Formal Opinion, still imposes broad immutable standards on advance waivers: The circumstances at the time of the conflict must be what was "expected" at the time of the waiver, the waiver cannot be "open ended," and the client presumably should be "sophisticated" and "already familiar" with the type of conflict. The risk of ex post

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<sup>206</sup> The Restatement provides:

Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . .

On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to the types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Restatement (Third) of the Law Governing Lawyers § 122 cmt. d (2000). The ALI approach is preferable to the current approach of the ABA, although it still does not clearly specify when advance consents are and are not enforceable.

<sup>207</sup> Proposed Rule 1.7 cmt. 13 (Public Discussion Draft 1999), <http://www.abanet.org/cpr/e2k/rule17draft.html>.

judicial invalidation of an advance waiver under these provisions is great enough that many lawyers may not give the waiver much weight in deciding whether to accept a client.

This author has suggested that, in place of the Restatement and the Ethics 2000 Commission approach of incorporating broad standards into comments, the Model Rules themselves should incorporate a defined rule that permits advance waivers in some specific instances.<sup>208</sup> First, the Model Rules should allow a lawyer and a client independently represented by counsel (including in-house counsel) to make a binding agreement at the outset of the representation, or at any time during the representation, with respect to the important elements of a potential conflict:

- (i) a definition of who the "client" is in the representation;<sup>209</sup>
- (ii) a definition of what is and is not an "adverse" interest;<sup>210</sup>
- (iii) the time when a representation ends (after which conflicts are evaluated as former client conflicts instead of current conflicts);<sup>211</sup>
- (iv) a time after termination of a representation when former client conflicts rules shall cease to apply;<sup>212</sup>
- (v) an agreement that conflicts between two current clients shall only be grounds for disqualification if the matters are "substantially related" (a criterion usually applied only to former-client conflicts);
- (vi) a definition of what is and is not a "substantially related" matter;<sup>213</sup> and

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<sup>208</sup> See Painter, Proposal to Amend Model Rules, *supra* note 3.

<sup>209</sup> It is often not clear whether parent, subsidiary, and sibling corporations should be treated as a single entity for conflicts purposes. Similar problems can arise in the context of joint ventures and other complex business arrangements. It is usually preferable for these problems to be worked out *ex ante* contractually rather than through *ex post* judicial determination.

<sup>210</sup> For example, a client could waive "positional" conflicts of interest by agreeing that the lawyer would not be deemed to represent an adverse interest simply by making legal arguments on behalf of another client that contradict arguments made on behalf of the first client. See Wolfram, *supra* note 18, at 696-702 (discussing ambiguities in "attack own work" prohibition).

<sup>211</sup> See *id.* at 703-06 (discussing ambiguity surrounding "sunset concepts" that are used to determine when representation ends and when more permissive former client conflict rules apply instead of current client conflict rules).

<sup>212</sup> See Model Rules of Prof'l Conduct R. 1.9 (1998) (specifying no time period after which conflicts created by former client representations expire). "Substantial relationship" between two matters, however, is improbable if the matters are separated by a longer period of time.

<sup>213</sup> See Wolfram, *supra* note 18, at 681, 727-28 (favoring "factual-reconstruction test" for applying "substantial relationship" standard, although acknowledging uncertainties and other practical difficulties with this approach). Lawyers and clients could reduce the uncertainties inherent in *ex post* application of the factual-reconstruction test by agreeing *ex ante* as to what is or is not a "substantially related" matter.

(vii) an agreement whereby the client consents in advance to a specific type of conflict.<sup>214</sup>

In addition, lawyers and clients should be allowed to agree *ex ante* that imputed disqualification of a law firm will be avoided if the lawyers involved in a matter are screened from any participation in another matter to which the conflicts rules would otherwise apply. The comment to Model Rule 1.10 should state that lawyers and clients can agree *ex ante* on appropriate screening procedures.

Furthermore, advance waivers should be permitted only when the client is independently represented in the matter by a lawyer, including in-house counsel, who is unaffiliated with the lawyer receiving the consent. In such cases, the advance consent is unlikely to be affected by asymmetry of information or unequal bargaining power between the lawyer and client. This bright-line rule is preferable to conditioning enforcement ability of the waiver on the client being "sophisticated."

Finally, the comments to Model Rules 1.7 and 1.9 should point out that advance waivers do not allow lawyers to disclose confidential client information in violation of Model Rule 1.6. Use of confidential client information to the client's disadvantage without the client's consent also should continue to be prohibited under Model Rule 1.8(b). The comments, however, should also state that, once consent is given to a conflicting representation, the client giving consent (and any other complaining third party) will have the burden of producing specific facts establishing that the lawyer has misused confidential information, in order for the lawyer to be disqualified or sanctioned for her conduct. Otherwise, specious claims of misuse of confidential information would eviscerate the advance conflict waiver. In addition, clients should be allowed to condition advance waivers on specific undertakings by the law firm, such as an undertaking to return or otherwise dispose of, at the conclusion of the firm's representation of the client, all relevant files, including internal law firm memoranda and computer records, concerning the matter.<sup>215</sup>

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<sup>214</sup> For example, in a co-client representation, one or both clients could agree *ex ante* that the lawyer could subsequently represent the other client in a substantially related matter.

<sup>215</sup> See Painter, Proposal to Amend Model Rules, *supra* note 3. This proposal requests that the Committee consider making the following revisions to the Model Rules of Professional Conduct:

Model Rule 1.7 should be amended to add a paragraph (c) providing:

[A] lawyer and a client independently represented by separate counsel, including an in-house counsel, may enter into a written agreement specifying one or more of the following:

(i) a definition of who the "client" is for purposes of this rule;

### B. *Lawyer Use of Client Information*

The Model Code provides that a lawyer cannot use client information for personal advantage without client consent.<sup>216</sup> The Model Rules only apply this prohibition to uses that disadvantage the client. Model Rule 1.8(b) thus provides that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation. . . ."<sup>217</sup> This default rule is a standard rather than a defined rule because the "disadvantage of the client" element must be evaluated subjectively *ex post*. The ALI articulated a similar default standard in an early draft of the Restatement,<sup>218</sup> but then added a defined rule in Section 60 of the Restatement that, even absent harm to the client, a lawyer must "account

- (ii) a time when a representation ends for purposes of this rule;
- (iii) a definition of what is or is not "directly adverse" for purposes of this rule;
- (iv) that conflicts between two concurrent clients shall only be grounds for disqualification if the matters are "substantially related" as well as a definition of what is or is not a "substantially related" matter; and
- (v) that the client consents in advance to a specific type of conflict.

Model Rule 1.9 should be amended to add a paragraph (d) providing:

[A] lawyer and a client independently represented by separate counsel, including an in-house counsel, may enter into a written agreement specifying one or more of the following:

- (i) a definition of who the "client" is for the purposes of this rule;
- (ii) a time after termination of the representation when the restrictions set forth in this rule shall cease to apply;
- (iii) a definition of what is or is not a "substantially related" matter;
- (iv) a definition of what is or is not a "materially adverse" interest; and
- (v) that the client consents in advance to a specific type of conflict.

Model Rule 1.10 should be amended to add a paragraph (d) providing:

A lawyer and a client independently represented by separate counsel, including an in-house counsel, may enter into a written agreement that imputed disqualification of a law firm will be avoided if the lawyers involved in a matter are screened from any participation in another matter to which this rule would otherwise apply.

The comment to Model Rule 1.10 should state that lawyers and clients can agree *ex ante* on what the appropriate screening procedures will be.

Id.

<sup>216</sup> Model Code of Prof'l Responsibility DR 4-101(B)(3) (1980) (providing that lawyer shall not knowingly "[u]se a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure").

<sup>217</sup> Model Rules of Prof'l Conduct R. 1.8(b) (1998). The Ethics 2000 Commission has proposed replacing the words "consents after consultation" with "gives informed consent," the general consent language that the Commission recommends be used throughout the Model Rules. Ethics 2000 Commission Web Page, *supra* note 1; see also *supra* note 172 (discussing definition of informed consent in Model Rule 1.4).

<sup>218</sup> Restatement (Third) of the Law Governing Lawyers § 111 (Tentative Draft No. 3, 1990).

to the client" for profits made from client information.<sup>219</sup> This defined rule, however, is not violated at the time the information is used but when the lawyer subsequently fails to account to the client for her profits.<sup>220</sup>

In 1993, Professor Stephen Bainbridge criticized the Model Rules and the earlier ALI provision because the default standard is ambiguous in insider trading cases in which it may not be clear that a lawyer's transactions disadvantage a client.<sup>221</sup> The ALI's new provision is only marginally better, as the lawyer's breach of duty only arises when the lawyer fails to account for her profits, not at the time that the lawyer or her tippee trades. This might be sufficient for disciplinary purposes, but the federal securities laws condition a lawyer's liability for insider trading on the lawyer's breach of a duty to her client, and furthermore require that this breach of duty occur at the time of the trade.<sup>222</sup> If Restatement Section 60 defines the lawyer's duty, the SEC

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<sup>219</sup> Id. § 112(2) (Proposed Final Draft No. 1, 1996) (adding requirement that lawyer account to client for profits from use of client information); Restatement (Third) of the Law Governing Lawyers § 60 (2000) ("Except as stated in § 62, a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made."); id. § 62 ("A lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure.").

<sup>220</sup> The Restatement also provides that the lawyer may not use confidential information if the client has instructed the lawyer not to use or disclose such information. Id. § 60(1)(a) (2000). This part of the Restatement is an opt-up default rule, in which client choice is the operative rule selection mechanism—the client specifically can instruct the lawyer not to use the information, in which case the "disadvantage to the client" criteria is inapplicable and the lawyer's use of the information is prohibited.

<sup>221</sup> See Stephen M. Bainbridge, *Insider Trading Under the Restatement of the Law Governing Lawyers*, 19 J. Corp. L. 1, 16-19 (1993). Bainbridge points out that trading in the stock of a tender offer target, for example, could help the tender offeror by putting stock in friendly hands. Model Rule 1.8(b) and the Restatement provision thus appear ambiguous at best when applied to an attorney representing a tender offeror. Id. at 7-16.

<sup>222</sup> See Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1994). The Supreme Court found, in *United States v. O'Hagan*, 521 U.S. 642 (1997), that the misappropriation theory of insider trading prohibits deception "in connection with" the purchase or sale of a security within the meaning of Section 10(b) because trades by misappropriators are *simultaneous* with their underlying breach of duty. As the Court in *O'Hagan* held:

[The "in connection with" element under Section 10(b) of the 1934 Exchange Act] is satisfied because the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide.

*O'Hagan*, 521 U.S. at 656. *O'Hagan* affirmed the conviction of a lawyer for trading on advance information from a client tender offeror. The lawyer's trades, however, unless they harmed his client tender offeror, did not unequivocally violate either Model Rule 1.8(b) or Section 60 of the Restatement. The lawyer later breached his duty under Section 60 of the Restatement by failing to account to the client for his profits, but this breach is probably not "in connection" with the trade because it does not coincide with the trade. See Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v.*

or a federal prosecutor is back in the quagmire of having to prove harm to the client at the time of the trade.<sup>223</sup>

Rather than immerse courts in fact-specific inquiries into whether a lawyer's trades "disadvantaged" her client, or whether the lawyer accounted to her client for the profits from her trades, it would perhaps be better to adopt the Model Code's defined default rule that use of client information for personal profit without permission from the client is prohibited whether or not it harms the client.<sup>224</sup> The client thus would have a defined *ex ante* entitlement to exclusive use of the information, although the lawyer and client could contract around that entitlement if they wished to do so.<sup>225</sup> This would be a majoritarian rule to the extent that most clients would prefer that their information not be used by their lawyer for personal advantage. If most clients would opt out by consenting, the rule would be a penalty default rule. It would still, however, be a useful rule because it would force the party that has information (the lawyer) to disclose that information (what the lawyer intends to do with the client's information) so the client then can decide whether harm is likely to result and consent should therefore be withheld.

Furthermore, it is conceivable that a majority of clients might not care if their lawyers use confidential information outside of public trading markets for such things as investments in real estate so long as the use does not disadvantage them. They might, however, have strong preferences that their lawyers not use confidential information for securities trades. If so, two tailored majoritarian default rules could be imposed: (1) a defined rule, along the lines of the Model Code, prohibiting use of confidential information in the securities markets without client consent;<sup>226</sup> and (2) a default standard, similar

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O'Hagan, 84 Va. L. Rev. 153, 191-92 (1998) (discussing ABA Model Rule 1.8(b) and draft Restatement § 112(2)).

<sup>223</sup> The Reporter for the Restatement states that "[a] clear instance of lawyer liability for use of confidential information even in the absence of harm to a client is insider trading in a client's stock." Restatement (Third) of the Law Governing Lawyers § 60 reporter's note to cmt. j (2000). The Reporter does not acknowledge, however, that the federal law on insider trading requires the court to find a breach of duty to the client at or about the time of the trade and that the Restatement's failure to return to the Model Code approach of requiring disclosure to the client and consent prior to the trade—whether or not it harms the client—contributes to lack of clarity in this area of the law.

<sup>224</sup> See *supra* note 216 and accompanying text.

<sup>225</sup> Use of nonpublic client information for securities trading still could be illegal under Section 14(e) of the 1934 Act if the information concerns a tender offer, even if the client's permission to trade relieves the lawyer of liability under Section 10(b). See *O'Hagan*, 521 U.S. at 672-73 n.17 (applying Section 14(e) to misappropriated information but leaving open question of whether trading with client's permission would be violation).

