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Permissive Rules of Professional Conduct

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Article

Permissive Rules of Professional Conduct

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Fred C. Zacharias^{††}

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This Article examines permissive rules of professional conduct—that is, rules providing that lawyers “may” engage in particular conduct—and the implications of these rules for other law governing lawyers. One might assume that, when a professional code explicitly authorizes lawyers to engage in certain behavior, the drafters made a normative judgment that the best way to regulate the conduct covered by the rule is to let lawyers determine how to act as a matter of individual discretion. One might also take the view that this normative judgment is worthy of respect and that other lawmakers should not encroach on the discretion accorded by the rules. This Article calls that view into question. It demonstrates that permissive aspects of the professional codes may be more limited than readily apparent and that, even when the code drafters intend to relegate issues to lawyers’ discretion, their justifications for according discretion often leave room for external constraints.

Lawyers are regulated by court-adopted disciplinary rules and other law, including civil liability standards,¹ civil statutes and regulations,² and criminal law.³ There is a robust body of

1. See generally 1 RONALD E. MALLIN & JEFFREY E. SMITH, LEGAL MALPRACTICE pt. III (5th ed. 2005) (describing theories of liability for legal professionals).

2. For example, the IRS has adopted rules for federal tax practitioners, e.g., Practice Before the Internal Revenue Service, 31 C.F.R. pt. 10 (2006), the SEC has adopted rules for securities lawyers, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), and the U.S. Patent and Trademark Office has adopted rules for patent and trademark lawyers, e.g., Changes to the Representation of Others Before the U.S. Patent and Trademark Office, 69 Fed. Reg. 35,428 (June 24, 2004) (to be codified at 37 C.F.R. pts. 1, 10, 11).

3. See generally Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998) (discussing criminal prosecutions of lawyers); Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73 (2001) (same).

academic and professional literature on the interrelationship between the disciplinary rules—which typically are modeled on the American Bar Association (ABA) Model Rules of Professional Conduct⁴—and the other law governing lawyers.⁵ External law plainly influences the legal ethics codes; code drafters⁶ routinely incorporate legal standards into the professional rules⁷ and rely upon the effects of extra-code constraints to supplement the codes' effects.⁸ The influence of the ethics codes on external law, however, is less plain.

4. For the most part, this Article uses the ABA's Model Rules of Professional Conduct (Model Rules) and the ABA's Model Code of Professional Responsibility (Model Code) as illustrations of disciplinary rules. Neither the Model Rules nor the Model Code has legal force. However, prior to the adoption of the Model Rules in 1983, most states based their disciplinary rules on the Model Code and, since then, the majority of states have based their disciplinary rules on some version of the Model Rules. The Model Rules were comprehensively amended in 2002, and many states have either amended their codes in light of the changes or have begun examining their codes with an eye to doing so. On one issue important to this Article—the circumstances under which lawyers may disclose client confidences to avert harm to third parties—there is significant state variation. See *infra* note 80.

5. See, e.g., David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (discussing the interplay of the various forms of regulation).

6. By “code drafters,” this Article refers to all of the various participants in promulgating the professional rules. With respect to the ABA Model Code and ABA Model Rules, this includes the reporters, their committees, task forces, and advisors, and the ABA House of Delegates which adopts the rules. Each state employs its own set of drafters who help the state's highest court determine which rules to adopt.

7. General principles of agency, fiduciary, criminal, and evidentiary law support many of the codes' provisions. Some rules refer specifically to external law. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d), 1.6(b)(6), 1.16(c), 4.1, 5.5, 8.4(b)–(c) (2006).

8. See Green, *supra* note 3, at 330 (discussing criminal prosecutions for conduct that also violates the ethics codes); Wolfram, *supra* note 3, at 75 (discussing criminal prosecutions of lawyers); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 867 (2002) (discussing the interrelationship between ethics codes and civil liability standards); Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 687 (2003) (“[T]he disciplinary system relies upon criminal and civil remedies to provide supplemental implementation of its goals.”); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 233 (1993) [hereinafter Zacharias, *Specificity in Professional Codes*] (“[T]he codes rely on noncode constraints to limit and punish misconduct . . .”); Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, PROF. LAW., 2003 Symposium Issue, at 15, 15–22 [hereinafter Zacharias, *Understanding Recent Trends*] (discussing federal administrative regulation of lawyer conduct).

Much of the literature on the extra-disciplinary significance of ethics codes focuses on whether mandatory rules (i.e., rules that require or prohibit particular conduct) should be enforced outside the disciplinary context—for example, whether they should serve as the standard of civil liability for professional negligence, breach of fiduciary duty, or fraud;⁹ whether they should be used in judicial proceedings as the basis of litigation sanctions¹⁰ or disqualification;¹¹ and whether they may form the basis for criminal liability.¹² On this issue, the ABA drafters themselves have taken a modest approach. For a long

9. Compare Stephen E. Kalish, *How to Encourage Lawyers to Be Ethical: Do Not Use the Ethics Codes as a Basis for Regular Law Decisions*, 13 GEO. J. LEGAL ETHICS 649, 668–69 (2000) (arguing that ethics law and regular law “should be separate”), Daniel Engelman, Comment, *The Rules of Professional Conduct and Civil Liability of Attorneys*, 1993 DETROIT C. L. REV. 915, 947 (1993) (arguing that the Rules are not too vague to define the standard of care and that the Rules’ standard of care is much less ambiguous than the common law standard of the “reasonable” lawyer), and David J. Fish, Comment, *The Use of the Illinois Rules of Professional Conduct to Establish the Standard of Care in Attorney Malpractice Litigation: An Illogical Practice*, 23 S. ILL. U. L.J. 65, 80 (1998) (arguing that the Rules, which were not enacted by the legislature and therefore are not statutory in nature, should not be the basis for civil liability), with Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 83 (1998) (“[C]ase law outside the field of legal malpractice demonstrates that courts consistently cite ethical rules to support decisions that modify the standards of civil liability.”), and Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 283 (1979) (arguing for enforcement of ethics codes in the civil liability context).

10. See, e.g., JUDITH A. MCMORROW & DANIEL R. COUILLETTE, THE FEDERAL LAW OF ATTORNEY CONDUCT, MOORE’S FEDERAL PRACTICE § 809.01 (3d ed. 1997) (explaining that when lawyers abuse the discovery process to the point of unethical behavior, “courts frequently look to the principles and language of legal ethics . . . to determine whether to use their inherent power to sanction the conduct at issue”).

11. Compare, e.g., Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 73 (1996) (“[D]isqualification should not be a *per se* remedy for a violation of a conflict rule and . . . , on the contrary, the court’s determination should not be based on the conflict rules at all.”), with Susan R. Martyn, *Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green*, 65 FORDHAM L. REV. 131 *passim* (1996) (arguing that removing the threat of disqualification would provide a greater incentive for lawyers to bend or break the conflict of interest rules).

12. See Green, *supra* note 3, at 329–30 (discussing the application of criminal law to lawyer misconduct); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 690 (2005) (“If the ethics rules can form the basis of a criminal prosecution, then the next step may be the pursuit of lawyers for their representation of clients that, while not unethical, fails to prevent misconduct.”).

time, their position was that the codes should play no role outside the disciplinary context¹³—a position that was at odds with the widespread use of the codes in a variety of extra-disciplinary settings. Currently, the drafters acknowledge that ethics codes may have consequences outside the disciplinary context, but insist that the professional rules are not drafted with those consequences in mind.¹⁴

Comparatively little attention has been given to a separate question about the extra-code influence of professional rules; namely, whether provisions that accord lawyers choices regarding particular conduct should be respected by external lawmakers who might otherwise forbid or compel the conduct. Unlike mandatory rules—which embody either obligations telling lawyers what they “must” or “shall” do or prohibitions telling lawyers what they “may not” or “shall not” do¹⁵—permissive

13. The ABA’s 1969 Model Code stated that it does not “undertake to define standards for civil liability of lawyers for professional conduct.” MODEL CODE OF PROF’L RESPONSIBILITY pmbl. (1969). Similarly, the pre-2002 versions of the ABA’s Model Rules claimed:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. 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. . . . Accordingly, 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.

MODEL RULES OF PROF’L CONDUCT pmbl. (1983).

14. See MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 20 (2006) (“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. . . . 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.”).

15. See *id.* R. 1.2(a) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation”); *id.* R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”); *id.* R. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); *id.* R. 1.4(a)(3) (“A lawyer shall keep the client reasonably informed about the status of the matter”); *id.* R. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent”); *cf. id.* R. 6.1 (providing anomalously that lawyers “should aspire to render at least (50) hours of pro bono publico legal services per year”).

professional rules generally are “cast in the term ‘may.’”¹⁶ This means, according to the ABA drafters, that they “define areas . . . in which the lawyer has discretion to exercise professional judgment.”¹⁷ Permissive aspects of the codes include various exceptions to attorney-client confidentiality¹⁸ as well as rules permitting lawyers to refrain from offering suspected perjury in a civil case,¹⁹ to charge a contingent fee in most types of cases,²⁰ to undertake certain conflicted representations upon the client’s informed consent,²¹ and to withdraw from the representation under specified conditions.²²

16. *Id.* pmbl. ¶ 14 (“Some of the Rules are imperatives, cast in the terms of ‘shall’ or ‘shall not.’ . . . Others, generally cast in the term ‘may,’ are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.”).

17. *Id.* *But see id.* R. 1.6 cmt. 15 (noting that although Rule 1.6(b) “permits but does not require disclosure of” client confidences in specified situations, “[d]isclosure may be required . . . by other Rules” in some circumstances if Rule 1.6(b) permits disclosure, and in one circumstance regardless of whether Rule 1.6(b) permits disclosure).

18. *See id.* R. 1.6(b) (setting forth exceptions to confidentiality).

19. *See, e.g., id.* R. 3.3(a)(3) (“A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”).

20. *See, e.g., id.* R. 1.8(i)(2) (“[T]he lawyer may . . . contract with a client for a reasonable contingent fee in a civil case.”).

