The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice

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THE (F)UTILITY OF RULES:
REGULATING ATTORNEY CONDUCT
IN FEDERAL COURT PRACTICE

Judith A. McMorrow*

The nice thing about standards is that
there are so many of them to choose from.¹

"Rules cannot determine the circumstances
of their own application."²

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* Professor of Law, Boston College Law School. This article grew out of the prepara-
  tion of a treatise on THE FEDERAL LAW OF ATTORNEY CONDUCT (Matthew Bender 3d
  ed. 2001) (with Daniel R. Coquillette). My thanks to Daniel Coquillette, Lawrence Cun-
  ningham, Jackie Gardina, John Gordon, Ray Madoff, David Nicholas, Mary-Rose Papan-
  dreo, James Repetti, Patricia Tarabelsi and Paul Tremblay for their comments on earlier
drafts. I was also aided significantly by insights from presentations at the Boston College
Law School and University of Cincinnati Law School faculty colloquium series and the BC
Jesuit Institute seminar on Structural Impediments to Ethical Behavior. Finally, my boun-
tiful thanks to Kimberly Posocco (BC Law '06), who spent hours preparing the charts and
reviewing the citation patterns discussed in this article, Jerry Kazanjian (BC Law '05), and
Mark Yankopoulous (BC Law '04) for their incredible research assistance. This work was
made possible by the generous financial support of the Boston College Law School Fund.

1. This phrase has been described as an oxymoron and social proverb. It is widely
   attributed to computer science professor Andrew S. Tanenbaum.

2. This precise articulation comes from Anthony P. Farley, Thirteen Stories, 15
   TOURO L. REV. 543, 544 (1999). For a description of the possible sources of this concept
see Frederick Schauer, Prescriptions in Three Dimensions, 82 IOWA L. REV. 911, 919 n.35
(1997).
I. INTRODUCTION

THE problem is often decried: out-of-control attorneys, opportunists, cowboys, self-dealers, and overzealous prosecutors abusing the litigation process either for self-serving ends or from ideological zeal. But one person's opportunist, cowboy, or self-dealer is another person's zealous advocate. Lawyers want and need guidance on how to resolve issues that have competing claims to right behavior. The true challenge for the legal profession is how to create norms of conduct to provide this guidance in a rapidly-changing legal culture. 3 Whether searching for curbs on abusive conduct or reinforcing norms in close cases, the first cure we look to—of course—is rules. We Americans have a love affair with rules. Our political and legal rhetoric embraces rules as the public cure for public problems. Those who toil with rules, however,

know well the limits of rule-making and rule implementation. 4 Rules have many varied and subtle forms. 5 All rules carry with them the inherent ambiguity of language. Every rule-making context forces us to consider how much, and where, discretion should be given. 6 Yet the softer version of standards, broader statements that guide the actor, leave many observers skeptical of their utility. 7 This is particularly true with formal systems, such as courts, government entities, and corporations, which tend to gravitate toward rules. 8 Rules are also rather crude instruments to capture ethical values. 9

The federal courts have often been held up as the paradigm of a more coherent rules system. The Federal Rules of Civil Procedure, Criminal Procedure, and Evidence are designed to increase the probability of a consistent outcome across state and territorial boundaries. 10

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5. See infra Section III.B.


7. See E. Norman Veazey, Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century, 5 DEL. L. REV. 1, 4 (2002) ("Our objective [in Ethics 2000 revision of Model Rules of Professional Conduct] was also to resist the temptation to preach aspirationally about 'best practices' or professionalism concepts. Valuable as the profession might find such guidance, sermonizing about best practices would not have—and should not be misperceived as having—a regulatory dimension. There are other vehicles for accomplishing that noble objective" such as the Conference of Chief Justices' National Action Plan on Professionalism); Lawrence J. Fox, Setting the Priorities: Ethics Over Expediency, 28 STETSON L. REV. 275 (1998) ("one of the worst things that ever happened to litigation ethics—no, ethics in general—was the recent emphasis on professionalism. Beyond good manners and avoiding temper tantrums, no one knows what professionalism means."); Susan R. Martyn, Professionalism: Behind a Veil of Ignorance, 24 U. TOLEDO L. REV. 189 (1992) (most professionalism efforts "conclude in hopeful exhortations but weak proposals for change"). Some philosophers use the term "principle" to distinguish broader concepts from specific, conclusive, and authoritative rules. Others focus on the distinction between descriptive and prescriptive rules. See Fredrick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 14-15 (Clarendon Press 1991) [hereinafter Playing by the Rules].

8. Prof. Benjamin Barton offers a very interesting comparative analysis of the institutional strengths and weaknesses of courts, legislatures and the market as regulators of attorney conduct. See Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market, 37 GA. L. REV. 1167 (2003). Prof. Barton concludes that courts have a critical weakness because they are too susceptible to lawyer lobbying and insufficiently accessible to the public. He concludes that the least-worst alternative is a legislative body.


10. Consistency is an express goal of the Rules Enabling Act, which sets out the procedure by which the rules of federal court practice are enacted. 28 U.S.C. § 2073(b) (2000)
last fifteen years, a new area of rule-ambiguity has emerged as federal courts have focused on how to regulate attorney conduct in federal court practice.  

The issue is well-known to observers of legal ethics in federal court practice. No single set of rules govern attorney conduct (i.e. ethics) in federal court practice. Instead some federal district courts use the state versions of the rules in which they sit, others use the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, or the court’s own detailed rules. Even if the district court has clearly designated which rules apply, the rules are often ignored or irrelevant to the question at hand.

The seeming incoherence of federal court regulation of attorney conduct, at first blush, begs for a resolution through rule-making. Uniform rules of attorney conduct for federal court practice would, in theory, yield the traditional benefit of rules: consistently applied norms of attorney conduct throughout the federal system. Rule-making for attorney conduct in federal court practice, however, has been an utter failure to date, even as the significant procedural reforms of the 1980s and 1990s saw a rise in the rule-based sanctions available to federal judges. The

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13. As used in this article, ethics refers to norms of right behavior that derive from the professional role of the actor. Law, like many professions, has articulated rules of ethical conduct that are part of the norms of conduct. As described in detail, these professional rules are not the only source of ethical norms.

14. As Professors Fred Zacharias and Bruce Green have observed, the momentum for “federal judicial regulation of attorney conduct more generally appear to have petered out.” Green & Zacharias, supra note 12, at 387. For an analysis of the procedural reforms
strengthening of the sanctions available through the Federal Rules of Civil Procedure has reinforced the understanding of federal courts as an appropriate body to establish norms of attorney conduct. Yet the federal courts could not develop the needed consensus to adopt federal attorney conduct ethics rules, or even a decision to refer uniformly to the rules of the state in which the court is sitting.

Those who maintain a national practice, lawyers who are subject to frequent removal of cases from state to federal court, and the Department of Justice ("DOJ") are deeply concerned about the inconsistent rules. They understandably do not like the indeterminacy and pockets of internal inconsistency inherent in the situation. While indeterminacy is a reality for many of their clients, and typically good for business in the private sector, it is quite uncomfortable, particularly when it carries the moral censure of "ethical violation." Yet, even the politically powerful Department of Justice has been unable to muster the necessary political consensus to create uniform rules, even in the specific areas of particular DOJ interest. The DOJ has also repeatedly tried, and failed, to address this issue through legislation.

Now that the initial issues have percolated through rule-making, congressional, judicial and academic review, we are in a good position to step back and explore the dynamic that has arisen. There is utility in working toward coherence in ethical rules in federal court practice, but recent experience suggests that the efforts toward a rule-based system will ultimately be futile. As developed in detail below, multiple cultures and values come together when we try to regulate attorney conduct in federal court practice, creating a fascinating, confusing and chimerical situation.


17. H. Geoffrey Moulton, Jr., Federalism and Choice of Law in the Regulation of Legal Ethics, 82 MINN. L. REV. 73, 75 (1997) ("two relatively recent trends, however—the increasingly multijurisdictional character of law practice and the increasingly disparate ethical norms of those jurisdictions—have conspired to put lawyers in the same uncomfortable position often occupied by their clients."). Prof. Moulton argues that the problems faced by lawyers "are no more difficult or momentous than similar problems faced much more often by their clients." Id. at 79.

18. This may be due, in part, to an unstated concern about DOJ capture of the rules process.

19. Capturing the policy strands of this issue is like holding finely woven threads in your hand. Each thread seems to float in a different direction, some deeply woven into other bases. See FEDERAL LAW OF ATTORNEY CONDUCT, supra note 11, at § 801.02[7] ("The federal law governing attorney conduct may be a relatively narrow field of regulation, but few branches of the law set out so vividly the pros and cons of fundamental
Federal courts have the inherent power to control the proceedings in their courtroom, including the long-recognized (albeit conceptually unclear) inherent power to regulate attorneys. In giving content to litigation ethics, judges draw on multiple sources, including the procedural rules, norms of practice and formal rules of professional conduct. The state rules of professional conduct were crafted by state supreme courts for regulatory use, using the model version proposed by the ABA as a starting point for discussion, and apply to a wide range of settings. Some of the norms contained in the state and Model Rules of Professional Conduct drew upon influential federal court decisions that crafted the norms through a common-law process. That common-law process has served the federal courts quite well. Even when citing to state Rules of Professional Conduct, federal courts often tend to revert back to the common-law approach by relying on their own body of federal case law to interpret the meaning of the text.

The rules of professional conduct in use by states contribute to a common-law, contextualized, approach to regulating attorney conduct in court practice. The rules of professional conduct do not address many of the issues that arise in litigation, often contain open-textured standards, and fail to address the remedy for violations, leaving all of these issues to judicial discretion. Judges have the wide fact-finding latitude to simply ignore the attorney conduct issue, which is usually ancillary to the merits of the litigation. Rules are unlikely to constrain this broad discretion, particularly among judges who have a strong culture of autonomy and absolute belief both in their ability to regulate the conduct of attorneys who appear before them and, perhaps more importantly, their finely honed ability to exercise discretion. It is, after all, their stock in trade. The federal appeals courts functionally give little review to the exercise of this very broad discretion.

This is not to suggest that rules of professional conduct are irrelevant in federal court practice. An analysis of the citation patterns of federal courts reveals a healthy reference to either the state or Model versions of the rules of professional conduct. But in practice, the rules of professional conduct function like standards, serving to guide the federal courts but not to unduly constrain their decision-making.
Federal judges do not seem too deeply concerned about the lack of uniform rules. The federal courts, like all courts, have informal mechanisms to control attorney conduct, a point that requires much more empirical research. In contrast, state courts, with their strong and historical role in regulating attorneys, care deeply about maintaining control over the rules—the formal processes—governing attorney conduct. States are the initial source of the right to practice law. This first order power gives state supreme courts, and the courts who report to them, a strong and powerful role among the multiple institutions that shape the legal profession.

Lawyers are left with the challenge of anticipating how a court will react to a particular ethical dilemma. There will be no perfect cure for the challenge inherent in a federal system. As discussed below, even if federal courts consistently use state rules of conduct (vertical uniformity), interpretive differences will arise because the norm creators in this context (the state supreme courts) are not the norm enforcers. Even if federal courts create targeted uniform rules to address recurring issues in federal court practice (horizontal uniformity), the inherent limit of rules and absence of appellate review means it is unlikely there will be a national body of case law to give meaning to the rules. What has emerged is a delicate, ongoing balance of competing interests that is driven by a minimal encroachment approach that acknowledges the state supreme courts’ strong interest but gives room for the autonomy interests of federal courts.

22. See, e.g., In re Williams, 156 F.3d 86, 92 n.6 (1st Cir. 1998) (“Heavy-handed criticism of an attorney by a judge may exact a considerable price, even when the judge does not formally frame the criticism as a reprimand.”); W. Bradley Wendel, Informal Methods of Enhancing the Accountability of Lawyers, 54 S.C. L. REV. 967, 976 (2003) (“In the appropriate case, though, a good judicial spanking may be more effective than all the professionalism conferences in the world at educating lawyers about the consequences of unprofessional conduct.”); Paula L. Hannaford, The National Action Plan on Lawyer Conduct: A Role for the Judge in Improving Professionalism in the Legal System, 36 COURT REVIEW 36, 39 (1999) (discussing National Action Plan recommendations that judges take active role in promoting professionalism, notes that “[n]othing acts as a deterrent to unprofessional conduct by lawyers quite as effectively as the watchful supervision of the trial judge.”).

23. United Mine Workers v. Ill. State Bar Ass’n, 389 U.S. 217, 222 (1967) (“That the States have broad power to regulate the practice of law is, of course, beyond question.”).

24. See Hannaford, supra note 22, at 37 (describing Conference of Chief Justice’s National Action on Lawyer Conduct and Professionalism. A plan which “would require more judicial leadership, coordination and daily involvement to achieve significant improvements in lawyer professionalism and ethical conduct”); Harold C. Clarke, The Judiciary as the Guardian of Professionalism, TEACHING AND LEARNING PROFESSIONALISM 65, 67 (ABA, 1997) (while reform of the legal profession in Georgia could occur through law schools, bar associations, law firms, courts, and individual lawyers, “only one had the power to invoke the interest and participation of almost all lawyers—the judiciary.”).