<sup>226</sup> If the majority of clients would not care whether lawyers traded in the securities markets with their confidential information, the default rule could be set to give the lawyer

to that in the Model Rules, prohibiting other uses of confidential client information to the disadvantage of the client.

The Restatement wisely provides, however, that its disgorgement provisions only apply to use of client information outside the practice of law.<sup>227</sup> Existing rules already address uses of client information within the practice of law. A lawyer is not required to seek client consent before using information from a client (whether about the client's future needs or about legal problems facing an industry) to expand his law practice, lease additional office space, invest in new computer software, or hire new associates.<sup>228</sup> A lawyer is also permitted to use general subject matter knowledge (for example about a type of transaction or industry) acquired in representing one client to represent another.<sup>229</sup> A lawyer's use of specific information in representing other clients is evaluated appropriately under the existing "disadvantage of the client" standard, coupled with prohibitions on disclosure of client confidences (conflicts rules provide yet another prophylactic against adverse use of confidential information).

Finally, it is true that many lawyers and clients might not contract around a prohibition on use of client information simply because of cognitive status quo bias or transaction costs (in particular, attitudinal negotiation costs will be high when lawyers ask permission to use client information). Nonetheless, the prohibition still might be a policy-preferred sticky default rule that helps accomplish other objectives. For example, although client consent to use of client information in the stock market may relieve the lawyer of liability for violating fed-

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an *ex ante* entitlement to use the information unless instructed otherwise. If this were the default rule, however, some lawyers might try to surcharge clients for contracting out of the default rule, and a "lemons problem" could arise when unscrupulous lawyers promise not to trade in order to charge higher fees and then break their promises. See Bainbridge, *supra* note 221, at 38.

<sup>227</sup> The Restatement provision requiring a lawyer to account to the client for profits made is limited to uses of confidential information outside the practice of law. Restatement (Third) of the Law Governing Lawyers § 60(2) (2000).

<sup>228</sup> None of these uses is likely to disadvantage the client and thus violate the standard under Model Rule 1.8(b), and most would not use a "confidence" or "secret" of the client, the operative language in DR 4-101(B)(3), as opposed to more general information.

<sup>229</sup> For example, a lawyer might suggest to a second client that she buy real estate in a particular location based on information learned from the first client. If confidential client information is not disclosed and the second client's purchase of the real estate does not disadvantage the first client, this use of the information is probably permitted. See Model Rules of Prof'l Conduct R. 1.6, 1.8(b) (1998). A default rule prohibiting such use also probably would be very difficult to enforce because the lawyer's communications with the second client would be privileged. A default rule prohibiting the lawyer herself from purchasing the real estate, on the other hand, would be easier to enforce so long as the lawyer's access to the confidential information could be established.

eral insider trading laws,<sup>230</sup> regulators might not want lawyers routinely to obtain such consent, because at least one rationale for prohibiting insider trading is protection of other investors who trade without similar informational advantages.<sup>231</sup> Even if only a few lawyers would ask for permission to use client information in the stock market, and only a few clients would grant permission, this is probably the way it should be.

### C. *Contractual Restrictions on Practice*

Immutable rules constrain a lawyer's ability to restrict contractually her future practice, either by entering into noncompetition agreements with other lawyers,<sup>232</sup> or by becoming an additional party to a settlement agreement of a client.<sup>233</sup> Agreements in the first context are the subject of extensive commentary<sup>234</sup> and litigation.<sup>235</sup> Agreements in the second context are quite infrequent for the obvious rea-

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<sup>230</sup> See Painter et al., *supra* note 222, at 179-81 (explaining that classical insider trading law governing information obtained from corporate insiders requires trading fiduciary to get permission from issuing corporation before trading, although misappropriation theory applicable to information obtained from outsiders only requires source of information to be told that fiduciary intends to trade). Client consent to the trades does not relieve the lawyer of liability in the case of a tender offer. See *supra* notes 221-22.

<sup>231</sup> See Painter et al., *supra* note 222, at 163 (discussing "equality of access theory" that underlay much of federal insider trading jurisprudence until early 1980s).

<sup>232</sup> See Model Rules of Prof'l Conduct R. 5.6(a) (1998) ("A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . ."); see also Model Code of Prof'l Responsibility DR 2-108(a) (1980) (same); Restatement (Third) of the Law Governing Lawyers § 13 (2000) (same).

<sup>233</sup> See Model Rules of Prof'l Conduct R. 5.6(b) (1998) (stating that "[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties"); see also Model Code of Prof'l Responsibility DR 2-108(b) (1980) (same); Restatement (Third) of the Law Governing Lawyers § 13 (2000) (same). The ABA Ethics 2000 Commission proposes no substantive changes to Model Rule 5.6. See Ethics 2000 Commission Web Page, *supra* note 1.

<sup>234</sup> See, e.g., Robert W. Hillman, *Law Firm Breakups* 29 (1990) (discussing prohibitions on noncompetition agreements); Serena L. Kaffer, *Golden Handcuffs: Enforceability of Non-Competition Clauses in Professional Partnership Agreements of Accountants, Physicians, and Attorneys*, 31 *Am. Bus. L.J.* 31, 32 (1993) (discussing noncompetition agreements among professionals).

<sup>235</sup> *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 410 (N.Y. 1989) (holding that law firm partnership agreement that conditioned payment to withdrawing partner of earned but uncollected partnership revenues in return for partner's promise not to practice law in competition with firm violated DR 2-108(A) and was therefore unenforceable as against public policy). But see *Howard v. Babcock*, 863 P.2d 150, 151 (Cal. 1993) (upholding covenant forfeiting departure benefits of withdrawing partner who practiced in same geographic area as firm on grounds that this "forfeiture-for-competition clause" did not restrain retiring partner's ability to practice, but only required him to pay his firm for lost clients).



son that a lawyer rarely will agree to restrict her future practice in return for a better settlement for a client in a single case.<sup>236</sup> Although there is a relative dearth of commentary on such "three-way" settlement agreements among plaintiffs, defendants, and plaintiffs' counsel, their advantages and disadvantages are worthy of serious consideration.

In 1995, Professor Stephen Gillers reportedly advised the New York Mercantile Exchange (NYMEX) that such an agreement with a plaintiffs' lawyer as part of a settlement with the lawyer's client was within ethical bounds.<sup>237</sup> The NYMEX settlement agreement prohibited the lawyer, Scott Bremmer, from ever representing any other clients in suing NYMEX again.<sup>238</sup> Professor Gillers insisted that the Model Rule 5.6(b) prohibition of such agreements was "wrong,"<sup>239</sup> even though New York's rule on its face is substantially similar.<sup>240</sup> Professor Geoffrey Hazard responded that the restriction in the NYMEX settlement agreement violated ethics rules in New York "and everywhere else."<sup>241</sup>

In *Feldman v. Minars*<sup>242</sup> a New York appellate court enforced a settlement agreement that prohibited a plaintiffs' law firm from representing or soliciting additional clients to sue the same defendant.<sup>243</sup> Although the court acknowledged that "[t]here is no question that a strong case can be made for the proposition that such a provision constitutes an impermissible restraint on the law firm's practice of law in violation of the [New York] Code of Professional Responsibility DR

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<sup>236</sup> Compared with the amount of litigation over noncompetition agreements, most of which are prohibited under Model Rule 5.6(a), there are relatively few reported cases concerning covenants not to sue prohibited under Model Rule 5.6(b).

<sup>237</sup> Cynthia Cotts, *May a Lawyer Deal Away Right to Practice?*, Nat'l L.J., Mar. 30, 1998, at 1.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (quoting Stephen Gillers).

<sup>240</sup> See N.Y. Code of Prof'l Responsibility DR 2-108(B) (2000) ("[I]n connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.").

<sup>241</sup> Cotts, *supra* note 237, at 1.

<sup>242</sup> 658 N.Y.S.2d 614 (App. Div. 1997).

<sup>243</sup> Specifically, the text of the agreement stated that:

As an inducement to the settling defendants [including Haber] to enter into this Settlement Agreement, and as a material condition thereof, [the Beigel firm] warrants and represents to the settling defendants that neither such firm nor any of its employees, agents, or representatives will assist or cooperate with any other parties or attorneys in any such action against the settling defendants arising out of, or related in any way to the investments at issue in the actions or any other offerings heretofore or hereafter made by the settling defendants . . . nor shall they encourage any other parties or attorneys to commence such action or proceeding.

*Id.* at 615.

2-108(B)”<sup>244</sup> the court held that “an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York.”<sup>245</sup> First, the antisolicitation part of the agreement merely prohibited the firm from conduct that until recently was prohibited by the disciplinary rules.<sup>246</sup> Second, the court accepted Professor Gillers’s argument that DR 2-108 should be construed narrowly because the underlying policy reasons for the rule have disappeared in the era of mass tort litigation in which it may be critically important for a defendant to restrict a settling plaintiff’s lawyer from turning around and filing the same suit on behalf of other plaintiffs.<sup>247</sup> Third, the court held that “the ‘clean hands’ doctrine would preclude the offending attorneys from using their *own* ethical violations as a basis for avoiding obligations undertaken by them. Even if it is against the public policy of this State, the ‘violation’ can be addressed by the appropriate disciplinary authorities.”<sup>248</sup>

As the court pointed out in *Feldman*, a lawyer’s covenant not to sue a particular person in the future could be an important factor in settlement discussions. Should it be permitted? The traditional argument against such covenants is that future clients who want to sue the same defendant may not be able to find a lawyer who is free to do so. A defendant perhaps even could buy itself immunity from suit by inserting “no sue” clauses in so many settlement agreements that future plaintiffs would have difficulty finding counsel. This argument, however, is not very persuasive because market forces should assure that, as some lawyers retire from suing certain defendants, others will recognize an opportunity, move in, and take their place.<sup>249</sup>

A stronger argument against such covenants is that permitting them creates perverse incentives for a lawyer to file a series of frivolous suits followed by a demand for payment in return for a covenant not to sue on behalf of future clients. Such a lawyer-extortionist probably would insist on structuring the settlement so that she received the bulk of the money paid for the covenant, either by way of a contingent fee or a side payment. Presumably, immutable ethics rules prohibiting

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<sup>244</sup> Id. at 616.

<sup>245</sup> Id. at 617.

<sup>246</sup> Id. at 616-17.

<sup>247</sup> Id. at 617.

<sup>248</sup> Id.

<sup>249</sup> Professor Gillers notes: “These untested assumptions are dubious. They ignore the market. If a claim has merit and elimination of one lawyer creates a vacancy, the market will produce a replacement. Undoubtedly, some lawyers will accept a restriction, but surely not enough to deprive worthy claimants of all counsel.” Id. at 617 (quoting Professor Gillers).

frivolous suits<sup>250</sup> and procedural rules sanctioning lawyers for frivolous pleadings<sup>251</sup> would be sufficient to deter such conduct, if Model Rule 5.6(b) were to be liberalized. However, extortion could be discouraged further by barring a lawyer from receiving a fee in connection with a covenant not to sue that is excessively high in proportion to the amount recovered by the lawyer's client (which is not likely to be very high in a frivolous lawsuit). With the extortion temptation thus removed, only rarely would a lawyer agree to an *ex ante* restriction on the lawyer's future practice.

Occasionally, however, a defendant will offer a high enough price for the covenant not to sue. In such cases, the defendant's motivation is usually not to preclude other plaintiffs from finding counsel but to prevent other plaintiffs from employing a particular lawyer who has acquired valuable information about the subject matter of a case. In effect, the defendant wants the plaintiff's lawyer to contract out of the rule that the lawyer may use information learned in the course of representing the first client in representing subsequent clients so long as the lawyer does not disclose client confidences or disadvantage the first client.<sup>252</sup> The inducement for the lawyer's agreeing to this is a better settlement offer for the first client, who in turn might transfer some of this increased value to the lawyer by paying a higher fee.

Model Rule 5.6, however, effectively transforms the rule that the lawyer may use client information in a subsequent representation into an immutable rule by prohibiting the lawyer from transferring the value of the information back to the first client as part of a three-way settlement agreement. This seems odd in view of the fact that, but for the first client having hired the lawyer, the lawyer would not have had the information, and thus would not be so attractive to future plaintiffs. Another oddity in the existing rules is that the lawyer may realize for herself the value of the first client's information without ever representing another plaintiff simply by selling exclusive use of the information directly to the defendant. The lawyer does this by agreeing to represent the defendant in future similar suits (and thereby disqualifying herself from representing anyone who might sue the defendant in a related matter). She can do so without the first client's consent if the settlement is final and if it removes any lingering adver-

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<sup>250</sup> See Model Rules of Prof'l Conduct R. 3.1 (1998) (providing that lawyer may not bring action, assert defense, or controvert issue "unless there is a basis for doing so that is not frivolous").

<sup>251</sup> See, e.g., Fed. R. Civ. P. 11(b) (providing that signing, filing, or submitting paper to court certifies that legal contentions are not frivolous).

<sup>252</sup> See *supra* Part II.B (discussing default rules concerning use of client information).

sity between the first client's interests and the defendant's interests.<sup>253</sup> Ironically, in this arrangement the lawyer realizes the entire value of the first client's information by getting paid a retainer from the defendant, and the first client gets next to nothing.

