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Symposium Article

The Incompleteness of the Model Rules and the Development of Professional Standards

by Nathan M. Crystal*

Rules and standards of professional conduct are proliferating. In November 2000, the American Bar Association's ("ABA's") Ethics 2000 Commission released its final report recommending changes in the ABA's Model Rules of Professional Conduct.¹ Earlier in the year the American Law Institute ("ALI") issued its long awaited Restatement of the Law Governing Lawyers.²

The Model Rules and the Restatement are similar in two respects. Both contain detailed rules and both are comprehensive, covering

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1. Center for Professional Responsibility, Ethics 2000 Commission, *November 2000 Report* (visited February 19, 2001) <http://www.abanet.org/cpr/e2k-whole_report_home.html>.

2. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

relationships between lawyers and their clients, the courts, and third parties. Standards prepared by other organizations, however, have taken a narrower approach. Some have focused on particular activities performed by lawyers. In 1994 the American College of Trial Lawyers issued a revision of its Code of Trial Conduct.³ In 1998 the ABA Section of Litigation issued Guidelines for Litigation Conduct⁴ and is now developing standards for settlement negotiations.⁵

Other organizations have focused on specialized areas of practice. In 1992 the American Academy of Matrimonial Lawyers developed standards to guide family law practitioners,⁶ followed, in 1995, by standards for attorneys and guardians in custody and visitation proceedings.⁷ The American College of Trust and Estate Counsel has prepared commentaries on the Model Rules.⁸ In the area of criminal practice, the ABA has issued Standards for the Prosecution and the Defense.⁹

Another aspect of the standards movement is the emphasis on professionalism. In 1988 the ABA House of Delegates recommended that state and local bar associations "encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyers' creed of professionalism."¹⁰ Many state and local bar associations have also adopted creeds or codes of professionalism.¹¹

What is one to make of this plethora of standards? Do they represent simply a hodgepodge of issuances by different organizations, each with its own views on lawyers' ethics, or is there some pattern to these efforts? Because the production of standards seems to be increasing,

3. American College of Trial Lawyers, CODE OF TRIAL CONDUCT, 156 F.R.D. 275 (1994) (1994 revision of code originally issued in 1956).

4. ABA Section of Litigation, *Guidelines for Conduct* (visited February 19, 2001) <<http://www.abanet.org/litigation/litnews/practice/guidelines.html>>.

5. ABA Section of Litigation, *Ethical Guidelines for Settlement Negotiations* (Draft Feb. 2001).

6. American Academy of Matrimonial Lawyers, *The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIMONIAL LAW. 1 (1992).

7. American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardian Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIMONIAL LAW. 1 (1995).

8. American College of Trust and Estate Counsel, *Commentaries on the Model Rules of Professional Conduct* (3d ed. 1999) (visited February 21, 2001) <<http://www.actec.org/pubInfoArk/comm/toc.html>>.

9. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

10. ABA/BNA Laws. Man. on Prof. Conduct (ABA/BNA) 1:401 (1984 & Supp. 2001).

11. See generally Adam O. Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV. 757 (2000).

how are we to evaluate each newly introduced set of standards? Are there any general principles that organizations should take into account in preparing standards?

Part I of this Article argues that the standards movement can be understood by focusing on the characteristics of the Model Rules of Professional Conduct, the basic source of lawyers' ethical obligations. The drafters of the Model Rules created a document that has significant limitations and, as a result, cannot serve as a comprehensive statement of lawyers' obligations. The various standards produced by other organizations respond to one or more of the limitations of the Model Rules.

Part II considers the evaluation of these other standards. Because the Model Rules are regulatory while other standards are voluntary, it is possible to derive several principles that can guide the work of standards drafters. First, standards should be consistent with the Model Rules unless there are strong reasons to deviate from the Model Rules and clear warnings of the deviation are given. Second, standards should provide detailed supplementation rather than mere repetition of the Model Rules. Third, drafters should develop an action plan to make voluntary standards influential.

I. THE CHARACTERISTICS OF THE MODEL RULES AND THE DEVELOPMENT OF STANDARDS

The ABA House of Delegates approved the Model Rules of Professional Conduct in 1983 to replace the Code of Professional Responsibility. The Model Rules have a number of characteristics that make them an incomplete source for determining a lawyer's ethical obligations. However, the word "incomplete" is not intended as a criticism of the Model Rules. It would be extremely difficult, if not impossible, to prepare a complete statement of lawyers' obligations. Nonetheless, by focusing on the ways in which the Model Rules are incomplete, we can begin to understand the function performed by other standards.

