IN THE SHADOW OF THE SHRINE: REGULATION AND ASPIRATION IN THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

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I. INTRODUCTION

This year, 2008, marks the one-hundredth anniversary of the first effort by the American Bar Association to codify the professional responsibilities of members of the legal profession. This year also signals the twenty-fifth anniversary of the adoption of the Model Rules of Professional Conduct, the ABA's third and most recent attempt at such codification. These coincident anniversaries present an appropriate occasion to compare the Rules with the Code of Professional Responsibility, adopted in 1969, and the Canons of Professional Ethics, adopted in 1908, and to assess our progress.

This article does not undertake a comprehensive analysis of the more than fifty provisions that make up the Rules, let alone the dozens of others that comprise the Canons and the Code. The limitations of space, time, and the author's expertise do not permit such an ambitious project.

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Besides, any such effort would be redundant with the existing body of scholarship that provides a panoramic overview of these codes.[1]

Nor does this article join the debate over the foundational question of whether the promulgation of lawyer ethics rules even makes sense.[2] This debate raises provocative issues we cannot afford to ignore. After all, that we have attempted to do something for one-hundred years does not require the conclusion that we have done it well, that it was worth doing, or that we should keep at it. This article assumes that such rules merit our attention, or, at least, we will continue to attend to them anyway.

Instead, this article focuses on a conceptual confusion that was present in the Canons and the Code and that continues into the Rules—despite the drafters' avowed intention to get rid of it. This confusion is important practically, because it has implications for compliance and enforcement. And it is also important theoretically because it reveals a basic ambivalence about the purpose of lawyer ethics codes. Furthermore, this conceptual confusion has crept beyond the Rules and into other state laws that regulate attorney conduct, as reflected in a case decided during the period covered by this *Survey* issue.

Specifically, this article maintains that the Rules—particularly the first two sections of the Rules—continue to include idealistic conceptions of lawyer behavior. The drafters of the Rules sought to move away from such thinking, which permeated the Canons and the Code, in favor of a regulatory and legalistic approach.[3] Indeed, the drafters succeeded in excluding explicitly aspirational language from almost the entire text, prompting critics to observe that the Rules "have a certain lifelessness to them" and do not make for "inspirational" reading.[4]

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1. *See, e.g.*, ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (2007); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986); Charles W. Wolfram, *Parts and Wholes: The Integrity of the Model Rules*, 6 GEO. J. LEGAL ETHICS 861 (1993); Forest J. Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?*, 13 PAC. L. J. 273, 275 (1982).

2. *See, e.g.*, Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); *see also* Marvin E. Frankel, *Why Does Professor Abel Work at a Useless Task?*, 59 TEX. L. REV. 723 (1981).

3. For a discussion of the legalization of the legal profession's norms, *see* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991).

4. Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839, 843 (2001). Of course, critics could lodge the same complaint with respect to many provisions of the Canons and the Code. For example, the Code tended to define responsibilities negatively, resulting in some conspicuously low-aiming directives. Thus, DR 6-101(A)(3) and (A)(1) addressed the issue of competency by prohibiting the "neglect of a legal matter" and by cautioning against undertaking representations that the lawyer "knows or should know [he or she] is not competent to handle." Still, the Rule's movement away from aspirational thinking is dramatic, and in a few instances so aggressive as to result in some unintended humor. For example, the title of Rule 3.4 grandiosely announces that it addresses "fairness to opposing party and counsel," but the text of Rule 3.4 consists of a list of acts of misconduct egregious enough to border on the criminal—or cross that border.

This article, however, contends that aspirational modeling persists in the Rules. Granted, this idealism does not manifest itself uniformly throughout the Rules. To the contrary, it takes different forms, affects some rules more than others, and raises concerns of varying kind and magnitude. This article maintains, though, that in the examples discussed here this aspirational thinking has significant implications for the provisions in question: at best, it renders the provision ambiguous and confusing; at worst, it renders the provision meaningless and unenforceable in a system expected (if not required) to provide fair notice of what is and is not permissible.

This critique leads to two invitations. One is a narrow invitation to revise specific rules to address particular difficulties identified here. This discussion appears at the end of each section. The other is a broader invitation to consider the reasons for our apparently irresistible impulse to include aspirational concepts in our standards for lawyer conduct. This discussion appears toward the end of the article following analysis of a recent case that inspires this kind of musing.

II. A BRIEF HISTORY OF CODES OF ATTORNEY CONDUCT

State bar associations made little effort to regulate members of the legal profession until the end of the nineteenth century.[5] Prior to that time, issues of attorney conduct and duty were left to generally applicable laws, the individual consciences of practitioners, and the ruminations of a few legal scholars. The last included Professor David Hoffman, whose *Resolutions In Regard to Professional Deportment*[6] has been criticized as having a "preachy" tone and as constituting "Victorian moralizing at its worst,"[7] and Professor George Sharswood, whose *Compend of Lectures on the Aims and Duties of the Profession of Law*[8] took a somewhat more pragmatic approach and had a significant influence on the first professional responsibility code adopted by a state bar, the Alabama Bar Association's 1887 *Code of Ethics*.[9]

The ABA, moved by Alabama's actions and other influences, created a committee to determine whether the ethics of the legal profession rose "to the high standards which its position of influence in the country

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5. Bowman, *supra* note 1, at 274.

6. David Hoffman, *Resolutions in Regard to Professional Deportment, in* A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (2d ed. 1836).

7. Geoffrey C. Hazard, Jr., *Rules of Ethics: The Drafting Task*, 36 RECORD OF ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 80, 81 (1981); *c.f.* Bowman, *supra* note 1, at 275 (referring to the "majesty of language" of Hoffman's work).

8. H. GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW (1854).

9. *See* Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAWYER 483, 494-98 (1938).

demands."[10] The committee was also asked to advise the ABA on the advisability and practicability of adopting a code of professional ethics. In 1906, the committee issued a report supporting the drafting and adoption of such a code.[11]

The report includes a great deal of gushy and self-righteous prose that makes it hard reading today. But perhaps the most striking characteristic of the report's language is its strong religious sensibility. The report twice refers to lawyers as "high priest[s] at the shrine of justice."[12] It warns that "the future of the republic depends upon our maintenance of the shrine of justice pure and unsullied."[13] It alludes to "the shyster, the barratrously inclined, [and] the ambulance chaser" and distinguishes them from the "true ministers of [the republic's] courts of justice robed in the priestly garments of truth, honor, and integrity."[14] It recommends the adoption of a code of ethics, using the religiously charged word "canons" more than half a dozen times.[15] And it supports this recommendation by arguing that "the 'thus it is written' of an American Bar Association code of ethics should prove a beacon light on the mountain of high resolve to lead the young practitioner . . . along the straight and narrow path."[16]

On the strength of this report, the ABA approved its first code of professional ethics on August 27, 1908.[17] This document consisted of thirty-two principles, generally expressed at a fairly high level of abstraction.[18] In an unabashed effort to claim the loftiest moral ground imaginable, the ABA lifted a suggestion from the 1906 report and assigned these principles the title of "Canons." Because the Canons took a good deal of their inspiration from Sharswood's work and the Alabama Code they were not wholly removed from practical concerns and

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10. JEROLD S. AUERBACH, UNEQUAL JUSTICE, LAWYERS, AND SOCIAL CHANGE IN MODERN AMERICA 40 (1976).