Model Rule 5.6 thus prevents the first client from negotiating with the lawyer and the defendant for a portion of the value of the information, but leaves the lawyer free to sell the information directly to another plaintiff, or to the defendant, as the lawyer sees fit. One advantage of changing Model Rule 5.6 into a default rule—stating that a lawyer's future practice is not restricted by a settlement agreement unless the agreement specifically so provides—is that lawyers would then be allowed to share with their clients some of the value of the information they acquire during the course of a representation.

#### *D. Disclosure of a Corporate Client's Crime or Fraud*

Courts, bar associations, and regulators often disagree over what a lawyer should do about an impending criminal or fraudulent act by a corporate client.<sup>254</sup> The disagreements are often sharp, in part because rules in this area are immutable (the client generally cannot instruct the lawyer in advance to use a different rule),<sup>255</sup> and in part because secrecy is one of the most controversial topics in the law.<sup>256</sup>

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<sup>253</sup> See Model Rules of Prof'l Conduct R. 1.9 (1998) (disqualifying lawyer from representing another client in substantially related matter only if second client's interest is adverse to that of first client).

<sup>254</sup> See Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. Cal. L. Rev. 1075, 1079-91 (1993) (discussing judicial equivocation on lawyers' obligations in face of client crime or fraud, bar's refusal to recognize its obligations, and regulators' use of coercion to assert their own view as law).

<sup>255</sup> Corporations can instruct their lawyers *ex ante* to conduct a representation in any way that is consistent with applicable ethics rules. These instructions, however, cannot opt out of immutable ethics rules.

<sup>256</sup> See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* 119-24, 131-35 (1982) (discussing justifications and limits of confidentiality and asserting that values protected by confidentiality are sometimes undermined by practices of secrecy); Stanley Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* 330 (1979) (stating that "[a] private conversation is one that I do not want others to hear, not one they necessarily cannot hear"); see also Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1, 13, 18 (1978) (arguing that cases in contracts distinguish between "deliberately acquired information" requiring effort to discover, and therefore usually protected from duty to disclose, and "casually acquired information" that is given less protection); Richard A. Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393, 397-400 (1978) (arguing that legal rules governing secrecy and assigning property rights to information are designed to achieve efficiency). But see Kim L. Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* 31-35, 57-85 (1988) (disagreeing with Posner's and Kronman's analysis and arguing that secrecy rules are designed to promote fundamental fairness to individuals rather than collective social utility).

The Model Rules provide that a lawyer may not participate in a client's crime or fraud,<sup>257</sup> but are vague with respect to what a lawyer affirmatively should do to stop or rectify the conduct.<sup>258</sup> A lawyer representing an organizational client simply must act in the "best interests of the organizational client,"<sup>259</sup> a standard so broad that it is almost meaningless. The ABA also refuses to impose a defined rule that would require a lawyer for an organization to report illegal acts by its agents to its board of directors.<sup>260</sup>

Federal regulators, such as the OTS and SEC, sometimes impose rules—usually broad standards<sup>261</sup>—on lawyers who "practice before" those agencies. The bar, however, is often hostile to these standards,<sup>263</sup> in part because they can be construed broadly by an

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<sup>257</sup> Model Rules of Prof'l Conduct R. 1.2(d) (1998).

<sup>258</sup> E.g., id. R. 1.13 (stating:

[A L]awyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations).

<sup>259</sup> Id. Model Rule 1.13 also states that "referring the matter to higher authority in the organization" is one of several measures that the lawyer may take. Id. The Restatement takes a similar approach. Restatement (Third) of the Law Governing Lawyers § 96 (2000) (Representing an Organization as Client).

<sup>260</sup> See Working Group on Lawyers' Representation of Regulated Clients, ABA, Report to the House of Delegates 6-7 (1993) (stating that among "novel theories of professional responsibility" developed by OTS was notion that lawyers have obligation to report misconduct to superiors, going "all the way to the client's board of directors" and declining to take that position themselves).

<sup>261</sup> See Carter, Exchange Act Release No. 34-17597, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,172 (Feb. 28, 1981) (announcing very broad standard:

When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance).

The Release states that the lawyer could: (1) approach the client's independent directors, or (2) resign. Id. But nowhere does the Release clearly state what the lawyer is or is not required to do.

<sup>262</sup> SEC Procedural Rule 102(e), 17 C.F.R. § 201.102(e)(1)(ii) (2000) (providing that SEC may temporarily or permanently deny to any person privilege of practicing before Commission who is found after notice and hearing to be lacking in character or to have engaged in improper professional conduct).

<sup>263</sup> See Stephen J. Friedman, Reflections on *Carter-Johnson*, in Thirteenth Annual Institute on Securities Regulation 297 (Arthur Fleischer, Jr. et al. eds., 1982) (discussing two issues raised by *Carter-Johnson* case: first, what happens if lawyer gives wrong advice and client acts on it; second, what happens if lawyer gives correct advice that client persistently ignores); Werner Kronstein, SEC Practice: The *Carter-Johnson* Case—A Higher Threshold for SEC Action Against Lawyers, 9 Sec. Reg. L.J. 293 (1981) (same).

agency's administrative law judges.<sup>264</sup> Regulators also inconsistently enforce these standards.<sup>265</sup> At other times, regulators have asked regulated entities to require their lawyers to opt into professional responsibility standards,<sup>266</sup> but the "voluntary" component has done little to appease the bar, and some of these opt-in rules have been rescinded.<sup>267</sup> The ABA has promulgated its own opt-in rules in at least one area that regulators are concerned about—legal opinions.<sup>268</sup> These opt-in rules—many of which are precisely defined in a document known as the "Silverado Accord"—prohibit such practices as rendering a literally accurate opinion on the basis of dubious factual assumptions or in circumstances where the opinion could further an illegal or fraudulent objective.<sup>269</sup> The ABA, however, disfavors opinions containing "negative assurances" about a client's acts. The Silverado Accord states, for example, that it is inappropriate to request an opinion from a lawyer stating that his client is in compliance with all applicable laws.<sup>270</sup>

One approach would be to amend Model Rule 1.13 to include an opt-out default rule requiring a lawyer to report certain acts to a client's full board of directors. For example, such a rule could provide that:

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<sup>264</sup> See Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. Rev. 225, 244-55 (1996) (discussing how SEC, in construing terms "improper professional conduct" in Rule 102(e), has articulated ambiguous standards for both lawyers and accountants, and how these standards have been arbitrarily applied in Rule 102(e) case law).

<sup>265</sup> See Painter, *supra* note 41, at 186 (discussing inconsistent SEC enforcement efforts); Painter & Duggan, *supra* note 264, at 244-55 (same).

<sup>266</sup> See *supra* note 97 (describing "Revised Attorney Letter" in which OTS in early 1990s asked lawyers for depository institutions to confirm that they would respond in accordance with "applicable rules of professional conduct" to any issue that might arise in connection with conflicts of interest, institution's compliance with laws or regulations, fiduciary duties, or principles of safety and soundness).

<sup>267</sup> The OTS Revised Attorney Letter was withdrawn after "three years of wrangling with the bar about requiring attorneys to 'confirm' their agreement with certain OTS views of professional responsibility," and after the OTS decided it was cheaper and easier to obtain the required information directly from the depository institutions. OTS Cancels "Attorney Letter," *Citing Examiners' Lack of Need*, Bank Law. Liability, Oct. 1995, Lexis, News Group File.

<sup>268</sup> The ABA used voluntary mechanisms when it sought to standardize opinion language and procedures. See ABA Comm. on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, of the Section of Business Law, American Bar Association, 47 Bus. Law. 167, 169, 170 (1991) [hereinafter *Silverado Accord*] (sometimes referred to as the "Silverado Accord"). While a legal opinion does not have to conform to the guidelines set forth in the Silverado Accord, the Accord defines preferred opinion-writing practice, and an opinion letter may incorporate provisions of the Accord by reference. *Id.* at 170.

<sup>269</sup> *Id.* at 190.

<sup>270</sup> *Id.* at 228.

If measures taken by [an organization's] lawyer fail to prevent an imminent illegal act, or fail to end an ongoing violation of the law, the lawyer shall refer the matter to the highest authority that can act on behalf of the organization with respect to the matter as determined by applicable law and the organization's charter or articles of incorporation.<sup>271</sup>

Corporate clients could opt out of this default rule requiring a report to their directors by stating in their articles of organization that reports of illegal acts and fraud should be made to a body other than the board, such as a compliance committee or the corporation's general counsel.<sup>272</sup> Once such a choice is publicized in the corporation's articles, third parties, such as regulators or investors, could ask the client why it contracted around the default rule.<sup>273</sup>

An even more problematic topic in legal ethics is lawyer disclosure of a client's impending crime or fraud to outside regulatory authorities or to third parties that could be affected by the conduct. The immutable rule in Model Rule 1.6 forbids disclosure unless the disclosure prevents the client from committing a crime that the lawyer believes will result in imminent loss of life or serious bodily injury, or unless the client is in a dispute with the lawyer.<sup>274</sup> The rule in most states, however, permits, but does not require, a lawyer to disclose client crime or fraud.<sup>275</sup> The Ethics 2000 Commission has recommended that Model Rule 1.6 be amended to reflect the latter, more flexible approach.<sup>276</sup> The Restatement also provides that disclosure is

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<sup>271</sup> Painter, Ethics 2000 Letter, *supra* note 4.

<sup>272</sup> *Id.*

<sup>273</sup> A similar rationale underlies the American Lawyer's Code of Conduct, which allows a corporate client to choose policies that its lawyers will be required to follow in resolving conflicts of interest among the directors, officers, and shareholders, but which also requires that the chosen policies be disclosed to shareholders beforehand so shareholders can decide "to approve or disapprove that policy, or to relinquish their shares." American Lawyer's Code of Conduct, *supra* note 27, R. 2.5.

<sup>274</sup> Model Rules of Prof'l Conduct R. 1.6 (1998). A minority of jurisdictions have adopted this more restrictive approach. See Proposal of Professor Roger C. Cramton to the ABA Ethics 2000 Commission to Amend Model Rule 1.6, <http://www.abanet.org/cpr/cramton.html> (last visited Apr. 16, 2001) (suggesting that Rule be revised to permit disclosure of client crime or fraud in broader range of circumstances).

<sup>275</sup> See Model Code of Prof'l Responsibility DR 4-101(C) (1980) (providing that "lawyer *may* reveal: . . . (3) the intention of his client to commit a crime and the information necessary to prevent the crime" (emphasis added)).

<sup>276</sup> The Ethics 2000 Commission's revised Model Rule 1.6 would allow a lawyer to reveal client information to the extent the lawyer reasonably believes necessary, among other things:

- (1) to prevent reasonably certain death or substantial bodily harm [whether or not on account of an act of the client];
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of

optional<sup>277</sup> but, like the Model Rules and Model Code, provides little specific guidance for lawyers representing organizational clients.<sup>278</sup>

The optional disclosure rule embraced by the Restatement, and now by the Ethics 2000 Commission, could be changed into a default rule by permitting, and perhaps encouraging, lawyers to contract around it by *opting-up* and committing themselves *ex ante* to disclose client fraud or illegal acts outside the organization.<sup>279</sup> This commit-

another and in furtherance of which the client has used or is using the lawyer's services; [or]

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

Proposed Revisions to Model Rule 1.6, <http://www.abanet.org/cpr/e2k-rule16.html>.

<sup>277</sup> Section 66 of the Restatement (Using or Disclosing Information to Prevent Death or Serious Bodily Harm) provides that disclosure is discretionary in a broad range of circumstances. The information need not concern a crime or fraud, need not concern an act of the lawyer's client, and the lawyer's services need not be involved. Legal conduct may still be disclosed by the lawyer if necessary to prevent death or serious bodily harm. For example, if information about a dangerous but legal product is known by the lawyer and the manufacturer but not by regulators and consumers, the lawyer may disclose. See Restatement (Third) of the Law Governing Lawyers § 66 (2000). Section 67 of the Restatement (Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss), on the other hand, allows disclosure by the lawyer in a narrower range of circumstances. An act of the client must be involved, the act must be a crime or fraud, and the lawyer's services must have been used in the matter in which the crime or fraud is committed. Section 67, however, is considerably broader than the current Model Rule 1.6. *Id.* § 67 cmt. b (noting:

[O]ver 40 jurisdictions have rejected [Model Rule 1.6] and have broadened the rule so as to permit use or disclosure to prevent substantial financial injury. Seventeen states also permit use or disclosure to rectify past and completed client fraud . . . Lawyer codes in seven states mandate disclosure in at least some circumstances of client fraud . . .).

Perhaps to reassure lawyers worried about legal liability for failure to disclose, Sections 66 and 67 both contain the same provision stating that "[a] lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person." *Id.* §§ 66(3), 67(4). Neither Section 66 nor Section 67 requires disclosure, although other law may require it in some circumstances.

<sup>278</sup> The text of Section 96 of the Restatement (Organization as Client) does not address disclosure outside the organization, and in the comment simply refers to other provisions of the Restatement, including Sections 66 and 67. *Id.* § 96 cmt. f. The comment also recognizes that:

[I]t may clearly appear that limited disclosure to prevent or limit harm would be in the interests of the organizational client and that constituents who purport to forbid disclosure are not authorized to act for the organization. Whether disclosure in such circumstances is warranted is a difficult and rarely encountered issue, on which this Restatement does not take a position.