25. Overall, the debate over federal rules has led to “better questions, rather than new answers.” Timothy P. Terrell, Turmoil at the Normative core of Lawyering: Uncomfortable Lessons from the “Metaethics” of Legal Ethics, 49 EMORY L.J. 87, 90-01 (2000) (discussing the nature and irony of ethical disagreement, analyzing how lawyering “is always conducted within a complex combination of philosophical possibilities”). See also Douglas N. Frenkel, Robert L. Nelson & Austin Sarat, Bringing Legal Realism to the Study of Ethics and Professionalism, 67 FORDHAM L. REV. 697 (1998) (major assumption of research pro-
While the effort to create rules of attorney conduct in federal court practice did not bear the envisioned fruit of uniform rules, it did bear some unintended benefits. Since 1995, when the issue was framed, federal courts have moved to embrace dynamic conformity by referring increasingly to the state Rules of Professional Conduct rather than the Model rules. More lawyers at least know where to look for the (imperfect) standards that will be the starting point for the federal court's analysis. The DOJ has had at least one success in going directly to a state to lobby for a change in the state ethics rule, indicating that the concededly labor intensive spot-fix can resolve some of the most critical issues. And there is still the possibility that in a few recurring situations the federal courts might be able to fill the gap with more precise rules. It is an open question, however, whether those targeted ethics rules might better be placed in the Federal Rules of Civil Procedure or Criminal Procedure.

II. THE PROBLEM AND EFFORTS TO RESOLVE IT

A. THE PROBLEM IN GREATER DETAIL

Federal courts do not use a uniform set of rules to address attorney conduct issues. This is particularly surprising given the close affinity between ethics in the litigation context and procedure, both of which address litigation (mis)conduct and often complement and occasionally supplant each other. The issue came into national prominence in 1995 when a Judicial Conference study of the rules regulating attorney conduct in federal courts revealed seven different sources of rules that district courts are directed to use when evaluating attorney conduct. This range

ject on study of ethical behavior and professionalism "was that neither hortatory professional ideologies nor the promulgation of rules themselves can provide reliable protections against both incivility and overtly unethical behavior in litigation."."

The analysis in this article is informed, in part, by a pilot study of interviews with judges to obtain a more thorough picture of how they exercise their discretion in regulating attorney conduct. The pilot study is an access study of federal and state judges. Judges were interviewed for 45-75 minutes and asked approximately 14 questions. A full description of the methodology, questions and human subjects' compliance can be obtained from the author by writing to memorrow@bc.edu. For an example of how interviews can be used see Ray D. Madoff, Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution, 76 S. Cal. L. Rev. 161, 167 (2002) (excerpts of interviews “have been added for the purpose of adding context to, rather than evidence for, the arguments, which will stand or fall on their own merit.”).


of approaches within the supposedly uniform federal courts occurred because district courts have the power to create local rules to supplement the federal rules of civil and criminal procedure. The Judicial Conference study was conducted by Professor Daniel R. Coquillette and revealed that of the 94 district courts, 62 courts (about 64%) used a scheme of dynamic conformity, directing that the district court should use the rules of the state in which the federal court was sitting. Of those courts, most had based their state attorney conduct rules on the ABA Model Rules of Professional Conduct (48), but others still used some version of the earlier ABA Model Code of Professional Responsibility (12), and two of the federal District Courts in California used California's rules adopted by statute. Ten federal courts adopted the ABA models directly. Ten others directed their courts to use both the state standards and the ABA model, even though those standards might conflict. Eleven district courts had no local rule at all, and the creative Northern District of Illinois drafted its own rules of conduct that varied in some respects from both the ABA models and the Illinois standards. District courts also have a common practice of issuing "standing orders" that govern common issues that arise in the court, and it is unclear whether some district courts have standing orders that address the issue of attorney conduct. The Coquillette Report noted that updating the research is extremely difficult because "the local rules picture changes monthly and it is very difficult for loose leaf services to remain accurate." Even as changes occur, there appears to be "no uniform trend in these changes.

Local rules themselves are a dynamic creature and the mosaic has changed somewhat since 1995. The fact of identifying the issue may have encouraged some courts to take action. For example, as of 2001, six more district courts adopted local rules, leaving only five districts without local rules governing attorney conduct. Most local rules are now available on-line.

Even when the local rule is easily found, some rules are badly drafted or provide "ambiguous guidance." More interesting is that even when the local rule is clear in content, the courts often give only nodding refer-

29. This conformity is "dynamic" because any changes in the professional conduct rules by the state after adoption of the local rule are automatically applicable in the federal court.
30. Two of the four federal district courts in California use the unique California Rules of Professional Conduct, either exclusively or in connection with the ABA models. See FEDERAL LAW OF ATTORNEY CONDUCT, supra note 11, at § 802.
31. Ten use the ABA Models Rules directly, while ten use both the state standards and the ABA models. Id.
32. Id. §§ 802.04, 802.05.
33. Local Rules Project, supra note 11, at 7.
34. Id.
35. FEDERAL LAW OF ATTORNEY CONDUCT, supra note 11, at § 802.01.
36. Local Rules Project, supra note 11, at 2.
ence to the local rule when assessing lawyer conduct, or disregard it.\textsuperscript{37} As Chart I indicates, over the last five years, federal courts have continued to cite the model version of the rules of ethics in 30-40\% of the cases that cite to the Rules of Professional Conduct.\textsuperscript{38} Since 1996, citations to the model rules have decreased while citations to the state version have increased, indicating that the district courts are moving toward dynamic conformity. The continued reference to the model version of the rules offers at least theoretical problems because, as discussed in greater detail below, many states have changed the model version of the Rules of Professional Conduct when adopting a state ethics code based on the Model Rules.

Even when a federal court cites to the state version of the ethics rule, they frequently go on to cite federal court cases that analyze the issue without regard to whether the underlying citation was interpreting the same text. For example, in the approximately sixty-four reported federal cases that refer to Rule 4.2 concerning contact with represented persons, two-thirds refer to the state version of the rule. Of those, well over half cited only federal cases to interpret the rule and 90\% of the opinions rely on federal cases to some degree in interpreting the rule.\textsuperscript{39} While some courts do use the local rule to refer to the state code and cite state cases interpreting the relevant provision, they are the exception. With amazing candor, the Fifth Circuit has expressly rejected use of a local rule that applied a state's rules of professional conduct, concluding that the federal courts should evaluate motions to disqualify based on "the ethical rules announced by the national profession in light of the public interest and the litigants' rights."\textsuperscript{40} This is arguably what is happening in other circuits as well, but without a similar express disclaimer of the local rule.

\begin{footnotesize}
\begin{enumerate}
\item Courts may comply with a rule of dynamic conformity by citing directly to the state rule without feeling a need to refer to the local rule to explain the choice of law.
\item A more thorough analysis of this citation pattern is developed at Chart III, infra.
\item A chart with supporting information is on file with the author.
\item In re Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992). The District Court looked to the local rule, which directed it to use the Texas Disciplinary Rules of Professional Conduct. Id. at 542. The Fifth Circuit concluded that the local rule was not the sole source of law, concluding that "its local rules alone cannot regulate the parties' rights to counsel of their choice" because motions to disqualify are "substantive motions." Id. at 543. The court then went on to cite federal conflict of interest cases, the ABA Model Code and Model Rules, and drafts of the American Law Institute's Restatement of the Law Governing Lawyers. Id. at 544-45. See generally Hricik & Ellis, supra note 16.
\end{enumerate}
\end{footnotesize}
This cacophony of local rules has resulted in a scheme with no horizontal uniformity—anathema to the heart of federal court rule-makers, who strive to have uniformity among the federal courts—at least consistent with the boundaries of Erie. Practitioners who practice in federal courts in multiple jurisdictions prefer horizontal uniformity. They wish to avoid different treatment on the same issue, depending on where the litigation is pending. For example, a law firm is more easily disqualified for conflicts of interest in the Fifth Circuit, which has applied the conflicts rules rigorously. The same firm that represents a client in the Second Circuit is less likely to be disqualified because of the more flexible "taint" standards.
standard used by that circuit. The Seventh Circuit appears willing to allow “screening” to avoid conflicts in situations that would probably not be tolerated in other circuits.

On the other hand, practitioners who are geographically based in one state, practicing both in state and federal courts within the state, generally prefer vertical uniformity under which they can be sure that the rules of conduct applied to them are the same whether practicing in the state court or the federal court across the street. When a lawyer takes on a client, the lawyer may not know whether the case will end up in state or federal court. Even plaintiffs, who can control the initial choice of forum, are vulnerable to removal. This is a significant possibility, given that between 1999-2003 anywhere from 11-20% of cases in federal court were lawsuits that were removed from state court.

Commentators on this lack of uniformity have provided a rich and valuable critique. This cacophony of approaches arose over the last 30 years. It arguably became labeled as a “problem” when the Committee on Rules of Practice and Procedure of the Judicial Conference discovered it. But the divergent perspectives described above are not equally vocal. The Department of Justice is a vociferous critic of the current schema. The tortured history of the DOJ’s efforts to bypass the limits of Model Rule 4.2, limiting contacts with a represented person, have been well-developed in the literature.

44. See, e.g., Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748 (2d Cir. 1981) (focusing on impairment of the process); Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1140 (2d Cir. 1975) (stating that a judge has an obligation to insure that cases are not tainted by unethical conduct brought to judge’s attention).

45. See, e.g., Cromley v. Bd. of Educ., 17 F.3d 1059, 1064-65 (7th Cir. 1994) (screening allowed to avoid disqualification when attorney who previously represented plaintiff withdrew and joined firm representing defendant). The screening cases may reflect a more tolerable attitude toward conflicts of interest that are reviewed after resolution of the case on its merits. In these circumstances, the courts are much more reluctant to require parties to undergo additional time and expense absent a sense that the conflict called into question the fairness of the result. See Ted Schneyer, Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law, 16 REV. LITIG. 537, 538 (1997).

46. See generally Hricik & Ellis, supra note 16. Prof. Hricik and Mr. Ellis provide a detailed analysis of how state and federal courts in Texas have strikingly different standards on several key issues, including treatment of former client conflicts, waiver of conflicts through delay, conflicts that arise from access to non-client confidential information, and representing interests adverse to current clients. See also David Hricik, Uncertainty, Confusion, and Despair: Ethics and Large-Firm Practice in Texas, 16 REV. LITIG. 706 (1997).

47. See Admin. Off. U.S. Cts., Judicial Business of The United States Courts Annual Report 2003, Table S-7, at 34 (2003). This significant variation in removal is due in part to a sharp increase in asbestos cases that were removed to federal court, many of which were later returned to state court. Id. at 26. See also MOORE’S FEDERAL PRACTICE § 107.03 (Matthew Bender 3d ed. 2000).


49. See, e.g., Green & Zacharias, supra note 12; Bruce A. Green, Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?, 64 GEO. WASH. L. REV. 460, 464-67 (1996); Roger C. Cramton & Lisa K. Udell, State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and...
prosecutors may be subject to sanction under state ethics rules for making contact with represented persons via undercover agents or through meetings that exclude counsel.\textsuperscript{50} The DOJ has skirmished over whether state ethics rules can limit a federal prosecutor’s ability to subpoena defense counsel.\textsuperscript{51} A more recent question has arisen concerning state regulation of the lawyer’s ability to engage in “deceit,” or direct their agents in acts of deceit, such as supervising undercover operations.\textsuperscript{52} These three areas have been the primary subject of what has been characterized as the “ethics wars.”\textsuperscript{53}

The DOJ’s attention to these issues was ratcheted up considerably in 1999 when Congressman Joseph McDade, angry at having been the target of a DOJ investigation and convinced that the prosecutors had acted unethically, slipped an amendment into an appropriations bill. Known as the “McDade Amendment,” this provision states that a government attorney is subject to state laws and rules and local federal rules governing

\begin{quote}
\end{quote}

Not recognizing that the review of attorney conduct rules was a subset of a much larger study of local rules, one student commentator has argued that the Judicial Conference review of attorney conduct rules is “a smokescreen masking attempts by the Department of Justice (DOJ) to bypass the no-contact rule.” John H. Lim, Note, \textit{The Side Effects of a Legal Ethics Panacea: Revealing a United States’ Standing Committee’s Proposal to “Standardize” Ethics Rules in The Federal Courts as an Attempt to Undermine the No-Contact Rule}, 13 Geo. J. Legal Ethics 547, 548 (2000).


\textsuperscript{51} Stern v. United States Dist. Ct., 214 F.3d 4, 15, 16 (1st Cir. 2000) (local rule requiring judicial preapproval of subpoenas to defense counsel is not applicable to federal prosecutors because it interferes with federal grand jury system).