11. *Report of the Committee on [the] Code of Professional Ethics, in* THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 111 (Geoffrey C. Hazard, Jr. & Deborah L Rhode eds., 3d ed. 1994) [hereinafter *1906 Report*].

12. *Id.* at 112.

13. *Id.*

14. *Id.* at 113.

15. *Id.* at 113-14. "Canon" is an "[e]nglish term derived from a Greek word meaning 'rule' or 'standard.'" Early in Judeo-Christian history a "canon" came to signify a list of religious writings that were deemed authoritative. HARPER COLLINS BIBLE DICTIONARY 167 (rev. ed. 1996).

16. 1906 Report, *supra* note 11, at 114. *C.f. Matthew* 7:14 ("Strait is the gate, and narrow is the way, which leadeth unto life"); *Proverbs* 2:20 ("Therefore walk in the way of the good, and keep to the paths of the just"); *Proverbs* 3:6 ("In all your ways acknowledge him, and he will make straight your paths"); and *Proverbs* 4:26 ("Keep straight the path of your feet, and all your ways will be sure").

17. ABA CANONS OF PROF'L ETHICS (1908).

18. For example, one Canon stated, "[t]he conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." *Id.* at Canon 22.

pragmatic solutions.[19] Nevertheless, a number of the Canons had something of the absolute commandment about them and fulfilled the promise of their title.[20]

From a twenty-first century perspective, the moralizing of the Canons may seem both presumptuous and pointless. But context matters to an understanding of their fundamental objective. When the Canons were drafted, the ABA was a thirty-year-old voluntary organization with a relatively small and select membership.[21] The Canons sought to convey the principles to which the members of this organization held themselves, and, in the process, to distinguish those attorneys from the rest of the rabble practicing law. The Canons thus were not, and should not, be read as a serious effort at setting a national standard for lawyer behavior; indeed, in the sense described, they were just the opposite.

Nevertheless, several developments over the next fifty years pressed the Canons into service as a uniform scheme to govern attorney conduct—and punish attorney misconduct.[22] First, the ABA grew exponentially in membership and influence. Second, the ABA enhanced the regulatory utility of the Canons by expanding their number and by issuing hundreds of opinions clarifying their meaning. And, finally, a majority of states adopted the Canons and thereby rendered them authoritative.

The Canons were, however, ill-suited for this use. Their principal failing was that they did not provide sufficiently clear notice of the sorts of conduct they prohibited. As noted above, many of the Canons used vague and general language, and others included abstract exhortations that set a high moral tone but did not lend themselves to actual enforcement.[23] The failure of the Canons to describe the responsibilities of attorneys with reasonable particularity is perhaps best demonstrated by this disclaimer in the Preamble: "the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned."[24] The Canons thus included some mysteries—and hinted at further mysteries beyond its

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19. For example, Canon 8 stated, "[a] lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation." *Id.* at Canon 8.

20. For example, Canon 1 stated, "[i]t is the duty of the lawyer to maintain towards the Courts a respectful attitude." *Id.* at Canon 1.

21. When the ABA was founded, in 1878, its membership consisted of only one-hundred lawyers. *See* History of the American Bar Association, *available at* http://www.abanet.org/about/history.html (last visited Aug. 14, 2008).

22. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 2-3 (2007-2008)

23. For example, Canon 29 stated that a lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." ABA CANONS OF PROF'L ETHICS Canon 29 (1908).

24. *Id.* at Preamble.

text. This may have contributed to the religious aura of the Canons, but it did little to help a practicing lawyer figure out what he or she needed to do in any particular circumstance.

The Canons failed to provide sufficiently specific guidance, and proved unworkable as a regulatory instrument, not only because of this vague and abstract language but also because they conflated two different ways of thinking about the ethical responsibilities of lawyers. One way of thinking about them envisions these responsibilities as minimum standards of conduct all attorneys must honor; another way perceives these responsibilities as high ideals toward which all attorneys should aspire. The Canons included both of these conceptions, often hopelessly intermingled.[25]

Lon Fuller—in an influential series of lectures given at Yale Law School in 1963 and later published as a book—described this distinction as one between a morality of duty and a morality of aspiration.[26] Fuller understood the morality of aspiration to be the morality of excellence. He recognized that this morality could influence law but maintained that it could not serve as law's direct object. In contrast, Fuller understood the morality of duty to be the proper subject for law. This morality, he argued, starts at the bottom and lays down basic rules. Intermingling the language and sensibilities of these two moralities necessarily results in confusion—as those charged with enforcing and obeying the Canons discovered.

So in the nineteen sixties the ABA undertook its second attempt to draft a set of ethics rules for attorneys, resulting in the 1969 ABA Model Code of Professional Responsibility. The Preliminary Statement to the Code explained that the document was divided into three sorts of statements. There were still statements called Canons, which were described as expressions "of axiomatic norms" that embodied the "general concepts" from which the rest of the Code was derived.[27] These nine Canons differed significantly from the forty-seven previously endorsed Canons, and the Code presented them less as substantive principles than as organizational headings—a role they performed without elegance.[28] The inclusion of the Canons seems forced, and it is difficult to discern what, if anything, they add to the text.

After each Canon appeared a series of numbered "Ethical Considerations." The Preliminary Statement described these provisions as "aspirational in character," cautioned that they were not mandatory,

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25. *See* Bowman, *supra* note 1, at 283 (reciting complaints to this effect from a variety of sources).

26. LON FULLER, THE MORALITY OF DUTY (1964).

27. MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1983).

28. For example, Canon 7 prescribed that "A Lawyer Should Represent a Client Zealously within the Bounds of the Law," and included within that subject matter the topics "Communicating with One of Adverse Interest" and "Trial Publicity." *Id.* at Canon 7. This seems a rather clumsy fit.

and indicated that they "represent[ed] the objectives toward which every member of the profession should strive."[29] The Ethical Considerations thus presumably reflected Fuller's morality of aspiration.[30]

The Code left for last the "Disciplinary Rules," which were described as stating "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[31] Unlike the Ethical Considerations, the Disciplinary Rules were mandatory. And these rules, of course, were intended to embody Fuller's morality of duty.