First, the Model Rules are intended principally as a statement of rules, the violation of which can lead to professional discipline. The Rules state: "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."¹² There are, of course, exceptions. Not all of the rules have a disciplinary function. Some use the term "may" and thus provide lawyers with professional discretion. Sometimes lawyers have very broad discretion that is unrestricted by a standard. In other situations lawyers have

12. MODEL RULES OF PROFESSIONAL CONDUCT, Preamble, Scope & Terminology (1983).

weaker discretion restricted or "grounded" in a general standard.¹³ Among the many discretionary decisions that lawyers face are the following: the decision to undertake representation, determination of whether a conflict of interest exists, the scope of counseling clients about nonlegal matters, choice of tactics and presentation of evidence, public comments about pending proceedings, dealing with clients who suffer from diminished capacity, disclosure of confidential information to prevent client wrongdoing, permissive withdrawal from representation, extent of pro bono service, methods of billing, and advertising of legal services.¹⁴

Other rules are descriptive of the professional relationship. For example, Model Rule 1.13(a) provides that a lawyer retained or employed by an organization represents the entity rather than any of its constituents.¹⁵ Despite these qualifications, the Model Rules are primarily a disciplinary code. As a disciplinary code, the Model Rules eschew aspirational statements. Indeed, the history of the Model Rules shows that the drafters intended to largely eliminate aspirational concepts.

The Code of Professional Responsibility preceded the Model Rules. The Code had a three-part structure comprised of canons, disciplinary rules (DRs), and ethical considerations (ECs), that differed significantly from the Model Rules. The Code's drafters intended the canons to serve as axioms of lawyers' obligations. For example, Canon 4 stated: "A lawyer should preserve the confidences and secrets of a client."¹⁶ The disciplinary rules were more detailed black letter statements of minimum standards, the violation of which could be the basis of professional discipline. By contrast, the ethical considerations served as both commentary on the disciplinary rules and aspirational norms that lawyers should strive to achieve, but the violation of which would not be the basis of discipline.¹⁷

Soon after its adoption, the Code of Professional Responsibility was subjected to substantial criticism. One of the objections to the Code was that the division into canons, ethical considerations, and disciplinary

13. See Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 39 (1997) (drawing distinction between restricted and grounded discretion).

14. For a discussion of discretion under the Model Rules, see Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POLY 75 (2000); see also 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.24 (3d ed. 2001).

15. MODEL RULES, *supra* note 12, Rule 1.13(a).

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980).

17. *Id.* Preliminary Statement.

rules was complex and confusing.¹⁸ The drafters of the Model Rules abandoned the structure of the Code and adopted a simpler framework of black letter rules followed by comments, much like the Restatements. In the process they eliminated the aspirational aspects of the Code. As a result the Model Rules have a certain lifelessness to them. To say that they are devoid of spirit would perhaps go too far, but reading the Model Rules is unlikely to be inspirational.

Second, the Model Rules are intended to apply to lawyers generally rather than to attorneys who practice in particular fields of law. The Model Rules are grouped under eight sections: (1) client-lawyer relationship; (2) counselor; (3) advocate; (4) transactions with persons other than clients; (5) law firms and associations; (6) public service; (7) information about legal services; and (8) maintaining the integrity of the profession. These sections do not deal with areas of specialization. As one thumbs through the rules, it is rare to encounter provisions that deal with particular areas of practice. Rule 1.11 deals with lawyers entering or leaving government practice¹⁹ and Rule 3.8 deals with the special responsibilities of prosecutors, but they are the exceptions.²⁰ Again, no criticism is meant by this observation. The drafters of the Model Rules had no choice. Despite vast differences in the practice of law, the legal profession is still unified in the sense that the same standards for admission and discipline apply to all attorneys. A set of rules that attempted to take into account the nuances of various areas of practice would be extremely difficult to produce, unwieldy in length, and of necessity contain much information that most lawyers would find irrelevant.