\textsuperscript{52} See \textit{Model Rules of Prof’l Conduct R. 8.4(c) (2002).} When a lawyer, or a lawyer’s agent, engages in an undercover operation—a common prosecutorial practice—the lawyer is engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. At least one state court decision has stated that these rules do not provide for a prosecutorial exception, although this conclusion was eventually softened through amendment of the state’s version of Rule 4.2. \textit{See In re Gatti, 8 P.3d 966 (Or. 2000).} In \textit{Gatti} the Oregon Supreme Court declined to accept the DOJ’s position that the court should create a prosecutorial exception. \textit{Id.} at 975-76. (“[f]aithful adherence to the wording of DR 1-102(A)(3), DR 7-102(A)(5), ORS 9.527(4), and this court’s case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree.”).

attorneys in the state where the attorney engages in his or her duties.54

The McDade Amendment has many technical problems—ambiguity being the primary issue—and is a burr in the side of the DOJ.55 When a local federal rule clearly designates the state rules of ethics, then at least the prosecutor knows where to look. But, as noted above, some local rules refer to both the state rules and the model rules, or adopt their own rules, leaving the prosecutor subject to potentially conflicting rules. The issues were sufficiently complex that the Department of Justice created the Professional Responsibility Advisory Office to answer the McDade questions of government attorneys and designated an ethics officer in each U.S. Attorney's office in the country.56

The McDade Amendment created pockets of confusion for federal prosecutors primarily in the areas noted above. Members of the Justice Department dislike the amendment because they feel that it has a chilling effect on government attorneys by forcing them to constantly put their law licenses on the line.57 Inconsistent bar rules make it hard to determine what rule is to be followed and the different interpretations of the rules make it hard to determine exactly what conduct is prohibited.58 As a result, the DOJ has emphasized to Congress that many government attorneys are afraid to act in many situations for fear of losing their licenses to practice.59

Given this steady cry of concern from the DOJ, an obviously powerful and credible actor in our federal system, it would seem that the situation would be ripe for swift resolution of this confusion.60 The cure would presumably be clear, coherent rules. But this has not happened.


55. See reauthorization (Civil), supra note 50.

56. Id. at 42 (statement of Mark Calloway, Acting Dir., Exec. Office for U.S. Attorneys, U.S. Dep't of Justice).

57. Id. at 35 (statement of Mark Calloway, Acting Dir., Exec. Office for U.S. Attorneys, U.S. Dep't of Justice), 42 (statement of Stuart Schiffer, Acting Assistant Attorney General, Civil Div., U.S. Dep't of Justice); Jesselyn Alicia Radack, The Big Chill: Negative Effects of the McDade Amendment and the Conflict between Federal Statutes, 14 GEO. J. LEGAL ETHICS 707, 723 (2001).


60. As discussed later in this article, the DOJ's efforts to create a more predictable federal court environment for their attorneys might not be achievable. See Donald C. Langevoort, Taking Myths Seriously: An Essay for Lawyers, 74 CHI.-KENT. L. REV. 1569, 1580 (2000) ("people are inclined to make sense of their environments via creative interpretation, reducing the anxiety of uncertainty by imposing artificial and illusory coherence.").
B. THE FAILED EFFORTS TO CREATE UNIFORM RULES OF ATTORNEY CONDUCT

After the problem was observed and recorded by the Judicial Conference in 1995, that body explored several possible reforms. Creating a national code of attorney conduct for all federal courts was proposed as a theoretical option, but it quickly stalled as overkill. Even assuming that the federal courts would have such authority to develop a broad-based code, which has been seriously questioned, there simply was no apparent political will to do so. Based on the Standing Committee’s study of reported cases, the most commonly litigated ethics issues in federal court practice involved conflicts of interest, contact with represented persons (Rule 4.2 problems) and advocates as witnesses. A great many issues covered by state ethics rules are simply not relevant in federal court practice. Taking on the formidable dragon of state chief justices to clean up a few loose ends seemed an unattractive use of time and ultimately inefficient because the state regulatory apparatus—whatever its flaws—is a superior method of regulating attorneys, particularly for activities that occur outside the litigation context.

The next option of voluntary local rules was quickly rejected as ineffective. Only fifteen of ninety-four districts ever adopted the voluntary “Federal Rules of Disciplinary Enforcement.” Voluntary resolution was unlikely to yield the desired consistency. The “do nothing” option was also rejected because of a concern for the “increasing balkanization,” with little reason to think that the situation would resolve itself over time. This resistance to local rules on attorney conduct was the next sign that this problem may be difficult to solve.

61. Zacharias, supra note 12.
63. FEDERAL LAW OF ATTORNEY CONDUCT, supra note 11, at § 802.20[1].
64. Some rules are designed primarily to protect the client, such as the duty of confidentiality and much of the operation of conflict of interest. Others are designed to protect the integrity of the fact-finding process, such as the duty not to introduce false testimony. Others function more like conventions to decrease the chance of later error or misunderstanding, such as putting certain fee agreements in writing and no commingling of client funds. See generally Larry Alexander & Emily Sherwin, The Deceptive Nature of Rules, 142 U. PA. L. REV. 1191, 1216 (1994). Yet others appear designed to protect the lawyer (and future clients of the lawyer), such as the prohibition on limiting future practice of law. Many of these rule types involve issues that are of primary interest to the bar regulatory apparatus. For example, the duty to not commingle funds, violations of criminal law and general neglect are far more likely to be raised in state bar disciplinary hearings than in the context of litigation in federal court practice. These are rarely, if ever, brought to the attention of courts during litigation.
65. FEDERAL LAW OF ATTORNEY CONDUCT, supra note 11, at § 802.21[1] (“Thus the ‘complete’ national standard was both theoretically undesirable, in that it entrenched on a traditional area of state responsibility, and also practically undesirable, in that a ‘complete’ set of national rules covered areas of little concern to the federal courts in actual practice, and made reliance on state disciplinary authorities more difficult.”). Cf. Barton, supra note 3.
66. FEDERAL LAW OF ATTORNEY CONDUCT, supra note 11, at § 802.20[1].
67. Id.
The Standing Committee eventually focused on two options. First, it could create a local rule of "dynamic conformity" which would require federal courts to apply the ethics rules of the state in which they sit. The rule would follow the Rules Enabling Act, assuring national uniformity of the state preference. Alternatively, the rules process could create "core" federal rules on the most frequently litigated issues, with all remaining issues governed by the state rules in which the district court is located. The Standing Committee considered ten rules, drafted "for discussion purposes only," covering issues such as choice of law, confidentiality, conflicts of interest, candor, advocate as witness and contact with represented persons.

Since the publication of the ten draft rules in 1998, the Standing Committee has not taken further action on the issue of rules of attorney conduct in federal court practice. Over the next four years there was rapid turnover in the position of DOJ's deputy attorney general, who has oversight over this issue. The Deputy Attorney General under President George W. Bush had just settled into office when Sept. 11th occurred, which resulted in a massive refocus of DOJ energies. There did not appear to be the ability to pursue the delicate negotiations needed to balance the many competing interests reflected in the judicial conference rule-making process. The presence of representatives from the Conference of Chief Justices and, of course, the weight of federal judges kept the DOJ from exerting dispositive influence on the process.

While the rules process limped along, the DOJ repeatedly tried to overturn the McDade Amendment legislatively, with no success on that front either. As Assistant Attorney General Stuart Schiffer stated in testimony before the House Judiciary Committee, it was hard to argue against a rule that says prosecutors "should act ethically in conformance with rules of ethics." At least four bills have been introduced to modify the McDade Amendment, each going down in defeat. Even the pro-

69. Federal Law of Attorney Conduct, supra note 11, at § 802.23[3].
72. Reauthorization (Civil), supra note 50, at 42 (statement of Stuart Schiffer, Acting Assistant Attorney General, Civil Div., U.S. Dep't of Justice).
The (F) Utility of Rules

investigation climate of 2002 was not enough to create sufficient support for DOJ efforts to overturn the McDade Amendment. At each turn, either the ABA came in to vigorously oppose the DOJ bills, or the Conference of Chief Justices lobbied against them.

This issue makes for strange political bedfellows. Those with a strong belief in state autonomy and states’ rights would push for the state supreme courts to retain the dominant role in regulating attorneys while those with a strong pro-prosecution perspective would presumably support the DOJ. Those concerned with undue influence of the DOJ would resist resolution by federal legislation because of concern for capture of the process. The ABA would presumably like to maintain its position as a dominant leader in the formation of rules of professional conduct, which would lead to resistance to actions that erode their position.

We are left in a state of limbo—with no perceptible movement in addressing the perceived problem of federal court ethics. When we look in greater detail at the power of federal courts and the interaction between federal courts and those who create norms of professional conduct, we can better understand why formal reform has screeched to a halt.

III. THE FUTILITY OF RULES: THE FUNDAMENTAL COMMON LAW NATURE OF REGULATING ATTORNEY CONDUCT IN FEDERAL COURT PRACTICE

A. WHY FEDERAL COURTS INEVITABLY REVERT TO A COMMON LAW PROCESS TO ADDRESS PROFESSIONAL RESPONSIBILITY ISSUES IN FEDERAL COURT PRACTICE

1. Inherent Power of the Federal Courts to Regulate Attorney Conduct

The federal courts have long recognized that they have inherent power to regulate the conduct of those who appear before them—including the attorneys. This inherent power was noted early in the 1800s—long before we thought about ethics codes. The inherent powers doctrine received a clarifying boost in 1991 when the U.S. Supreme Court decided Cham-

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74. Eight days after the Sept. 11, 2001 attacks, two bills were introduced in the Senate to loosen the restrictions of the McDade Amendment. The Professional Standards for Government Attorneys Act of 2001, S. 1437, was introduced by Sen. Patrick Leahy and directed the Judicial Conference of the United States to create national rules of professional conduct in areas where state ethics rules impede federal investigations. This bill was sent to the Senate Judiciary Committee and no further action was taken. See Professional Standards for Gov't Attorney Act of 2001, S. 1437, 107th Cong. (2001); S. 1435, 107th Cong. (2002). Similar provisions were included in earlier drafts of the Patriot Act and passed the Senate, but were removed after heavy lobbying from the ABA during the conference report. See Peter A. Joy & Kevin C. Munigal, Anti-Contact Rule in Criminal Investigations, CRIMINAL JUSTICE, 16-WTR Crim. Just. 44, 46 (Winter 2001).
77. FEDERAL LAW OF ATTORNEY CONDUCT, supra note 11, at § 806.01[3]; Ex parte Burr, 22 U.S. 529, 530-31 (1824).
bers v. Nasco. The Supreme Court upheld the imposition of attorneys' fees against the litigant under the court's inherent powers to sanction bad-faith conduct in litigation. Chambers made clear that courts could use their inherent power to sanction conduct, even if that conduct was otherwise covered by the federal rules of civil procedure. While courts should "ordinarily" use the procedural rules, Chambers reinforced that the inherent powers doctrine is extremely flexible and could be wielded by use of the sound discretion of the district court.

While the Court has required bad faith before using inherent powers to shift attorneys fees to the opposing litigant, it is less clear whether bad faith is required to sanction an attorney. Chambers reinforced the well-established idea that a court has the power to control admissions to the bar and to discipline attorneys who appear before it. The notion of "supervisory powers"—which functions as a special form or subset of inherent powers—appears to give courts greater latitude in imposing sanctions on attorneys who appear before the court. Just as a parent is quick to infer attitude or intent from words or actions (who among us has not heard or said the phrase "Don't take that tone with me!"), courts more readily infer attitude and intent from attorney conduct rather than litigant conduct. This may largely be a semantic discussion because the most egregious conduct is likely to draw the strongest sanction. In these cases, intent can be inferred from objective manifestations of conduct, just as intent is inferred in both criminal law and intentional torts.

The federal courts have cited Chambers extensively over the past ten

79. Id.
80. Id. at 47-48.
81. Id. at 48.
82. See, e.g., United States v. Seltzer, 227 F.3d 36 (2d Cir. 2000), and cases cited therein; In re Fisherman's Wharf Fillet, Inc., 83 F. Supp. 2d 651, 665 (E.D. Va. 1999) (finding bad faith not required for non-monetary discipline of attorney, but facts justified finding of bad faith); United States v. Claros, 17 F.3d 1041, 1047 (7th Cir. 1994) (citing Harlan with approval, dicta); Harlan v. Lewis, 982 F.2d 1255, 1260 (8th Cir. 1993) (stating, in dicta, that the finding of bad faith is not required for sanctions under inherent powers; facts would have justified implied finding of bad faith). But see Resolution Trust Corp. v. Bright, 6 F.3d 336, 340 (5th Cir. 1993) (requiring bad faith in disbarment sanction, quoting In re Thalheim, 853 F.2d 383, 389 (5th Cir. 1988)).
83. Seltzer, 227 F.2d at 44 (citing Ex parte Burr, 22 U.S. at 531) (while this power "ought to be exercised with great caution," it is nevertheless "incidental to all Courts.").
84. The Court in Chambers also noted the non-fee sanctions imposed on the attorneys involved, including suspension and disbarment, are derived from the court's power to supervise attorneys who appear before it. Chambers, 501 U.S. at 43.
85. DAN B. DOBBS, THE LAW OF TORTS § 24 (2000); WAYNE R. LAFAVE, CRIMINAL LAW § 3.5(f) (3d ed. 2000). This greater latitude under the inherent powers doctrine to sanction attorneys is less clear when evaluating a federal prosecutor's conduct. See United States v. Williams, 504 U.S. 36, 45-47 (1992); R. Michael Cassidy, Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence, 13 GEO. J. LEGAL ETHICS 361, 373 (2000) (critiquing Williams); This may flow from the practical reality that the prosecutor stands at a unique intersection of the litigant and attorney role. That unique blending may functionally lead courts to require a clearer finding of bad faith by the prosecutor before imposing sanctions under their inherent powers. See generally Zacharias & Green, supra note 54.
years. While *Chambers* is frequently cited at the end of a string of references, it serves as the exclamation point for the idea that the federal court is in control. The sheer number of pages courts use to reinforce this idea of "we're in charge" reflects a sense that the litigation world around them appears to be out of control. The breadth and flexibility of the inherent powers doctrine is an acknowledgment that not all aspects of litigation misconduct can be accurately identified in advance through rule making.