The Code thus unabashedly sought to serve two distinct functions. It was designed, the Preliminary Statement said, to be adopted by appropriate agencies as "both" (1) "an inspirational guide to the members of the profession" and (2) "a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards."[32] In theory, the Code thus reflected, and treated distinctly, the moralities of aspiration and of duty.

But the text was not quite that tidy. The Preliminary Statement noted that enforcing agencies, in applying the Disciplinary Rules, might "find interpretive guidance" in the Ethical Considerations.[33] This obviously blurred the line that supposedly existed between requirements and recommendations. The language of the Ethical Considerations and Disciplinary Rules blurred it still further. Despite their ostensibly aspirational nature, many of the Ethical Considerations were couched in mandatory language. One does not need to look far to find an example. EC 1-1 states that "Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."[34] Furthermore, some of the Ethical Considerations restated a Disciplinary Rule and therefore could not be understood as simply offering suggestions about how lawyers of excellence should strive to conduct themselves.[35] Little surprise, then, that some courts concluded that the violation of an Ethical Consideration could, in and of itself, support disciplinary action.[36] This sort of confusion infected the Disciplinary Rules as well, some of which included language that seemed permissive[37]or aspirational[38] rather than compulsory.

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29. *Id.* at Preliminary Statement.
30. Fuller, *supra* note 26.
31. *Id.*
32. *Id.*
33. *Id.*
34. MODEL CODE OF PROF'L RESPONSIBILITY EC 1-1 (1983).
35. *See* Bowman, *supra* note 1, at 291.
36. *See, e.g.*, Comm. on Prof'l Ethics & Conduct v. Behnke, 276 N.W.2d 838 (Iowa 1979).
37. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(C) (1983) (stating the conditions under which a lawyer "may" undertake representation of a client despite a conflict of interest).

The Code suffered from another failing too. Attorneys play a variety of different roles, including counselor, advisor, advocate, and so on. These distinct roles necessarily give rise to distinct ethical issues. For the most part, however, the Code treated the practice of law as a fairly homogenous exercise and did little to tease out the responsibilities unique to each of these roles—and the tensions that exist between them. For these and a variety of other reasons, the Code did not receive a warm reception and calls for a different kind of document followed hard on its adoption.[39]

So, in the summer of 1977—a mere eight years after adoption of the Code—the ABA appointed a commission, chaired by Robert J. Kutak of Nebraska, to evaluate the professional standards applicable to the bar.[40] In early 1980, the Kutak Commission distributed for public discussion a draft of proposed rules of professional conduct.[41] Numerous drafts and reports followed and, in August of 1983, the ABA adopted the Model Rules of Professional Conduct and Comments to them.[42]

"The history of the model rules," it has been observed, "shows that the drafters intended to largely eliminate aspirational concepts."[43] Kutak noted, "[t]he problem with aspirational standards is that too often they do not remain aspirational."[44] "They tend," he warned, "to become enforceable rules."[45] By excluding aspirational thinking, the Rules would provide much clearer and fairer guidance than that offered by the Canons or the Code.[46]

A number of amendments to the Rules were later adopted, including some significant changes added in 2003 as a result of the ABA project called "Ethics 2000."[47] The passage of time and the amendment process, however, have not resulted in any conscious and expressed movement away from the principle that the Rules do not and should not contain aspirational concepts. In theory, the Rules have abandoned such

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38. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY DR 9-101 (1983), which appears to require that a lawyer avoid "even the appearance of impropriety."

39. *See* Bowman, *supra* note 1, at 287-89.

40. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at viii (2006) [hereinafter *Legislative History*].

41. *Id.*

42. *Id.* at 9.

43. Crystal, *supra* note 4, at 842.

44. Robert J. Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 1016.

45. *Id.*

46. It has been argued that this absence of aspirational thinking renders the Rules "an incomplete source of professional obligations." Crystal, *supra* note 4, at 844. This sense of incompleteness gave rise to a "professionalism" movement within the bar and the drafting of non-binding creeds and pledges of professionalism. *Id.* at 844-46. *See also* Robert F. Drinan, *Legal Ethics from 1983 to 1993: Golden Age or a Decade of Decline?*, 6 GEO. J. LEGAL ETHICS 693 (1993).

47. Legislative History, *supra* note 40, at x-xi.

considerations, subject to the conspicuous exception of Rule 6.1 and its exhortation that "[a] lawyer should render public interest legal service."[48]

III. ASPIRATIONAL CONCEPTS IN THE RULES

A. Preamble

In light of this history, we might expect to have difficulty discovering in the Rules any lingering confusion between regulatory and idealistic thinking. It nevertheless turns up immediately and conspicuously. We need read no further than the fourth paragraph of the Preamble to encounter it.

The fourth and fifth paragraphs of the Preamble include a list of responsibilities attorneys "should" honor.[49] This hortatory language notwithstanding, the specific rules that later address these responsibilities actually frame them in mandatory terms. The Preamble thus misses the mark in stating that an attorney "should" be competent, prompt, and diligent, "should" maintain communication with the client, "should" keep information relating to the representation of a client confidential, and "should" conform to "the requirements of the law."[50] These are not things an attorney *should* do; these are things an attorney *must* do. The Rules say so.

This imprecision would probably not raise much concern if the Preamble ended there; but it does not. Instead, it goes on to list additional duties lawyers "should" obey. At this point, however, the thinking shifts from the practical and mandatory to the idealistic and aspirational. Thus, the sixth paragraph of the Preamble tells lawyers they "should" seek "improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."[51] It states that attorneys "should" cultivate knowledge of the law "beyond its use for clients," "work to strengthen legal education," "further the public's understanding of and confidence in the rule of law and the justice system," and "devote professional time and resources and use civic influence to ensure equal access" to the justice system for those who face economic or social barriers.[52] On its face, the Preamble makes no distinction between these responsibilities and those set forth in its earlier paragraphs.

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48. "Notably, this is the only place in the proposed Model Rules where the operative verb is 'should.' Elsewhere, the controlling language is 'shall,' 'shall not,' or 'may.'" Robert B. McCay, *In Support of the Proposed Model Rules of Professional Conduct*, 26 VILL. L. REV. 1137, at 1147 (1981).