Third, the Model Rules often refer lawyers to "other law" for directions on how they should act. Many rules make specific references to general law. For example, Rule 3.4(b) states that a lawyer shall not "offer an inducement to a witness that is prohibited by law."²¹ Similarly, Rule 3.4(d) provides that a lawyer shall "make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."²² Likewise, Rule 3.5 directs lawyers not to influence or communicate with judges, jurors, or prospective jurors except to the extent permitted by law.²³ Rule 4.2 allows a lawyer to communicate with a represented

18. HAZARD & HODES, *supra* note 14, § 1.11, at 1-20.

19. MODEL RULES, *supra* note 12, Rule 1.11.

20. *Id.* Rule 3.8.

21. *Id.* Rule 3.4(b).

22. *Id.* Rule 3.4(d).

23. *Id.* Rule 3.5.

person when "authorized by law."²⁴ More generally, the Model Rules assume the applicability of background legal principles: "The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."²⁵

To summarize, the Model Rules are an incomplete source of professional obligations because they contain disciplinary rules rather than aspirational guidance, focus on general duties rather than the obligations of lawyers in particular areas of practice, and refer lawyers to "other law" to determine many of their obligations. The various standards offered by different organizations can be understood as responding to one or more of these limitations of the Model Rules.

The first way in which the Model Rules are incomplete is their focus on disciplinary rules rather than aspirational standards. The professionalism movement in broad terms responds to this absence in the Model Rules.

The origins of the professionalism movement are usually traced to the Stanley Commission Report, adopted by the ABA in 1986.²⁶ The report, issued three years after the adoption of the Model Rules, noted the movement away from aspirational standards:

The transition from the Canons to the Code to the Model Rules was paralleled by the development of disciplinary enforcement machinery in the several states. As a consequence, lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits. However, lawyers have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.²⁷

The recommendations of the Stanley Commission included the resolution "to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct."²⁸ The Stanley Commission noted:

Surely, it is not too much to call on the American Bar Association and its members to reach for such a goal. The minimum standards are

24. *Id.* Rule 4.2.

25. *Id.* Preamble, Scope & Terminology.

26. ABA Comm'n on Professionalism, ' . . . In the Spirit of Public Service': A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243 (1986).

27. *Id.* at 259.

28. *Id.* at 296.

important, indeed essential, to uphold; but leadership, example and inspiration are needed as well. We call on the American Bar Association to provide the leadership and the example, which in turn will provide the inspiration.²⁹

The tone of professionalism codes produced in later years is strikingly different from the Model Rules. For example, the Lawyer's Creed of Professionalism begins with the following preamble, emphasizing the difference between the Creed and the rules of professional conduct:

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.³⁰

Specific provisions of the Creed carry out this high-toned approach.

I will advise my client that civility and courtesy are not to be equated with weakness;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good.³¹

Similarly, the Lawyer's Pledge of Professionalism that was adopted by the Younger Lawyers Section of the ABA and approved by the House of Delegates in 1988 for dissemination to the profession, offers a broad vision of the role and responsibilities of lawyers:

1. I will remember that the practice of law is first and foremost a profession, and I will subordinate business concerns to professionalism concerns.
2. I will encourage respect for the law and our legal system through my words and actions.
3. I will remember my responsibilities to serve as an officer of the court and protector of individual rights.

29. *Id.* at 296-97.

30. ABA/BNA, *supra* note 10, 1:401.

31. *Id.* 1:401.02.

4. I will contribute time and resources to public service, public education, charitable, and pro bono activities in my community.
5. I will work with the other participants in the legal system, including judges, opposing counsel and those whose practices are different from mine, to make our legal system more accessible and responsive.
6. I will resolve matters expeditiously and without unnecessary expense.
7. I will resolve disputes through negotiation whenever possible.
8. I will keep my clients well-informed and involved in making the decisions that affect them.
9. I will continue to expand my knowledge of the law.
10. I will achieve and maintain proficiency in my practice.
11. I will be courteous to those with whom I come into contact during the course of my work.
12. I will honor the spirit and intent, as well as the requirements, of the applicable rules or code of professional conduct for my jurisdiction, and I will encourage others to do the same.³²

Thus, the professionalism codes fundamentally represent a response to the absence of an aspirational or spiritual component to the Model Rules. Indeed, the leading critic of the professionalism movement, Rob Atkinson, has drawn a parallel between the movement and religious crusades.³³

The second way in which the Model Rules are incomplete is they largely ignore the ethical problems posed by particular areas of practice. Traditionally, lawyers have been generalists who are available to handle any kind of legal matter. That is no longer the case. The Stanley Commission noted this change:

[T]he practice of law has now broken down into informal specialties more than at any earlier time. There is simply too much to know for all aspects of law to be practiced by everyone. Tax lawyers, probate lawyers, litigators, energy specialists and family lawyers only begin to suggest the diversity. These divisions are informal in most states, but they are real. Even lawyers in general practice do not do everything; at most, they handle matters in several areas of law and refer the rest to others. One implication of these divisions for the Bar generally is that lawyers may feel they have more in common with practitioners in their substantive areas than with the Bar as a whole.³⁴

32. ABA/BNA, *supra* note 10, 1:403.

33. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 270 (1995).

34. 112 F.R.D. at 252-53; *see also* Geoffrey C. Hazard, Jr., *Changing Structures in the Practice of Law*, 61 LA. L. REV. 167, 167-68 (2000).

Suppose a tax lawyer wants to know her obligations in drafting an opinion regarding a tax shelter. Model Rule 2.3 specifies when a lawyer may evaluate a matter for a client to be used by a third person, but it provides no standards for that evaluation.³⁵ Instead, tax lawyers must turn to regulations issued by the IRS to determine their obligations.³⁶ Similarly, a lawyer who represents a child finds little guidance in Model Rule 1.14 on his ethical obligations. The reality of specialization in the practice of law, coupled with the generality of the Model Rules, produces a need for standards that deal with the specific problems of lawyers practicing in particular speciality areas. Much of the standards production work has taken this direction. The *Bounds of Advocacy*, produced by the American Academy of Matrimonial Lawyers; *Commentaries on the Model Rules*, produced by the American College of Trust and Estate Counsel; *Standards for the Prosecution and Defense Function*, prepared by the ABA; and many other sets of standards respond to this incompleteness in the Model Rules.

Finally, the Model Rules are incomplete because they assume and often incorporate reference to other law. The Restatement (Third) of the Law Governing Lawyers, published by the American Law Institute last year, represents an effort to deal with the legal incompleteness of the Model Rules. To some extent the Restatement is successful in this endeavor. It deals with a number of topics not covered in the Model Rules: lawyer civil liability,³⁷ the attorney-client privilege,³⁸ and the work product doctrine.³⁹

In several respects, however, the Restatement fails in dealing with the legal incompleteness of the Model Rules. The Restatement is itself incomplete. For example, notably absent from the Restatement is any coverage of issues involving advertising and solicitation. To be sure, there are ethics rules already dealing with these topics, but the force behind change in the rules dealing with advertising and solicitation has come from Supreme Court decisions providing lawyers with First Amendment protection for various forms of commercial speech.⁴⁰

The Restatement frequently covers the same topics as the Model Rules but often stakes out a position that is quite different from the Model Rules. For example, the Restatement deals not only with the attorney-

35. MODEL RULES, *supra* note 12, Rule 2.3.

36. 31 C.F.R. § 10.33 (2000).

37. RESTATEMENT, *supra* note 2, ch. 4.

38. *Id.* ch. 5, topic 2.

39. *Id.* ch. 5, topic 3.

40. For a review of these developments, see NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 445-59 (2d ed. 2000).

client privilege and the work product doctrine, but also with the ethical duty of confidentiality.⁴¹ The Restatement, however, authorizes lawyers to disclose confidential information in a number of situations in which the Model Rules mandate confidentiality. Restatement section 66(1) allows lawyers to disclose confidential information "when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person."⁴² The Model Rules only allow disclosure "to the extent the lawyer reasonably believes necessary . . . to prevent the client from *committing a criminal act* that the lawyer believes is likely to result in imminent death or substantial bodily harm."⁴³ In section 67, the Restatement authorizes lawyers to reveal confidential information to prevent, mitigate, or rectify substantial financial loss in a number of situations.⁴⁴ The Model Rules prohibit disclosure of confidential information in these situations.⁴⁵ Restatement section 124 sometimes allows screening to prevent disqualification of an entire firm when a member of the firm is personally disqualified from representation of a client.⁴⁶ Under the Model Rules, screening is not allowed except in the case of former government lawyers.⁴⁷ The drafters of the Restatement decided to include coverage of matters already dealt with in the Model Rules to clarify issues that had arisen under the Model Rules and also to promote change in the Model Rules.⁴⁸ Finally, the Restatement, like the Model Rules, often refers to "other law" for resolution of an issue, thus continuing the same legal incompleteness found in the Model Rules.⁴⁹

41. RESTATEMENT, *supra* note 2, ch. 5, topic 1.

42. *Id.* § 66(1).