It may be that, as Professors Fred Zacharias and Bruce Green argue, federal court authority to regulate lawyers is "a practice in search of a theory." There are many unresolved questions about "the scope and nature of judicial authority." Lower courts have followed the Supreme Court's lead and have protected their core ability to regulate the conduct of both litigants and attorneys through a case-by-case common law approach. Federal courts have constrained their authority at the edges, limiting inherent powers to regulate prosecutors before a grand jury, and disallowing use of inherent powers when it conflicts with substantive law, or imposes procedural innovations outside the rule-making process, or pierces sovereign immunity. These are nibbles on the edges of the power of federal courts.

The strengthening and clarification of the inherent powers doctrine emerged as commentators noted a shift in judicial function from deciding cases to managing them. The concept of "managerial judging" recognizes the shift in judicial focus from deciding cases on the merits to managing litigation in an era in which the vast majority of cases settle. With a managerial focus, judges become more concerned with efficiency of the process. Managerial judging also emphasizes the judge's wide discretion

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86. The opinion has been cited approximately 2200 times as of July 15, 2004. Approximately 90% of those citations were made with little or no discussion of *Chambers*.

87. *Chambers*, 501 U.S. at 46 ("whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices."); see generally Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. Cal. L. Rev. 1331 (2003) (cognitive jurisprudence and error in rule-making).


89. *Id.* at 1307.

90. *Williams*, 504 U.S. at 36.


93. *United States v. Horn*, 29 F.3d 754, 770 (1st Cir. 1994) (holding that despite prosecutor's egregious conduct, the "court's supervisory power, although potent, cannot intrude, unaided, into the sovereign's protected preserves.").

as a manager. The inherent powers doctrine is one of the many tools available to judges to give vigor to this management role.

2. Filling in the Content to Create Litigation Ethics

The inherent powers doctrine sets out the court's power, but it does not articulate any standards or rules. It is a jurisdictional statement, not an articulation of norms. Because the inherent powers doctrine is designed to supplement the federal rules, courts are left with a common law process to guide them in using their inherent powers. When applied to attorney conduct, the federal courts do not write on a blank slate. The scholarly debate over rules of attorney conduct in federal courts has often been framed as if the ethics rules (Rules of Professional Conduct) are the dominant source of norms. Ethics rules are important, but are not the only place to look for litigation ethics. Litigation ethics are supported by at least four core anchors: the Federal Rules of Civil and Criminal Procedure and Evidence, the Rules of Professional Conduct, norms of conduct established by custom or practice within the bar, and expectations framed by the judges before whom the lawyer is appearing. These sources of norms all come together to create what can be broadly called "litigation ethics."

Some of the provisions of the Federal Rules of Civil Procedure embody clear ethical values, such as Rule 11's prescription to bring claims well grounded in fact and law, or a reasonable extension of the same. More often, the Federal Rules and ethics blend when a lawyer takes action that falls between procedural rules but has ethical dimensions. For example,


96. Schauer, supra note 2, at 918. See generally H.L.A. Hart, THE CONCEPT OF LAW 10 (1961); PLAYING BY THE RULES, supra note 7, at 16 (discussing distinction between prescriptive and descriptive rules). While the rules of procedure and evidence, and the Rules of Professional Conduct both have more typical canonical form than norms established by custom, practice, or judicial expectation, these latter sources can be a potentially more significant source of entrenched norms than the formal rules. Id. at 72.

97. It is interesting to note that the phrase "litigation ethics" is rarely used by federal courts in their published opinions. The idea is more often the focus of scholarly critique. See generally Mark C. Suchman, Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation, 67 FORDHAM L. REV. 837, 873 (1998) (litigation ethics in corporate litigation "are alive, but perhaps not well"); Eric E. Jorstad, Litigation Ethics: A Niebuhrian View of the Adversarial System, 99 YALE L.J. 1089 (1990).

Wonderful articles have probed whether lawyers should have different ethical constraints in litigation as opposed to pre-litigation (or "primary conduct") activity. See, e.g., Stephen McG. Bundy & Einer Elhauge, Knowledge About Legal Sanctions, 92 MICH. L. REV. 261 (1993); David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye, Scholer, 66 S. CAL. L. REV. 1145, 1190-91 (1993); William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1085 (1988). The line between litigation and pre-litigation activity is not always clear. Bundy & Elhauge, 92 MICH. L. REV. at 296; Wilkins, 66 S. CAL. L. REV. at 1190-91. This article assumes that standards governing pre-litigation conduct flow from the anticipated norms to be applied in litigation.

courts often turn to the language of ethics to evaluate what a lawyer should do when the lawyer accidentally receives privileged or work product documents from the other side.99

At least the rules of civil and criminal procedure and evidence and the Rules of Professional Conduct begin with a text that can be examined and readily ascertained, even if vague on the topics that most likely raise ethical issues. At this point in the discussion, two important aspects of the rules of procedure/evidence and the rules of conduct should be noted. First, both the rules of procedure/evidence and the rules of conduct have a variety of self-defining terms that “do little to provide ethical or moral guidance where it is most acutely needed.”100 The idea of “unreasonable” burdens and “undue” costs under the Rules of Civil Procedure and the Rules of Professional Conduct, the requirement to act with “reasonable diligence,” to keep the client “reasonably informed,” to not charge an “unreasonable” fee, and the like all are areas that require judgment to define.101

Second, the rules of procedure and rules of conduct derive from quite different perspectives. The Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and the Federal Rules of Evidence derive from a formal rule-making process that is controlled by the federal courts and Congress.102 Although interested parties are invited to participate in the rule-making process, the final rules must be embraced by the judiciary. Ambiguities in the meaning of the rules are clarified by judges who are armed with a sharp understanding of the burdens and benefits of a broad interpretation of the rules.103 The rules of procedure and evidence were created largely by judges for use in litigation.

In contrast, the Rules of Professional Conduct are dominated by lawyers and have been criticized for undue deference to the needs and desires of attorneys.104 As discussed below, the Rules of Professional Conduct were created as the rules for attorney discipline by the bodies authorized to grant or withhold the license to practice law. Federal judges are one step removed from this regulatory process and from a presumably more detailed understanding (than the regulators) of the under-

99. **Federal Law of Attorney Conduct**, supra note 11, at § 809.03[1].
101. **Model Rules of Prof'L Conduct** R. 1.3 (2002) (lawyer should act with reasonable diligence and promptness); R. 1.4 (promptly inform and reasonably consult, keep client reasonably informed); R. 1.5 (prohibits unreasonable fee); R. 1.7 (can represent if lawyer reasonably believes lawyer will able to provide competent and diligent representation if other requirements are met), R. 3.7 (lawyer shall not act as advocate at a trial at which the lawyer is likely to be a necessary witness).
103. Zacharias, supra note 100.
lying justification for each rule. Federal judges, as experts in rules, would
of course expect attorneys to comply with the rules. But we might expect
those judges to have a greater willingness to examine the justification for
the rule if its application in litigation would yield a less than optimum
result. 105

Norms established by custom or practice and judicial expectation are
harder to capture and analyze. Custom or practice within the bar suggests
the existence of legal communities that can shape conduct. The civility
movement captures this effort to raise the level of custom and practice
within the bar. 106 The idea of social norms has received some interesting
attention in legal literature and the work of sociologists is increasingly
influencing our understanding of how social norms affect legal systems. 107
Both norms within the bar and a judge's expectation within the court­
room are obviously shaped by a host of complex influences, including
positive law, Rules of Professional Conduct, legal culture, adversarial
paradigm, and the like. 108

Judges create norms both through their interpretation of the various
rules (procedure and ethics) and through informal actions. Judges do not
typically question their power to use less formal mechanisms to address
attorney conduct issues. Judges report that their first level response to
questionable conduct—if they decide to act at all—is to talk with the law­
yer when an issue arises. 109 It may begin with a simple inquiry, such as
probing the fee arrangement with an attorney or raising a conflict issue.
It may be manifest in pushing counsel on the merits of an issue, or calling
counsel up for a sidebar, or dressing down the lawyer in court. These less
formal mechanisms are not dependent on a specific rule but they can
have powerful norm-setting effects within a courtroom. 110 Because the
judge has enormous discretionary power to shape the case, the lawyers

105. Playing by the Rules, supra note 7, at 73-76 (discussing layering of rules).
108. Playing by the Rules, supra note 7, at 102 ("many of the acts I would now not
think of performing are acts that became unthinkable for me by a process of socialization
that is itself substantially determined by regulative rules"). Cf. Geoffrey P. Miller, Norms
and Interests, 32 Hofstra L. Rev. 657, 673 (2003) ("Competitive norms often do not
represent an idealized product of spontaneous social ordering. They serve the interests of
particular groups.").
109. See, e.g., Claudia Rickert Isom, Professionalism and Litigation Ethics, 28 Stetson L. Rev. 323, 324 (1998) (reporting that at Florida Conference of Circuit Court judges edu­
cational seminar, most common response to videos of unprofessional and unethical con­
duct "was to do nothing or to privately counsel the offending attorney.").
110. See, e.g., Anthony V. Alfieri, Critical Theories and Legal Ethics: Impoverished
Practices, 81 Geo. L.J. 2567, 2591 (1993) (noting "the relative stability of legal discourse,
institutions, and relations.").
have powerful incentive to stay on the good side of the judge. While some lawyers will proceed to defy and annoy the judge,\textsuperscript{111} anecdotal evidence suggests that in the face of clear signals from a judge most lawyers will alter their behavior.

Conspicuously absent from the list of anchors for litigation ethics is substantive law. Over time, some conduct that had previously been conceptualized as an ethical issue has been absorbed into substantive law. For example, twenty years ago there was a serious ethical question about whether prosecutors could threaten criminal charges to obtain an advantage in a civil case. In 1987, the Supreme Court issued an opinion concluding that as a matter of statutory interpretation it was appropriate under 42 U.S.C. section 1983 to condition a dismissal of criminal charges on an agreement that the defendant not pursue a civil claim (known as "release-dismissal" agreements).\textsuperscript{112} Once the federal courts framed the issue in that way, subsequent cases were much less likely to treat the question as an ethical issue because it had become subsumed into the substantive law.\textsuperscript{113} Similarly, some poignant and disturbing acts by defense counsel in criminal cases are not treated as ethics issues, but subsumed in the substantive question of whether the conduct meets the constitutional requirements for ineffective assistance of counsel.\textsuperscript{114} A related phenomenon occurs in the development of the attorney-client privilege. Federal courts are allowed to create a federal common law for privileges under the Federal Rules of Evidence, except where state law

\textsuperscript{111} See, e.g., Interview with Federal District Court Judge:

"I remember prosecuting a case, a very significant drug conspiracy, and with some lawyers from—who are well known drug lawyers. And they were antagonizing the judge to the point where the judge was losing his temper. They would make arguments that were just absurd. The judge was screaming at them and I remember talking to the lawyer at a break and said "Why are you doing this? This isn't going to help, the judge clearly despises you," and he said "when you've been in the business long enough, you'll understand it doesn't matter what the judge thinks it's what my client thinks. And he's happy that I'm giving the judge hell and he's going to tell all his friends that I gave that judge hell and I'm going to get a lot of business out of this." There was a very frank statement that someone made. They won't often be quite so obvious about it. There are times when I think people want a pit-bull, they want a gladiator and there are all too many lawyers who are willing to serve that function for them if the pay is right." [03-FD]


\textsuperscript{113} Model Rules of Prof'l Conduct R. 3.8(a) (2002) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"). The Model Code of Professional Responsibility was more explicit, stating that "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Model Code of Professional Responsibility, DR 7-105(A) (2004).

As described infra § III(A)(3), U.S. Supreme Court cases did influence the ethical and professional vision reflected in the Model Code.

\textsuperscript{114} See Federal Law of Attorney Conduct, supra note 11, at §§ 811.04, 813.01.
provides the rule of decision.115 This provides the textual basis for the development of common law on the attorney-client privilege, which is informed, but not constrained, by the state-articulated duties of confidentiality.116 Federal courts typically ignore the duty of confidentiality when articulating the scope of the attorney-client privilege.117 Once the ethical dimensions of the conduct have been subsumed into the substantive law, the state ethics codes (and the ABA models) become largely irrelevant. Courts typically do not undertake a formal analysis to explain why they are ignoring state ethics rules, but the supremacy clause would dictate that substantive federal law would prevail over countervailing state law.