*Id.*

<sup>279</sup> See Richard W. Painter, Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules, 63 *Geo. Wash. L. Rev.* 221, 267-74 (1995) (proposing



ment could then be disclosed to third parties, who could adjust their own dealings with the lawyer and the client accordingly.<sup>280</sup> Alternatively, the bar could impose a *penalty default rule* that most lawyers and clients would not want, but that is desirable because it forces actors to contract for their own tailored rule.<sup>281</sup> A default rule, requiring lawyers for a corporation to report violations of the securities laws to the SEC unless the client's articles of organization provide otherwise, would be such a penalty default rule.<sup>282</sup> The undesirable rule would force the majority of corporations that do not want the rule to specify in their articles exactly what they want the lawyer to do.

If default rules are used to govern lawyer disclosure of client crime or fraud, whether to the board of directors or to someone outside the organization, who should choose whether to opt out of the rule? In most situations, it would be best for the client to decide, so long as the client makes its choice *ex ante* and is not allowed secretly to change the rule in the middle of a representation (and thereby deceive third parties and perhaps its own shareholders). First, a corporate client easily can specify the chosen rule in its publicly available articles of organization. Investors, if they do not like the rule, can respond by voting to change the rule or by selling their shares,<sup>283</sup> and regulators and other third parties can respond by adjusting their own interaction with the client accordingly. Lawyer-chosen rules, on the other hand, could remain a secret between lawyers and managers of clients. It is conceivable, however, that widely publicized lawyer-chosen rules (perhaps in the law firm codes of professional responsibility recommended in Part III of this Article) could be an effective way for law firms to weed out prospective clients who do not want to play by the lawyers' chosen rules.

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that lawyers be permitted to choose *ex ante*, from limited number of alternatives, which whistleblowing rules they will be bound to follow, so long as their choice is publicly disclosed).

<sup>280</sup> *Id.* at 267-74 (suggesting that chosen rule would signal to third parties—such as regulators, transaction participants, and investors—probability that lawyer will blow whistle should client misconduct occur; that rational third parties would adjust their expectations accordingly and sometimes reward clients whose lawyers have chosen expansive whistleblowing rules; and that rational clients would choose their lawyers in anticipation of third-party responses).

<sup>281</sup> See Ayres & Gertner, *supra* note 12, at 95-107. (discussing penalty default rules).

<sup>282</sup> This rule is immutable for auditors under the securities laws. See 15 U.S.C. § 78j-1 (Supp. IV 1998) (requiring auditors to implement procedures designed to detect illegal acts, to report illegal acts to management, and if problem is not remedied, to make report to full board and to SEC).

<sup>283</sup> See American Lawyer's Code of Conduct, *supra* note 27, R. 2.5 (applying similar rationale).

Whether default or immutable rules are used, should disclosure of a corporate client's crime or fraud be governed by defined rules, or by standards? Some criteria, such as whether a lawyer "knows or should know" that a client is embarking on illegal or fraudulent conduct, are intrinsically governed by standards. Hindsight bias on the part of a fact finder<sup>284</sup> may work against the lawyer when these standards are interpreted in cases in which it is not clear whether client conduct was foreseeable. This ambiguity is all the more reason why other aspects of the rule should be more sharply defined. Instead of the current Model Rule 1.13, which gives the lawyer very little guidance on what to do about a crime or fraud, the rule should contain a safe harbor—for example, a rule requiring the lawyer to report to the board of directors but no further. Whatever rule is chosen, in view of the severe penalties imposed on lawyers who are found to have breached the vague prohibition in Model Rule 1.2(d) against "assisting" a crime or fraud,<sup>285</sup> these situations should be governed as much as possible by defined rules.<sup>286</sup>

### *E. Race and Sex Discrimination*

Race and sex discrimination are areas in which the bar for a long time not only neglected to enact rules of its own, but also resisted efforts by courts to impose immutable rules on lawyers.<sup>287</sup> In the

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<sup>284</sup> See Jeffrey Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. Chi. L. Rev. 571, 572 (1998) (discussing effect of hindsight bias on legal decisions, including assessments of foreseeability in tort cases).

<sup>285</sup> Model Rules of Prof'l Conduct R. 1.2(d) (1998); see also John H. Cushman Jr., Paul, Weiss Law Firm to Pay U.S. \$45 Million, N.Y. Times, Sept. 29, 1993, at D1. Suits brought by the OTS and Resolution Trust Corporation in the early 1990s alleged that attorneys who represented failed institutions facilitated their clients' efforts to mislead federal regulators. Almost all of these actions against law firms were settled prior to trial, and settlements totaled over \$200 million. These include settlements with Jones, Day, Reavis & Pogue (\$50 million), Paul, Weiss, Rifkind, Wharton & Garrison (\$45 million), Kaye, Scholer, Fierman, Hays & Handler (\$41 million), and Troutman, Sanders, Lockerman & Ashmore (\$20 million). *Id.*

<sup>286</sup> It is possible that standards would be preferable to defined rules, if courts and agencies would build valuable precedent interpreting the standards as they have in contract and corporate law. A number of factors, however, distinguish the law governing lawyers from contract and corporate law. First, because the underlying issues are so controversial and legal precedent on lawyer liability accumulates relatively slowly, ambiguous standards have stayed ambiguous for a long time. Second, a standard is often construed *ex post* by an administrative agency—usually the same agency that claims it was misled by the lawyer—and only reviewed by a court on appeal. The ambiguity of the standard, coupled with the extraordinary power of the agency, is likely to create an accurate impression on the part of lawyers that the standard is unfair.

<sup>287</sup> See *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984) (rejecting arguments made by defendant law firm that Title VII did not prohibit sex discrimination in its selection of partners); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 128 (S.D.N.Y. 1977)

1960s and 1970s, law firms began to comply with antidiscrimination laws,<sup>288</sup> and by the late 1980s local bar associations in a few cities sought to remedy the effects of past discrimination with opt-in rules. Most of these rules establish quantitative hiring "goals,"<sup>289</sup> coupled with commitments to facilitate the professional growth and promotion of minority associates. Although the opt-in quantitative goals are usually well defined, the firms' other commitments generally are set forth as standards, and in both instances reputation is used to enforce the chosen rules. Breach cannot legally be penalized. Preservation of the reputational capital that a firm acquires by opting in is the incentive to comply.

In 1989, for example, ninety San Francisco Bay Area law firms and corporate legal departments pledged that fifteen percent of their associates would be minorities by 1995, and that twenty-five percent or more of their associates would be minorities by 2000.<sup>290</sup> Addressing the more difficult problem of retention and promotion, the San Francisco firms also pledged to have five percent minority partners by the end of 1995, and ten percent minority partners by the end of 2000.<sup>291</sup> In 1991, a committee of New York's Association of the Bar, headed by former Secretary of State Cyrus Vance, drafted another pledge, signed by thirty-five large New York firms, stating that the firms would hire a "substantial number" of minority lawyers over the next five years.<sup>292</sup> The pledge stated that ten percent of the total lawyers hired during that five-year period was a "desirable goal" but "not

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(denying defendant's motion to dismiss complaint alleging discrimination on basis of religion and ethnicity, where defendant had argued in its motion that Title VII did not apply to law firm's partnership decisions).

<sup>288</sup> The extent of compliance or noncompliance is difficult to measure because discrimination is difficult to prove. The enactment of Title VII and subsequent caselaw applying Title VII to partnership decisions, see *supra* note 287, however, surely led to some improvement.

<sup>289</sup> There is, of course, considerable debate over whether such numerical goals are a good policy or are themselves discriminatory. Even if firms decide to move away from quantitative goals, they may still retain some of the qualitative rules in the *ex ante* affirmative action commitment (equality of work assignments, not holding firm functions at discriminatory clubs, refusing to represent clients that discriminate, etc.).

<sup>290</sup> See David Margolick, 35 Law Firms in New York Pledge More Minority Hiring, N.Y. Times, Sept. 26, 1991, at B1 (

Two years ago, for instance, 90 law firms and corporate legal departments in San Francisco pledged that by 1995, 15 percent of all their associates and 5 percent of their partners would be members of minority groups. By the year 2000, the numbers would be 25 percent and 10 percent.).

<sup>291</sup> See Edward A. Adams, City Bar Panel Considers New Goals on Minorities, N.Y. L.J., Mar. 14, 1995, at 1 (discussing report on retaining minorities at major New York law firms).

<sup>292</sup> See Daniel Wise, 35 Law Firms Sign Minority Hiring Pledge, N.Y. L.J., Sept. 26, 1991, at 1.

a quota.”<sup>293</sup> While the pledge did not include specific goals for percentages of minority partners, it did include promises to provide minority associates with equally challenging work assignments as those provided to other associates, and to provide the same amount of social contact with the firms’ lawyers and clients.<sup>294</sup> The participating firms also pledged not to hold functions at private clubs that discriminate on the basis of race, creed, religion, or sex.<sup>295</sup> One hundred eighty-three additional law firms and corporate law departments eventually joined the pledge,<sup>296</sup> and by 1997 the Association’s President reported that “last year approximately 17.5% of the associates hired by the 25 largest firms were minorities, and 14.3% of the associates in these firms are now minority, compared to 8.4% five years ago.”<sup>297</sup> Retention and promotion statistics, however, were not as high, as the number of minority associates remaining in law firms after their fourth year was “disappointingly small, and the number of black partners remains minuscule.”<sup>298</sup>

Although substantial numbers of women associates are hired by large law firms,<sup>299</sup> promotion of women associates to partner remains relatively infrequent.<sup>300</sup> Bar associations so far have not used opt-in default rules to address the difficulties women have obtaining partnerships and progressing within partnerships. It is conceivable, however, that firms collectively could agree to opt into policies that enhance the promotional chances of women lawyers (and some men lawyers as well): flexible work schedules, maternity and paternity leaves, nondiscriminatory work assignment policies, mentoring programs, sexual harassment policies, and substitution of flexible partnership promotion policies for rigid up-or-out time tables. Such policies could be agreed upon, even by firms that disfavor numerical goals (which raise the difficult legal and policy issues generally associated with affirmative action). Collective action through *ex ante* contracting thus could address some problems that firms might be less likely to address on

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<sup>293</sup> *Id.* See also Cyrus Vance, Letter to the Editor, Clarification Offered By Panel Chairman, N.Y. L.J., June 5, 1991, at 2.

<sup>294</sup> *Wise*, *supra* note 292.

<sup>295</sup> *Margolick*, *supra* note 290, at B1.

<sup>296</sup> Michael A. Cardozo, A Letter From the President of the Association of the Bar of the City of New York, *The Metropolitan Corp. Couns.*, Dec. 1997, at 46.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* (“Only ten of New York’s 25 largest firms have one or more African American partners. . . . Only 2.4% of lawyers in this country’s 250 largest firms are black; yet over 4.5% of law school graduates 8, 9 and 10 years ago were black.”).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* (“Women are three times less likely to make partner in large New York City law firms than men [and i]n 1987, 41% of law school graduates were women; yet in 1996-97 only 22% of new partners in large firms were women.”).

their own<sup>301</sup> and that the bar is unlikely to address with immutable rules.

These opt-in affirmative action programs raise an obvious question (although one without an obvious answer): Should immutable nondiscrimination laws be changed to default rules? If Professor Richard Epstein is correct in stating that employers already have sufficient economic incentives not to discriminate, such an approach would be appealing.<sup>302</sup> Presumably, the same reputational paradigm that induced some firms to opt into affirmative action in San Francisco and New York would deter those firms from opting out of nondiscrimination laws. If, however, Professor Richard McAdams is correct that economic incentives are insufficient to deter the social norms that drive discrimination,<sup>303</sup> it is predictable that at least some firms would opt out of nondiscrimination laws. The case for opt-out discrimination laws thus is weak, unless costs are imposed on firms for opting out (perhaps higher bar membership fees) and commensurate benefits are passed on to firms that opt into affirmative action goals (perhaps lower bar membership fees).<sup>304</sup> Unless such a mechanism is adopted for shifting externalities imposed by discrimination back to discriminating firms, or it is shown that firms have sufficient economic incentives not to discriminate in the first place,<sup>305</sup> antidiscrimination laws are likely to remain in force. Opt-in programs will facilitate opting up to a higher level of responsibility regarding minority and women law-

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<sup>301</sup> Presumably, if these policies were efficient, a law firm would have an incentive to adopt them regardless of what other law firms do. However, some policies that discriminate disproportionately against women lawyers may increase firm profits, at least in the short term, and a law firm may be reluctant to change unless other firms also promise to bear the costs of making the same change. Nonpromising firms might thereby gain a cost advantage, but at least the promising firms would not be undercut in cost competition with each other.

<sup>302</sup> Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 9 (1992) (arguing that competitive markets offer better protection against discrimination than any antidiscrimination law).

<sup>303</sup> Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *Harv. L. Rev.* 1003, 1034-36 (1995) (arguing that status-production theory of race discrimination is more faithful to economics than Epstein's associational preference model). But see Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 103 *Harv. L. Rev.* 1085, 1091-92 (1995).

<sup>304</sup> Such a market-based approach has been deployed in environmental laws that allow pollution permits to be traded. See Clean Air Act §§ 403(a), (b), (d), 42 U.S.C. §§ 7651b(a), (b), (d) (1994) (providing system of exchangeable sulfur emission allowances). Market-based regulations of this sort, however, usually measure compliance with numerical quotas, which may not be a legally acceptable response in the context of race and sex discrimination.