21. *See, e.g., id.* R. 1.7(b) (setting forth cases involving a concurrent conflict of interest in which a lawyer “may” accept the representation with a client’s informed consent).

22. *See id.* R. 1.16(b) (setting forth circumstances under which “a lawyer may withdraw from representing a client”). Other provisions of the Model Rules are also framed in permissive language. *See id.* R. 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable . . .”); *id.* R. 1.5(c) (stating that subject to limitations, “[a] fee may be contingent”); *id.* R. 1.5(e) (detailing when lawyers from different firms may divide a fee); *id.* R. 1.7(b) (“Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client” under specified circumstances.); *id.* R. 1.13(c) (“[I]f (1) . . . the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation . . .”); *id.* R. 1.13(g) (allowing a lawyer representing an organization also to represent its members and constituents, subject to the conflict rule); *id.* R. 1.14(b) (allowing a lawyer to take protective action if his client either has diminished capacity or is at risk of imminent harm); *id.* R. 1.14(c) (authorizing a lawyer to reveal information about a client with diminished capacity to take protective action where reasonably necessary to protect the client’s interests); *id.* R. 1.15(b) (“A lawyer may deposit the lawyer’s own funds in a client trust account for the sole purpose of paying bank

Given the model code drafters' professed indifference to the disciplinary rules' influence on other lawyer regulation, it would seem peculiar for the bar to ask external lawmakers to defer to the normative judgments underlying the codes' permissive rules. But the profession has not been inhibited by the code drafters' position. Witness the ABA's recent, and apparently successful, opposition to a proposed reporting requirement originally considered for inclusion in the Security and Exchange Commission's (SEC) Sarbanes-Oxley regulations.²³ The

service charges"); *id.* R. 1.17 (detailing when a lawyer may sell a law practice); *id.* R. 2.3(a) ("A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client."); *id.* R. 3.6(b)–(c) (enumerating what a lawyer may state extra-judicially); *id.* R. 3.7(b) (allowing a lawyer to represent a client when another lawyer in his firm may be called as a witness, unless Rule 1.7 or Rule 1.9 forbids it); *id.* R. 5.5(d) ("A lawyer admitted in another United States jurisdiction, and not disbarred or suspended . . . may provide legal services in this jurisdiction that (1) . . . are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction."); *id.* R. 6.4 ("A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration"); *id.* R. 7.2(a) ("Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise"); *id.* R. 7.3(d) ("Notwithstanding the prohibitions [from contacting prospective clients for pecuniary gain] in paragraph (a), a lawyer may participate with a prepaid or group lawyer service plan"); *id.* R. 7.4(a) ("A lawyer may communicate the fact that a lawyer does or does not practice in particular fields of law."); *id.* R. 7.4(b) ("A lawyer admitted to engage in patent practice . . . may use the designation 'Patent Attorney'"); *id.* R. 7.4(c) ("A lawyer engaged in Admiralty practice may use the designation 'Admiralty'"); *id.* R. 7.5(b) ("A law firm with offices in more than one jurisdiction may use the same name"); *id.* R. 7.5(d) ("Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.").

23. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8150, 67 Fed. Reg. 71,670, 71,673 (Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205) ("Under certain circumstances, these [proposed] provisions permit or require attorneys to effect a so-called 'noisy withdrawal' and to notify the Commission that they have done so and permit attorneys to report evidence of material violations to the Commission."); see also Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8156, 68 Fed. Reg. 6324, 6324–25 (Feb. 6, 2003) (to be codified at 17 C.F.R. pts. 205, 240, 290).

For discussions of the SEC regulations governing securities lawyers, and particularly the SEC's consideration of a mandatory reporting rule, see Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 25–26 (2003); Stephen Fraidin & Laura B. Mutterperl, *Advice for Lawyers: Navigating the New Realm of Federal Regulation of Legal Ethics*, 72 U. CIN. L. REV. 609, 647–54 (2003); Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17

SEC proposal would have required lawyers to alert the SEC to public corporations' wrongdoing through a "noisy withdrawal."²⁴ The ABA's response was that SEC regulation should not preempt disciplinary rules that, in most states, give lawyers discretion to report client wrongdoing.²⁵ The ABA argued that a mandatory disclosure rule would "remov[e] the flexibility that lawyers need in order to have time to counsel their corporate clients effectively" and would be "undesirable, costly and unnecessary."²⁶ Consistent with this approach, the ABA amended its model confidentiality rule to expand lawyers' discretion to report client misconduct, but pointedly rejected a mandatory disclosure obligation in the vein of the SEC's proposal.²⁷

GEO. J. LEGAL ETHICS 1, 5–6 (2003); Samantha Ahuja, Note, *What Do I Do Now? A Lawyer's Duty Post-Sarbanes-Oxley*, 38 VAL. U. L. REV. 1263, 1317–30 (2004).

24. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,674 (proposing that a lawyer who does not receive an appropriate response from a corporate client regarding an internal report of a securities violation be required to stop representing the company, notify the SEC of his withdrawal, and "disaffirm" any securities filings that are "tainted"); Press Release, Sec. & Exch. Comm'n, SEC Adopts Attorney Conduct Rules Under Sarbanes-Oxley Act (Jan. 23, 2003), <http://www.sec.gov/news/press/2003-13.htm> (noting deferral of the proposal); see also Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 809–16 (2004) (discussing the proposal).

25. See Letter from Alfred P. Carlton, Jr., President, Am. Bar Ass'n, to the Sec. & Exch. Comm'n (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm> [hereinafter Letter from ABA to SEC]. At the time of its response to the SEC's request for comments, the ABA itself had recently rejected proposed confidentiality exceptions that would give lawyers discretion in limited circumstances to report clients' financial wrongdoing, but the proposed exceptions were reconsidered and adopted soon after. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2006); Am. Bar Ass'n Task Force on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW. 189, 205–07 (2002).

26. Letter from ABA to SEC, *supra* note 25; see also E. Norman Veasey, *The Ethical and Professional Responsibilities of the Lawyer for the Corporation in Responding to Fraudulent Conduct by Corporate Officers or Agents*, 70 TENN. L. REV. 1, 21 (2002) ("To the extent that the lawyer's leverage to remonstrate effectively with the client to prevent or rectify fraud is an important goal—and I think it is—that goal is clearly better achieved if the lawyer has discretion to disclose or not to disclose, depending on the circumstances."). See generally Christin M. Stephens, Comment, *Sarbanes-Oxley and Regulation of Lawyers' Conduct: Pushing the Boundaries of the Duty of Confidentiality*, 24 ST. LOUIS U. PUB. L. REV. 271, 281–86 (2005) (discussing the SEC proposal and the ABA response).

27. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2006) (allowing lawyers to disclose information to prevent clients from committing crimes or frauds in furtherance of which the lawyers' services have been used, or to

In general, when the bar asks lawmakers to defer to permissive rules (such as the attorney-client confidentiality exceptions), the bar's argument is that the rules reflect a considered judgment that it is important to allow lawyers to decide for themselves how to act, rather than mandating lawyers' conduct—either through ethics codes or other law.²⁸ That judgment may rest on a variety of rationales, including the premise that lawyers making individualized decisions are in the best position to judge how to proceed, the notion that lawyers' autonomy is worthy of respect, or the argument that there simply is no best choice among the alternative courses of conduct. The code drafters' judgment in favor of discretion arguably deserves respect because the drafters have special expertise in understanding the true work of, and competing pulls upon, lawyers.²⁹ Insofar as a state's highest court has adopted the ABA model as part of the local professional rules, so that a permissive rule might be said to reflect a considered decision by the bench as well as the bar, the argument that external lawmakers should defer and respect lawyers' discretion has greater force.³⁰

The validity of this kind of argument depends upon whether it is accurate to characterize a particular permissive provision as embodying a normative judgment favoring discretion not only for purposes of professional discipline but also for purposes of regulation more generally. Each permissive rule implicitly raises two questions. First, does a rule telling law-

mitigate injuries resulting from such crimes or frauds); *id.* R. 1.13(c) (allowing lawyers to reveal information under limited circumstances when necessary to prevent injury to an organizational client).

28. As discussed in Parts IV.A–C, however, the permissive nature of a rule does not always signal an intent of the drafters to defer entirely to lawyer discretion. Nor does the fact that the codes believe a rule granting discretion is appropriate necessarily mean that other law-making institutions (e.g., courts) will agree or that the code drafters expect them to agree.

29. *Cf.* MODEL RULES OF PROF'L CONDUCT pmb. ¶ 9 (2006) (noting the "conflicting responsibilities" that lawyers encounter); Richard E. Flamm, *Looking Ahead to Ethics 2015: Or Why I Still Do Not Get the ABA Model Conflict of Interest Rules*, 19 N. ILL. U. L. REV. 273, 274 (1999) ("No one can honestly quarrel, furthermore, with either the Commission Members' credentials, or the diligence with which they have tackled their duties . . .").

30. *Cf.* Green, *supra* note 3, at 387 ("Where professional norms are clear, they are presumptively worthy of respect. . . . If one accepts that the professional norms, particularly as embodied in the lawyer codes, are a reasonable articulation of the elements of effective legal assistance, then criminal prosecutions that are in tension with professional norms should be a cause for concern.").

yers they “may” do something really mean it? In other words, is lawyer discretion meant to be as broad as it appears on the face of the rule? Second, did the ABA (or state) code drafters in fact make a normative judgment about what lawyers may or may not do, to which they intended other lawmakers, in other contexts, to defer? Permissive rules conceivably reflect various purposes and understandings, so the answers to these two questions may differ from provision to provision.

The questions concerning the interpretation of the codes’ permissive rules have broad implications for lawyer regulation. State³¹ and federal statutes,³² civil procedure rules,³³ and administrative regulations³⁴ all restrict lawyers from engaging in aspects of conduct that permissive ethics rules appear to authorize—for example, restricting lawyers’ discretion regarding whether to disclose or maintain confidences,³⁵ to accept a

31. For example, some state child abuse reporting statutes require lawyers to report threatened harm, when confidentiality rules typically leave the reporting decision to the lawyers’ discretion. *See* MISS. CODE ANN. § 43-21-353 (Supp. 2006) (“Any attorney . . . having reasonable cause to suspect that a child is . . . an abused child, shall cause an oral report to be made immediately . . .”); OR. REV. STAT. § 419B.005 (2003) (including “attorney” as a “[p]ublic or private official” who has a duty to report child abuse under section 419B.010).