43. MODEL RULES, *supra* note 12, Rule 1.6(b)(1) (emphasis added).

44. RESTATEMENT, *supra* note 2, § 67(2).

45. See MODEL RULES, *supra* note 12, Rule 1.6.

46. RESTATEMENT, *supra* note 2, § 124.

47. Compare MODEL RULES, *supra* note 12, Rules 1.10 and 1.11. On the rejection of screening in the Model Rules see Crystal, *supra* note 40, at 304-07; see also HAZARD & HODES, *supra* note 14, § 14.8.

48. RESTATEMENT, *supra* note 2, Foreword:

In many instances, however, the Restatement significantly departs from the code formulations. These departures are carefully considered and were extensively debated. As those of us involved in the drafting of the codes will testify, many of these departures simply clarify the intent of the code provisions and others seek to supersede drafting mistakes. Other departures reflect recognition that experience with the codes revealed that better resolutions were to be had on a variety of issues.

Id.

49. See, e.g. *id.* §§ 105, 115.

This is not the place to present a detailed criticism of the Restatement. In fact, many of the Restatement sections, particularly the ones expanding exceptions to the duty of confidentiality, seem justified. The analysis here is empirical and analytical—to place the Restatement within the broader framework of the standards movement and to show how the Restatement and other standards respond to ways in which the Model Rules are incomplete.

II. STANDARDS FOR STANDARDS DRAFTERS

There is one striking contrast between the Model Rules and all of the other standards issued by professional organizations. The Model Rules are intended to be adopted as law by state supreme courts and to regulate the practice of law by providing a basis for professional discipline. All of the other standards are not intended to be adopted as law. They are intended to operate by persuasion and influence rather than regulation. The voluntary, nonregulatory character of these standards has important implications for both the substance of the standards and the procedure for implementation of the standards. I offer three principles for standards drafters: (1) Draft standards that are consistent with the Model Rules unless strong reasons justify a departure from the Model Rules and the standards give clear warning of the change; (2) provide detailed supplementation rather than mere repetition of the Model Rules; and (3) develop an action plan to make the standards influential.

A. Standards Should Generally Be Consistent with the Model Rules Unless Substantial Reasons Justify the Deviation and the Standards Give Clear Warning of the Departure from the Model Rules

Because violation of a rule of professional conduct is a basis for discipline in all jurisdictions, drafters of standards must take care that their standards are consistent with the Model Rules. Normally, standard drafters will accept the Model Rules as the basis for their analysis, but sometimes standard drafters in particular areas of practice may disagree with the approach of the Model Rules or may attempt to validate a practice that varies from the Model Rules. If drafters propose a standard that deviates from the Model Rules, they should warn practitioners of the substantial risks of this approach.

An example of the problem of consistency with the Model Rules can be found in the Commentaries on the Model Rules adopted by the American College of Trust and Estate Counsel (“ACTEC”).⁵⁰ Under the Model

50. American College of Trust and Estate Counsel, *supra* note 8, MPRC Rule 1.6.

Rules, when a lawyer is asked to represent clients in a single matter and those clients have potentially differing interests, the lawyer may proceed with the representation if the lawyer reasonably believes that he can do so and if both clients consent after consultation, which includes an explanation of the "implications of the common representation and the advantages and risks involved."⁵¹ In estate planning for husband and wife, some practitioners believe that it is proper for a lawyer to represent the spouses either separately or jointly.⁵² In separate representation, the lawyer represents each spouse separately as to that spouse's rights and interests.⁵³ Further, in separate representation, the lawyer must maintain the confidentiality of information received from either spouse, even if the information might affect the estate plan of the other spouse.⁵⁴ The lawyer, however, may have a duty to withdraw if the receipt of confidential information means that an actual conflict of interest exists between the spouses.⁵⁵ By contrast, in joint representation the lawyer represents both spouses "joined to accomplish a mutual goal."⁵⁶ If a lawyer who is engaged in joint representation receives confidential information from one spouse that has an impact on the estate plan of the other spouse, the lawyer must act as a fiduciary to both spouses and must choose to disclose, to maintain confidentiality, or to withdraw based on the lawyer's determination of which action does the least harm.⁵⁷