49. MODEL RULES OF PROF'L CONDUCT, at Preamble (2007).

50. *Id.*

51. *Id.*

52. *Id.*

The drafters of the Rules sought to do away with the confusion that follows when we conflate regulatory and idealistic thinking. The Rules nevertheless begin with precisely such a mistake. Granted, the error occurs in a portion of the text that is introductory in nature and has little practical significance. But the fact that we find the confusion so early, and so manifestly, suggests we may expect to run across more of it in the Rules themselves—and, indeed, we do.[53]

B. Diligence

Rule 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[54] The rule thus incorporates a reasonableness standard familiar from tort and malpractice law.[55] It also clearly departs from the more idealistic notion of "zealous" representation that had been required by Canon 15.[56] For precisely this reason, in February of 1983 the American College of Trial Lawyers suggested Rule 1.3 be amended to substitute the word "zeal" for

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53. *Id.* at Scope ¶ 14.The Rules include an introductory section entitled "Scope" that includes a similarly curious passage. *Id.* The passage observes that the rules differ in their purposes. "Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' MODEL RULES OF PROF'L CONDUCT Scope ¶ 14. These define proper conduct for purposes of professional discipline." *Id.* Others include permissive language and leave the matter in question to the attorney's discretion and judgment. Still others "define the nature of relationships between the lawyer and others." *Id.* Thus, the Rules are "partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role." *Id.* There are two significant problems with this provision. First, it assumes that each rule clearly signals which of these three characterizations apply to it; this, however, does not hold true; therefore, to some extent these rules perpetuate the same sort of confusion that haunted the Disciplinary Rules and the Ethical Considerations. Second, and for present purposes more importantly, this paragraph fails to acknowledge that the Rules continue to include aspirational principles and language. Disregarding the lingering aspirational sensibilities in the Rules obviously honors the avowed intention to do away with such thinking; but, as will be shown, it does not correspond to the reality of the text.

54. *Id.* at R. 1.3.

55. Caution argues against reading this language as a wholesale incorporation of state malpractice law. The Rules acknowledge that because they "do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." *Id.* at Scope ¶ 20. But the Rules also state that they are "not designed to be a basis for civil liability," which would include malpractice claims. MODEL RULES OF PROF'L CONDUCT Scope ¶ 20. Further, the Rules do not explicitly indicate whether local standards and practices play a role in determining issues such as competency and diligence, although malpractice actions typically implicate such considerations. In February of 1983 the ABA Section of General Practice proposed, but later withdrew, an amendment to Rule 1.1 stating that "[c]ompetence consists of the legal knowledge, skill, and care commensurate with that generally afforded to clients in the locality by other lawyers in similar matters." Legislative History, *supra* note 40, at 36.

56. CANONS OF PROF'L ETHICS Canon 15 (1969) ("[t]he lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability'").

"reasonable diligence," arguing that the former "connotes strong motivation and extraordinary effort" while the latter "connotes merely adequate professionalism and adequate effort."[57]

The proposed amendment was withdrawn, perhaps in anticipation of the possibility that the comments to Rule 1.3, which were in the process of being drafted, would clarify matters. Indeed, in August of 1983, the Kutak Commission proposed a draft comment stating that "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[58] The ABA House of Delegates incorporated this language in the 1983 Rules.[59] A fair interpretation of the resulting text suggested that Rule 1.3 set a low mandatory standard ("shall act with reasonable diligence") while the Comment described a high aspirational goal ("should act with commitment and dedication . . . and zeal").

In August of 2001, however, the Ethics 2000 Commission recommended revising Comment [1] to Rule 1.3 to state that "[a] lawyer *must* also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[60] This recommendation was adopted.[61] The combination of a mandatory verb and aspirational nouns leaves us with a puzzle: either "reasonable diligence" and "commitment and dedication and zeal" mean the same thing—and it seems plain they do not—or the Comment adds substantive requirements to the Rule—which contradicts the principle that a comment does no more than explain and illustrate a rule's meaning and purpose.[62] This conceptual oddity has practical implications; after all, an attorney who wants to know the controlling standard for diligent representation finds a mandatory and minimal answer in the rule, a mandatory and aspirational answer in the comment, and no assistance in the applicable interpretive principles.[63] The ABA could address this

57. Legislative History, *supra* note 40, at 62.

58. *Id.*

59. *Id.* at 63.

60. *Id.* (emphasis added).

61. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2007).

62. *Id.* at Scope ¶ 21. Interestingly, though perhaps coincidentally, the Preamble also endorses the principle of zealous representation: "[The basic principles underlying the Rules] include the lawyer's obligation zealously to protect and pursue a client's legitimate interests . . . ." *Id.*, at Preamble ¶ 9. In light of the Preamble's tendency to intermingle mandatory and aspirational principles, however, this language offers little guidance.

63. Indeed applying the relevant interpretive principle leads to a strange and ironic consequence. An introductory passage in the Rules makes clear that the comments serve only as "guides to interpretation" while "the text of each Rule is authoritative." *Id.* at Scope, ¶ 21. If we follow this principle and if we adopt a literal reading of the Comment in question then we must disregard that provision as inconsistent with the authoritative text of the Rule. But if we try to avoid this result by construing the Comment as aspirational rather than mandatory (and thereby eliminating the conflict between the Comment and the Rule) then we must interpret the Comment to say precisely what it did

ambiguity through any number of simple clarifying revisions to the Rule, the Comment, or both, depending on what the ABA actually intends Rule 1.3 to say; one obvious possibility is to return the Comment to its previous phrasing.

C. Confidentiality

All the attorney responsibility standards promulgated by the ABA over the past one-hundred years have recognized a lawyer's obligation to maintain client confidentiality. Canon 37 declared that "[i]t is the duty of a lawyer to preserve his client's confidences."[64] The Code, through DR 4-101(B)(1), broadly prohibited a lawyer from revealing or improperly using "a confidence or secret" of a client.[65]

The expansive language contained in DR 4-101(B) was limited, however, by the definitions included in DR 4-101(A). This provision defined "confidence" to encompass only information "protected by the attorney-client privilege under applicable law[.]" Also, it limited "secrets" to information that would embarrass or injure the client if disclosed or information that the client had specifically requested the lawyer to keep confidential.[66]

Rule 1.6 eschews these definitions and distinctions in favor of the comprehensive command that "[a] lawyer shall not reveal information relating to the representation of a client[.]"[67] Read literally, Rule 1.6 thus renders confidential anything an attorney learns that relates in any way to his or her work for a client. This reaches information that no reasonable client would expect an attorney to treat secretly, information that would not disadvantage the client if revealed, and information already known to members of the general public.[68] The stunning breadth of this rule has

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before *Ethics 2000* changed it. If the *Ethics 2000* Commission intended to raise the bar then it should have revised the Rule itself, however, if the Commission did not intend to raise the bar then it should have left the Comment alone. Whatever the Commission's intentions, revising the Comment as it did was unhelpful.