32. *Compare* 11 U.S.C. § 327(a) (2000) (stating that a lawyer who “hold[s] or represent[s] an interest adverse to the estate” should not represent the estate), *with* MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(4) (2006) (allowing a client to waive his lawyer’s conflict of interest).

33. *Compare* FED. R. CIV. P. 23(g) (requiring a lawyer serving as class counsel to “adequately represent the interests of the class”), *with* MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2006) (providing opportunities to waive conflicts of interest).

34. For example, the Office of Thrift Supervision (OTS) brought charges against the law firm of Kaye, Scholer, Fierman, Hays & Handler for allegedly assisting its clients in submitting misleading information in violation of 12 C.F.R. § 563.180(b)(1) (1989) (current version at 12 C.F.R. § 563.180(b)(1) (2006)). *See* Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 988–91 (1993). The agency interpreted its regulations to forbid financial institutions’ lawyers from submitting information that they believed, but did not know, to be false. *See id.* at 991. Such conduct would ordinarily be permissible under the Model Rules, at least in the context of advocacy. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3), 3.9 (2006). *See generally* Zacharias, *Understanding Recent Trends*, *supra* note 8, at 16–18 (discussing administrative regulations imposed by other federal agencies that followed the OTS model).

35. *See* SEC Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of the Issuer, 17 C.F.R. § 205.3(b)(1)–(3) (2006) (requiring a lawyer to report fraud to the chief legal officer and the chief executive officer, or to the board of directors if the

waiver of a conflict,³⁶ or to charge a contingent fee.³⁷ Lawyers also are potentially subject to civil liability under common law standards for acting within the range of discretion afforded by a permissive rule.³⁸ Whether legislatures, administrative agencies, and courts should give weight—perhaps even preemptive weight—to an ethics rule that authorizes lawyers to exercise discretion depends, at least initially, on the meaning of the rule and what it is intended to accomplish.

To date, little attention has been paid to the nature of permissive ethics rules.³⁹ This Article examines some of the existing examples of permissive rules and identifies the range of premises that appear to underlie them. It demonstrates that the extent of discretion accorded by the codes, even for disciplinary purposes, is narrower and less certain than initially appears. Moreover, the Article suggests that, given the current state of professional regulation, one can rarely argue defini-

officers do not respond in a reasonable time); Patent and Trademark Office Code of Professional Responsibility, 37 C.F.R. § 10.85(b)(1) (2006) (“A practitioner who receives information clearly establishing that . . . [a] client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so the practitioner shall reveal the fraud to the affected person or tribunal.”).

36. See 11 U.S.C. § 327(a).

37. See Board of Veterans’ Appeals: Rules of Practice, 38 C.F.R. § 20.609(d)(2)(i) (2006) (prohibiting a lawyer to charge a contingent fee when a “disinterested third party” is funding the litigation on the claimant’s or appellant’s behalf); see also Assistance Program Under the 9/11 Heroes Stamp Act of 2001, 70 Fed. Reg. 43,214, 43,215 (July 26, 2005) (to be codified at 44 C.F.R. pt. 153) (“[A]ny fee arrangement (including contingency, hourly, etc.) exceeding 5% of an eligible claimant’s payment from the Heroes Stamp Act fund would not be in the best interest of the eligible claimant.”); Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 92 n.105 (2003) (listing statutes and court rules that limit the amount of contingent fees).

38. See, e.g., Lawrence J. Fox, *It Takes More Than Cheek to Lose Our Way*, 77 ST. JOHN’S L. REV. 277, 284 (2003) (noting that when the ABA amended Rule 1.6, it increased lawyers’ risk of civil liability for failing to report client misconduct because they “no longer have the shield of 1.6’s prohibition on disclosure of confidential information”).

39. But see Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 46 (2003); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 52 (2005) (arguing that permissive rules are not necessarily meant to give lawyers unbridled discretion, but may “presuppose that lawyers will exercise professional conscience in deciding how to act in individual cases within the category identified by the rule”); George W. Overton, *Permissive Duties*, CBA REC., June–July 1997, at 46, 50.

tively that a permissive rule reflects a normative judgment that is meant to be respected by other lawmakers. This conclusion has importance not only for how lawmakers should view permissive professional rules, but also for how rule drafters should develop such rules in the future.⁴⁰

Part I of this Article identifies three different ways of characterizing permissive rules, each of which has significance for determining the extent of lawyers' discretion under the rules. Part II describes potential limits on lawyers' discretion, some arising from the professional codes themselves and some imposed by outside regulation. Part III discusses the possible justifications for permissive rules, each of which seems to underlie at least some of the codes' permissive provisions. Finally, Part IV analyzes the significance of the existence of these multiple characterizations and justifications for institutions writing, implementing, and enforcing the rules.

I. THE NATURE OF DISCRETION IN PERMISSIVE ETHICS RULES

Permissive ethics rules take various forms. Some give lawyers two alternatives, or a range of alternatives, without even implicitly suggesting grounds for choosing between or among them. For example, in most jurisdictions, a lawyer who reasonably believes (but does not know) that a client in a civil case will testify falsely "may" refuse to offer the testimony.⁴¹ In rendering legal advice to clients, a lawyer "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁴² "[A] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."⁴³ And a lawyer may "contract with a client for a reasonable contingent fee in a civil case."⁴⁴ On their face, rules such as these have no limiting principles.

40. Part IV of this Article notes some implications of our analysis of permissive rules for courts and other lawmakers. However, this Article focuses primarily on identifying the nature of permissive rules—an important endeavor that the previous literature has omitted. This Article leaves the normative issues of precisely how other lawmakers should respond to permissive rules to another day.

41. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2006).

42. *Id.* R. 2.1.

43. *Id.* R. 1.8(e)(2).

44. *Id.* R. 1.8(i)(2).

Other permissive rules cabin lawyers' discretion. For example, lawyers may disclose client confidences in order to prevent certain harms⁴⁵ or defend themselves against accusations of wrongdoing,⁴⁶ but only to the extent they "reasonably believe[] necessary" to accomplish the authorized end.⁴⁷ A lawyer may accept a client's informed waiver of concurrent conflicts of interests, but only under specified circumstances⁴⁸ and when "the lawyer reasonably believes that [he or she] will be able to provide competent and diligent representation."⁴⁹ A lawyer "may limit the scope of the representation" with client consent,⁵⁰ but some codes circumscribe that authority to apply only in situations in which its exercise is "reasonable under the circumstances."⁵¹ Lawyers "may withdraw from representing a client" in a series of prescribed instances,⁵² but must seek permission of a tribunal to do so in litigation⁵³ and take steps to protect the client's interests.⁵⁴ Although provisions such as these limit when and, in some cases, how the lawyer may exercise discretion, a lawyer acting within the limitations nevertheless is given a range of choice.⁵⁵

45. *See id.* R. 1.6(b)(2).

46. *See id.* R. 1.6(b)(5).

47. *Id.* R. 1.6(b); *see* McClure v. Thompson, 323 F.3d 1233, 1242–43 (9th Cir. 2003) (concluding that the future crime exception to attorney-client confidentiality includes a requirement that the disclosing attorney's belief be reasonable).

48. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2006).

49. *Id.* R. 1.7(b)(1).

50. *Id.* R. 1.2(c).

51. *Id.* cmt. 7.

52. *Id.* R. 1.16(b).

53. *See id.* R. 1.6(c).

54. *See id.* R. 1.6(d).

55. A third set of discretionary rules seems to grant discretion implicitly, by allocating authority to lawyers to make a category of decisions without specifying the limits on that authority. For example, although the codes typically require lawyers to abide by client decisions concerning the "objectives of representation," they also imply that lawyers have discretion to determine the means to implement the client's objectives. *See id.* R. 1.2(a) & cmts. 1–2. The pre-2002 version of the Model Rules seems to grant lawyers full authority to make strategic decisions in pursuing clients' objectives, but the current version is more ambiguous. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (2001) (assigning "responsibility for legal and tactical issues" to the lawyer), *with* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2006) (noting that clients "normally defer" to lawyers regarding tactical decisions, but concluding that "[b]ecause of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such

In either case, a key threshold question is how, as a general matter, permissive rules should be viewed. There are three basic possibilities. A rule stating that a lawyer may, but implicitly need not, act in a particular way can be seen as equivalent to not regulating at all. It may be seen as affirmatively authorizing a lawyer to make any decision within the range of choice defined by the rule. Finally, it may be seen as authorizing a lawyer to make choices, but only on terms, or based on considerations, implied by the rule. The resolution of this threshold question should influence whether and how other lawmakers take account of a permissive rule.

A. PERMISSIVE RULES AS NONREGULATION

Consider the first possibility. It is not self-evident that permissive rules reflect anything other than a drafting alternative to nonregulation. Arguably, permissive rules simply indicate where mandatory rules end and the absence of regulation begins. They describe an area of conduct where the professional rules are silent.

For example, the rule on attorneys' fees states that a lawyer "may" share fees with another lawyer *if* certain conditions are fulfilled.⁵⁶ Is this different from a mandatory rule stating that a lawyer "may not" share fees *unless* the same conditions are fulfilled? With respect to the latter rule, it would be an exaggeration to conclude that the drafters affirmatively left fee sharing to lawyers' "discretion" in all cases in which the conditions are satisfied. The more logical interpretation is that the drafters took no position on (or did not regulate) fee sharing that occurs when the preconditions are satisfied.⁵⁷ At least

disagreements are to be resolved"). This Article will not address this category of discretionary rules as there is some dispute about whether these rules are, in fact, permissive; arguably, the rules are better viewed as nonregulation rather than permissive regulation.