<sup>305</sup> See Epstein, *supra* note 302, at 41-47 (discussing economic incentives not to discriminate).

yers,<sup>306</sup> while immutable laws remain in place to establish a floor beneath which discriminatory conduct may not go.<sup>307</sup>

### F. Commitment to Work Pro Bono Publico

Under the reign of Henry VII, the lawyer's obligation to work pro bono publico was an immutable rule.<sup>308</sup> In recent times, however, lawyers have not been required to work for free,<sup>309</sup> although many believe they have a moral obligation to do so.

The ABA and state bar associations have responded to shortages in legal services with aspirational rules. In 1983, the ABA adopted Model Rule 6.1, which states that "[a] lawyer should render public interest legal service,"<sup>310</sup> a standard so broad that it had little concrete meaning. In 1993, Model Rule 6.1 shifted toward a defined rule when it was amended to state that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."<sup>311</sup> This rule, however, by its own terms, was aspirational, and not legally enforceable. In 1990, Florida's Supreme Court appeared to adopt an immutable rule when it found that lawyers had an obligation, upon admission to the Florida Bar, to render legal services to the poor when appointed to do so by the court.<sup>312</sup> However, the Court merely re-

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<sup>306</sup> See *supra* text accompanying note 72 (discussing opt-up default rules).

<sup>307</sup> Critics of these opt-in affirmative action programs would argue that participating firms that agree to numerical quotas are observing a *lower* level of responsibility to minority lawyers who are hired on the basis of factors unrelated to ability, putting them at a competitive disadvantage in the workplace, and that the firms are also observing a lower level of responsibility to nonminority lawyers who are put at a competitive disadvantage in the hiring process. Firms that make these affirmative action commitments presumably disagree.

<sup>308</sup> 11 Hen. 7, c. 12 (1494) (Eng.) (providing that for every poor person having cause of action against any person,

the justices shall appoint attorney and attorneys [sic] for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help, and business in the same);

see also 2 William S. Holdsworth, *A History of English Law* 491 (4th ed. 1936) (discussing these statutes); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. Rev. 735, 740-49 (1980) (same).

<sup>309</sup> Model Rule 6.2 provides that a lawyer shall not seek to avoid a court appointment to represent a person, but provides an exception if "representing the client is likely to result in an unreasonable financial burden on the lawyer." Model Rules of Prof'l Conduct R. 6.2(b) (1998). Courts that appoint attorneys to represent indigent litigants generally compensate the lawyer. This work is not distributed evenly. Some lawyers are given such appointments regularly, and rely on them for a significant portion of their income, while many lawyers are rarely if ever asked by a court to accept such a representation.

<sup>310</sup> Model Rules of Prof'l Conduct R. 6.1 (1983) (amended 1993).

<sup>311</sup> Model Rules of Prof'l Conduct R. 6.1 (1998).

<sup>312</sup> *In re Amendments to Rules Regulating the Florida Bar—1-3.1(a) and Rules of Judicial Admin.—2.065 (Legal Aid)*, 573 So. 2d 800, 801, 806 (Fla. 1990).

quested recommendations from a bar commission on how to increase legal services for the poor, and the commission responded by proposing another aspirational rule calling for twenty hours of legal service each year, or an annual donation of \$350 to a legal aid organization.<sup>313</sup> The rule requires lawyers to report whether they have met the pro bono requirement, and failure to report can result in disciplinary action.<sup>314</sup> If information about compliance is widely disseminated, the rule could become a reputationally-enforced rule.

Another possibility would be an opt-in pro bono rule. Lawyers could be required to make ten-year pro bono commitments *ex ante*, beginning with the year of their application for admission to the bar (usually the third year of law school). Lawyers could commit zero, 100, 200, or any other number of hours of pro bono services per year over the next ten years. Lawyers could then be disciplined (probably with a fine) for doing less than the amount of work specified in their pro bono commitments. Reputational incentives to make high commitments would be enhanced if the names of bar applicants and their service commitments were publicized. Ten years later, each lawyer would make another commitment for the next ten years, and so on until retirement. High pro bono commitments could then be looked upon favorably when lawyers are selected for prominent positions in bar associations, judicial appointments, and retention by corporate clients that seek to promote pro bono work by their lawyers.<sup>315</sup>

Although it might be desirable to prohibit firms from discriminating against high pro bono lawyers in hiring, it would probably be better to allow both firms and prospective associates to take pro bono commitments into account when making their decisions. New lawyers thus could pick firms based on the pro bono commitments of lawyers already at the firms, and firms that want only low pro bono lawyers could hire them, thereby gaining a low pro bono reputation that might make recruiting new lawyers (and clients) more difficult. Once a lawyer was hired, however, her pro bono commitment would act as an

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<sup>313</sup> Rules Regulating the Florida Bar R. 4-6.1(b) (1994).

<sup>314</sup> *Id.* R. 4-6.1(d).

<sup>315</sup> This proposal might work even more effectively if the first pro bono commitment were irrevocably made upon application to law school, considered in law school admissions, and then filed by schools with the bar of the state where each student is admitted after graduation. Indeed, at least one major law school already solicits *ex ante* public service commitments from applicants by reserving a certain number of slots for students who check a box on the application form requesting a "public interest" law course package. Although future public interest work is not part of the binding commitment, the course package and participation in the School's clinical program apparently are. Public Interest Law and Policy, <http://www.law.ucla.edu/students/admissions/AcademicPrograms/Special-Programs/PublicInterest.html> (last visited Apr. 16, 2001).

implied covenant in her employment contract that the firm would breach if it later penalized her for meeting the pro bono obligation.<sup>316</sup>

Although a regime requiring such ex ante pro bono commitments is possible, most jurisdictions will probably build instead on the aspirational approach of Model Rule 6.1 and perhaps Florida's reporting requirement. If sufficiently reliable information about lawyers' pro bono work becomes publicly available, ex post commitment to pro bono work could increase as lawyers are pressured to meet pro bono needs. Municipal governments, foundations, nonprofit organizations, and even corporations could withhold legal work from firms whose lawyers failed to perform a certain minimum number of hours of pro bono work. Failure to do adequate pro bono work might be a detriment to finding future employment, and a detriment to seeking public office. In a regime where information about lawyers' pro bono work is widely disseminated, an aspirational rule specifying a certain number of hours could be a focal point<sup>317</sup> for some lawyers' career decisions and a goal to be exceeded for others.

Voluntary action within the reputational paradigm, whether in the form of ex ante pro bono commitments or ex post acceptance of pro bono assignments, is most likely to flourish in a regime that requires full disclosure of how much pro bono work lawyers actually do. Assuming jurisdictions adopted and enforced disclosure rules similar to Florida's, reputational markets might help address shortages of legal services and thereby avert the more drastic remedy of reinstating the immutable rule of Henry VII.

### G. General Conclusions

From these examples, as well as the examples briefly alluded to in Part I of this Article, some general conclusions can be drawn about which types of rules are appropriate in which circumstances.

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<sup>316</sup> See *Wieder v. Skala*, 609 N.E.2d 105, 110 (N.Y. 1992) (finding plaintiff has claim for breach of contract where defendant firm fired plaintiff for compliance with professional ethics standards deemed implicit in employment contract). The more difficult problem would be protecting high pro bono lawyers in the competition for partnership, although presumably a firm that does not like high pro bono lawyers would avoid hiring them in the first place.

<sup>317</sup> A focal point, also referred to as a "Schelling Point," is "the combination of *strategies* that players are likely to choose because it is especially prominent under the conditions and culture in which the players find themselves." Douglas G. Baird et al., *Game Theory and the Law* 307 (1994); see generally Thomas C. Schelling, *The Strategy of Conflict* (1980). Focal points can steer players toward mutual cooperation even in situations in which there is no contract or binding rule. Legal rules, whether or not they deter conduct with sanctions, can become focal points. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649, 1679-88 (2000).



Immutable rules that protect clients are appropriate in situations in which clients have insufficient information or bargaining power to protect themselves from lawyer overreaching. Rules prohibiting commingling of client funds are a good example; few honest lawyers would request waiver of these restrictions, so waiver is not allowed.<sup>318</sup> Few honest lawyers would put themselves in a client's will unless they were related to the client, so this also is prohibited.<sup>319</sup> A lawyer may not negotiate for literary or media rights prior to concluding a representation,<sup>320</sup> a rule that is probably justified because asymmetry of information makes it difficult for the client to detect both lawyer overreaching in negotiating the deal and efforts by the lawyer to represent the client in a way that maximizes literary or media profits rather than serves the client's objectives. Oregon believes sex with clients is another example of attorney overreaching requiring an immutable rule,<sup>321</sup> although most states have yet to follow suit, particularly outside of the domestic relations practice area.<sup>322</sup>

In other situations, such as waiver of conflicts, default rules are appropriate. Opting out *ex ante* (before a conflict occurs) would be constructive in many circumstances, but probably should be restricted to clients acting with the advice of independent counsel. A tailored default rule permitting *ex ante* waiver should apply to these clients, while a default rule permitting only *ex post* waiver should apply to all other clients.<sup>323</sup> The Model Rules already make a similar distinction by permitting an *ex ante* agreement limiting a lawyer's malpractice liability only if the client is represented by independent counsel.<sup>324</sup> In yet other situations, default rules should be available to all clients, but subject to immutable rules that remain in place to provide a minimal level of protection. For example, a client can consent in writing to opt out of the default rule that a lawyer may not enter into a business transaction with a client.<sup>325</sup> Neither party, however, can opt out of

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<sup>318</sup> See Model Rules of Prof'l Conduct R. 1.15 (1998). This is not to say that a lawyer cannot use a client's money for the lawyer's own purposes, so long as the client agrees in writing to loan the lawyer the money and the loan otherwise meets the requirements for lawyer-client transactions. See *id.* R. 1.8(a).

<sup>319</sup> *Id.* R. 1.8(c).

<sup>320</sup> *Id.* R. 1.8(d).

<sup>321</sup> See *supra* text accompanying note 126 (discussing Or. Code of Prof'l Responsibility DR 5-110(A)-(C)).

<sup>322</sup> See *supra* text accompanying note 128 (discussing N.Y. Code of Prof'l Responsibility DR 5-111).

<sup>323</sup> See *supra* notes 209-15.

<sup>324</sup> Model Rules of Prof'l Conduct R. 1.8(h) (1998) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement.").

<sup>325</sup> *Id.* R. 1.8(a)(3).

immutable rules requiring that the lawyer disclose the terms of the transaction to the client in writing, that the client be given an opportunity to seek the advice of independent counsel, and that the transaction be subject to ex post judicial review with respect to whether it was fair and reasonable to the client (an immutable standard).<sup>326</sup>

Immutable rules usually are appropriate when the objective is to protect third parties or the justice system. Whether or not a client or even opposing counsel consents, a lawyer should not be permitted to suborn perjury,<sup>327</sup> misrepresent facts or law to a tribunal,<sup>328</sup> assert a frivolous claim or defense on behalf of a client,<sup>329</sup> or assist a client in a criminal or fraudulent act.<sup>330</sup> However, some immutable rules, such as those prohibiting contractual restrictions on future practice, probably are outdated, given the plentiful supply of lawyers and the advantages that could accrue to clients from greater contractual freedom.

Furthermore, some existing rules already allow a lawyer, acting with the permission of a client, to contract for a higher level of responsibility to third parties.<sup>331</sup> Perhaps in a wider range of areas, such as defining appropriate responses to crime and fraud, a lawyer and client should be permitted to make ex ante undertakings that protect third parties.<sup>332</sup> For example, default rules could direct lawyers to report illegal acts within an organizational client to the appropriate authority, such as the board of directors, and not simply to the officer who pays the legal bills. Clients that did not like the default rule could opt out by instructing lawyers ex ante to make such reports elsewhere within the organization.<sup>333</sup> One advantage of using default rules for such controversial topics is that default rules should be easier for bar associations to agree upon than immutable rules, and therefore are more likely to be defined rules rather than standards.<sup>334</sup>

Furthermore, tailored rules of all sorts (immutable, default, and opt-in) need to become more common. Professor David Wilkins is

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<sup>326</sup> *Id.* R. 1.8(a).

<sup>327</sup> See *id.* R. 3.3(a)(2), (4).

<sup>328</sup> See *id.* R. 3.3(a)(1).

<sup>329</sup> See *id.* R. 3.1.

<sup>330</sup> See *id.* R. 1.2(d).

<sup>331</sup> See *id.* R. 2.3 (allowing lawyer to undertake evaluation for use by third persons).

<sup>332</sup> See Painter, *supra* note 279, at 267 (advocating use of disclosure warranties by lawyers and their clients ex ante to prevent crime and fraud, and to protect third parties from potential consequent harm).

<sup>333</sup> See *supra* text accompanying note 272.

<sup>334</sup> See *supra* text accompanying notes 130-33 (discussing how immutable rules dealing with controversial subject matter, such as organizational clients' crime or fraud (Model Rule 1.13), or reasonableness of legal fees (Model Rule 1.5), are usually standards rather than defined rules).

right that context counts.<sup>335</sup> Tailored rules for problems unique to particular practice areas also may be easier to draft, easier to muster political support for, and easier to enforce than pure majoritarian rules.<sup>336</sup> Representation of organizational clients is one area that badly needs tailored rules, and these rules should be more clearly defined than the current Model Rule 1.13. Another area in which tailored rules would be helpful is lawyer use of client information. Default rules could be tailored to the way in which a lawyer uses client information (whether in securities trades or in making other investments) and could give either the lawyer or the client the initial unqualified right to use the information instead of the default standard (“disadvantage of the client”) that is applied today.