64. CANONS OF PROF'L ETHICS Canon 37 (1968). Canon 37 went on to clarify that this duty outlasts the lawyer's employment and extends to the lawyer's employees. Canon 37 also provided that the lawyer could disclose confidential information if necessary in defense against a client's accusation. Finally, Canon 37 cautioned that the intention of a client to commit a crime was not included within the confidences a lawyer was bound to honor. *See id.*

65. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(B)(1)(1983). This prohibition was subject to the exceptions set forth in DR 4-101(C). *Id.* at DR4-101(B).

66. *Id.* at DR 4-101(A). In addition, some of the Ethical Considerations grafted limitations on the reach of DR 4-101(B). *See, e.g., id.* at EC 4-2.

67. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007). Some states, including Michigan, have declined to adopt Rule 1.6 and have retained language similar to DR 4-101. *See, e.g.*, MICH R. OF PROF'L CONDUCT R. 1.6 (2006).

68. For example, read literally Rule 1.6 would extend to data an attorney gleaned from a popular Internet site. Such information would have constituted neither a "confidence" nor a "secret" within the terms of DR 4-101(A).

prompted one critic to observe it sets a standard for confidentiality that is "flat-footed, stolid, and myth-like," and "absurd."[69]

Different theories have been offered to explain why the ABA House of Delegates voted to adopt a rule that, as a practical matter, cannot mean what it says.[70] For present purposes, however, motives matter less than consequences. Certainly, some of the consequences of this broad language are appealing, at least in the abstract. By phrasing Rule 1.6 so expansively, the ABA enshrined the aspirational image of the attorney as the perfect confidant. Further, this broad notion of confidentiality fits well with the justification for the rule; after all, a narrow and crabbed articulation of the duty would not encourage clients to "communicate fully and frankly"[71] about their concerns. Nevertheless, a rule that cannot mean what it says is obviously of sparse utility.

Of course, limiting interpretations by the ABA, state disciplinary authorities, and courts can help explicate and narrow Rule 1.6. This offers scant consolation, however, with respect to a rule that was supposedly designed to move away from vague aspirational commands, improve on prior codes, and bring greater clarity to the issue of confidentiality. The unfortunate fact remains that Rule 1.6, as written, fails to provide adequate "guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."[72] Furthermore, nothing short of a substantial revision to Rule 1.6 would appear to address the problems created by the present text.

D. Organizational Clients and Clients with Diminished Capacity

Rule 1.13, which concerns organizational clients, and Rule 1.14, which pertains to clients of diminished capacity, share several important qualities. First, the issues addressed in both these rules received little or no attention in the Canons or the mandatory provisions of the Code. Interestingly, the Code's aspirational Ethical Considerations did include some discussion of these matters—a point to which I will return.[73] Second, although many of the Section 1 rules proceed from the assumption that the client has certain characteristics—i.e., that the client is a mature human being of sound mind fully capable of expressing his or

69. Wolfram, *supra* note 1, at 865-66.

70. *Id.* at 865-67. For example, one theory is that the Rule was adopted to protect lawyers from malpractice litigation. *Id.* at 866.

71. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [2] (2007).

72. *Id.* at Scope, ¶ 20.

73. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.13 *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18, 5-24; *and compare* MODEL RULES OF PROF'L CONDUCT R. 1.14 *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-11, 7-12.

her wants, interests, and values[74]—both Rule 1.13 and Rule 1.14 relate to clients who do not fit that description. And, finally, in order to accommodate the difficulties that follow from this reality, both rules indulge in some legal fictions and integrate some aspirational thinking. Indeed, both rules incorporate an ideal that, though commendable, seems oddly out of place in a regulatory document. We see this shared aspiration best if we focus first on Rule 1.14.

Rule 1.14(a) states that in dealing with a client of diminished capacity "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[75] This provision may articulate an admirable goal, but it is hard to know what to make of it as a compulsory decree. For a variety of reasons, telling someone to do something "normal" and to do it "as far as reasonably possible" does not seem sensible as a mandate. Surely, for example, attorneys have wildly differing notions of "normalcy" and of what it means to go "as far as reasonably possible" to achieve it. Of course, we might try to render Rule 1.14 comprehensible by interpreting "normal client-lawyer relationship" to mean "a client-lawyer relationship that satisfies the rules that apply generally to those relationships." This, however, simply gives rise to a different dilemma. After all, to the extent a client's capacities permit a lawyer to comply with the other Section 1 rules, no reiteration of his or her obligation to comply appears necessary. On the other hand, to the extent a client's capacities do not allow a lawyer to fulfill certain Section 1 duties, it is pointless to require her or him to do so.

To save Rule 1.14(a) from redundancy or meaninglessness we must, therefore, read it to mean something other than what it says. Specifically, we must read it not as a command, but as an exhortation. We must understand it to suggest that good lawyers will aspire to maintain with clients of diminished capacity the same sort of relationship they enjoy with other clients; a relationship marked, for example, by respect, loyalty, and communication. It certainly makes sense to urge lawyers to strive for such a goal, but it makes no sense to cast that goal as a requirement that will serve as the basis for discipline if not achieved.

The history of Rule 1.14 supports the proposition that it properly expresses an aspiration, rather than an enforceable mandate. As noted above, the drafters of the Code concluded that discussion of this issue belonged in the Ethical Considerations rather than the Disciplinary Rules. In addition, in February of 1983 the New York State Bar Association suggested revising proposed Rule 1.14 to state that a "lawyer *should*, as far as is reasonably possible, maintain a normal client-lawyer

74. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt (stating that "[t]he normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted is capable of making decisions about important matters").

75. *Id.* at R. 1.14(a).

relationship with the client."[76] The New York Bar argued that this rule presented "a guide to sensible practice and sound client relations when dealing with the disabled client, but should not be used as a basis for professional discipline or malpractice liability."[77] The Commission replied to this suggestion with the unresponsive, and therefore mystifying, observation that "the proposed rule formulated the responsibility in terms of 'as far as reasonably possible' and thus included a flexible standard."[78] In any event, the proposed amendment was defeated by voice vote.[79]

The comments to Rule 1.14(a) further substantiate the conclusion that it is correctly understood as aspirational. Those comments routinely employ the kind of qualified and conditional language that signals the description of close judgment calls, rather than the prescription of specific practices. Indeed, on some occasions the language becomes so relativistic and uncertain that it devolves into internally inconsistent musings about how an attorney should proceed. Thus, for example, Comment 2 holds that "[e]ven if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication,"[80] while Comment 4 observes that "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[81]

In sum, Rule 1.14 recognizes that the characteristics of certain clients will make it challenging for attorneys to maintain a "normal" relationship with them. Rule 1.14(a) urges attorneys to try to do so despite the difficulties it presents. That this is an honorable ideal makes it no less idealistic. The good news is that the fix here seems relatively simple. For example, the rules could continue to endorse this aspiration, while preserving their regulatory purpose and structure, by simply relocating 1.14(a) to the comments and framing it in explicitly hortatory language.