Any of these four sources of norms for litigation ethics—procedural/evidentiary rules, Rules of Professional Conduct, norms and judicial expectations—can have the label "ethics" attached, although it is most commonly attached to the Rules of Professional Conduct. Ethics is a weighted word. Once the label "unethical" is attached, only the clearest countervailing ethical norm, or unequivocal law or procedural rule, will trump.118 (And we would expect some linguistic hand-wringing about the conflict between law and ethics.) Even if there is a clear and contrary positive law that compels unethical conduct, common morality may push the lawyer to exhibit what William Simon has called "moral pluck" and do what is ethical.119

3. Federal Court Influence on State Ethics Rules: The Dialectic Process

So we have a broad, inchoate inherent power to regulate the conduct of attorneys. The norms applied through inherent powers—"litigation ethics"—emerge from multiple sources. While the Rules of Professional Conduct are very important, they are not the only source of norms. Even if we wanted the Rules of Professional Conduct to take a dominant place in framing litigation ethics, as currently framed, they are not up to the task. Because of the general standards contained in the rules, timing of their implementation, jurisdictional issues, and subtly different needs of the federal courts, the state standards are incapable of functioning with strong constraining force.

115. Fed. R. Evid. 501 (privilege questions in federal court "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" except where state law provides the rule of decision).
116. See Zacharias, supra note 100, at 71-72.
117. These two doctrines are grounded in different policy concerns. I have no quarrels with keeping these concepts separate. My query is why the ethical dimensions of confidentiality largely disappear when attorney client privilege issues come up, rather than serving as an important complementary doctrine.
In terms of hierarchy, the ethics rules (i.e. Rules of Professional Conduct in most states) would be the primary rules to examine when confronted with an issue of litigation ethics that is not otherwise addressed in the Federal Rules of Civil Procedure or other substantive law. To understand why the Rules have limited constraining force in federal court, we need to understand the development of these rules. The history of the efforts to set standards and rules for the legal profession is fairly recent and familiar to many. The 1908 Canons of Ethics was a precatory code drafted by the ABA and not tied to licensing requirements when initially drafted.\textsuperscript{120} The Canons of Ethics were occasionally cited by federal courts to chide lawyers.\textsuperscript{121} In a handful of areas, the Canons appear to have influenced the common law practice in federal courts.\textsuperscript{122}

The ABA's 1969 Model Code of Professional Responsibility was promulgated and sent to the states for incorporation into the states' licensing scheme. The Model Code included many footnote citations to a plethora of ABA opinions along with multiple state and some federal court cases that influenced or explained the policy choices reflected in the Model Code. Federal cases, including Supreme Court cases interpreting constitutional doctrine, had an influence in the development of the Canon 4 duty to preserve the confidences and secrets of a client,\textsuperscript{123} the Canon 5 duty to exercise independent professional judgment on behalf of a client,\textsuperscript{124} the Canon 7 duty to represent a client zealously within the

\textsuperscript{120} CHARLES WOLFRAM, MODERN LEGAL ETHICS § 2.6.2 (West 1986). The Canons were later adopted by some state bar associations as the basis of discipline. \textit{Id.}


\textsuperscript{122} See, \textit{e.g.}, Fitzgerald v. Freeman, 409 F.2d 427, 428 (7th Cir. 1969) (calling them "code of ethics," opinion relies of Canons 13 and 34 to support division of fees).


bounds of the law, duties of candor to the court, and public criticism of judges.

The Model Code was adopted essentially verbatim in most jurisdictions. It was drafted under a comparatively more inclusive process than the Canons of Ethics, but was still subject to criticism as reflecting a narrow vision of lawyering. The Model Code was quickly acknowledged by federal courts, and as Chart II indicates, by the mid-1980s reached its peak of influence as the courts crafted norms of litigation conduct. Although this Code was only a "model," federal courts could safely cite to the model and assume it reflected state versions (to the extent the court thought about that concern at all). The ABA Model Code became a handy reference point for the courts. The ABA proudly features its influence in this area.

The Model Code's flaws were many, not least of which was the fact that many critical issues were not addressed by the Model Code. One significant example was the conflict of interest obligation owed to former clients. Because the Model Code was silent on this issue, the federal courts who addressed former client conflicts wrote largely on a blank slate. Drawing on analytical constructs developed before the Model Code of Professional Responsibility was even adopted by the ABA in 1969, the federal courts continued to do what they had done in the past when confronted with issues that needed resolution. They created a common law,


126. Precision Inst. Mfg. Co. v. Auto. Maint. Mach. Co. 324 U.S. 806 (1945) (DR 7-102(B)(2) on duty to promptly reveal fraud on a tribunal committed by person other than the client to the tribunal); United States v. Pape, 144 F.2d 778, 782 (2d Cir. 1944); Colton v. United States, 306 F.2d 633 (2d Cir. 1962) (on DR 7-106(B)(2) disclosure of identity of client).


128. Wolfram, supra note 120, at § 2.6.2 n.21 (noting that the ABA Committee largely copied from 1887 Code of Ethics of the Alabama State Bar Association); see also Wolfram, supra note 118, at § 2.6.3 (describing drafting and adoption process for Model Code).

129. The ABA has featured its role in crafting the lawyer Codes and Rules. See ABA Center for Professional Responsibility, at http://www.abanet.org/cpr/home.html (accessed August 3, 2004) ("Center has provided national leadership and vision in developing and interpreting standards and scholarly resources in legal ethics, professional regulation, professionalism and client protection mechanisms.").

130. Wolfram, supra note 120, at § 2.6.4 (describing critiques of the 1969 Code).
faming the issues largely unconstrained by formal rules. Similarly, the
Model Code failed to develop in detail the particular duties of govern­
ment attorneys, a subject which had been left to the courts to develop.

In other words, the Model Code did not arrive on the scene in 1969 as
an intact body of rules applied to the federal courts, but rather as stan­
dards and rules reflecting the legal culture and informed by the federal
court’s common law and constitutional decision-making. The gaps in the
Model Code, its express application to the disciplinary process (a subject
discussed in greater detail below) and its often broad pronouncements
made it function in the federal courts largely as a body of advisory
standards.

The ABA soon went back to the drawing board and produced and
adopted the Model Rules of Professional Conduct in 1983. The Model
Rules did not contain a footnote trail to indicate directly what influenced
the various rules. We know from the content of the rules and the slender

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131. See T.C. Theatre Corp., 113 F. Supp. at 268-69. Although T.C. Theatre was issued
long before the Model Code of Professional Responsibility, the Model Code did not give
specific attention to the duties owed to former clients. As a result, the federal common law
developed from T.C. Theatre and its progeny was highly influential. See MODEL RULES OF
PROF’L RESPONSIBILITY R. 1.9 (1983) (adopting the substantial relationship test of T.C.
Theatre).

legislative history that many federal court decisions were highly influential in the drafting of the Model Rules. For example, the federal cases setting out the "substantial relationship test" as the analytical construct for evaluating duties to former clients appears to be the basis for the substantial relationship test of Model Rule 1.9.133 Similarly, federal cases involving special conflicts of interest for former and current government officers and employees appear to have been highly influential in the development of Model Rule 1.11, including the authorization of screening.134 These cases in turn were often influenced by ABA Opinions.135 The point is not that we can tie down a dispositive influence, but that a dialectic process occurred where the multiple institutional actors had varying degrees of influence upon each other.

By the mid-1980s, the federal courts were now well into the habit of citing the "Model" version of the ABA promulgations on attorney conduct. Although the Model Rules were sent to the states, the deference to the ABA—and consequently the perceived unity of vision—had begun to fray. States were much more likely to modify the Model Rules than the previous Model Code, with 44 states modifying the Model Rules in some significant respect before adopting them.136 It appears that the longer states waited to revise their older code and move to a Model Rules type of system, the more they would revise the ABA version.137

But citation habits had been set. Federal courts often cited to the model version, using the model as a guide where relevant, when developing the court's common law doctrines. The federal courts often failed to recognize the increasing divergence between the state and model versions of the attorney conduct rules.

Meanwhile, the proliferation of local rules meant that somewhere in this time frame the federal district courts were likely adopting a local rule that identified the rules they would apply when evaluating attorney conduct. The local court rules that were drafted earlier are more likely to refer directly to the Model Code or Model Rules.138 Later rules might adopt the rules of the state in which the court sits—but may not be clear that they are adopting "dynamic conformity" to capture revisions in the state rules that occur after adoption of the local rule.139 The federal

133. Id.
134. See, e.g., Gen. Motors Corp. v. New York City, 501 F.2d 639, 650-52 (2d Cir. 1974), cited in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at 91:4007; Armstrong v. McAlpin, 625 F.2d 433, 445 (2d Cir. 1980); Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977); LaSalle Nat'l Bank v. Lake County, 703 F.2d 252, 255-56 (7th Cir. 1983).
135. See, e.g., Gen. Motors, 501 F.2d at 648-49 (quoting ABA Comm. On Prof'l Ethics and Grievances, Formal op. 37 (1931)).
137. See Kaufman, supra note 12, at 137.
courts did not have any process of periodic review and revision of any local rules. Consequently, for some courts the local rules became outdated after the Model Rules were issued. But since the local rules are so easily ignored, the situation was a tolerable anachronism. 140

At the same time there was a proliferation of local rules, federal courts also experienced a sharp increase in the other procedural tools to regulate attorney conduct. 141 The 1983 and 1993 revisions of Rule 11 gave federal courts clearer power to impose sanctions for frivolous litigation. 142 This led to thousands of published federal court opinions on what various courts believed constituted a position well grounded in fact or law (or a reasonable extension of law), giving sharper articulation of an issue that had rarely been addressed by state regulatory bodies. 143 The trend in amendments to the Federal Rules of Civil Procedure is to grant federal judges greater power to regulate attorney conduct under Rules 16 (settlement), 26(g)(3) (discovery) and 37 (compliance with court orders). The same trend of expanded procedural rules appears in both the court of appeals and the Supreme Court. 144 Other statutory bases for imposing sanctions encourage judges to take an active role in regulating conduct. 145 With this broad arsenal of sanctions available, ethics and professional conduct rules serve largely to supplement gaps in the procedural rules and to provide ideas and justifications for the court's imposition of its catch-all power: the inherent power doctrine.

Appeals except as otherwise provided by specific Rules of this Court) by attorneys subject to these Rules shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship"); Local Rules of U.S.D. Ct. Ma. (including amendments through Jan. 2, 2001), 83.6(4)(b) (violation of ethical requirements and rules adopted by the Supreme Judicial Court of Massachusetts "as they may be amended from time to time by said court" constitute misconduct).


144. See Fed. R. App. P. 38 (authorizing award of costs, including attorneys fees, for taking frivolous appeal); Fed. R. App. P. 46(b), (c) (governing suspension, disbarment, or other discipline of member of bar); S. Ct. R. 8 (governing disbarment or other discipline of member of bar); S. Ct. R. 42.2 (authorizing sanctions for frivolous appeal).

4. The Incompleteness of State Rules and the Remedy-Driven Federal Courts

Habit was not the only impediment to adopting the state versions of the Model Code or Model Rules in federal court practice. Even the somewhat more tightly drawn Model Rules failed to address many specific problems that arise in federal court practice. For example, the Model Rules do not tell lawyers or courts what professional relationships trigger a duty to avoid conflicts of interest, whether a disqualified lawyer can turn over predisqualification work-product, ethical dimensions of how to behave when the opposing side accidentally sends confidential documents, whether prosecutors have greater latitude to make contact with represented persons, and a host of other large and small questions.

The Model Rules also set out provisions intended to be applied in a wide range of litigation and non-litigation contexts. As a result, the underlying rules require contextual definition. For example, the most commonly-litigated ethics issue in federal court practice is conflict of interest. The text of Model Rule 1.7(a) states that a lawyer may not represent the client if “the representation of that client will be directly adverse to another client” or there is a significant risk that the representation “may be materially limited by the lawyer’s responsibilities to another client, or to a third person, or by the lawyer’s own interests.” While the comments to the rule give insights into what these terms mean, they understandably are never formally defined. Federal courts crafted standards under the Model Code based on common factual situations, such as suing one’s own client, and have continued to rely on this jurisprudence to give meaning to ideas such as “directly adverse” and “materially limited” under the Rules. Federal courts have had to consider the special problem of simultaneous representation that occurs from client mergers or acquisitions and from corporate affiliates and subsidiaries. The courts develop their own jurisprudence to address these more complex factual scenarios.

146. In other words, the divergence between the Model Rules and state versions was irrelevant in many circumstances because so many of the ethical issues that arise in federal court practice are not clearly addressed in the Model Rules or Model Code.
148. Id. at § 809.03.
149. Id. at § 810.03.
These are problems that require particularistic decision-making, with the Rules of Professional Conduct giving the appearance of rules but functionally serving as less-constraining standards.\textsuperscript{155}

In applying rules of conduct, the federal courts seldom struggle with the intent behind the rule. That analysis would require a focus on the drafter. Instead, courts typically focus on the value that the rule supports.\textsuperscript{156} By shifting the focus from intent, which is more akin to fact-finding, to value exploration, the analytical process allows the decision-maker’s own assessment of the values to play a greater role.