Other revisions to the Model Rules that have been suggested to the Ethics 2000 Commission are statements of “best practices” similar to the ethical considerations of the Model Code.<sup>337</sup> Such statements can play an important part in lawyers’ conduct if reputational enforcement is taken into account.<sup>338</sup> Many of the opt-in rules suggested in this Article also could be incorporated into ABA-prescribed best practices that would encourage lawyers to cooperate with each other to the mutual advantage of their clients.<sup>339</sup> Indeed, in the pro bono area, the ABA has gone back to aspirational rules that it hopes will become focal points<sup>340</sup> for lawyer behavior. Although the ABA demonstrated its preference for legally-enforced rules when it abandoned the Ethical Considerations in the Model Rules, the Ethical Considerations probably should have been retained. In abandoning the Ethical Considerations, the ABA abandoned a potentially very useful tool for influencing lawyer behavior in areas in which, for whatever reason, a legally-enforced rule is not workable.

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<sup>335</sup> See generally Wilkins, *Making Context Count*, *supra* note 62.

<sup>336</sup> But see Morgan & Tuttle, *supra* note 62, at 998-99 n.77 (pointing out difficulties with “middle-level principles,” particularly when applied to lawyers whose practice cuts across several different areas).

<sup>337</sup> See *supra* note 187 (discussing Ethics 2000 Commission’s debate on statements of best practices).

<sup>338</sup> Ethical considerations could easily be turned into reputationally enforced rules by making information about complaints against lawyers publicly available. Two examples of Model Code considerations that could be addressed by publicly available information are Ethical Considerations 1-5 and 2-23. Model Code of Prof’l Responsibility EC 1-5 (1930) (stating that lawyer should avoid “even minor violations of the law”); *id.* EC 2-23 (stating that lawyer should avoid controversies over fees with clients and attempt to resolve those controversies amicably).

<sup>339</sup> See, e.g., Gilson & Mnookin, *Disputing Through Agents*, *supra* note 9, at 514-15 (using prisoners’ dilemma to illustrate evolution of cooperation among lawyers in domestic relations bar).

<sup>340</sup> See *supra* notes 308-15 and accompanying text.

## III

## LAW FIRM CODES OF PROFESSIONAL RESPONSIBILITY

A logical extension of the contractarian framework is the development of law firm codes of professional responsibility. These codes would be ideal mechanisms for lawyers collectively to select some of their own rules at a more local level than the ABA or state bar associations. Indeed, contractarian solutions to many of the problems discussed above, such as opting in or out of rules for use of client information and disclosure of client fraud, only may be practical if law firms adopt codes of professional responsibility that specifically address these issues.

In 1996, New York became the first state to provide for discipline of law firms as well as individual lawyers.<sup>341</sup> A New York law firm is required, among other things, to have a policy for checking proposed engagements against records of prior engagements to prevent impermissible conflicts.<sup>342</sup> Many law firms also voluntarily have adopted formal policies on issues such as assumption of corporate directorships,<sup>343</sup> new clients and new matters,<sup>344</sup> opinion letters,<sup>345</sup> client conflicts,<sup>346</sup> firm and personal investments,<sup>347</sup> firm audits and client funds,<sup>348</sup> record retention,<sup>349</sup> and representation of depository institutions.<sup>350</sup> Law firms probably should be encouraged, or even required,

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<sup>341</sup> N.Y. Code of Prof'l Responsibility DR 1-102(A), DR 1-104(A), (C), DR 5-105(E) (2000); see also Karen B. Burrows & Richard W. Painter, *Discipline of Law Firms*, Report of the Committee on Professional Responsibility, 48 *Rec. Ass'n B. City N.Y.* 628, 637-42 (1993) (proposing rules substantially similar to those adopted by Appellate Division three years later); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 *Cornell L. Rev.* 1, 37-46 (1991) (suggesting that rules be adopted to impose discipline on law firms).

<sup>342</sup> N.Y. Code of Prof'l Responsibility DR 5-105 (2000) (providing that law firm "shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements").

<sup>343</sup> See Stephen R. Volk et al., *Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms*, 48 *Bus. Law.* 1567, 1570-71 (1993) (describing broad range of policies and procedures adopted by fifty law firms surveyed by authors).

<sup>344</sup> See *id.* at 1571-72.

<sup>345</sup> See *id.* at 1572-74.

<sup>346</sup> See *id.* at 1580; see also N.Y. Code of Prof'l Responsibility DR 5-105 (2000).

<sup>347</sup> See Volk et al., *supra* note 343, at 1568-70; see also William K.S. Wang & Marc I. Steinberg, *Insider Trading 901-09* (1996) (reprinting securities trading policy of anonymous Washington, D.C. law firm).

<sup>348</sup> Volk et al., *supra* note 343, at 1574-75.

<sup>349</sup> *Id.* at 1580.

<sup>350</sup> In some instances, these policies have been imposed on law firms in litigation with OTS. See Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 *S. Tex. L. Rev.* 639, 645 n.27 (1994) (discussing OTS consent decrees requiring law firms to implement detailed policies on representation of depository institutions).

to integrate these policies into law firm codes of professional responsibility that are then filed with the state bar. Although a lawyer's breach of his firm's code could be considered a breach of state bar rules as well, it is probably best for the bar to leave enforcement to the firms themselves. The bar simply could require that each firm have a code, just as a corporation is required to have articles of incorporation, and then make reasonable efforts to enforce its own code. Codes of professional responsibility would give firms an opportunity not only to consolidate their informal policies into one formal document, but also to specify *ex ante* what the ethical obligations of their attorneys are in specific types of situations that are not addressed adequately by bar association codes.

Law firm codes also could address issues that affect work quality, an aspect of professional responsibility that is addressed only by broad standards in bar association codes.<sup>351</sup> For example, law firm codes could establish *maximum* weekly billable hours for lawyers (many firms already have minimums). Although a weekly maximum of seventy billable hours per week, for example, might cut into a firm's short-term profits, clients presumably would be willing to pay for a reduction in their exposure to the mistakes and poor judgment that plague lawyers who work for days with little sleep. Prospective associates also might consider a maximum billable hours policy when deciding where to accept an offer of employment. Another issue that could be addressed by a law firm code is substance abuse, which is the underlying cause of many disciplinary violations sanctioned by state bar associations.<sup>352</sup> Addressing these and similar issues in a law firm's code of professional responsibility instead of merely in a handbook or other firm publication would send an important message to the firm's lawyers and clients alike: That the firm considers work or personal habits that undermine work quality to be professionally irresponsible. Examples of provisions that could be included in a law firm code of professional responsibility are set forth in the Appendix.

Law firm codes of professional responsibility have several important advantages. First, law firm codes are a convenient place for a

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<sup>351</sup> See Model Rules of Prof'l Conduct R. 1.1 (1998) (competent representation); *id.* R. 1.3 (reasonable diligence and promptness in representing clients).

<sup>352</sup> Cf. Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools, 44 J. Legal Educ. 35, 36 (1994) (reporting that substance abuse may be involved in as many as fifty to seventy-five percent of major disciplinary cases). A law firm code of professional responsibility could: (1) require the firm's lawyers to report substance abuse by themselves or other lawyers to a committee that would facilitate treatment; (2) provide that a lawyer could take a leave of absence to get treatment without penalty; and/or (3) place limitations on the consumption of alcohol on the firm's premises and at firm functions.

firm to opt out of default rules in bar association codes as well as to opt into additional rules that send a positive signal to clients, regulators, prospective associates, and other third parties. Second, law firm codes can address agency problems that sometimes lower ethical standards within firms. Finally, law firm codes would encourage lawyers within firms to give each other meaningful feedback on compliance with the codes' rules as well as with externally imposed bar association rules.

### *A. Filling Gaps in Bar Association Codes*

Several of the gaps in the Model Rules that have been identified in this Article, including rules on use of client information,<sup>353</sup> disclosure of client crime or fraud,<sup>354</sup> and pro bono obligations<sup>355</sup> could be addressed in law firm codes. For example, a firm might decide that each of its lawyers should: (1) not use client information for personal advantage without client consent; (2) report an organizational client's crime or fraud to the highest authority within the organization; and (3) perform at least seventy-five hours of pro bono work each year. Another firm might decide that each of its lawyers should: (1) be forbidden to use client information for personal advantage if the intended use disadvantages the client; (2) agree with an organizational client at the beginning of the representation on a policy concerning reporting crime or fraud within the organization, and then adhere to the policy throughout the representation; and (3) do as much pro bono work per year as the lawyer believes appropriate, with up to 200 hours of pro bono work per year being credited to minimum billable hours requirements. Just as corporate charters and bylaws are subordinate to state corporation codes, each firm's code of professional responsibility would be subordinate to immutable bar association rules of professional responsibility (the two examples above are both consistent with the Model Rules). Law firm codes thus could, like corporate charters and bylaws, opt into provisions that fill gaps in state-provided rules and opt out of state-provided default rules.<sup>356</sup>

In situations in which it is impractical for bar associations to impose majoritarian immutable rules on the entire profession, localized rulemaking of this sort could generate tailored rules that suit a firm and the clients it represents. Law firm codes of professional responsibility, if required to be posted on firms' websites, would give both

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<sup>353</sup> Model Rules of Prof'l Conduct R. 1.8(b) (1998).

<sup>354</sup> *Id.* R. 1.6, 1.13.

<sup>355</sup> *Id.* R. 6.1.

<sup>356</sup> See *supra* text accompanying notes 63-64 (discussing provisions in Model Business Corporation Act and Delaware corporation code).

clients and prospective associates a chance to choose their firms with more precision, and would put third parties on notice as to how lawyers in a firm will respond to particular situations.

Law firm codes also could restore some of the discretion that bar association rules give to individual lawyers, but which is taken away when law firms tell their lawyers whom to represent and how to practice law. A law firm code could provide, for example, that no lawyer in the firm shall penalize another lawyer in the firm for exercising in good faith the right under Model Rule 1.16 to refuse to represent a client whose objectives the lawyer considers repugnant.<sup>357</sup> Under such a provision, a lawyer who does not want to work for tobacco companies, gun manufacturers, casinos, or other clients whom the lawyer finds objectionable presumably would feel free to say no (so long as the objection is in good faith, and not so broad as to impair seriously the lawyer's ability to contribute to the work of the firm). A law firm code also could provide that a subordinate lawyer who disagrees with a superior on a question of professional responsibility may, with adequate notice, withdraw from the matter as soon as another lawyer at the firm can be substituted in her place. Although Model Rule 5.2 protects the subordinate lawyer from discipline if she resolves an arguable question of professional responsibility as directed by her superior,<sup>358</sup> in the absence of such a provision in the firm's code she could be sanctioned by the firm for deciding not to proceed as directed by the superior. An opt-in withdrawal clause in the firm's code provides a subordinate lawyer with another choice. Finally, a law firm code could provide that a lawyer will not be penalized by the firm for exercising her right under Model Rule 6.4 to serve as a director, officer, or member of a law reform organization notwithstanding the fact that the reforms proposed by the organization may affect the interests of her clients or other clients of the firm.<sup>359</sup>

The bar could require that law firm codes specifically address certain issues, such as pro bono obligations and procedures for dealing with client fraud, just as New York requires firms to have procedures for checking conflicts.<sup>360</sup> Firms thus would be required to fill specified gaps in bar association codes, but would not be told which rules they must choose.<sup>361</sup> Although the bar probably should refrain from disci-

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<sup>357</sup> Model Rules of Prof'l Conduct R. 1.16 (1998).

<sup>358</sup> *Id.* R. 5.2.

<sup>359</sup> *Id.* R. 6.4.

<sup>360</sup> See *supra* note 342.

<sup>361</sup> Other "gaps" in the Model Rules include policies for billing travel expenses and office overhead to clients, rendering opinion letters, and ownership of equity stakes in clients. Some of these issues are addressed elsewhere by the ABA or the ALI, but these

plining lawyers for violating their firm's codes of professional responsibility, a law firm perhaps should be subject to discipline for failure to adopt a code or to enforce its own rules. If law firms are to be encouraged to adopt meaningful codes, it also will be important to preclude plaintiffs from using the codes as evidence of a self-imposed higher standard in malpractice and other suits against law firms.

### *B. Addressing Agency Problems*

Agency problems abound in any partnership, including a law firm.<sup>362</sup> These problems are intensified, however, in law firms that move away from lockstep partner compensation schemes toward "eat what you kill" schemes that reward partners for getting and keeping major clients and for winning big cases. Lawyers compensated only for business they generate are denied the benefits of diversification and are, in extreme cases, practicing for themselves, even though they practice in a firm. Their decisions will be directed toward increasing their personal contribution to the firm's revenues, even if those decisions decrease total firm value. For example, a lawyer may have cheated in discovery in order to win a case, although she would have refrained from doing so if her compensation had been linked less closely to her success in the case. If she wins the case because of her dishonest conduct, she will keep most of the fees from her client; if she is caught, she will suffer a sanction, but the firm will share in this loss, particularly in the loss of reputation.<sup>363</sup> The dishonest partner even might be lucky enough to avoid much of the reputational sanction by finding someone else in the firm to blame. These incentives are even more pronounced if the conduct in question is not clearly a breach of

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pronouncements are not always easily translated into rules in a particular jurisdiction, particularly absent a local bar association opinion or judicial opinion addressing the issue. See Restatement (Third) of the Law Governing Lawyers § 38 (2000) (providing default rule that clients will not be billed for office expenses and overhead unless otherwise agreed); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-418 (2000) (approving of equity in lieu of cash fee arrangements but providing that they must be fair and reasonable to client in accordance with Model Rule 1.5 and must not interfere with lawyer's independent professional judgment on behalf of client under Model Rule 2.1); Silverado Accord, *supra* note 268 (setting forth rules for legal opinions which lawyers can opt into by incorporating Accord by reference). Many firms have policies on these and other similar issues, but these policies usually are not publicized and are sometimes not enforced. Law firm codes of professional responsibility could address these issues with clearly defined rules, modeled where appropriate after ABA or ALI provisions, that then could be publicized and enforced by the firm.