56. See MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2006).

57. The difference between not regulating and authorizing a choice of conduct is highlighted by the rule requiring a lawyer to expedite litigation provided that doing so is "consistent with the interests of the client." *Id.* R. 3.2. This rule does not appear to regulate what lawyers must or may do when expediting litigation is *not* consistent with the client's interests. *See id.* Even so, it would be surprising to find courts or ethics committees interpreting the rule as if it affirmatively accords lawyers discretion to delay whenever delay, in and of itself, benefits the client. Indeed, the comments to Model Rule 3.2 suggest that a lawyer must consider more than the client's desires. *See id.* cmt. 1 (stating that a lawyer who fails to expedite must have "some substantial purpose other than delay").

some of the other permissive rules, when read in context, have similar effects—suggesting nothing more than an exception to a mandatory standard and leaving the excepted area unregulated.⁵⁸ The term “may” simply is used to set boundaries establishing when the rule’s mandate or prohibition applies.⁵⁹

On the surface, the argument in favor of viewing permissive rules as nonregulation is belied by the fact that the drafters had a drafting choice. That the drafters opted for a permissive formulation (“may . . . if”) rather than a mandatory formulation (“may not . . . unless”) suggests that they intended to do more than simply create an exception, an unregulated field. However, at least where the permissive rule serves as an exception to multiple mandates, the permissive approach may be the only drafting option available to accomplish nonregulation.

Assume, for instance, that trial lawyers generally “may not” offer evidence they know to be false,⁶⁰ but otherwise generally “must” offer any other relevant evidence that will help the client’s cause⁶¹ or that the client insists on presenting.⁶² If

58. For example, Model Rule 3.1 includes two sentences, the first stating that a lawyer “shall not” make frivolous assertions, and the second stating that a lawyer in a criminal case “may nevertheless so defend the proceeding as to require that every element of the case be established.” *Id.* R. 3.1. The obvious reading is that the second sentence is meant simply to make clear that the rule against asserting frivolous defenses does not preclude a criminal defense lawyer from ensuring that the prosecution meets its burden of proof. Nothing suggests that the rule is meant to give the criminal defense lawyer discretion to require the prosecution to prove its case. Almost certainly, that choice—ethically and constitutionally—belongs to the client.

59. *See, e.g., id.* R. 1.8(i) (“A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation . . . except that the lawyer may: (1) acquire a lien . . . to secure the lawyer’s fees or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.”).

Another interesting example of this phenomenon is Model Rule 1.6, which provides that a lawyer “may” reveal otherwise confidential information when necessary “to comply with other law or a court order.” *Id.* R. 1.6(b)(6). Because the exception does not require a lawyer to comply with other law, it suggests that the drafters envision instances in which disobedience may be appropriate—perhaps in situations in which a lawyer seeks to challenge the “other law.” However, the permissive language certainly is not meant to imply that compliance with the law is purely discretionary; it simply articulates the boundaries of the otherwise mandatory confidentiality rules while requiring the lawyer (and other lawmaker) to decide whether confidentiality or other law should take precedence, based on considerations not apparent in the professional rules.

60. *See id.* R. 3.3(a)(3).

61. This arguably is required as a matter of competence under Model Rule 1.1. *See id.* R. 1.1 & cmt. 2. The Model Code made this obligation more explicit

the drafters want to exclude from these opposing mandates evidence which a lawyer “reasonably believes” to be false, the obvious way to do so is by saying that the lawyer “may” (but need not) offer such evidence. One cannot necessarily assume that employing permissive language has a broader purpose than identifying the limits of the mandatory rules. If identifying those limits is indeed the objective, then even though the rule says “may,” it probably does not reflect a judgment that other lawmakers should respect the “autonomy” recognized by the rule, on one hand, or that lawyers should regularly exercise the “discretion” accorded by the rule, on the other.

B. PERMISSIVE RULES AS DEFERRING TO LAWYER CHOICE

The argument that permissive rules are equivalent to non-regulation depends on one’s attitude toward the rules. Not surprisingly, given lawyers’ self-interest and the structure of some of the rules, many practicing lawyers take an extremely lawyer-protective view of permissive rules. They assume that whenever ethics provisions permit lawyers to act in a certain way, the provisions are defining an area in which lawyer conduct is meant to be unconstrained.⁶³ On this understanding, the choice of conduct belongs entirely to individual lawyers.⁶⁴ A lawyer’s decision within the area covered by a permissive rule is both unregulated by the disciplinary process and intended to be free from other regulatory oversight.

by providing that a lawyer “shall not . . . [f]ail to seek the lawful objectives of his client through reasonably available means.” See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(1) (1980).

62. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (1980) (requiring lawyers to follow their clients’ directions except as to matters “not affecting the merits of the cause or substantially prejudicing the rights of the client”); cf. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 1 (2006) (offering suggestions but not definitively prescribing how to resolve tactical disagreements between a lawyer and client when discussion between them fails to yield a resolution).

63. See, e.g., Zacharias & Green, *supra* note 39, at 46–47 (discussing the gloss modern practitioners place on the codes).

64. See JOHN T. NOONAN, JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 107 (2d ed. 2001) (“The Code also, like the Model Rules, is permissive; in no circumstances is a lawyer required to disclose”); David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825, 1825 n.1 (2004) (assuming that discretionary exceptions to confidentiality do not anticipate any limits on lawyers’ exercise of discretion).

If one interprets the permissive rules, or particular permissive rules, as endorsing professional self-restraint as the preferred disciplinary approach, a key question is what external lawmakers should make of that signal. The ABA drafters have claimed not to work with an eye toward how other regulators will use or enforce the codes.⁶⁵ That does not mean, however, that the drafters are indifferent regarding the issue of whether other lawmakers will respect their regulatory preferences; presumably, the drafters at least hope that other regulators will give some weight to the considered judgments underlying the rules.⁶⁶ How far this expectation extends, however, will not be clear from the terms of the rules.

C. PERMISSIVE RULES AS REGULATED DISCRETION

The ABA drafters' explanation that "may" signifies something more than silence suggests a third, narrower understanding of the permissive rules; namely, that permissive rules give lawyers "discretion," but only "discretion to exercise professional judgment."⁶⁷ This approach is consistent with standards governing other legal actors who are expected to make discretionary decisions based on particular principles and are taken to task for abusing their discretion.⁶⁸ The explanation of "may"

65. Cf. MODEL RULES OF PROF'L CONDUCT pmb. ¶ 11 (2006) ("To the extent that lawyers meet the obligations of their profession, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination.")

66. See, e.g., *id.* ¶ 14 ("Violation of a Rule should not itself give rise to a cause of action against a lawyer. . . . 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.")

67. *Id.*

68. For example, judges' discretionary decisions typically must be principled and may be reviewable for abuse of discretion. See *United States v. Martinez-Salazar*, 528 U.S. 304, 304 (2000) (noting that "the District Court's [decision] was an abuse of discretion" in "violation of . . . due process"); Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 518–22 (1997) (discussing the difficulty in relying on judicial discretion to issue sanctions under Federal Rules of Civil Procedure Rule 11 because of the ambiguity and lack of consistent meaning of the word "discretion"); George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 764–72 (1986) (discussing how constitutional adjudication and the use of legal tests involving multiple factors have increased discretion in the judicial decision-making process). The meaning of "discretion," however, often varies depending upon the context and the actor to which it applies. See RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131–39 (1977) (discussing the various meanings of the word "discretion" and its influence on judges' decisions); George P. Fletcher, *Some Unwise Reflections About Discretion*, 47 LAW

in the introduction to the Model Rules suggests that one should interpret the permissive provisions with a view to their implicit limitations.⁶⁹ Although the rules give lawyers choices, lawyers are required to exercise “professional judgment” in selecting among those choices.⁷⁰ That is, lawyers remain subject to regulatory oversight, but the standard by which lawyers’ conduct is judged is more deferential than in other areas of conduct governed by the ethics rules.

Under this view of permissive rules, the codes’ allocation of discretion often comes with an implicit mandate. Lawyers’ choice of conduct is not unfettered, as it might be were the rules simply silent regarding the type of conduct in question. Rather, lawyers have “discretion” akin to that of a judge or administrative agency that is accorded broad leeway. Like these other decision-makers, lawyers may be criticized for abusing their discretion.⁷¹ Perhaps lawyers may be disciplined for failing to “exercise professional judgment” implicitly contemplated by particular permissive rules. Maybe lawyers merely will suffer professional opprobrium for exercising discretion inadequately.⁷² But in either case, the permission to choose among the options comes with expectations. It is subject to regulation.⁷³

& CONTEMP. PROBS. 269, 271–85 (1984) (reviewing various groups’ perception of the meaning of “discretion” and analyzing the degree to which discretion is accepted as a justification for a decision). Scholars have noted that prosecutors’ discretion, though broad, is expected to be exercised with a view to “serving justice” and maintaining prosecutorial neutrality. *See generally* Bruce A. Green & Fred Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840–52 (2004) (discussing prosecutorial discretion and neutrality); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 53–56 (1991) (discussing prosecutors’ obligation to serve justice).

69. *See* MODEL RULES OF PROF’L CONDUCT pmb. ¶ 14 (2006).

70. *Id.*

71. *See, e.g., id.* ¶ 15 (“Compliance with the rules . . . depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings.”).

72. *See, e.g., id.* ¶ 7 (“Many of a lawyer’s responsibilities are prescribed in the Rules of Professional Conduct . . . However, a lawyer is also guided by . . . the approbation of professional peers.”).

73. Of course, the failure to articulate grounds for the exercise of discretion under the permissive rules undermines their force. *See* William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1, 20 (2005) (noting ABA drafters’ persistent failure to indicate how lawyers should exercise their discretion to disclose corporate clients’ confidences to avoid future harm).

This interpretation makes considerable sense when one compares permissive ethics provisions to vague or open-textured rules that also envision variations in how different lawyers will act. Both open-textured provisions (such as requirements of “reasonable diligence”⁷⁴ and reasonable communications with the client⁷⁵ and prohibitions against “unreasonable fee[s]”⁷⁶) and permissive provisions incorporate “standards” rather than bright-line “rules.”⁷⁷ Like permissive provisions, open-textured provisions accord lawyers a degree of discretion. But the open-textured provisions envision the exercise of discretion only within the narrow boundaries of otherwise acceptable behavior. Implicitly, they signal enforcement authorities to refrain from proceeding against lawyers who make good-faith and plausible but, in hindsight, erroneous judgments in areas of uncertainty. In contrast, permissive provisions imply a broader degree of discretion. They anticipate that lawyers will exercise professional judgment in the whole range of cases, not just close cases, and that lawyers will not be sanctioned for making wrong choices except perhaps in extreme situations in which they have failed to exercise judgment at all.