More importantly, the Model Rules and Model Code (and the state versions) are expressly silent about remedies and sanctions. Litigation is largely a remedy-driven system, and attorney conduct issues are particularly so. In most cases, the claimed violation of ethical obligations is raised by opposing counsel, who is motivated to do so not just by some abstract desire to improve the legal profession, but rather to get a concrete remedy, such as disqualification of opposing counsel, limitation or exclusion of evidence, an order of production, reimbursement of fees, civil or criminal contempt, and the like.\textsuperscript{157} The moving lawyer’s motivation might be a desire to expose errant conduct to the court to set a tone for the litigation. It is no coincidence that the three most litigated ethical issues in federal court practice—conflicts of interest, contact with represented persons, and advocate-witness concerns—all offer tactical advantages to the moving party if the court awards the requested remedy.\textsuperscript{158}

The judges are obviously concerned about their institutional role in crafting a remedy. Since attorney conduct issues are largely derivative in court practice, secondary to the fair resolution of the litigants’ claims, the federal courts appear reluctant to address attorney conduct issues unless they will have a consequence in the case at hand.\textsuperscript{159} A detailed analysis of the reported decisions indicates that federal judges, like their state counterparts, are concerned with the integrity of the judicial process and the efficiency and fairness in the proceeding before the court. Concern for the integrity of the legal profession as an independent concern, at least as reflected in the reported decisions, plays a less dominant role.\textsuperscript{160}

Because of the remedy-driven nature of the courts, and the federal court’s reluctance to take on a dominant role in maintaining the integrity of the legal profession, the federal judges are rightly concerned that they

\begin{footnotes}
\item[155] Playing by the Rules, supra note 7, at 77-78.
\item[156] Id. at 95 (discussing the substantive justification for a rule).
\item[157] See generally Federal Law of Attorney Conduct, supra note 11, at § 808.02[2] (describing remedies for conflicts of interest); § 809.06 (describing remedies given by federal courts for unethical conduct in civil discovery).
\item[160] Id.
\end{footnotes}
do not want ethics issues to be used for strategic advantage. The inevi-
tability of strategic use of ethical rules has been well noted elsewhere. And the line between fairly raising an issue, and undue strategic advantage, is very opaque. Some courts have asserted that lawyers have a duty to report ethical issues, such as conflict of interest, to the court. But other courts are clearly concerned about the use of misconduct charges for strategic advantage. In an effort to avoid having ethics used as a litigation tactic, federal courts may look to the timing of the motion to infer undue strategic motives, to the amount of pre-trial preparation or to the relative wealth of the parties to infer that the motion is to harass or increase expenses to the opposing side. Courts may also examine the circumstances to determine if the motion is designed to delay the proceeding or postpone judgment. In the end, a court's evaluation requires a delicate balancing of competing equities, including a desire not to lightly deprive a litigant of his or her counsel of choice. At this point, a court is balancing a host of competing concerns that are often not reflected in the text of any state or model professional conduct rule, but are part of the mosaic of common law interpretation.

Not only are both the Model Code and Model Rules silent on sanctions, but they ostensibly sought to limit their application to the regulatory context. The Preamble to the 1983 Model Rules expressly states that the “rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.” During the editing and


162. See Wilkins, supra note 6.


165. Research Corp., 936 F. Supp. at 701, 703 (“Disqualification can result in increased expenses. . . .”); SWS Fin, Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1400 (N.D. Ill. 1992) (“The sanction of disqualification foists substantial costs upon innocent third parties.”); Kevlik v. Goldstein, 724 F.2d 844, 848 (1st Cir. 1984) (“We are aware that disqualification motions can be tactical in nature, designed to harass opposing counsel.”).

166. See, e.g., Research Corp., 936 F. Supp. at 701 (Disqualification “can result in increased expenses, delay in resolution of the proceedings and deprivation of choice of counsel.”); Parkinson v. Phonex Corp., 857 F. Supp. 1474, 1476 (D. Utah 1994) (Wholesale filing of motions would result in “needless disruption and delay of litigation, thereby impairing the efficient administration of justice.”) (citing Armstrong v. McAlpin, 625 F.2d 433, 438 (2d Cir. 1980)).

167. See, e.g., Kevlik, 724 F.2d at 848 (strategic concerns not dispositive in evaluating motion to disqualify).

public comment process for the 1983 Rules, the “Scope” discussion was limited at the suggestion of the New York State Bar Association to include a sentence that “nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.”

Whatever the model version might say, the ABA could not control how those rules would be used. If the ABA puts its name and imprimatur behind the underlying standard, it is hard to justify why that standard should not be used, where appropriate, in court-based review of conduct, malpractice and the like. Once adopted by the state, the weight of the rules would be heavier. Without much discussion, state supreme courts operate as if their norms, and their leadership, should be the dominant voice in legal ethics. The Conference of Chief Justices has developed a National Action Plan on Lawyer Conduct and Professionalism, and it is clear that they identify their role as preeminent. The Conference of Chief Justices undertook the national action plan to create “a strong, coordinated effort by state supreme courts to enhance their oversight of the profession.”

The state bars (and the ABA) see themselves as a vital national leader of efforts to articulate norms of conduct. And the Model Rules (and the state revisions) are the preeminent articulation of those norms.

It is not surprising that the ABA revised the Scope section in the 2002 revisions to the Model Rules, recognizing that these rules, while not addressing sanctions in related contexts like litigation, nonetheless might be relevant to that inquiry. The Scope section now includes a statement that

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172. 172. The dominant ABA role is not ordained from on high and reasonable minds have questioned this role. When Prof. Andrew Kaufman suggested that the ABA get out of the business of establishing rules for attorney conduct, some of the attendees of the 27th ABA National Conference on Professional Responsibility were politely, but clearly, skeptical of his position. Kaufman, *supra* note 75, at 4 (giving speech upon receipt of the Michael J. Franck Award). For many, the ABA’s role in articulating rules of conduct, and its showcase ABA Center for Professional Responsibility, are the shining star in the ABA’s crown. “Since 1978, the Center has provided national leadership and vision in developing and interpreting standards and scholarly resources in legal ethics, professional regulation, professionalism and client protection mechanisms. Its devotion to assuring the highest standards of conduct by lawyers and judges and to enhancing the profession’s role serving and protecting the public interest is underscored by its vigilance to meet the challenges of an evolving society.” ABA Center for Prof’l Responsibility, Welcome Message, at http://www. abanet.org/cpr/home.html (Aug. 2, 2002).
despite the caveats about the limits of the Rules, "[n]evertheless, since the Rules 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." 173 While hardly a claim that the Rules should be the basis for discipline in federal courts, it at least acknowledges that the Rules have relevance in other contexts. The ABA has wisely made these adjustments, since few really believed that the ABA was disclaiming relevance of their rules in non-disciplinary contexts. Yet, states have no power to demand that federal courts be the enforcer of legal ethics when application of the rules (i.e. remedy) will impede what the federal judges perceive as the interests of the federal courts. 174

The incompleteness and arguably limited scope of the Model Rules was one of the reasons the American Law Institute ("ALI") chose to devote fifteen years toward drafting a Restatement of the Law Governing Lawyers. 175 The ALI intended the Restatement to address the full range of conduct issues, including formation of the lawyer-client relationship, the duty of confidentiality, work product issues, conflicts of interest, fiduciary and agency obligations, fees and obligations to non-clients. 176 In terms of relative influence, however, the Restatement of the Law Governing Lawyers has not been embraced to fill the gap. As Chart III indicates, the federal courts cite the restatement at a significantly lower rate than the courts cite the state or model versions of the Rules of Professional Conduct. The restatement has not yet become a significant competitor with, or source to complement, the Rules of Professional Conduct. 177 This may

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173. The revised provision states:
Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules 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. (Emphasis added.)


174. See generally WOLFRAM, supra note 118, at § 2.6 (analyzing judicial application of lawyer codes).

175. RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS xxi-xxii (2000) [hereinafter Restatement]. See generally Ted Schneyer, The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?, 46 OKLA. L. REV. 25, 26 (1993) (While "the law of lawyering is in disarray, it does not necessarily follow that ALI intervention is a good idea.").


177. See Schneyer, supra note 175, at 27 (expressing concern about "the potential rivalry between restatement and ethics codes for the attention of judges and other decision makers.").
occur because more federal courts give at least nodding recognition to the local rules, which typically direct them to the state rules of conduct. It may also be because some provisions of the Restatement either conflict with the prevailing rules or depart from existing case law.\textsuperscript{178} Whatever the reason, it is fair to conclude that the Restatement of the Law Governing Lawyers has had relatively little influence in federal court practice. This suggests that the Rules of Professional Conduct (both state versions and the model) are the most important prescriptive generalizations to which the federal courts give initial attention when addressing attorney conduct issues.\textsuperscript{179}

\textbf{Chart III}

\textbf{Federal Court Citation to Model Rules, State Rules, Model Code \& Restatement 1980-2003}\textsuperscript{180}

\begin{itemize}
\item [\textbullet] Citation to Model Code of Professional Responsibility
\item [\textbullet] Citation to State Rules of Professional Conduct
\item [\textbullet] Citation to Model Rules of Professional Conduct
\item [\textbullet] Citation to Restatement Third of Law Governing Lawyers
\end{itemize}


\textsuperscript{179} \textit{Playing By The Rules}, supra note 7, at 77 (discussing decision-making by entrenched generalization).

\textsuperscript{180} The citation pattern for the Model Rules of Professional Conduct and state versions of the Rules of Professional Conduct were prepared by running a search for cases that cited “rules of professional conduct” and a search for cases that cited “model rules of professional conduct” and then subtracting the lower number of cases citing to “model rules” from those citing to “rules” generally. A review of the 328 cases from 1989 and 1996 revealed only one case that did not involve the ABA code. (For those who are curious, there is a pharmacist’s Rules of Professional Conduct.) It was impossible to duplicate this process in order to determine how many times the court cited to state codes of professional responsibility because a search for “code of professional responsibility” brought up not just cases that cited to the model code and the state codes but also various business and other codes of professional responsibility.
5. The Federal and State Interests and Institutional Competence

We need to add into the mix some additional dimensions of the state and federal courts' interests in regulating attorney conduct. While there appears to be a dominant national legal culture in the United States, we still have state-based regulation. We could describe that state-based regulation as the archaic detritus of an older system of federalism.\(^{181}\) Our preference for state-based regulation more likely reflects the notion that fine-tuning at the state and local level is an important step in thoughtful and effective regulation.\(^{182}\)

As noted above, the Conference of Chief Justices has continuously promoted its vision of the strong, dominant state role in the regulation of attorneys. A full development of the value of state-based regulation of attorneys is beyond the scope of this article. It is safe to conclude, however, that the control of the legal profession will not be wrested away from the state supreme courts without significant trauma.

The federal courts' selective involvement in establishing norms of conduct suggests two core concerns: efficiency and integrity of the judicial process. The judge's dominant task is to resolve the dispute before him or her. Faced with burgeoning dockets and increasingly complex cases, judges inevitably engage in time triage.\(^{183}\) Called "task interference" in the language of psychology, judges allocate less time to managing attorney conduct.\(^{184}\) The federal judges appear to embrace what can be called a minimal encroachment approach to attorney regulation. Federal judges typically engage in that amount of regulation minimally necessary to achieve their goal of efficient and fair resolution of the case at hand. Some judges have a more expansive view of their role, but that does not appear to be the dominant view.

Sometimes federal judges will enforce an ethical norm for the benefit of the judicial process in general, even if the benefit does not directly flow to the case at hand. For example, courts—rather than litigants—are likely to raise a question of whether a lawyer has failed to cite directly adverse authority in the controlling jurisdiction.\(^{185}\) This is a fairly precise rule, yet it has been addressed in over 50 published federal court opinions.\(^{186}\) In most cases, the court raises the question itself, primarily because the duty arises when counsel has failed through due diligence to discover authority helpful to the opposing counsel's case. (Who wants to

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\(^{181}\) As Prof. Benjamin H. Barton has noted, it wasn't until the late 19th century that state supreme courts established themselves as having inherent judicial authority to regulate the practice of law. See Barton, supra note 3, at 1173.

\(^{182}\) The principle of subsidiarity captures this concept.

\(^{183}\) See generally Tobias, supra note 10.


\(^{185}\) Model Rules of Prof'L Conduct, R. 3.3(a)(2) (2002) ("A lawyer shall not . . . knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

\(^{186}\) See Federal Law of Attorney Conduct, supra note 11, at § 811.02 and cases cited therein.
go before a court and say “sanction the other side for not correcting my sloppy or nonexistent research . . . .”). By the time the court raises the issue, the precedent has been discovered (usually by the court’s own initiative), so any dilution or taint on the trial process has been reduced or eliminated. But courts appear willing to sanction an attorney, at least through criticism in the written opinion, in order to send a signal both to the attorney involved and others. Fact-finding is de minimus because the written briefs offer the requisite proof. More serious sanctions for intentional violation of the obligation to cite directly contrary authority are typically limited to cases in which the lawyer (or the lawyer’s office) was involved in the development of the prior precedent, allowing a strong inference of knowledge of the precedent.187

The federal courts’ response to the failure to cite contrary authority reflects both a strong belief in the integrity of the judicial process and one example of the obligation of lawyers as officers of the court. It makes sense that federal judges want lawyers to adhere to this ethical precept because it increases the likelihood of an outcome consistent with the law.