<sup>362</sup> See generally Gilson & Mnookin, *How Partners Split Profits*, *supra* note 9; Ribstein, *supra* note 10.

<sup>363</sup> A law firm's reputation is a substantial determinant of the firm's market power (the fees it can charge, the clients it can attract, and the associates it can hire), and this reputational capital is eroded when one of the firm's partners is caught in unethical conduct.



the bar's professional conduct rules but is close to the line, or if the situation requires decisions that will be carried out by a team of lawyers rather than one individual lawyer, making it more difficult to assess blame. In these cases, the firm's reputation may suffer, while the guilty lawyer emerges from the incident relatively unscathed, ready to take her chances yet again to please the next client who comes along.<sup>364</sup>

Many firms exercise little centralized control over ethics problems apart from conflicts, suggesting that firms either do not acknowledge that these agency problems exist or, more likely, believe them to be too difficult to solve. With increased exposure to litigation against lawyers,<sup>365</sup> however, some firms are establishing "ethics committees" or appointing "ethics partners" and insisting that the firm's lawyers consult them, and in some instances defer to their judgment, in situations that are "close calls."<sup>366</sup> This approach not only brings additional ethics expertise to bear on difficult situations, but also addresses a firm's agency problems by assuring that its partners have collective input in decisions that could affect the entire firm. Although ethics committees or ethics partners will sometimes prefer to resolve each situation *de novo* in an effort to comply with externally-imposed bar association rules, once a firm has decided how to approach a particular problem it may make sense to embody that decision in a rule that is then announced to all of the firm's lawyers.

Rules of this sort accomplish several objectives. A rule (for example, that the firm will not represent a client who refuses to desist from an ongoing violation of the securities laws) signals to all lawyers at the firm that a particular type of problem is taken seriously and, at a minimum, should be reported to the ethics committee or ethics partner. The rule also gives lawyers in the firm leverage in negotiations with clients who ask that exceptions be made. Finally, the rule signals to persons outside the firm that the firm deals with a problem in a particular way (for example, that the firm resigns from representing

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<sup>364</sup> The lawyer-client collusion problem has been discussed extensively in the literature on agency problems in law firms. See Cohen, *supra* note 10, at 281-83, 289-90 (describing generally collusion problem); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 Md. L. Rev. 869, 899-903 (1990) (suggesting reasons why lawyers no longer police clients' demands for inappropriate "strategic litigation").

<sup>365</sup> See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 Vand. L. Rev. 1657, 1661 (1994) ("Since 1970 there has been an unprecedented growth in legal malpractice claims and lawsuits."); see also *supra* note 285 (discussing multimillion-dollar settlements).

<sup>366</sup> See Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 Geo. J. Legal Ethics 271, 280-81, 287-89 (1997) (describing increasing use of ethics committees, ethics counsel, and peer review and discussing firms' motivation for doing so).

clients that it knows are violating the securities laws). The disadvantage of using a defined rule is that it is more difficult for the firm to tailor exceptions to the rule in appropriate circumstances than if a standard were imposed instead (for example, "all lawyers in this firm shall encourage their clients to obey the law") and particular situations are then sent to an ethics committee for case-by-case decision. Persons outside the firm, however, are less likely to credit a firm with having a specific approach to a problem if the firm opts into a standard instead of a defined rule (even if there is a defined rule, outsiders will also have to be convinced that the firm is enforcing the rule). Although self-imposed defined rules will not always reduce a firm's internal agency costs, sometimes they will, making law firm codes of professional responsibility a natural extension of the trend toward centralized resolution of ethics problems within law firms.

### *C. Facilitating Feedback*

People learn effective decisionmaking by receiving proper feedback.<sup>367</sup> When a lawyer experiences the consequences of decisions, the lawyer acquires information that helps in making future decisions. If someone else, perhaps a superior lawyer in her firm, reverses the lawyer's decision and explains why, the lawyer learns from that experience also. Furthermore, a lawyer receives feedback when she chooses a strategy in litigation or negotiation and watches opposing lawyers respond to it. Feedback, however, is subject to cognitive biases. Positive reinforcement is relatively easy to absorb, whereas negative feedback must be sufficiently powerful to overcome the psychological predisposition toward reaffirming the course of conduct that has already been chosen.<sup>368</sup> Indeed, negative feedback of sufficient strength to reverse a pattern of conduct may be hard to come by

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<sup>367</sup> See Richard H. Thaler, *The Psychology and Economics Conference Handbook: Comments on Simon, on Einhorn and Hogarth, and on Tversky and Kahneman, in Rational Choice: The Contrast Between Economics and Psychology* 95, 96 (Robin M. Hogart & Melvin W. Reder eds., 1987) ("Accurate learning takes place only when the individual receives timely and organized feedback."); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 *Tex. L. Rev.* 77, 86 (1997) (explaining psychologists' argument that learning effective decisionmaking requires proper feedback (citing Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. Bus.*, S251, S274-75 (1986))).

<sup>368</sup> See Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 *S. Cal. Interdisc. L.J.* 375, 421 n.97 (1975) ("Researchers frequently point out that for learning to occur, feedback must be sufficiently salient and unambiguous to convince the actor, who is motivated to find confirmation rather than disconfirmation, that there was an error attributable to judgment processes.").

in real life.<sup>369</sup> Put more simply, people, including lawyers, do not like to admit they were wrong.

Bar disciplinary boards give practicing lawyers very little feedback on how ethically and competently they are practicing law. Few lawyers, particularly large-firm lawyers, are ever brought before disciplinary boards.<sup>370</sup> Furthermore, because the discipline process is inherently adversarial, it calls upon a lawyer to justify her conduct, thus enhancing the lawyer's already strong motivation to find confirmation for her prior decisions. The publication of disciplinary proceedings in bar journals has pedagogical value, but it is not the same as receiving feedback by making decisions on a repeated basis, and then seeing how quickly others respond.

Much of the feedback that lawyers get about ethics thus takes place not in bar disciplinary proceedings, but in law practice. In dealing with other lawyers, lawyers presumably receive feedback from the reputational paradigm when they learn that "what goes around, comes around."<sup>371</sup> Unethical lawyers presumably are taught to be ethical, or are discharged by their firms, and the fact that disciplinary cases often involve solo practitioners<sup>372</sup> suggests that intrafirm feedback is somewhat effective at helping lawyers avoid discipline.

Nonetheless, intrafirm feedback and external feedback both have an uncertain future. As the tenure of the average associate shortens, firms have less incentive to train associates properly. Agency problems that make partners more likely to violate ethics rules in order to keep clients<sup>373</sup> also affect the quality of feedback associates get from partners. The more decentralized ethical decisionmaking is in a large firm, the more likely it is that associates will receive conflicting feedback. Finally, the growing size of the bar and increased lawyer mobility make it less likely that lawyers will interact with the same lawyers from outside their firms more than once, making the reputational paradigm a less robust mechanism for steering lawyers toward ethical behavior.

Law firm codes of professional responsibility at least partially could offset these trends by institutionalizing feedback within law firms on compliance with ethics rules. Partners who deliberate over

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<sup>369</sup> Id. (noting that, in real life, feedback that is sufficiently salient and unambiguous to convince actor that she has erred "is not particularly common").

<sup>370</sup> See Ramos, *supra* note 365, at 1696-97 (reporting that "[t]he only available statistics indicate that eighty percent of those disciplined are solo practitioners," and that "[i]n one study, no disciplinary cases were found in firms of over seven lawyers").

<sup>371</sup> See Gilson & Mnookin, *Disputing Through Agents*, *supra* note 9, at 525-27 (discussing reputational incentives for cooperative conduct).

<sup>372</sup> See *supra* note 370.

<sup>373</sup> See *supra* text accompanying notes 362-66.

which rules to include in their firm's code might discuss their own experiences and learn from each other. Associates practicing in firms with codes should less frequently receive inconsistent feedback from partners with different ideas about how to practice law. The firm's code, and the response of the firm's ethics committee to a proposed interpretation of that code, at least would be a part of the feedback received.

Law firm codes also could impose higher responsibilities on supervising lawyers to give feedback, for example, by opting up from Model Rule 5.1, and by providing that a lawyer would be subject to discipline by the firm if she had supervisory authority over another lawyer whom she knew *or should have known* was going to violate the firm's code but failed to take remedial action.<sup>374</sup> Law firm codes also could opt out of the default rule in Texas,<sup>375</sup> Illinois<sup>376</sup> and some other jurisdictions that a lawyer who is fired for reporting lawyer misconduct to superiors in her firm has no case for retaliatory discharge.<sup>377</sup> Indeed, a code could require lawyers to report other lawyers' misconduct to the firm's ethics committee. Unlike the mostly ineffective Model Rule 8.3,<sup>378</sup> such an internal reporting requirement might sometimes be obeyed. Law firm codes cannot assure consistent feedback on compliance with ethics rules, but they do make such feedback more likely.

### CONCLUSION

The contractarian framework reveals some general trends in professional responsibility rules, including gradual migration away from

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<sup>374</sup> Model Rules of Prof'l Conduct R. 5.1(c)(2) (1998) (providing that lawyer shall be responsible for another lawyer's violation if "the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action").

<sup>375</sup> See *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 544-45, 547 (Tex. 1998) (holding that law firm did not breach its fiduciary duty to one of its partners by firing her for reporting to firm's managing partners apparent overbilling by another partner).

<sup>376</sup> See *Jacobson v. Knepper & Moga*, P.C. 706 N.E.2d 491, 492, 494 (Ill. 1998) (denying recovery to lawyer who was fired from law firm for insisting that firm stop filing consumer debt collection actions in wrong venue in violation of fair debt collection practices laws).

<sup>377</sup> A written firm policy prohibiting discharge in these circumstances would become an implied-in-fact covenant in the employment contract or partnership agreement. See *supra* notes 112, 316 (discussing implied-in-fact covenants in employment contracts).

<sup>378</sup> Model Rules of Prof'l Conduct R. 8.3 (1998) (requiring that lawyer having knowledge of another lawyer or judge violating Rules that raises substantial question of fitness "shall inform the appropriate authority"); see also Committee on Prof'l Responsibility, *The Attorney's Duties to Report the Misconduct of Other Attorneys and to Report Fraud on a Tribunal*, 47 Rec. Ass'n B. City N.Y. 905, 907 (1992) (discussing ineffectiveness of mandatory reporting rules in New York).

standards and toward defined rules. Many hotly-debated issues in the profession, however, continue to be governed by standards, discretion-laden rules, and aspirational language. There also has been some migration away from immutable rules toward default rules and opt-in rules. This change, however, for the most part has not included rules governing conduct that affects third parties, even though the interests of third parties could be included in some lawyer-client contracts.

Default rules and opt-in rules, if carefully chosen with the protection of third parties in mind, could enrich professional responsibility codes enormously. These rules also are more likely than their immutable counterparts to be defined rules because the bar is more likely to agree on how to define a rule stating that lawyers and clients can opt out if they want another rule. The ABA also should define more clearly existing opt-out mechanisms and in some cases make them easier to use earlier in a representation. In other cases, aspirational rules, including ethical considerations similar to those in the Model Code, could reinvigorate reputational enforcement of ethics norms, particularly if coupled with disclosure of information about lawyer compliance. Finally, the ABA should consider requiring law firms to adopt their own codes of professional responsibility. Law firm codes would fill gaps in the law, address agency problems within law firms, and enhance the quality of feedback that lawyers give to each other about ethics within firms.

APPENDIX  
SAMPLE LAW FIRM CODE  
OF PROFESSIONAL RESPONSIBILITY PROVISIONS

The following provisions address some isolated professional responsibility issues. These provisions are not intended collectively to comprise a complete law firm code.

A. USE OF CLIENT INFORMATION

1. A lawyer at this firm shall not use client information in the purchase or sale of securities without the consent of both the client and the firm's ethics committee (the "ethics committee"). All securities trades by lawyers at this firm also must be cleared by the firm's insider trading law compliance committee.
2. A lawyer at this firm shall not use client information for personal advantage in the purchase or sale of a business or of commercial real estate without first informing the client.<sup>379</sup>
3. A lawyer at this firm may not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation and the intended use is approved by the ethics committee.<sup>380</sup>

B. CLIENT CRIME OR FRAUD

1. If a lawyer at this firm discovers that an organizational client is engaged in or is about to engage in a crime or fraud, the lawyer shall proceed as follows:
  - (A) The lawyer shall request that a responsible person within the organizational client take appropriate steps to rectify the problem.
  - (B) If steps taken under (A) do not result in the client's taking action to avert the crime or fraud, the lawyer promptly shall inform the ethics committee of the problem and also shall proceed up the chain of command of the organizational client until action is taken to avert the crime or fraud.

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<sup>379</sup> This and the preceding provision opt into defined rules tailored to specific uses for client information. Securities transactions get the highest level of scrutiny (veto by the client or by one of two firm committees) while business and commercial real estate transactions get an intermediate level of scrutiny (prior notice to the client, which gives the client a chance to complain if he or she believes that he or she might be disadvantaged by the transaction).