Nothing in the rules of professional conduct authorizes lawyers to represent multiple clients while keeping information obtained from one secret from the other. Indeed, the essence of multiple representation is full disclosure in an effort to reach common objectives or to resolve differences between the parties. Professor Geoffrey Hazard has criticized probate and estate lawyers for claiming that their practice should be subject to special rules.⁵⁸ He argues that while joint representation is consistent with the Model Rules, separate representation is "incorrect as a matter of law and therefore a legally dangerous mode of practice."⁵⁹

51. MODEL RULES, *supra* note 12, Rule 1.7(b)(2).

52. Special Study Committee on Professional Responsibility, *Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP. PROB. & TR. J. 765, 771-72 (1994).

53. *Id.* at 772.

54. *Id.* at 796.

55. *Id.* at 794-95.

56. *Id.* at 771.

57. *Id.* at 787.

58. Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 6 (1994).

59. *Id.*

The Restatement of the Law Governing Lawyers, while not rejecting the concept of separate representation outright, refers to it as “novel” and cautions lawyers about the substantial risks involved in undertaking this form of representation:

The risks of conflict and subsequent claims for malpractice are obviously substantial, and any lawyer considering this novel form of representation presumably would fully inform clients of its risks. At least at this point, the advice should include informing the clients that the structure is untried and might have adverse consequences unintended by the lawyer or clients.⁶⁰

Despite these warnings, the ACTEC Commentaries appear to validate the use of separate representation, although expressing caution about the approach. The comment to Rule 1.6 states:

There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the consent of the clients some experienced estate planners regularly undertake to represent husbands and wives as separate clients. Similarly, but with less frequency, some estate planners also represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately. For example, without disclosing a confidence of one spouse the lawyer may be unable adequately to represent the other spouse. However, within the limits of MRPC 1.7 (Conflict of Interest: General Rule), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. It is unclear whether separate representation could be provided within the scope of MRPC 2.2 (Intermediary). The lawyer's disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.⁶¹

Sometimes standards drafters may take the opposite approach, adopting a standard that is more restrictive than the Model Rules. The American Academy of Matrimonial Lawyers took this approach in connection with the representation of husband and wife. Standard 2.20 states: “An attorney should not represent both husband and wife even

60. RESTATEMENT, *supra* note 2, § 130 cmt. c, Reporter's note.

61. American College of Trust and Estate Counsel, *supra* note 8, MRPC 1.6.

if they do not wish to obtain independent representation."⁶² Under the Model Rules a lawyer may act as an intermediary between husband and wife, but the comments to Standard 2.20 reject this approach:

Serving as an intermediary between husband and wife is not prohibited by the RPC [Rules of Professional Conduct]. However, it is impossible for the attorney to provide impartial advice to both parties, and even a seemingly amicable separation or divorce may result in bitter litigation over financial matters or custody.⁶³

B. Standards Should Provide Detailed Supplementation Not Repetition of the Model Rules

While standards drafters must generally be consistent with the Model Rules, mere repetition of the Model Rules is not helpful to lawyers. Thus, standards drafters should strive to supplement the Model Rules in ways that provide assistance to lawyers in the particular practice area or lawyering activity with which the drafters are dealing. To provide such assistance, standards drafters must first determine the problematic areas or issues they wish to address. Formal or informal surveys of membership to identify problem areas can provide focus to the work of drafters. Having identified issues worthy of treatment, drafters can then provide commentary and illustrations that focus on these problem areas and offer guidance to practitioners. When significant professional differences exist and a clear answer is not possible, the drafters can summarize the differing views with the arguments in favor of each position. Drafters could also offer their view on what they believe to be the preferred approach. Specificity and detail rather than generality should be the guide posts for standards drafters.

The approach taken by the Seventh Circuit in developing its standards of conduct provides a good example of how standards drafters can be helpful to lawyers by providing detailed guidance. In 1989 the Chief Judge of the Seventh Circuit appointed a nine-member committee on civility, chaired by District Judge Marvin E. Aspen.⁶⁴ During the next eighteen months, the committee conducted a study of the issue of civility. In addition to a review and analysis of the relevant literature, the committee "conducted an informal survey via a four-page questionnaire distributed to circuit, district, bankruptcy and magistrate judges; to more than 1500 lawyer-members of The Seventh Circuit Bar Association

62. American Academy of Matrimonial Lawyers, *supra* note 6, at 25.

63. *Id.* at 25-26.