Understood in this way, permissive ethics rules clearly differ from nonregulation (i.e., silence). They, in fact, are a form of regulation that has traditional roots. Until the mid-twentieth century, the professional codes relied less on codified rules than on the expectation of individual lawyers’ self-restraint, guided by professional norms.⁷⁸ The contemporary codes for the most

74. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2006).

75. *See id.* R. 1.4.

76. *Id.* R. 1.5.

77. *Cf.* LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 30 (2001) (“The quality that identifies a rule and distinguishes it from a standard is the quality of determinateness.”); H.L.A. HART, *THE CONCEPT OF LAW* 26–41, 120–32 (1961) (distinguishing rules and standards); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 1–16 (1991) (providing examples and explanations of various types of rules); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557, 559 (1992) (offering “an economic analysis of the extent to which legal commands should be promulgated as rules or standards”).

78. *See* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 *WM. & MARY L. REV.* 1303, 1314–16 (1995). Some modern commentators have argued that lawyer regulation has become overly legalistic and should rely more heavily on lawyers’ exercise of professional judgment. *See, e.g.*, WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 15 (1998) (contrasting a “rule-focused approach” with a more contextual approach allowing the exercise of professional judgment).

part have rejected the regime of self-regulation, but one can view the remaining permissive rules as endorsing informed self-regulation with respect to limited areas of conduct. This understanding of the permissive rules raises obvious interpretive difficulties, because the codes do not make explicit the criteria on which professional judgment is to be exercised. Yet the emphasis on self-restraint is theoretically defensible as a mode of professional regulation.

Many commentators accept the position that at least some permissive rules are regulatory in nature—that they *require* lawyers to make an informed choice in individual cases about the conduct that they are to take.⁷⁹ In their view, for example, lawyers deciding whether to disclose client wrongdoing as permitted under a “future harm” exception to the confidentiality rule⁸⁰ must take into account both clients’ interests in confiden-

79. See Levine, *supra* note 39, at 46 (arguing that lawyers must at least exercise their discretion); Zacharias & Green, *supra* note 39, at 53–55 (same). This strain of reasoning is evident in the cases that evaluate whether criminal defense lawyers have performed so ineffectively as to violate the constitutional standards set forth in *Strickland v. Washington*, 466 U.S. 668, 669–700 (1984). For example, in *Rompilla v. Beard*, the U.S. Supreme Court considered a lawyer’s failure to investigate. See 125 S. Ct. 2456, 2462–63 (2005). The Court hinted that such a failure, by itself, might not have constituted ineffective assistance of counsel. See *id.* at 2463 (noting that there was “room for debate” on the issue). The Court, however, held that the lawyer’s failure to examine a file from a previous conviction that the prosecution had turned over and on which counsel had notice the prosecution intended to rely was unreasonable. See *id.* at 2467. Justice O’Connor’s concurrence noted that the lawyer’s failure to make a choice rendered the behavior improper because it constituted “inattention, not reasoned strategic judgment.” *Id.* at 2471 (O’Connor, J., concurring) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)).

80. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2006). There is a wide variation among jurisdictions’ rules authorizing lawyers to disclose client confidences to prevent harm to third parties. States such as New York have provisions based on the ABA Model Code providing that, despite the general obligation to preserve client confidences, a lawyer “*may* reveal . . . [t]he intention of a client to commit a crime and the information necessary to prevent the crime.” N.Y. CODE OF PROF’L RESPONSIBILITY DR 4-101(C) (2003) (emphasis added). Others emulate the pre-2002 version of the Model Rules, allowing disclosures only to prevent criminal acts a lawyer believes are “likely to result in death . . . or substantial bodily harm.” CAL. RULES OF PROF’L CONDUCT R. 3-100(B) (2004). Yet other states *require* disclosures to avert certain harms. See, e.g., WIS. RULES OF PROF’L CONDUCT R. 1.6(b) (2006) (“A lawyer shall reveal [client confidences] to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.”). Some states authorize lawyers to disclose client confidences to prevent criminal fraud that is likely to result in financial harm to another, regardless of

tiality and third-party interests.⁸¹ At least in extreme cases, a lawyer abuses his professional discretion when he makes a decision arbitrarily⁸² or based on irrelevant or impermissible considerations.⁸³ It would thus be improper for a lawyer to treat the future harm exception as a default rule and to bargain at the outset of the representation never to reveal client wrongdoing, or to decide categorically never to disclose client wrongdoing as permitted by the rule, because doing so would derogate third-party interests that the rule protects.⁸⁴

However, even accepting the baseline assumption that some permissive rules contain limits on the exercise of discretion, the extent of those limits typically is unclear. For exam-

whether the lawyer's services were used in the fraud. *See, e.g.*, N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006) ("A lawyer shall reveal" client confidences to prevent the client or another "from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interest or property of another.").

81. *See* Levine, *supra* note 39, at 47–52 (describing a deliberative model of exercising discretion); Zacharias & Green, *supra* note 39, at 53–54 (discussing potentially mandatory aspects of exercising discretion under the permissive exceptions to confidentiality); Limor Zer-Gutman, *Revising the Ethical Rules of Attorney Client Confidentiality: Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 705–06 (1999) (suggesting that a discretionary rule is not a voluntary rule, but a "compulsory and sanctionary rule" that is violated when the lawyer does not apply the rule in good faith or with minimal competence); *cf.* Mario J. Madden, *The Indiscreet Role of Lawyer Discretion in Confidentiality Rules*, 14 GEO. J. LEGAL ETHICS 603, 604–05 (2001) (criticizing the amount of discretion a lawyer is afforded under confidentiality exceptions, partly because moral judgments made under the exceptions are not "systematically legitimate").

82. *See, e.g.*, Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 51–52 (1997) ("While a lawyer could decide whether or not to represent a particular client by flipping a coin, it would be improper for [a lawyer] to decide in an equally arbitrary manner whether to betray [a child client's] confidences" to protect the child from life-threatening harm.).

83. *See, e.g., id.* at 52, 54 (arguing that it would be impermissible to decide whether to disclose a child client's confidences to protect the child from harm "on the basis of the lawyer's self-interest, for example, in order to avoid the public criticism that might attend one decision or the other if the facts became known," but that it would be permissible for a lawyer to act in her self-interest in deciding whether to reveal client confidences in the lawyer's self-defense under current Model Rule 1.6(b)(5), because discretion is afforded for the lawyer's benefit).

84. The California Rules of Professional Conduct seem to take the opposite position: under the strict language of the new California confidentiality provision and its comments, neither disclosure nor non-disclosure under the future crime exception should ever subject a lawyer to discipline. *See* CAL. RULES OF PROF'L CONDUCT R. 3-100 & cmts. 4–5, 9 (2004). The terms of the rule thus suggest to lawyers that they may bargain away their options.

ple, whether it would be wrong for a lawyer to establish a flat policy that he will always disclose client wrongdoing when the rule affords discretion to do so is a harder question than whether he may always refuse to disclose.⁸⁵ Announcing a practice of reporting misconduct at the outset of representation educates the client. If it is exclusively the client's interest that will be impaired by the revelation of confidences, the lawyer arguably should inform the client *ex ante* of the circumstances under which the lawyer will disclose. On the other hand, if a permissive disclosure exception is intended to further the public interest in law compliance by allowing lawyers to learn of and then discourage proposed wrongdoing by clients, it is less clear that a lawyer should be allowed to adopt an across-the-board position foreclosing the exercise of discretion in either direction.

Consider another example that highlights the difficulty of identifying when limits on discretion apply. Most states have permissive conflict-of-interest provisions which provide that a lawyer *may* accept a waiver when certain conditions are satisfied. May a lawyer legitimately adopt an across-the-board practice of accepting all cases in which a client agrees to waive a conflict? Arguably, a lawyer who might become a prospective witness and can satisfy a lawyer-as-witness provision⁸⁶ still has an obligation to decline representation when the client can easily retain an equally good lawyer who will not be prone to a disqualification motion. A lawyer confronted by an unsophisticated client who is willing to waive a significant conflict under the governing conflict-of-interest rule⁸⁷ simply to avoid having to seek another lawyer might also, in some circumstances, need to send the client elsewhere.⁸⁸ Nevertheless, the contrary position is plausible—that the conflict rules, like rules governing fees and initial retainer agreements, contemplate arms-length

85. For an argument supporting the latter position, see Richard W. Painter, *Rules Lawyers Play by*, 76 N.Y.U. L. REV. 665, 666–67 (2001).

86. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.7 (2006) (prohibiting a lawyer from acting as both advocate and witness in the same proceeding, subject to three exceptions).

87. *E.g.*, *id.* R. 1.7.

88. See Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 433 (1998) (discussing lawyers' obligations under the conflict-of-interest rules).

transactions between lawyers and clients and therefore allow lawyers to exercise discretion entirely in their own interests.⁸⁹

Withdrawal rules provide another example of the interpretive difficulties inherent in permissive ethics provisions. One might argue that when the stated grounds for permissive withdrawal are satisfied, a lawyer may withdraw (subject to court approval) for any reason at all.⁹⁰ An alternative view, however, is that a permissive withdrawal rule must be read in light of a lawyer's duty of loyalty to the client, so that withdrawal to achieve certain ends is an abuse of the lawyer's discretion to withdraw.⁹¹ Cases holding that a lawyer may not drop a client like a "hot potato" to accept another engagement, because doing so is an act of disloyalty, illustrate this approach.⁹² In the end, the extent of discretion accorded by each particular rule depends upon one's interpretation of the rule's purpose and effect.