<sup>380</sup> This provision combines the text of Model Rule 1.8(b) with a requirement that the ethics committee be informed so it can assure compliance with the consent requirement of the rule.

- (C) If steps taken under (B) do not result in the client's taking action to avert the crime or fraud, the lawyer promptly shall inform the client's board of directors or other highest authority designated in the client's articles of organization.<sup>381</sup>
  - (D) If steps taken under (C) do not result in the client's taking action to avert the crime or fraud, the lawyer shall resign from the representation.<sup>382</sup>
2. If a client of this firm retains an auditing firm for purposes of complying with the disclosure requirements of the securities laws, a lawyer at this firm who is rendering legal services in connection with the securities laws and who knows information that is material to the audit but that is unknown to the auditors shall proceed as follows:
- (A) The lawyer shall request permission from the client to inform the auditors or shall request that the client inform the auditors.
  - (B) If steps taken under (A) do not result in communication of the information to the auditors, the lawyer shall inform the client's board of directors of the situation.
  - (C) If steps taken under (B) do not result in communication of the information to the auditors, the lawyer shall inform the ethics committee of the situation and resign from the representation.
3. A lawyer who resigns from a representation under paragraphs 1 or 2 shall withdraw or disaffirm any opinion, document, affirmation, or similar work product upon which third parties might rely.<sup>383</sup>

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<sup>381</sup> This provision opts up by requiring remedial measures (including referral of the matter to the highest authority within the organization) that are permitted but not required under Model Rule 1.13. Model Rules of Prof'l Conduct R. 1.13(b), (c) (1998) (requiring lawyer with such knowledge to "proceed as is reasonably necessary in the best interest of the organization" but only suggesting, not requiring, specific measures to be taken); see also Painter, *Ethics 2000 Letter*, *supra* note 4 (proposing adding similar language to Model Rule 1.13).

<sup>382</sup> This provision opts up by requiring the withdrawal that is permitted but not required in a client crime or fraud situation under Model Rule 1.16(b)(1), (2)-(3). Model Rules of Prof'l Conduct R. 1.16(b) (1998) (allowing lawyer to withdraw from representation if no "material adverse effect on the interests of the client" will result or client either persists in criminal or fraudulent action involving lawyer's services, uses lawyer's services to perpetrate crime or fraud, or persists in objective "lawyer considers repugnant or imprudent").

<sup>383</sup> This provision requires the "noisy withdrawal" that is permitted under Comment 16 to Model Rule 1.6. *Id.* R. 1.6 cmt. 16 ("Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevent the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.").

### C. CONFLICTS OF INTEREST WITHIN AN ORGANIZATIONAL CLIENT

A lawyer at this firm shall offer an organizational client an opportunity to adopt a policy that its lawyers are required to follow in resolving conflicts of interest among the board of directors, officers, and shareholders. The lawyer, however, shall inform the client that this firm's lawyers will not be bound by such a policy unless:

- (A) it is consistent with applicable rules of professional responsibility;
- (B) it is consistent with this Code; and
- (C) it is disclosed to the client's shareholders and corporate officers in advance.<sup>384</sup>

### D. PRO BONO PUBLICO SERVICES

A lawyer at this firm shall perform at least fifty hours of pro bono work each year.<sup>385</sup>

### E. MAXIMUM BILLABLE HOURS

A lawyer at this firm shall not work more than 80 hours of billable time in any seven day period, 240 hours of billable time in any calendar month or more than 2600 hours of billable time in any calendar year.

### F. PROTECTION FROM RACE, RELIGION, OR SEX DISCRIMINATION

1. Partners of the firm shall treat each other as if employment discrimination laws that apply to the terms and conditions for employment of associates also applied to the relationship among partners. This provision is an exception to the general rule that no provision of this Code shall be deemed to set a higher standard of conduct for purposes of establishing legal liability.<sup>386</sup>

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<sup>384</sup> The rule requires the lawyer to give corporate clients an opportunity to opt into the ex ante contracting allowed by Rule 2.5 of the American Lawyer's Code of Conduct. American Lawyer's Code of Conduct, *supra* note 27, R. 2.5. The provision also requires that Rule 2.5's requirement of shareholder and officer notification be observed. See *supra* text accompanying note 27 (discussing Rule 2.5).

<sup>385</sup> This provision makes the aspirational Model Rule 6.1 into a "legally enforceable" rule within the firm. See *supra* notes 22, 310-12, and accompanying text (describing Model Rule 6.1).

<sup>386</sup> This provision addresses the "glass ceiling" problem by opting into a substitute for the rule, described in Justice Powell's concurring opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), that Title VII does not apply to race and sex discrimination in the relationship among partners. *Id.* at 79 (Powell, J., concurring) (emphasizing that relationship among partners is not employer-employee and therefore does not implicate Title VII). Liability concerns, however, might cause many firms to delete the last sentence of this provision.



2. No firm functions, including meals billed by a lawyer to the firm or to a client, shall be held at private clubs or organizations that discriminate in selecting members or allowing access to their facilities on the basis of race, sex, religion, or national origin. The firm's lawyers shall make every effort to discourage clients from conducting business with the firm's lawyers at such clubs or organizations.
3. A lawyer or other employee of the firm may refrain from working on religious holidays and on any one predetermined day of the week (whether for religious reasons or otherwise). Lawyers and other employees wishing to refuse work assignments on certain days in accordance with this provision shall inform the firm's managing partner. It shall be the responsibility of the partner in charge of a matter to ascertain from the firm's personnel records whether a lawyer or other employee assigned to the matter is free to work on certain days, and to plan representation of the client accordingly. No lawyer at the firm shall penalize another lawyer or other employee in performance evaluations or otherwise for not working on specified days as set forth by this provision.

G. CONFLICTS OF INTEREST FROM INVESTMENTS  
AND DIRECTORSHIPS

1. A lawyer in the firm may become a director of a for-profit entity if:
  - (A) the lawyer informs the ethics committee prior to accepting the directorship;
  - (B) the ethics committee concludes that performance by the lawyer of his or her duties as a director will not create any impermissible conflicts with the interests of any of the firm's clients under Model Rule 1.7(b), or result in a breach of any other professional responsibility rules by the lawyer or the firm;
  - (C) the lawyer does not incur any obligation to render legal services for the entity that is not approved by the firm's ethics committee;
  - (D) whether or not the entity is a client of the firm, the lawyer informs its board of directors that he or she is not rendering legal services for the entity in his or her capacity as a director;
  - (E) if the entity is a client of the firm, the ethics committee makes an annual determination that the firm should continue to represent the entity;

- (F) the entity is to the best of the lawyer's knowledge after reasonable investigation in full compliance with all laws and regulations; and
  - (G) the lawyer promptly informs the ethics committee if he or she later discovers that the entity is engaged in an ongoing violation of laws or regulations, and the lawyer promptly resigns as a director if requested to do so by the ethics committee.<sup>387</sup>
2. A lawyer in the firm may purchase an equity stake in a client of the firm if:
- (A) the lawyer informs the ethics committee prior to completing the transaction;
  - (B) the ethics committee concludes that the transaction will comply fully with Model Rule 1.8(a), all other rules of professional responsibility, and all other provisions of this Code, including Section A governing use of client information;
  - (C) the client is to the best of the lawyer's knowledge after reasonable investigation in full compliance with all laws and regulations applicable to its business;
  - (D) the ethics committee makes an annual determination that the firm should continue to represent the client; and
  - (E) the lawyer promptly informs the ethics committee if he or she later discovers that the client is engaged in an ongoing violation of laws or regulations.<sup>388</sup>

#### H. CONFLICTS OF INTEREST FROM POLITICAL ACTIVITY

1. A partner in the firm shall not make a campaign contribution to a government official whom the partner has reason to believe has responsibility for deciding whether to retain the firm for a government legal engagement or appointment. A partner who makes a campaign contribution to a government official who within the two subsequent years has responsibility for deciding whether to retain

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<sup>387</sup> These provisions are designed to assure that the ethics committee is informed of a lawyer's intent to accept a directorship and has an opportunity to check for possible conflicts or other ethical problems as well as to decide whether the firm ought to render legal services for the same entity. These provisions also help prevent the firm's lawyers from accepting or retaining directorships with entities that are most likely to get them into trouble because they are not in compliance with the law.

<sup>388</sup> These provisions are designed to assure that investments by the firm's lawyers in clients comply with the Model Rules and with the firm's own rules on use of client information. These provisions, like the provisions in the preceding section governing lawyer directorships, are also designed to prevent the firm from being captive to a client in which one of its lawyers has an investment interest.

the firm for a government legal engagement or appointment shall not share in the fees earned by the firm in connection with the matter.<sup>389</sup>

2. Partners at the firm shall not solicit political contributions from associates or other employees of the firm.

#### I. THE INDIVIDUAL LAWYER'S DISCRETION IN PRACTICING LAW

1. A lawyer may refuse to represent a client whose objectives the lawyer considers repugnant, so long as the objection is in good faith and the lawyer does not object to representing so many clients that the lawyer's objections seriously impair the lawyer's ability to contribute to the work of the firm.
2. A lawyer may resign from representing a client whose objectives the lawyer considers imprudent or repugnant, so long as the resignation is in good faith and adequate notice of withdrawal from the matter is given to the partner in charge of the matter so another lawyer at the firm can be substituted in his or her place.<sup>390</sup>
3. A subordinate lawyer who disagrees with a superior on an arguable question of professional responsibility may with adequate notice withdraw from the matter as soon as another lawyer at the firm can be substituted in his or her place.<sup>391</sup>
4. A lawyer may serve as a director, officer, or member of a law reform organization even if the reforms proposed by the organization may affect the interests of his or her clients or other clients of the firm.<sup>392</sup>

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<sup>389</sup> This rule opts up by adding a defined rule to the unenforceable standard imposed by new Model Rule 7.6 (adopted by the ABA House of Delegates on February 14, 2000). Model Rule 7.6 provides: "A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment." Model Rules of Prof'l Conduct R. 7.6 (1998).

<sup>390</sup> This provision provides at the firm level the same discretion that individual lawyers have to resign from representing clients on grounds specified in Model Rule 1.16. See *supra* note 33 (describing Model Rule 1.16).

<sup>391</sup> This provision provides a subordinate lawyer with an alternative to continuing to work on the matter and relying on the safe harbor in Model Rule 5.2 that shields the lawyer from discipline if she resolves an arguable question of professional responsibility as directed by her superior. See *supra* text accompanying note 358 (describing Model Rule 5.2 and explaining benefits of alternative rule).

<sup>392</sup> This provision provides at the firm level the same discretion concerning outside law reform organizations that an individual lawyer has under Model Rule 6.4. See *supra* note 359 and accompanying text (describing Model Rule 6.4).

5. No lawyer in the firm shall penalize another lawyer in the firm for exercising discretion in accordance with the provisions of this section.

#### J. SUPERVISORY RESPONSIBILITIES

A lawyer at this firm shall be responsible for another lawyer's violation of this Code if the lawyer is a partner in the firm or has direct supervisory authority over the other lawyer, and if he or she either knows of the conduct at a time when its consequences can be avoided or mitigated, or is in a position where the lawyer should have known of such conduct but fails to take reasonable remedial action.<sup>393</sup>

#### K. REPORTING ETHICAL VIOLATIONS AND PROBLEM ENGAGEMENTS

1. If a lawyer in this firm has reasonable belief that another lawyer in the firm has violated any provision of this Code, the lawyer shall promptly report all relevant information to the firm's ethics committee.<sup>394</sup> Where possible, the ethics committee shall take all reasonable steps, consistent with enforcement of this Code, to protect the anonymity of the reporting lawyer. In all cases, the ethics committee shall take precautions to assure that there are no negative professional repercussions for the reporting lawyer from having made the report.
2. A lawyer in this firm shall promptly inform the ethics committee if a client is engaged in an ongoing violation of laws or regulations.
3. The retainer agreement for every engagement of this firm shall state that communications by a lawyer at the firm to the ethics committee are consented to by the client. The ethics committee shall assure that any communications with outside ethics consultants about the engagement do not waive any of the client's evidentiary privileges. A lawyer shall resign from representing a client who requests that a matter not be communicated to the ethics committee.
4. No lawyer in this firm shall penalize a lawyer in a performance evaluation or otherwise, for:

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<sup>393</sup> This provision opts up by adding a "knew or should have known" standard to Model Rule 5.1(c)(2), which only imposes responsibility if the partner or supervisory lawyer knew of the conduct in question. Model Rules of Prof'l Conduct R. 5.1(c)(2) (1998).

<sup>394</sup> This provision is a firm-level version of Model Rule 8.3 (imposing affirmative duty to report violations of applicable rules, unless information was obtained while serving as member of approved lawyers' assistance program and disclosure would violate attorney-client privilege).

- (A) reporting suspected lawyer misconduct to superiors in the firm or to the firm's ethics committee; or
- (B) making a good-faith determination that a proposed course of conduct violates this Code or other applicable codes of professional responsibility and taking appropriate action based on that belief.<sup>395</sup>

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<sup>395</sup> These provisions opt out of the default rule in Texas, Illinois, and some other jurisdictions that a lawyer who is fired for obeying rules of professional responsibility has no case for retaliatory discharge. See *supra* notes 375-78 (discussing *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998) and *Jacobson v. Knepper & Moga*, 706 N.E.2d 491 (Ill. 1998)).