64. Committee on Civility of the Seventh Federal Judicial Circuit, *Interim Report*, 143 F.R.D. 371 (1992). The Final Report of the Committee can be found at 143 F.R.D. 441 (1992).

practicing in Illinois, Indiana and Wisconsin; and to members of other bar associations within the Circuit."⁶⁵ The survey asked respondents to identify particular sources of civility problems. The committee then evaluated both statistical and impressionistic results of the survey. It concluded that the problem of lack of civility had many causes and that no simple solution was possible. It recommended standards of conduct for the Seventh Circuit as part of an overall approach. The standards were intended to be used for educational purposes, for the guidance of lawyers, and to express the commitment of judges. They were not intended to be used as the basis of sanctions because the committee found widespread dissatisfaction with the imposition of sanctions as a method for dealing with lack of civility.⁶⁶

The Seventh Circuit accepted the recommendations of the committee and adopted Standards for Professional Conduct.⁶⁷ The standards are divided into three sections: (1) lawyers' duties to other counsel; (2) lawyers' duties to the court; and (3) courts' duties to lawyers. While the standards certainly express an approach to lawyering that goes beyond adherence to disciplinary rules, they are not filled with platitudes. Instead, they have a level of detail that can both guide and influence the behavior of lawyers and judges. For example, under the section on lawyers' duties to other counsel are thirty standards, including the following:

6. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.

...

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

...

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

...

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.⁶⁸

65. 143 F.R.D. at 374.

66. *Id.* at 409-10.

67. Standards for Professional Conduct Within the Seventh Federal Judicial Circuit (visited February 28, 2001) <<http://www.ca7.uscourts.gov/conduct.pdf>>.

68. *Id.* at 1-3.

By contrast to the Seventh Circuit Standards, the American College of Trial Lawyers Code of Conduct is less satisfactory as a set of standards⁶⁹ because many of the provisions duplicate the Model Rules.

C. Drafters Should Develop an Action Plan for Making Their Standards Influential

Because standards, unlike the Model Rules, are voluntary rather than binding, standards drafters must consider how to make their work influential. Many approaches are possible. First, to the extent standards are drafted by membership organizations, members can be required to adhere to or sign pledges of compliance with the standards as a condition of membership. Second, standards drafters could approach law firms and seek to convince their leaders to adopt standards as guides for conduct within the firm.⁷⁰ Third, drafters could prepare teaching materials for law schools based on their standards. Fourth, preparers can sponsor seminars and other educational programs in which their standards are disseminated and discussed. Finally, to the extent that standards are adopted by courts, they can exert enormous influence over lawyers even when the standards are not enforced through a regulatory process. Again, the Seventh Circuit standards stand out as an example. While the standards specifically state that they are not to be used as a basis for sanctions, their adoption by the Seventh Circuit places the prestige of the court behind the standards.

III. CONCLUSION

The fundamental source of lawyers' professional obligations are the rules of professional conduct adopted by courts in each jurisdiction. In the vast majority of jurisdictions, these rules are based on the ABA's Model Rules of Professional Conduct. The Model Rules are, however, incomplete in three important respects: They establish rules for discipline of lawyers but largely ignore the aspirations of the profession of law. They focus on general principles, ignoring the problems of particular areas of practice. They assume and often incorporate by reference legal principles. The diverse movement to develop standards of professional conduct, sponsored by many organizations, extending over many decades, and continuing to grow in scope, responds to the three ways in which the Model Rules are incomplete. By considering the

69. <http://www.actl.com/home/publications_by_date/code_of_trial_conduct/code_of_trial_conduct.html> (visited February 28, 2001).

70. Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. (forthcoming Spring 2001).

relationship between standards and the Model Rules, drafters of standards can gain insights to guide their work.

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ETHICAL ISSUES IN
SETTLEMENT NEGOTIATIONS**

*Session One:
Limits on Misleading Conduct*

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***Panel:* The Honorable Thomas Zlaket
Chief Justice
Supreme Court of Arizona**

**Wm. Reece Smith, Jr., Esq.
Tampa, Florida**

**Professor Nathan Crystal
University of South Carolina**

on

March 9, 2001

at the

**Walter F. George School of Law
Macon, Georgia**

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