Similar concerns arise in connection with the representation of organizational clients. Such clients exist solely by operation of the law and they cannot speak for themselves or make their interests known except through representatives. Rule 1.13 therefore seeks to navigate the attorney through rocky narrows of two conflicting realities. The attorney must view the organization as the client: the organization exists independently of its representatives and, indeed, the interests of the organization and its representatives may conflict. But the attorney, by necessity, communicates with organizational representatives and not with

76. Legislative History, *supra* note 40, at 320 (emphasis in original).
77. *Id.*
78. *Id.*
79. *Id.*
80. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [2].
81. *Id.* at R. 1.14 cmt. [4].

the organization itself. In this sense, while the attorney's *client* is the organization, the attorney's *relationship* is with its representatives. As with Rule 1.14, the characteristics of these clients complicate the attorney's efforts to maintain a "normal" relationship with them; Rule 1.13, like Rule 1.14, provides some guidance in sorting through the complexities this presents.

In doing so, Rule 1.13[82] stresses one reality over the other. All its provisions affirm that the lawyer's duties run to the organization and not to its representatives. Thus, Rule 1.13(a) declares that "[a] lawyer employed or retained by an organization *represents the organization* acting through its duly authorized constituents."[83] Rules 1.13(f) and (g) discuss the attorney's responsibility to ensure that constituents and representatives do not become confused about who the lawyer represents. Additionally, Rules 1.13(b), (c), (d), and (e) address the lawyer's duty to go up the chain of command when he or she learns that a representative of the organization has acted, or intends to act in a manner inconsistent with the organization's interests.[84]

Indeed, Rule 1.13 pursues this approach so single mindedly that it ignores the competing reality. It disregards the indisputable—if for these purposes, also awkward—fact that lawyers build their relationships with people and not with legal entities. Rule 1.13 thus seeks to solve a complicated and practical problem by resorting to a simple and idealistic fiction. In essence, it tells lawyers that in assessing their ethical obligations, they must put aside the close interpersonal relationships they have developed with organizational representatives so they can instead pursue the best interests of an abstract entity.

At a theoretical level, this approach has an attractive purity to it. Representing entities but communicating with constituents can result in confusion over where a lawyer's duties lie, but Rule 1.13 puts that confusion to rest. Furthermore, without such a strong bright-line rule lawyers would tend to accommodate the wishes of the constituents—even at the expense of the interests of the organization. Some would do so for honorable reasons, acting out of loyalty to the individual with whom they actually have a personal relationship. Some would do so for dishonorable reasons, bowing to the economic power of the individuals who retain them to represent the organization, who approve payment of their bills, and who hold the authority to terminate the relationship. Some would do so for both types of reasons. An unqualified and unequivocal rule can resist forces that a more flexible and ambiguous rule cannot.

At a practical level, however, Rule 1.13 offers little useful guidance. The reason is simple: the Rule's abstract, idealistic, and aspirational model fails to engage with the powerful realities of the lawyer-

82. *Id.* at R. 1.13.
83. *Id.* at R. 1.13(a) (emphasis supplied).
84. *Id.* at R. 1.13(b)-(e).

representative relationship. In particular, the absolutism of Rule 1.13 fails to recognize that preserving an attorney's relationship with an organizational representative counts for something—something we want to preserve and protect if we can do so without sacrificing higher goals. Granted, that relationship cannot trump the best interests of the organization. But, in many circumstances, maintaining a sound lawyer-representative relationship proves essential to guarding and advancing those interests. Representing organizations and dealing with representatives presents the lawyer with a problem surgical in its delicacy. Rule 1.13 strikes at this dilemma with a blunt instrument.

The Comments to the Rule appear to reflect a greater sensitivity to the complexity at issue here. But the Comments also seem strangely reluctant to address these matters head on, as though acknowledging the significance of the attorney-constituent relationship might unacceptably compromise the bright-line principle of organizational representation endorsed in the Rule. Unfortunately, this lack of directness prevents the Comments from contextualizing the absolutism of the Rule in a manner that proves helpful. Rule 1.13(b) and the comments to that provision demonstrate the point.[85]

In brief, Rule 1.13(b) states that if a lawyer learns that a representative is acting, intends to act, or refuses to act in a manner that "is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization," then the lawyer must "proceed as is reasonably necessary in the best interest of the organization."[86] Again, this provision emphasizes the best interest of the organization to the exclusion of all other considerations. More importantly, though, the vague nature of this provision offers no specific guidance at all. Comment 4 to the rule purports to fill this void.[87] In fact, however, it does not do so—or, at least it does not do so in a way that corresponds with the interests that Rule 1.13 declares paramount.

Comment 4 provides a list of factors to which the lawyer should give "due consideration" under 1.13(b).[88] The Comment first lists "the seriousness of the violation and its consequences."[89] This, however, adds nothing to the Rule. By its own terms, the Rule only applies where there is a violation of the law "that is likely to result in substantial injury to the organization."[90] Presumably any legal violation that results in such substantial injury would qualify as serious. The Comment next lists "the

85. *See id.* at R. 1.13(b).

86. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007). Curiously, the rule omits the possibility that the representative *has acted* in a way that carries these implications and gives rise to the attendant duties.

87. *Id.* at R. 1.13 cmt. [4].

88. *Id.*

89. *Id.*

90. *Id.* at R. 1.13(b).

responsibility in the organization"—whatever that means—and "the apparent motivation of the persons involved."[91] But if the rule truly requires the attorney to focus entirely on the interests of the organization, and if a violation of law likely to result in substantial injury to the organization has occurred, then consideration of the representative's responsibilities and motives seems out of place. The Comment then lists "the policies of the organization" as a factor.[92] Directing the attorney's attention toward organizational policy may or may not have merit. It is hard to know what to make of this recommendation in the context of the Comments, in light of the Committee's earlier warning that "[d]ecisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[93] Comment 4 lists as a final factor "any other relevant considerations."[94] Read in conjunction with the introductory clause of the list, this last factor essentially directs the attorney to give due consideration to those things he or she ought duly to consider in the first place; a command perfect in its circularity. In sum, if we take Comment 4 at face value and read it as an explication of the bright-line principle articulated in Rule 1.13, then we must conclude that it provides no clarification of a rule badly in need of it.