D. IMPLICATIONS OF THE THREE CONCEPTIONS OF PERMISSIVE RULES

The recognition that some permissive rules may be regulatory in nature—designed to identify areas in which lawyers' choices must be the product of professional judgment, and not be made arbitrarily—has significance for external regulation. It means that even if judges and other lawmakers are naturally inclined to defer to the code drafters' normative judgments, they should feel free to impose extra-code constraints when doing so would reinforce an obligation to exercise professional

89. The drafters of the Model Rules encourage this interpretation by noting, with respect to permissive rules, that "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." MODEL RULES OF PROF'L CONDUCT pmb. ¶ 14 (2006). That statement is not definitive, however, because it does not define the "bounds of such discretion." *See id.*

90. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 550–51 & n.83 (1986) (arguing that where withdrawal will not harm the client, a lawyer may withdraw under Model Rule 1.16(b) "for no reason or for a not very appealing reason, such as to pursue recreational interests or . . . to make a higher fee doing extensive work for a new and wealthier client," but also noting that contract law may provide a different answer).

91. *See, e.g.,* Green, *supra* note 82, at 40–41 (arguing that it may be an abuse of trust for a lawyer to withdraw based on undisclosed, highly particularized personal beliefs that could have been identified as potentially relevant prior to accepting the representation).

92. *E.g.,* *Picker Int'l, Inc. v. Varian Assocs.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) ("A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.").

judgment that is implicitly contained in a professional rule. Doing so would merely complement the codes. It would provide clearer guidance to lawyers than they receive from the permissive rules and would subject lawyers who abuse their discretion to enforcement mechanisms that supplement, but are not inconsistent with, professional discipline. Thus, for example, a decision by courts to impose civil liability for fraud when a lawyer's failure to report client misconduct was, in hindsight, an abuse of the discretion accorded by an ethics code's confidentiality exception would arguably comport with the code drafters' expectations.⁹³

Similarly, to the extent that other permissive rules are equivalent to nonregulation (i.e., they simply fail to take a position on a given type of conduct), those rules also should not constrain other lawmakers. The decision to leave conduct unregulated for disciplinary purposes is not evidence that the drafters believe lawyers should never be regulated, nor does it necessarily reflect the drafters' view of the alternative lawmakers' relative competence to establish standards of behavior. The codes' failure to regulate simply means that the drafters themselves were unprepared, or could not agree, to dictate a single course of conduct. This failure does not reveal their position on whether other lawmakers should do so. The drafters may even have affirmatively desired that other lawmakers set the standards and may have contemplated that any external legal standards would be enforceable through professional discipline, based on rules requiring lawyers to comply with other law. In short, external regulators cannot fairly draw definitive conclusions from the code drafters' failure to restrict particular conduct.

The situation is different, however, when a permissive rule reflects an affirmative judgment by the drafters that the optimal way to regulate the particular conduct is self-regulation—letting lawyers decide for themselves how to act, as a matter of professional discretion. Such a rule can be interpreted in two

93. Indeed, the expectation that civil liability might be imposed in such cases motivated opposition to some proposals for provisions that would permit whistle-blowing by lawyers. See, e.g., Lawrence J. Fox, *It's All in the Atmosphere*, 62 *FORDHAM L. REV.* 1447, 1448–50 (1994) (“If this rule were adopted as an amendment to Model Rule 1.6, it would create significant liability exposure for counsel. . . . [T]he fact that a lawyer had the discretion to disclose confidential information, and did not, will be no defense to the claim that if the lawyer had disclosed confidential information some harm or other could have been prevented.”).

ways. The drafters may have preferred self-regulation for disciplinary purposes, but may have been indifferent on the question of whether other law should constrain lawyer discretion. Alternatively, the drafters may have believed self-regulation to be preferable for all purposes; in other words, that individual lawyers not only are in a better position than the code drafters to decide how to act in a particular case, but also are in a better position to decide than lawmakers more generally. This is how the ABA, in its submission to the SEC, chose to understand the permissive provision on lawyers' disclosure of client misconduct.⁹⁴ Practicing lawyers likely take this view of most permissive provisions, contemplating that when they exercise discretion within the limits of the rules, they should be immune from professional discipline, civil liability, and judicial oversight.

It is unclear whether code drafters generally share the expectation that lawmakers will treat the judgments in the codes' permissive rules as preemptive. At least at first glance, this expectation seems presumptuous. Ethics rules are initially drafted by bar associations, which have no law-making authority. The Model Rules explicitly deny any intent to substitute for civil liability standards.⁹⁵ In most jurisdictions, any legal force the codes have derives from their adoption by the highest state court.⁹⁶ Thus, judgments made by the code drafters are subordinate to judgments of the courts. Moreover, insofar as judicial rule-making authority is delegated by the legislature,⁹⁷ even judicially-adopted rules are subordinate to subsequent legislative judgments.

In some states, however, the authority underlying ethics

94. Letter from ABA to SEC, *supra* note 25 (“[M]andating withdrawal and disaffirmance removes the flexibility that lawyers need in order to have time to counsel their corporate clients effectively. In some instances, premature withdrawal and disaffirmance of documents might seriously and unfairly harm the issuer and its shareholders or create disruption in the market for issuer’s securities, when more time spent with managers or expert advisers might have avoided the need for the attorney to employ so extreme a measure.”).

95. See MODEL RULES OF PROF’L CONDUCT pmb. ¶ 20 (2006) (stating that a violation of the Rules does not “give rise to a cause of action” or “create any presumption . . . that a legal duty has been breached”).

96. See Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1308 nn.12–13 (2003) (observing that state judiciaries usually control state regulation of lawyers).

97. See *id.* at 1308 n.13 (discussing the delegated authority of federal courts).

codes is different. Courts have primary responsibility for regulating the bar, and judicially-adopted professional rules therefore can preempt inconsistent state legislation.⁹⁸ Indeed, cases in some jurisdictions go so far as to hold that courts have negative inherent authority, meaning that state legislatures are precluded from regulating the bar even interstitially.⁹⁹ Hence, judgments by code drafters that are approved by the courts should, at least arguably, preempt inconsistent legislative judgments.

The argument that permissive ethics codes create, or should be deemed to create, an immunity from constraints under federal law is considerably weaker. The argument reduces to a claim that the ethics codes represent the thrust of state law, that the authority to regulate lawyers is reserved to the states, and that federal law therefore cannot trump state rules of lawyer conduct. The Washington State Bar Association recently made such an argument in response to the Sarbanes-Oxley regulations, taking the position that its lawyers are forbidden from making disclosures that the SEC rules authorize but that state confidentiality rules prohibit.¹⁰⁰ One might simi-

98. See Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 362 (1998) [hereinafter Wolfram, *Inherent Powers*] (“Quite beyond that, most state supreme courts also claim the exclusive power to regulate lawyers as the court sees fit—even if the state’s legislature has enacted legislation that on its face is applicable to lawyers.”); see also Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 4–5 (1989) [hereinafter Wolfram, *Lawyer Turf and Lawyer Regulation*] (discussing the alleged inherent power of courts to regulate lawyers).

99. See Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 543–55 (1983) (discussing the development of courts’ claims to the exclusive right to regulate the bar and the more recent trend toward greater legislative control); Amanda Irene Figgs, *Shaulis v. Pennsylvania State Ethics Commission: The Supreme Court of Pennsylvania Continues to Wield Its Exclusive Power to Regulate the Manner in Which an Attorney Practices Law*, 14 WIDENER L.J. 553, 553–54 (2005) (discussing a recent case in which the Pennsylvania Supreme Court rejected legislative controls on lawyer behavior); Wolfram, *Inherent Powers*, *supra* note 98, at 374 n.46 (citing “extravagant” applications of negative inherent authority); Wolfram, *Lawyer Turf and Lawyer Regulation*, *supra* note 98, at 7–12 (discussing cases applying “negative inherent authority”).

100. Wash. State Bar Ass’n, Interim Formal Op. (2003), available at <http://www.wsba.org/lawyers/groups/ethics2003/formalopinion.doc> (“As a general matter and with the current lack of case law on the pre-emption issue, a Washington attorney cannot as a defense against a [Washington Rules of Professional Conduct] violation fairly claim to be complying in ‘good faith’ with

larly argue that the SEC is forbidden to require lawyers to make disclosures in circumstances in which such disclosures are discretionary under a state confidentiality rule. Although the state sovereignty argument is questionable as a constitutional matter,¹⁰¹ that is not to say that federal lawmakers should, as a matter of policy, ignore state rules that reflect a clear preference for individual self-regulation.

In the end, however, whether the drafters can reasonably expect other lawmakers to defer to their judgment that lawyers should be given discretion clearly depends upon the rationale for each permissive rule. While the premise of one permissive provision may be that self-regulation is preferable, and therefore that other lawmakers should follow suit, the premise of others may be that self-regulation is limited or appropriate only for disciplinary purposes. Parts II and III address these possibilities.

II. LIMITS ON LAWYER DISCRETION

The claim that other lawmakers should respect the discretion afforded by permissive ethics rules, and therefore that they should refrain from making laws that encroach on lawyers' discretion, is strongest when that discretion is unrestricted for disciplinary purposes. If the code drafters themselves have imposed limits, it becomes harder to argue that other lawmakers should accede to lawyer self-regulation. In at least some cases, the drafters appear to have restricted discretion in ways not necessarily evident from the face of the permissive rules. The restrictions may derive either from a separate rule or from other law or legal processes.

the SEC Regulations, as that term is used in Section 205.6(c) of the Regulations, if (s)he took an action that was contrary to this Formal Opinion.”); see also Memorandum from the Sarbanes-Oxley Subcomm. of the Wash. State Bar Ass'n Special Comm. for the Evaluation of the Rules of Professional Conduct to the President, President-elect, and Board of Governors, Wash. State Bar Ass'n (July 2003), available at <http://www.wsba.org/lawyers/groups/ethics2003/sarbanesoxleymemotoboadofgovernors.doc> (explaining the draft Interim Formal Ethics Opinion).

101. See N.C. State Bar, Formal Op. 9 (2006) (holding that the Sarbanes-Oxley requirements preempt North Carolina's state confidentiality rules); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 365 (1994) (rejecting the argument that state ethics rules may not be preempted by federal law); see also Cramton et al., *supra* note 24, at 799–801 (criticizing the Washington bar opinion).