A second federal interest would likely be procedural consistency. As explained above, even consistent rules do not necessarily lead to consistent outcomes.188 The most common way to get greater consistency is through greater clarity and rigidity in the rules and a reduction of discretion. And as discussed above, attorney conduct issues lend themselves to greater, not lesser, discretion.

B. THE INTERPRETIVE PROCESS AND JUDICIAL DISCRETION

1. Primary Discretion on Rules

We are left with the fact that the translation of state rules of conduct into federal court practice requires judicial discretion. Judicial discretion is a vast and complex topic.189 Discretion has been the dominant norm in judicial control of litigation. For example, judicial discretion in Rule 11 was not “a mere by-product of the drafting process, but rather was a favored means to achieve procedural goals.”190 Similarly, judicial discretion has been a central feature of the pre-trial reforms.191

The application of a rule requires multiple steps that implicate discretion: an analysis of what rule (or standard) applies, fact-finding to see if

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187. See, e.g., Velazquez v. Figueroa Gomez, 783 F. Supp. 31, 35 (D.P.R. 1991) (permitting defense attorneys given 20 days to explain why they did not cite adverse precedent that lawyers had litigated); Jorgenson v. County of Volusia, 625 F. Supp. 1543, 1547 (D. Fla. 1986) (analyzing DR 7-102 and Model Rule 3.3(a)(2), court imposed $500 fine; “The Court finds it reprehensible that plaintiffs’ counsel . . . omitted Bellanca and Del Percio from the supporting memorandum of law, especially, when he personally represented respondents in Del Percio.”).

188. See infra Part III.

189. See generally Ronald Dworkin, TAKING RIGHTS SERIOUSLY 31-33 (1977) (discussing strong and weak discretion); Fletcher, supra note 6.

190. Armour, supra note 6, at 514.

191. See Resnick, supra note 140, at 195-214 (discussing the durability of discretion at the expense of uniformity).
the circumstances of the case are covered by the rule, and a decision about remedies. The first stage of determining what rule or standard applies has been the subject of formal debate over the past ten years and is discussed at length above. Judges in some circumstances have "primary discretion," the ability to choose the rules or norms that will apply to resolve the issue at hand. Primary discretion takes place when the state version of the rules of responsibility does not clearly address the issue at hand. In those cases, the rules themselves offer relatively less guidance and are not sufficiently clear to significantly constrain the lawyer's or the judge's judgments. The judge then turns to other norms or standards to resolve the issue.

Even if a court looks to a particular Rule of Conduct, a rule does not, and cannot, determine its own weight. With Rules of Professional Conduct, this plays out in two forms. First, precedent plays some role in interpreting the rules of conduct, but for many issues the court simply offers its own understanding of the issue without significantly delving into precedent, or relies on federal precedent. The remedy stage offers the second example of the indeterminate weight of the ethics rules. As discussed above, the rules themselves give no remedy, and it is the remedy that largely determines the weight of the rule. For remedy purposes, other values such as efficiency may have greater weight.

2. Discretion Through Fact-Finding Process

Discretion also operates through the judge's fact-finding power. Fact-finding is a huge burden. Judges have at least two decision-points in the factual interpretation stage. The judge can simply refuse to acknowledge the factual issue in any formal fashion. Because attorney conduct issues in litigation are usually ancillary to the merits of the underlying suit, cognitive theory would predict that judges would allocate their time to the primary task of deciding cases. This "parsimonious strategy" to

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192. See Alexander & Sherwin, supra note 64, at 1192. Alexander and Sherwin use the provocative language of rules "lying" to emphasize the ways in which rules do not constrain in ways that are implied in the text. See also Playing by the Rules, supra note 7, at 8 ("The strength of a rule resides not so much in a rule's logical status or linguistic meaning as in the conditions surrounding its applicability, acceptance, and enforcement."). As Prof. Schauer notes, the distinction between the factual predicate and the consequent (what happens if the factual predicate is present) is not always sharp. Id. at 23.


194. See generally Alexander & Sherwin, supra note 64, at 1217.

195. Schauer, supra note 2, at 919-20 ("Whether a rule that declares itself nonoverridable or absolute will be treated as such by its addressees, appliers, or interpreters is an empirical fact nondeterminable by the rule itself, regardless of the language within the rule.").

196. See John Bell, Discretionary Decision-Making: A Jurisprudential View, in The Uses of Discretion 89, 102 (Keith Hawkins, ed. 1992) ("By plotting all the constraints, legal and otherwise, within the institutional context, we come to understand the full scope of the autonomy which the individual possesses.").

197. Hirsch, supra note 181, at 605 ("When courts or other lawmaking bodies have no choice but to deal with multiple issues simultaneously, a theory of cognitive jurisprudence again anticipates that they will apply themselves unevenly, the lion's share of attention..."
simply ignore the conduct is a "decision by default, a kind of heuristic."198 We certainly have reason to think that simply ignoring the issue is a fairly common first level response by judges.199 Lawyers have noted this phenomenon and have complained about judges who ignore perceived misconduct.200

Alternatively, a judge can acknowledge the issue—essentially tell the lawyers to cut it out—but not engage in the fact-finding necessary to establish an ethics violation. Many ethical issues in litigation turn on "fact finding about motive, which is the hardest kind of fact-finding to do."201 Finding facts is not a mechanical process; it involves identification and allocation of values, all of which take time and energy.202 As a result, there is a tendency to simply tell the lawyers to stop the conduct, but not engage in fact-finding necessary to support a sanction.

3. Discretion to Comment

Many judges do delve into ethical issues that are raised in the courtroom and take the time to address the issues in reported decisions. Perhaps the issue was unavoidable, dispositive, involved compelling or egregious facts, raised roles issues of importance to the judge or drew an emotional response from the judge.203 A judge's personal experience with the particular ethical issue may also help explain how the judge responded to primary tasks.


199. See Isom, supra note 109.


201. When asked what his reaction would be when an ethical issue arose, one state court judge responded:

There is no good way to describe what my reaction would be. My first reaction would always be frustration. And the frustration was two-fold. First, and primarily I must say, was not an ethical, was not a frustration about ethics, it was a frustration about the activity of the lawyer creating some kind of a side issue that I now had to spend time to do fact finding on, or at least deal with in some fashion, typically in a form of fact finding, because these typically were always fact-driven issues. "Did you disclose this stuff, didn't you disclose this. If you didn't disclose, why didn't you." It was a fact bound issue. So my first response was, damn it, there is a fact issue here that now is a side issue that I have to decide. I've got a million things on my plate; I don't need to deal with this. And I frankly don't want to because there is no intellectual content to it. It's all just pure fact finding and not only fact finding about activity, but fact finding about motive which is the hardest kind of fact-finding to do. [02-SB].

202. See Rowland & Carp, supra note 197, at 3.

acts to the issue.\textsuperscript{204} We can only speculate.

We know that the written trail left by reported decisions is an incomplete picture. As explored in previous work,\textsuperscript{205} factors such as efficiency\textsuperscript{206} judicial collegiality and reputation as a fair-minded judge,\textsuperscript{207} concern for the reputation of the lawyer\textsuperscript{208} or the dignity\textsuperscript{209} of the lawyer might all push a judge to elect not to comment on attorney conduct. Some judges presumably have greater tolerance for the adversarial obligation of lawyers.\textsuperscript{210} The writing process itself might cause the judge's

\textsuperscript{204} This is an important empirical question that needs to be studied. Theory would suggest that a judge’s personal experience shapes a judge’s willingness to address an issue. See H.W. Perry, Deciding to Decide 260-63 (1991); Hirsch, supra note 87, at 1362.

\textsuperscript{205} See generally McMorrow, Gardina & Ricciardone, supra note 159.

\textsuperscript{206} See generally Herbert Jacob, The Governance of Trial Judges, 31 L. & Soc’y Rev. 3 (1997); Zacharias & Green, supra note 62, at 1360 (“Efficient allocation of judicial resources militates in favor of district courts confining themselves to adjudicating questions of professional misconduct that can be resolved without resort to an independent fact-finding mechanism.”).

\textsuperscript{207} See generally Harry T. Edwards, The Effects of Collegiality on Judicial Decision Making, 151 U. Pa. L. Rev. 1639 (2003) (summarizing theories of influences on judicial decision making); In re Voorhees, 739 S.W.2d 178, 187 (Mo. 1987) (without Canon 3B(3) judges may be tempted to avoid “rocking the boat,” but “not every failure to inform about well-publicized misbehavior of a fellow judge” is misconduct); Leslie W. Abramson, The Judge’s Ethical Duty to Report Misconduct By Other Judges and Lawyers and Its Effect On Judicial Independence, 25 Hofstra L. Rev. 751, 779-80 (1997) (“Understandably, what judge would want the reputation of a snitch?”). Reputation is a multifaceted subject, a full exploration of which is well beyond the scope of this article. Reputation concerns may include a desire to avoid controversy if the judge is subject to reelection, a desire for influence in the legal academy, a desire for influence in the local or state bar, and the like. Reputation may have the more genial goal of serving as confirmation that the judge is actually a fair-minded and fair-acting arbiter.

\textsuperscript{208} Judges may agree with Justice Stevens’ factual assessment that “[d]espite the changes that have taken place at the bar since I left the active practice 20 years ago, I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation.” Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 413 (1990) (concurring in part and dissenting in part). See also Shapiro, supra note 152, at 425 (describing situation in which lawyer asked for conference concerning a conflict issue; judges’ response to opposing counsel “You guys have got to be crazy. You’re going to have a terrible opinion against you.” The attorneys withdrew.).

As one federal district court judge described, “I think it’s potentially a career-ruining decision when a judge refers something to a professional conduct committee or institutes disciplinary procedures or even names a lawyer in an opinion in which the lawyer is cited for a potential ethical violation. So I tend to, to do it very rarely and only if I felt the violation was most serious and intentional rather than inadvertent that I would likely consider it an ethical violation.” [03-FD].

\textsuperscript{209} One federal district court judge stated that the judge would never publicly embarrass a lawyer. To publicly embarrass a lawyer shows “a lack of respect. Respect has to be mutual.” (08-FD).

\textsuperscript{210} Two federal judges interviewed about their views of attorney conduct reflect the range of tolerance. One federal district court judge stated that “there are circumstances where your duty to your client, it seems to me, requires that you approach the border of the box—requires it.” [04-FD].

A federal appeals court judge had a much more critical assessment of the adversarial paradigm. After describing the problem as a “disturbing level of distortion of law and fact, misdescribing cases, omissions, outright misdescription. It’s getting worse at a rate of about 5% per year,” the judge went on to criticize judges who are too sympathetic of the adversarial pressures. “[S]ome of my colleagues resist even criticizing much less imposing sanctions under R. 38 of the App Rules. Their argument is that the lawyer is supposed to zealously represent the client—if they come close to the zone or a little over, well . . . . Or
Appellate judges may need to garner the votes of the other judges on the panel. While this subject requires much more detailed examination and empirical research, for our purposes it is sufficient to note that judges have ample reasons not to comment on a lawyer’s conduct in written opinions.

4. Secondary Discretion Through Limited Review

In the area of attorney conduct, federal judges also have what has been termed secondary discretion: the judge’s decisions are accorded a presumption of correctness that will be overturned only if the discretion has been abused. Many attorney conduct issues are fact bound and thereby shielded from significant appellate review. This secondary discretion is particularly strong because appeals courts rarely have an opportunity to apply even this abuse of discretion standard because of delays in appellate review. In the 1980s, the U.S. Supreme Court issued a series of opinions holding that motions to disqualify are not immediately appealable. Since 1985, attorney disqualification issues have received appellate review only in the rare circumstances in which a writ of mandamus has been issued or the issue has been preserved and reviewed along with the appeal on the merits.

Limiting appellate review to mandamus or those cases that are resolved on the merits and then appealed had two interesting effects. First, for conflict of interest and advocate-witness issues, appellate analysis slowed to a trickle, forcing current courts to refer over and over again to older decisions as they analyzed whether disqualification was appropriate. Many of these commonly cited appellate decisions reflect the state of legal ethics in the 1970s and early 1980s, using the language of the Model Code. The result is what Professor Ronald Rotunda has called the “death
of precedent" in conflicts analysis in federal courts.216

This severely limited appellate review also arguably skews the conflicts analysis when the rare case does go up on appeal. By the time the case is decided on the merits and appealed, a successful motion to disqualify is often old news. It takes the unusual case in which the losing party also lost the motion to disqualify earlier in the lawsuit.217 Those rare cases that preserve and pursue the disqualification of counsel have a huge burden. When reviewing the case, appellate courts appear very reluctant to overturn the motion to disqualify, presumably because this raises very challenging remedy issues. If the motion to disqualify were erroneously granted to the party that lost the litigation below, the make-whole remedy would be to reverse the decision and order a new trial with the disqualified counsel. But absent indication that the merits have been skewed by the change in counsel, courts would be imposing huge transaction costs by ordering a new trial because of a collateral, seemingly procedural issue that did not affect the merits.218 The "affirmance effect"—the fact that 80% of all federal civil cases, both published and unpublished, are affirmed—gives the original court decision to disqualify (or not) powerful momentum.219

Finally, if the underlying merits of the case have been resolved, appeals courts have been reluctant to allow attorneys to appeal from published criticism of the lawyer unless there is a formal sanction imposed.220 The net effect, again, is to give the trial judge enormous, largely unreviewable, discretion.