A different reading of Comment 4, however, disposes of some of these objections and helps clarify, at least to a limited extent, how attorneys should understand and apply Rule 1.13. The factors listed in Comment 4 may make little or no sense as elaborations on the principle that the attorney represents the organization. They make better sense, however, as considerations intended to help the attorney avoid unnecessary disruption of the lawyer-representative relationship. With respect to this problem, it is indeed helpful to think about the seriousness of the violation, the position and motives of the person involved, why organizational policy might have led the individual to behave as he did, and any other extenuating circumstances. To the extent a violation resulted from an innocent and correctible mistake, the attorney may be able to remedy the problem in cooperation with the representative—and without bringing the matter to the attention of higher authorities and sacrificing the lawyer-representative relationship in the process.[95]

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91. *Id.* at R. 1.13 cmt. [4].

92. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [4] (2007).

93. *Id.* at cmt. [3].

94. *Id.* at R. 1.14 cmt. [4].

95. *Id.* The text of the Comment that follows the list of factors clarifies that these considerations focus more on the attorney-representative relationship than on the abstract interests of the organization. For example, the Comment observes that while the attorney should "ordinarily" refer the issue to "a higher authority," "[i]n some circumstances it may be appropriate for the lawyer to ask the constituent to reconsider the matter[.]" *Id.* at R. 1.13 cmt. [4]. The Comment also suggests that "if the circumstances involve a constituent's innocent misunderstanding of law" and if the constituent "subsequent[ly] accepts the lawyer's advice" then the attorney may elect to end matters there and not

Unfortunately, the literal language of the Comment clings tenaciously to the absolutist quality of Rule 1.13 and frames its guidance by reference to the principle of organizational representation as if it were the only value at stake. The Comment would offer much more useful, practical, and comprehensible direction if it candidly acknowledged and openly addressed the significant role the lawyer-representative relationship plays in this complex drama. The Comments should explicitly recognize the preservation of this relationship as a value as well— even if it may be one in tension with the aspirational notion attorneys must consider nothing beyond the best interests of an abstract creature of the law.

E. Advisor

Rule 2.1 advances three propositions.[96] None of them seem to have much to do with each other. They do, however, share one characteristic in that their significance within the broader context of the Rules is puzzling.

First, Rule 2.1 directs that, "[i]n representing a client, a lawyer shall exercise independent professional judgment[.]"[97] This seems a strange leading principle to find in a Rule entitled "Advisor." One would expect to discover it instead at the beginning of a rule called "Professional Independence of a Lawyer." Such a rule exists—Rule 5.4—but it focuses on concerns about sharing fees with non-lawyers and receiving compensation from non-clients.[98] In any event, neither Rule 2.1 nor its Comment explains what this obligation entails. If it relates to concerns about conflicts of interest then this Rule duplicates Rules 1.7, 1.8, 1.9, and 1.10. If it relates to other concerns, then the Rule and the Comment fail to identify them or provide any guidance as to how to analyze them.

Second, Rule 2.1 commands that a lawyer "render candid advice."[99] This principle does relate to the Rule's title and the Comment does offer a useful clarification of it, explaining that the lawyer has a duty of candor to the client even though that may result in some uncomfortable and unwelcome conversations.[100] Nevertheless, the location of this principle creates a structural oddity. The overall structure of the Rules suggests it would make more sense to locate this principle in Rule 1.4, which addresses the duty to communicate with the client,[101] or in a provision

report the issue up the chain and all, of course, in "the best interest of the organization." *Id.* at R. 1.13 cmt. [4] (2007).

96. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007).

97. *Id.*

98. *See id.* at R. 5.4.

99. *Id.* at R. 2.1.

100. *Id.* at R. 2.1 cmt. [1].

101. *Id.* at R. 1.4.

paralleling Rule 3.3, which discusses the obligation of candor to the tribunal.[102]

Third, and for present purposes most importantly, Rule 2.1 states that, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[103] The rule expressly frames this principle in permissive rather than mandatory terms.[104] And, indeed, it seems implausible that a disciplinary body would take action against an attorney for failing to discuss such "other considerations" with her or his client.[105]

Permissive language has a place in a regulatory framework. Ordinarily, though, a regulation includes such an allowance in order to create an exception to a broader principle of prohibition. Thus, for example, Rule 1.6 prohibits an attorney from disclosing information relating to the representation of the client.[106] But that rule also provides a list of circumstances where a lawyer "may" reveal such information. In other words, regulatory language granting permission to pursue a course of conduct typically appears only where other regulatory language otherwise appears to prohibit it.

This does not, however, hold true here. The Rules include no language stating, or even implying, that attorneys lack the authority to discuss extra-legal considerations with their clients. Why, then, have such a rule? Perhaps this language is present in order to incorporate into the Rules an aspirational model in which the members of our profession strive to serve as both attorneys *and* counselors.[107]

As with Rule 1.14, the history of this portion of Rule 2.1 supports the proposition that it expresses an ideal rather than a mandate. The Disciplinary Rules included no counterpart to it, but the aspirational Ethical Considerations did. Indeed, the explicitly aspirational language of the Ethical Consideration makes its text a good deal more straightforward and understandable than this portion of Rule 2.1. Thus, Ethical Consideration 7-8 stated that "[i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those

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102. MODEL RULES OF PROF'L CONDUCT R. 3.3.

103. *Id.* R. 2.1.

104. *See id.* R. 1.6(b).

105. *Id.* Oddly, the Comment includes stronger language than the Rule itself and an aggressive interpretation of it could lead to the conclusion that a lawyer's failure to discuss these other considerations with the client could rise to the level of incompetent representation. *See id.* at cmt. n. 2. stating that "[p]urely technical legal advice . . . can sometimes be inadequate" and that "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied").

106. *Id.* at R. 1.6 (2007).

107. A more cynical, though certainly plausible, explanation is that this language is intended to preclude a client from complaining to disciplinary authorities about the fact that an attorney provided extra-legal advice that the client chose to follow to their detriment.

factors which may lead to a decision that is morally just as well as legally permissible."[108]

As it stands, Rule 2.1 is a mishmash of ideas that do not all relate to each other, including a mandatory principle of candor and an aspirational notion of normative counseling. Improving the rule would require relatively little effort. The "professional independence" language should either be relocated into Rule 5.4 and explained or jettisoned altogether. The "candid advice" mandate should be moved to the text of Rule 1.4; this would result in a rule that strongly endorses the importance of candor in all attorney-client communications. Finally, the suggestion that lawyers should aspire to serve their clients not only as legal advisors but as counselors should be incorporated into a comment to that new text of Rule 1.4.