A. LIMITS IMPOSED BY OTHER ETHICS PROVISIONS

Mandatory provisions of the codes may limit the discretion granted to lawyers under a permissive rule. For example, the fee rule provides that a “lawyer may . . . contract with a client for a reasonable contingent fee.”¹⁰² This seems to suggest that so long as the size of a proposed contingency fee is reasonable given the expected recovery and risk of non-recovery, lawyers may require a contingent fee as a condition of the representation. Courts and ethics committees, however, have interpreted mandatory rules, such as the requirement in Model Rule 1.5 that a lawyer “not make an agreement for . . . an unreasonable fee,”¹⁰³ as limiting the lawyer’s ability to insist on a contingent fee. The ABA ethics committee relied upon the predecessor version of Model Rule 1.5 and opined that “[a] lawyer normally has an obligation to offer a prospective client an alternative fee arrangement before accepting a matter on a contingent fee basis.”¹⁰⁴ Building on this interpretation, *In re Fallers* held squarely that despite the discretionary language in the rules, courts may overrule a lawyer’s decision to charge a contingent fee.¹⁰⁵

Similarly, mandatory rules arguably constrain a lawyer’s discretion under Model Rule 2.1 to refer to non-legal considerations “such as moral, economic, social and political factors” in rendering legal advice.¹⁰⁶ Irma Russell has suggested that the permissive provision is limited by another portion of the same rule that states “a lawyer shall exercise independent professional judgment and render candid advice.”¹⁰⁷ Russell maintains that, when references to non-legal considerations are necessary elements of “candid advice,” a lawyer must include

102. MODEL RULES OF PROF’L CONDUCT R. 1.8(i)(2) (2006).

103. *Id.* R. 1.5(a). Of course, Model Rule 1.8 already includes a reasonableness limitation, but that limitation arguably refers only to the size of the contingent fee (on a forward-looking basis), not whether a contingent fee arrangement in and of itself constitutes a reasonable fee under the particular circumstances. *See id.* R. 1.8(i)(2).

104. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 86-1521 (1986) (emphasis omitted). The committee built on this gloss to conclude that when a client has the funds to pay a fixed fee, the lawyer should offer alternative fee arrangements and allow the client to make the choice. *See id.*

105. *See* 889 P.2d 20, 21 (Ariz. Ct. App. 1994).

106. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2006).

107. Irma S. Russell, *Keeping the Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513, 521 (2003).

them.¹⁰⁸ Larry Gantt has argued even more broadly that lawyers' permissive authority to counsel clients concerning non-legal considerations is constrained by a host of other rules, including those governing competence, confidentiality, conflicts of interest, and allocation of decision making.¹⁰⁹ Gantt concludes that to determine whether lawyers are required to provide counseling under Model Rule 2.1, they must "look beyond the permissive language in the text."¹¹⁰

These examples raise an interpretive question. When a mandatory rule conflicts with a permissive rule, which trumps? In some cases, a code's comments may resolve this question. For example, Model Rule 8.3 requires lawyers to report certain misconduct of other lawyers,¹¹¹ and Model Rule 4.1 requires lawyers to disclose material "necessary to avoid assisting a criminal or fraudulent act by a client,"¹¹² but both include caveats for information that is protected by the confidentiality provisions of Model Rule 1.6.¹¹³ Model Rule 1.6, in turn, includes several discretionary exceptions to confidentiality¹¹⁴ which must be read in light of the mandatory aspects of Model Rules 8.3 and 4.1. A comment to Model Rule 1.6 indicates that when both the mandatory rules and the permissive confidentiality exceptions apply, the mandatory obligations override the lawyer's discretion not to disclose.¹¹⁵ In jurisdictions in which the

108. *See id.* at 521–22 (“[T]he lawyer who bites his tongue rather than voice the unpleasant argument against a client’s course of action fails more than his own conscience; he fails to fulfill the foundational duty of providing candid legal advice.”). It might equally be argued, however, that the mandatory provision requires candid advice exclusively about legal considerations, so that the decision whether to refer to non-legal factors is always discretionary.

109. *See* Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 388–97 (2005); *see also* Green, *supra* note 82, at 49–50 (giving an example of where, “in order to address the [client’s] question competently, a lawyer must identify relevant non-legal considerations”).

110. Gantt, *supra* note 109, at 419–20.

111. *See* MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2006).

112. *Id.* R. 4.1(b).

113. *See id.* (requiring disclosure “to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6”); *id.* R. 8.3(c) (“This Rule does not require disclosure of information otherwise protected by Rule 1.6.”).

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

115. *See id.* R. 1.6 cmt. 12. Likewise, Model Rule 3.3(b), which requires a lawyer to disclose a person’s intent to engage in a crime or fraud during litigation, is meant to trump any provision making disclosures of client wrongdoing discretionary. *See id.* R. 1.6 cmt. 15 (“Rule 3.3 . . . requires disclosure in some

professional code does not include clarifying comments, institutions charged with interpreting the code (e.g., courts and ethics committees) must determine whether the mandatory or permissive rule takes priority.¹¹⁶

This last point highlights an important fact: limits inherent in some of the codes' permissive provisions may only become apparent as the provisions are fleshed out by ethics committees or judicial opinions interpreting the rules. Constraints on lawyers' ability to demand contingent fees did not appear likely until the ABA ethics committee issued Informal Opinion 86-1521.¹¹⁷ Potential limits on the discretion to withdraw can only be ascertained with any degree of certainty after courts implement their supervisory authority over withdrawal and specify the factors that are germane.¹¹⁸ Nevertheless, in the end, permissive provisions that contain the substantive and procedural limitations described above cannot be conceptualized as purely discretionary. Realistically viewed, they contain explicit and implicit constraints that lawyers initially may not perceive or understand.

B. LIMITS IMPOSED BY OTHER LAW OR LAWMAKERS

Some discretionary rules limit their grants of discretion by delegating the right to constrain discretion to other lawmakers. For example, Model Rule 1.16, which permits lawyers to withdraw from a representation in specified circumstances, explicitly provides that lawyers in litigation must first obtain the permission of the tribunal.¹¹⁹ Although a few courts have regarded this limitation as *pro forma* and have treated the lawyer's discretion to withdraw as absolute,¹²⁰ most courts under-

circumstances regardless of whether such disclosure is permitted by this Rule.”)

116. See, e.g., N.Y. State Bar, Op. 781 (2004) (opining that where a client has perpetrated a fraud on a tribunal, the lawyer must withdraw fraudulent submissions because correction of false submissions, although discretionary under the confidentiality rules, is mandatory under the rule requiring rectification of frauds on the court).

117. See ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1521 (1986).

118. See *infra* text accompanying note 125.

119. See MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2006).

120. See, e.g., Fid. Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 310 F.3d 537, 541 (7th Cir. 2002) (reversing a trial court's refusal to allow withdrawal on the basis that the prerequisites for discretionary withdrawal under the professional rules had been triggered).

stand the limitation as authorizing courts to overrule the lawyer's exercise of discretion on the basis of independent interests (e.g., judicial efficiency).¹²¹ Similarly, the codes (at least for disciplinary purposes) appear to recognize that lawyers' discretion to make certain disclosures¹²² is governed by the obligation to comply with other law and rules of court.¹²³ Conflict-of-interest rules allowing lawyers to accept certain waivers arguably contemplate that lawyers will exercise that option in light of their fiduciary obligations.¹²⁴

The import of these limitations is unclear. The drafters may simply be recognizing the obvious: courts have the power to limit lawyers' discretion by, for example, denying them the right to withdraw from a representation or compelling them to make unauthorized disclosures.¹²⁵ If that is the case, the draft-

121. See *Haines v. Liggett Group*, 814 F. Supp. 414, 425–26 (D.N.J. 1993) (overruling the requests of lawyers to withdraw even though it was clear that the lawyers would indeed suffer severe, unexpected financial hardship in continuing the representation); *Cherokee Nation v. United States*, 42 Fed. Cl. 15, 17 (1998) (holding that even when the conditions for withdrawal under the professional rules are satisfied, courts may force a lawyer to continue the representation if necessary to preserve judicial efficiency); Billings, Cunningham, Morgan & Boatwright, P.A. v. Isom, 701 So. 2d 1271, 1272 (Fla. Dist. Ct. App. 1997) (rejecting withdrawal seemingly authorized by the professional rules on the basis that the client's independent interests outweighed those of the law firm—the firm had represented the client for a long time, and substitute counsel would be difficult to find); see also Lindsay R. Goldstein, Note, *A View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship—An Analysis and Proposal for Reform*, 73 *FORDHAM L. REV.* 2665, 2699–2704 (2005) (comparing courts' responses in criminal and civil cases to withdrawal motions predicated on a breakdown in the attorney-client relationship).

122. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2006) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer believes reasonably necessary . . . to comply with other law or a court order.").

123. See *id.* R. 3.4(c) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists . . .").

124. See, e.g., *id.* R. 1.7(b) (allowing conflict waivers in specified circumstances); see also Zacharias, *supra* note 88, at 412–23 (discussing a lawyer's obligations in evaluating client conflict waivers).

125. For example, some commentators have suggested that the codes reflect a different view of the appropriate contours of confidentiality than the judicial view. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 *N.C. L. REV.* 1389, 1409–47 (1992) (comparing the separate visions of the bar and judiciary regarding attorney-client secrecy); Fred C. Zacharias, *The Falacy That Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar*, *PROF. LAW.*, 1999 Symposium Issue, at 39, 40 (discussing the bar's failure "to accept that its vision of appropriate secrecy . . . diverges from

ers are not affirmatively inviting courts to regulate lawyer discretion (and may even prefer that courts not do so), but are acknowledging that when courts choose to impose obligations, lawyers will not be disciplined for complying. Alternatively, these provisions might reflect the drafters' recognition that courts are in a superior position to make contemporaneous, objective determinations regarding whether or not lawyers should be allowed to withdraw or whether disclosures should be made in a particular situation. If that is the intent, court-imposed restrictions are consistent with both the letter and spirit of the rules' grant of discretion.