5. Natural Resistance to Limiting Discretion

Judges generally resist efforts to limit their discretion—particularly in

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217. As a practical matter, if a motion to disqualify is granted, then substitute counsel is now in control. Even if substitute counsel lost on the merits, it is unlikely that they would claim that the outcome would have been different with substitute—better—counsel. See SHAPIRO, supra note 152, at 420-28 (describing phenomenon of and consequences that flow from filing a motion to disqualify).
218. Collateral damage from motions to disqualify is huge for the losing side as well. See Rotunda, supra note 214, at 272 ("The threat of disqualification can impose substantial costs on a law firm and the client it represents. It protracts the litigation and increases its cost, exerts extra pressure on the client to settle the matter rather than defend a disqualification motion or find new legal counsel, and if the lawyers are disqualified, burdens the client to find and prepare a new law firm to represent it.").
220. In many jurisdictions, the criticism of an attorney in a written opinion is not appealable once the underlying merits have been resolved. See, e.g., In re Williams, 156 F.3d 86, 92 (1st Cir. 1998) ("A jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction" and consequently are not appealable.); Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992) ("an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects."). But see Walker v. City of Mesquite, 129 F.3d 831, 832 (5th Cir. 1997) (attorney may appeal a public reprimand even when no monetary sanctions have been imposed).
this area of managing the cases that come before them.\textsuperscript{221} The very raison d'\'etre of federal judges is to exercise discretion. The only way to stop them from exercising their inherent function is to strip them of the discretionary power.

The experience under Rule 11 is illustrative. Rule 11 prohibits filing a pleading, motion or other paper that is filed for an improper purpose or lacks a factual or legal foundation.\textsuperscript{222} In 1983, Rule 11 was substantially strengthened to not just empower, but to command federal judges to sanction.\textsuperscript{223} This turned Rule 11 into a litigation weapon.\textsuperscript{224} After 10 years experience under this mandatory Rule, the Judicial Conference amended Rule 11 to return significant discretion to judges to impose sanctions. The changes offered few guidelines, "creating in effect the absolute right not to sanction."\textsuperscript{225} The rule drafting process was unable to give more specific content to the rule. Judicial discretion, once again, became the preferred method to achieve the underlying goal of limiting frivolous litigation.

In some respects, it perhaps shows disrespect for judges to attempt to constrain their discretion too much, especially in areas involving what is fairly characterized as controlling the proceeding before them. It de­means the very quality that one seeks in the judge. On the other hand, lawyers have a deep interest in having notice of the standards that will be applied to them.

\textbf{6. Problems With Discretion}

Of course, there can be problems with judicial discretion. Abuse of discretion is the typical standard for reviewing trial court imposition of sanctions for attorney misconduct.\textsuperscript{226} We do not have evidence that this discretion is systematically abused. But because of the absence of appellate review, we also do not have evidence that the discretion is wisely used.

We know that discretion always carries with it the possibility of abuse. The broad discretion for attorney conduct issues understandably scares the DOJ. They want to eliminate the possibility of abuse—\textit{from their perspective}. The DOJ has been successful in whittling away at judicial

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  \item \textsuperscript{222} \textsc{Fed. R. Civ. P. 11}.
  \item \textsuperscript{223} Brown, \textsc{supra} note 98, at 1566-67; Georgene M. Vairo, \textit{Rule 11: Where We Are and Where We Are Going}, 60 FORDHAM L. REV. 475 (1991).
  \item \textsuperscript{224} Brown, \textsc{supra} note 98, at 1567-69.
  \item \textsuperscript{225} Armour, \textsc{supra} note 6, at 507.
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discretion in a few key areas, such as successfully convincing the First Circuit that the district court exceeded its rulemaking authority to the extent that the local rules incorporate a state rule limiting subpoenas on defense counsel in the grand jury context.\textsuperscript{227} The DOJ has gone to states with ethics interpretations that impair DOJ activities and has had at least one success in getting the state to change the ethics rule.\textsuperscript{228} Discretion can be curbed on the edges by strategic attacks.

Some might be concerned about this generally broad discretion because political ideology can play a role in decision-making. But the impact of ideology on a judge's view of attorney conduct is not obvious.\textsuperscript{229} Critical legal studies critiques of preferences for the existing power structure do not necessarily assist us in analyzing the allocation of discretion in regulating attorney conduct in federal court practice. The impact of race and gender may be evident in individual cases, but it is again unclear what role it has in determining the allocation of power in this area. Law and economics offer the more obvious assistance by giving analytical support for the idea that judges will naturally align themselves with approaches that give them maximum flexibility to advance individual or institutional efficiency.

Lawyers presumably want to be free from the uncertainty of unpredictable outcomes. We understand intuitively, and more recently from empirical data, that judges are not immune from many of the cognitive biases that affect other mere mortals.\textsuperscript{230} Judges are prone to hindsight bias: after the bad consequences have occurred, people may overestimate the predictability of the bad event.\textsuperscript{231} But most judges were also practicing attorneys, which presumably would give them greater empathy for the lawyer's task.\textsuperscript{232} There is some reason to think that greater empathy still may not minimize the gaps in perceptions. Judges are prone to egocentric biases, such as overestimating their abilities in comparison to others.\textsuperscript{233} For example, in Prof. Theodore Eisenberg's study of bankruptcy judges and lawyers, "[e]ach group tends to overstate the merits of its professional performance compared to the other group's perception of that performance."\textsuperscript{234} For example, judges viewed themselves as fine-tuning

\textsuperscript{227} Stern v. United States Dist. Ct., 214 F.3d 4, 21 (1st Cir. 2000) (local rule requiring judicial preapproval of subpoenas to defense counsel is not applicable to federal prosecutors because it interferes with federal grand jury system).


\textsuperscript{229} Legal realists broke the story on this subject. See generally Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 846 (1935).


\textsuperscript{231} Id. at 799-805.

\textsuperscript{232} Levels of empathy are an interesting research question.

\textsuperscript{233} Guthrie, Rachlinski & Wistrich, supra note 230, at 811-16.

compensation more than lawyers perceive this occurring. On the flip side, lawyers perceived themselves as complying with fee guidelines far more than judges perceive compliance. And many decisions about attorney conduct in litigation are made “under uncertain, time-pressured conditions” that may “encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.” One path to minimizing such heuristics is through “increased attention and greater deliberation”—the very commodity that judges are carefully marshalling and jealously guarding. We must be cautious, however, about overemphasizing these heuristics, or the public policy implications derived therefrom.

Because we do not have evidence of systematic abuse of discretion—or intolerable levels of cognitive bias—it is quite understandable that courts perceive that the benefits of discretion outweigh the risks. Once again, all systems push toward flexibility for judges in addressing attorney conduct.

C. No Easy Cure for this Problem

Lawyers are left with the challenge of anticipating how a federal court will react to a particular ethical dilemma. There will be no easy cure for the challenge inherent in a federal system. The analysis above demonstrates that even if federal courts consistently use state rules of conduct (vertical uniformity), there are multiple steps in the decision-making process that incorporate significant judicial discretion. At heart, these interpretive differences will arise because the norm creators in this context (the state supreme courts) are not the norm enforcers. Federal judges are one step removed from the rules and have a long history of articulating the values behind the rules as applied in their courtroom.

Even if federal courts create targeted uniform rules to address recurring issues in federal court practice (horizontal uniformity), the inherent limit of rules and the absence of appellate review means it is unlikely that

235. Id. at 985.
236. Id. at 987; see also Ian Weinstein, Don’t Believe Everything You Think: Cognitive Bias in Legal Decisionmaking, 9 CLINICAL L. REV. 783 (2003) (analyzing lawyer and client perceptions).
237. Guthrie, Rachlinski & Wistrich, supra note 230, at 783.
238. Id. at 819-820 ("[e]ven with greater resources, judges will still resort to cognitive shortcuts."). Guthrie, Rachlinski and Wistrich advocate three methods to minimize heuristics: adopting multiple perspectives when making decisions, limiting heuristics to circumstances in which they are most appropriately used, and reducing reliance on judgments that are particularly prone to distortion. Id. at 822-25.

One method to temper egocentric bias is to provide multiple judicial appeals. Id. at 828-29. When a judge criticizes an attorney in a written opinion (i.e. shames the lawyer), but imposes no additional sanction, that written criticism is alone not subject to appeal, taking away one technique to check this egocentric bias. In re Williams, 156 F.3d 86 (1st Cir. 1998).

239. Cf. Samuel Issacharoff, Behavioral Decision Theory in the Court of Public Law, 87 CORNELL L. REV. 671 (2002). In particular, “the literature has had relatively little to say about the role of institutional mechanisms that may buffer or even neutralize defective heuristics that can dominate individual decisionmaking.” Id. at 671-72.
there will be a national body of case law to give meaning to rules that might be adopted.

What has emerged is a delicate, ongoing balance of competing interests that is driven by a minimal encroachment approach that acknowledges the state supreme courts' strong interest, but gives room for the autonomy interests of the federal courts. This is an acceptable policy result, not because the current situation is good, but because the alternatives will not be better and might make the situation worse.

Very targeted and selective drafting of specific rules to address commonly-occurring situations may offer some modest help. But the situations amenable to precise rules are also situations that might better be addressed in the rules of procedure. For example, there may be value in setting out in a text how lawyers should proceed when there is accidental disclosure of privileged information, the limits of prosecutorial contact with represented persons during investigations, and the specific requirements for subpoenas on defense counsel. The fact that these are recurring situations and are woven into the underlying procedural requirements suggests that these issues may be better addressed under the rules of civil or criminal procedure. 240

IV. THE UTILITY OF RULES: MINIMAL ENCROACHMENT APPROACH

So far, federal courts have been unable to develop a rule-based resolution to the issue of which rules should govern attorney conduct in federal court practice. The effort to create rules of attorney conduct in federal court practice, while likely to be futile, has had some important positive effects. While the Rules of Professional Conduct are not as deeply entrenched in federal courts as they are in the state regulatory apparatus, this does not mean that the rules are without value. Rules foster "predictability, reliability, and certainty," but to varying degrees. 241 The very fact that the issue was raised might have been the impetus for a few district courts embracing a local rule of dynamic conformity. That advances the goal of predictability (at the expense of the highest level of consistency for those with a national practice).

Over the past ten years, this debate has also sharpened our understanding of the role of federal courts in developing litigation ethics. Rules are a device for allocating power. 242 Representatives from the Conference of State Chief Justices have been involved in the federal courts' analysis of this issue and have been clear about their preference for a minimal encroachment approach by federal courts. The rich scholarly discussion has

241. Playing By the Rules, supra note 7, at 98, 102.
242. Playing By the Rules, supra note 7, at 98 ("If rules function in the service of a division of responsibility among agents or institutions, if they service jurisdiction-appor­tioning roles, then rule-based decision-making can patrol the boundaries between jurisdic­tions in a way that no other decision-making procedure can.").
sharpened our understanding of the role of judges in shaping ethical norms.

The debate over what attorney conduct rules apply has also sharpened our understanding of the field of litigation ethics. The early Rules Committee study revealed that conflict of interest, contact with represented persons and advocate as witness are the three most litigated ethics issues in federal court practice. By putting these issues on the radar screen, courts may become a bit more thoughtful about the policy differences and choices.

The failed effort to create uniform rules has also encouraged dialogue. The McDade Amendment and the power of national rule-making have forced the DOJ to the negotiating table with certain states. The DOJ’s multiple efforts to make an end run around the issues by going directly to Congress have been unsuccessful because of the amazing and shifting values this issue raises.

This process is also causing some to rethink the role of the American Bar Association in promulgating rules of conduct. Andrew Kaufman has been using this process to argue that the ABA’s dominant role in crafting standards of professional conduct is no longer appropriate and that the power of rule-making should be centered in the Conference of Chief Justices and the Judicial Conference, with the ABA functioning in an advisory capacity.243

V. CONCLUSION

It is no secret that we have multiple strains on our state-based system of attorney regulation. The debate over rules of conduct for federal court practice has helped us understand the limited and focused interest of federal courts.

Although federal courts are unlikely to create comprehensive rules of conduct, they may yet develop a handful of rules. Even without a few focused rules, we recognize that the grip of the states has loosened. States are one important actor in the law governing lawyers. They are not the only actor, however. In federal litigation, the federal courts inevitably will be the dominant actor in determining the norms, the remedy and the role that federal courts are willing to assume in the mosaic of attorney regulation.

It is appropriate to end this article with a critical caveat. This analysis is based on inferences from the failed effort to create at least some uniform rules of attorney conduct applicable to federal court practice. This analysis, unfortunately, is informed largely by anecdotal evidence about judges’ concerns. We know relatively little about litigation realities, and even less about the systemic patterns of how judges deal with issues of attorney conduct.244 We have much more to learn.

244. See Clermont & Eisenberg, supra note 217, at 148 ("A major point of this Article is that all of us know very little about litigation realities. The realm of unknowns is vast.").