IV. ASPIRATIONAL PRINCIPLES IN STATE RULES

State versions of the Rules may, and often do, differ from the version approved by the ABA. Sometimes differences exist because a state's implementing provisions add substantive principles to the rules that include aspirational concepts or language. The Michigan Court Rules addressing professional disciplinary proceedings features some excellent examples.

The Michigan rule that specifies the grounds for attorney discipline includes conduct that violates the Michigan Rules of Professional Responsibility,[109] conduct that violates a state or federal criminal law,[110] and the violation of an order of discipline.[111] These categories are predictable and appropriate. But this rule also includes some extraordinarily idealistic—and painfully vague—proscriptions as well. For instance, it states that the grounds for discipline include "conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach"[112] and, even more remarkably, "conduct that is contrary to justice, ethics, honesty, or good morals[.]"[113] Furthermore, this Rule provides that such conduct can serve as the basis for discipline "whether or not occurring in the course of an attorney-client relationship."[114] The Michigan Court Rules thus require attorneys, on pain of discipline, to behave ethically and morally in all aspects of their lives.

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108. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983). EC 7-8 added that "[i]n the final analysis, however . . . the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client." *Id.*

109. MICH. CT. R. 9.104(A)(4).

110. MICH. CT. R. 9.104(A)(5).

111. MICH. CT. R. 9.104(A)(9).

112. MICH. CT. R. 9.104(A)(2).

113. MICH. CT. R. 9.104(A)(3).

114. MICH. CT. R. 9.104(A).

More commonly, though, variations occur because a state adds language to, or modifies the language of, a specific ABA rule before adopting it. Some such revisions make good sense and even serve the practical ends of the Rules. For example, the text of Michigan Professional Responsibility Rule 1.10(b) as adopted by the Michigan Supreme Court departs substantially from the ABA text of that rule in order to avoid a few of the more draconian consequences that can follow from the principle of imputed disqualification.[115] Other revisions, however, incorporate language that is broad, vague, and aspirational, thereby moving the Rules in the opposite direction from where the drafters intended to take them. Examples of this include Michigan Rule 3.5(c), which amends the ABA trial publicity rule by adding a provision that prohibits undignified and discourteous conduct toward a tribunal,[116] and Michigan Rule 6.5(a), which adds to the rules a provision requiring lawyers to treat with courtesy and respect all persons involved in the legal process.[117] These provisions recently came under the scrutiny of both the state and federal courts.

In *Grievance Administrator v. Fieger,* a noted trial lawyer was accused of violating these two rules when, in the course of a radio broadcast, he made off-color remarks about the judges on the Michigan Court of Appeals panel that had reversed a jury verdict he had obtained in a lower court. [118] The Michigan Supreme Court concluded that the lawyer had indeed run afoul of Michigan Rules 3.5(c) and 6.5(a).[119] A detailed discussion of the Supreme Court's holding is not warranted here because a federal court subsequently found these rules, particularly as interpreted by the Michigan Supreme Court, unconstitutionally overbroad and vague.[120] The most interesting and important aspects of this case accordingly revolve around issues of First Amendment law rather than issues of professional responsibility law.

Nevertheless, the *Fieger* case is noteworthy for present purposes because of the aspirational thinking that finds its way into the Supreme Court's interpretation of the state rules. For example, in the course of its analysis the Court alludes to the fact that the state bar rules require a lawyer to take an oath to maintain respect for courts and judges, "abstain from all offensive personality," and conduct "himself or herself personally and professionally in conformity with the high standards of

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115. *See* MICH. RULES OF PROF'L CONDUCT R. 1.10(b)(1)-(2).

116. *See id.* at R. 3.5(c). For a history of Michigan Rule 3.5 and the source of its text *see Grievance Adm'r v. Fieger,* 476 Mich. 231, 293, 719 N.W.2d 123, 159 (2006); *see infra* note 118 and accompanying text.

117. *See* MICH. RULES OF PROF'L CONDUCT R. 6.5(a). *C.f. Id.* at R. 4.4 which addresses some of the same concerns through more specific and prohibitory language.

118. *Fieger,* 476 Mich. at 235, 719 N.W.2d at 128.

119. *Id.*

120. *See* Fieger v. Mich. Supreme Court, No. 06-11684, 2007 WL 2571975 (E.D. Mich. Sept. 4, 2007).

conduct imposed."[121] Furthermore, the Court closes its opinion by quoting a century-old Ohio Supreme Court decision that extolled the special responsibilities of the attorney—as "a priest at the altar of justice."[122] One-hundred years is a long detour to take to return to the language and sensibilities of the 1906 ABA Report.

V. CONCLUSION

Aspirational thinking thus continues to influence the regulation of lawyer conduct. It persists in the ABA Rules themselves. It appears in state implementing regulations and state variations on the Rules, and it shapes the frames of reference courts use to interpret those rules. To paraphrase Mark Twain, rumors of the death of aspirational thinking have been greatly exaggerated.

There are a number of possible explanations for why aspirational thinking persists in the drafting, implementation, and interpretation of the legal ethics rules. It may persist because the distinction between the morality of duty and the morality of aspiration is sometimes difficult, if not impossible, to discern. There is certainly some truth to this proposition, but it does not explain those instances where the drafters of the Rules have chosen unmistakably aspirational language or principles to describe the responsibilities of lawyers. On the other hand, aspirational thinking may continue to influence the Rules simply because of its long history of presence in prior codes. There may be something to this as well; after all, once ideas find their way into an elaborate regulatory scheme it can prove extraordinarily difficult to exorcise them. Still, this explanation does not hold up very well in light of the drafters' high level of consciousness around the issue and announced desire to address it. Or, aspirational thinking may merely continue here because legal ethics rules are different, in at least one important respect, from other sorts of rules.

The legal profession has the distinctive characteristic of regulating itself. Our rules of professional responsibility therefore do not simply declare what lawyers must do; they declare what *lawyers themselves say they must do*. Under these circumstances, a text that sets baseline standards and announces the least lawyers must do to stay out of trouble is something of an embarrassment. Granted, such a text will provide clear guidance and lead to fair enforcement, and in that sense the Rules mark a substantial improvement over the Canons and the Code. But such a text will also leave us with the undeniable, and sometimes irresistible, sense that we should expect more and better of ourselves. Perhaps, in this regard, the persistence of aspirational thinking is not a cause for puzzlement or alarm, but a cause for hope. The project before the profession is to channel that thinking in constructive directions and away

121. *Fieger*, 476 Mich. at 245, 719 N.W.2d at 134.

122. *Id.* at 264, 719 N.W.2d at 144 (quoting *In re* Thatcher, 89 N.E. 39, 88 (1909)).

from a regulatory document whose proper function—and sole practical function—is to provide full and fair notice of what the bar requires of those who practice before it.