C. IMPLICATIONS OF THE LIMITS ON DISCRETION

That the codes themselves may contemplate limits on lawyers' discretion affects how other lawmakers should regard permissive rules. Most obviously, when the codes impose limits, there is no inherent reason for other lawmakers to forebear from enforcing them.¹²⁶ Thus, Russell's and Gantt's conclusions that mandatory rules sometimes require lawyers to counsel their clients about non-legal considerations might well justify the imposition of civil liability (e.g., for professional negligence) when a lawyer has failed to discuss non-legal considerations, or may justify the promulgation of administrative regulations that require such counseling. Similarly, insofar as permissive rules accede to other law and invite external lawmakers to develop limits, there is no reason why external regulators should decline the invitation. They would not be encroaching on lawyer discretion so much as reinforcing a limitation recognized by the drafters themselves.

Arguably, when code drafters include limitations on permissive authority that they have granted to lawyers, the drafters are signaling that their commitment to informed self-regulation is relatively weak. For example, the grant of occasional discretion to reveal or keep secret client misconduct seems to be trumped by the requirement that lawyers correct

the vision of judges evaluating claims of privilege"); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 71-75 (1999) [hereinafter Zacharias, *Harmonizing Privilege and Confidentiality*] (explaining the different conceptions of secrecy of the bar and judiciary).

126. That is not to say that ordinary constraints on other lawmakers might not cause them to forebear, but rather that the mere existence of permissive language in the ethics codes should not serve as an impediment to external regulation.

their clients' and witnesses' false testimony and remedy other frauds on the court.¹²⁷ The limitation on discretion highlights the drafters' conclusion that the public interest in the integrity of judicial proceedings outweighs the drafters' general preference for allowing lawyers to make individual decisions regarding disclosure of client confidences. Given the weakness of the commitment to lawyer autonomy in the adjudicative context, external lawmakers might reasonably infer that, even from the drafters' perspective, other public policy considerations can justify further limits.

Suppose, however, that a code does not expressly limit a permissive rule. Should other lawmakers respect self-regulation as the preferable regulatory alternative and forebear from imposing requirements or liability within the area that the rules leave to lawyers' discretion? Any argument to this effect presupposes that by granting lawyers options, the code drafters made a normative judgment to which they believed other lawmakers should defer. In fact, however, code drafters develop permissive provisions for a variety of reasons—some normative, some not. The drafters' expectations of whether external lawmakers will ratify the discretion delegated by a disciplinary rule may well depend upon the reasons why the codes have emphasized discretion in that particular rule. As discussed below, it is not ordinarily obvious from the face of a rule why the codes have permitted lawyers to choose their actions, nor is it always clear whether the drafters' justification for according discretion was meant to have implications for external lawmakers.

III. JUSTIFICATIONS FOR PERMISSIVE RULES

Code drafters sometimes adopt rules that accord lawyers discretion because they believe that to be the correct approach and hope that other lawmakers will agree with, or accede to, the drafters' normative judgment.¹²⁸ In other instances, the

127. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3), (b)–(c) (2006).

128. As Susan Koniak has pointed out, sometimes the drafters clearly intend to establish the legal standard, fully expecting or hoping that courts and other law-making institutions will accept their approach. See Koniak, *supra* note 125, at 1411. The bar's vision of the appropriate substantive law may, however, conflict with the view of other law-making institutions. *Id.* The normative view underlying the limited discretionary future harm exception to attorney-client confidentiality, for example, seems to be inconsistent with the views underlying both agency law, which allows agents to disclose to protect the superior interests of third parties, and judicial exceptions to attorney-

drafters anticipate and accept that external lawmakers may reach different conclusions about the appropriate rule. That expectation may stem from the debatable nature of the issue or from the fact that the code drafters have limited the scope of their inquiry and the interests they have considered. As a consequence, after the fact, it often is both possible to posit a range of explanations for a given discretionary rule and impossible to ascertain a clear intention on the drafters' part to preempt other law.

A. THE NORMATIVE JUDGMENT THAT THE PERMISSIVE APPROACH IS CORRECT ACROSS-THE-BOARD

Permissive ethics rules reflect a variety of normative judgments that the code drafters may believe external lawmakers should follow. First, the range of situations that a rule implicates may both call for a balancing of interests and involve interests that individual lawyers can best understand and accommodate. Second, lawyers' personal interests in being able to select their conduct may warrant respect. Third, in situations in which lawyers must make difficult choices, the drafters may believe lawyers are entitled to deference, or room for error, when in hindsight their decisions prove to be wrong or questionable. Finally, the drafters may regard a discretionary rule as preferable simply because it is the lesser of two (or more) evils.

The permissive future harm exceptions to attorney-client confidentiality¹²⁹ typify ethics rules that can be explained on the basis of the drafters' belief that lawyers should be allowed to balance moral and systemic considerations through case-by-case decision making. Whether a lawyer should disclose a client's confidences to prevent or rectify serious harm to a third party when permitted to do so arguably depends upon a balance among client rights, society's interest in the operation of the legal system (which lawyers have an interest in protecting), and moral or other societal considerations (which lawyers also have an interest in serving). How to strike the balance turns on the relative importance of preserving a client's trust, the nature

client privilege. See RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1958) ("An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person."); see also Zacharias & Green, *supra* note 39, at 57–60 (discussing judicial interpretations of attorney-client secrecy requirements).

129. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2006).

and seriousness of the risk to third parties, and the extent to which the client truly meant to entrust a confidence. A rule authorizing lawyers to decide the disclosure issue on a case-sensitive basis may be the best way to implement the normative judgment that balancing is appropriate and that lawyers are in a good (perhaps the best) position to strike the balance. Code drafters may prefer the permissive approach to an under- or over-inclusive alternative that would require lawyers always to disclose in certain categories of cases and never to disclose in others.¹³⁰

Other discretionary rules seem to focus on the rights of lawyers themselves, deeming lawyers' interests paramount and therefore according lawyers autonomy to decide whether or not to promote those interests. This approach helps explain rules permitting lawyers to counsel clients about moral and political considerations¹³¹ and rules authorizing lawyers to withdraw when a client wishes to take a "repugnant" position.¹³² In many cases, client or public concerns may not provide a compelling reason for *requiring* lawyers to withdraw or to advise clients about non-legal factors. Yet individual lawyers may legitimately believe that the dictates of competence, conscience, or their personal conception of the lawyer's role warrants consideration of moral or political issues. The advice and withdrawal rules appear to reflect the code drafters' judgment that these lawyers' beliefs should be respected, at least to the extent of protecting their ability to engage in moral or political counseling and to avoid personal participation in cases that offend them. The permissive nature of the rules enables lawyers to

130. See generally J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 355–56 (1976) (discussing rationales for permissive disclosure of clients' intended crimes); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 101 (1994) (same). In contrast, mandatory disclosure rules drafted by other lawmakers—such as the proposed SEC regulations implementing the Sarbanes-Oxley Act—reflect the opposite normative judgment. Their premise is either that balancing is inappropriate or that lawyers are not uniquely situated to determine the appropriate accommodation of interests.

131. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006).

132. *Id.* R. 1.16(b)(4). The future harm exceptions have similarly been explained by some as respecting a lawyer's autonomy. See, e.g., Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1175 (1985) (advocating a mandatory disclosure rule, but acknowledging that such a rule would infringe lawyers' autonomy).

address concerns of conscience to the extent they deem it appropriate to raise them, but at the same time maintains the codes' key elements of client-orientation, role-differentiation, and zealous advocacy.

Another situation in which code drafters may predicate a permissive rule on normative considerations that they expect other lawmakers to accept occurs when the drafters impose particularly difficult decision-making responsibilities but do not believe that an attorney deserves sanction for implementing those responsibilities in good faith if the attorney's decision proves faulty. In other words, fairness may require that in some situations lawyers be accorded a measure of leeway, or wriggle room, pursuant to which they can make their best judgments free from fear of punishment. This understanding probably underlies rules allowing lawyers to decline to present suspected perjury in civil cases.¹³³ In the absence of discretion, lawyers would be forbidden to introduce testimony they know to be false but be required to introduce helpful testimony that they merely believe is false; the propriety of the lawyer's conduct would turn on the lawyer's actual knowledge, and there would be no room for error. When it is unclear whether the information in a lawyer's possession rises to the level of knowledge or to mere suspicion that the client's proposed testimony will be false, any decision by the lawyer creates considerable disciplinary risk. The permissive ethics provision arguably obviates that risk by according the lawyer discretion in close cases.

Finally, some permissive provisions may be explicable not based on the affirmative utility of discretion but simply as being preferable to the likely alternatives. For example, as described in the Introduction, the ABA faced pressure following the collapse of Enron and other corporate scandals to adopt mandatory disclosure obligations, but responded by expanding its permissive provisions. Proponents argued, among other things, that permissive disclosure is preferable to mandatory reporting because clients who are aware of a disclosure obliga-

133. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2006). It has been noted that the future harm exceptions to confidentiality similarly obviate the need to decide on which side of the line a case falls. See Donald L. Burnett, Jr., *The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers*, ARMY LAW., Feb. 1987, at 19, 23 (noting difficult decisions under proposed military rules of professional conduct, under which disclosure would be mandatory to avert certain harms, and otherwise would be impermissible).

tion will be less willing to retain and confide in lawyers¹³⁴ and because risk-averse lawyers will withdraw from representation at the first hint of client misconduct, thereby denying clients wise and informed counsel.¹³⁵ The proponents evidently persuaded the rule-drafting body that the permissive approach better supports the lawyer's role in promoting compliance with the law.

The justifications discussed above all reflect decisions by the code drafters that, on balance, discretion is the preferable approach to regulating a particular area of professional conduct. Such judgments ordinarily imply a belief that other lawmakers should reach the same conclusion.¹³⁶ Nevertheless, the terms of permissive rules seldom make clear whether the rules are based on these kinds of considerations.

By way of example, consider yet again the future harm exceptions to confidentiality. One might argue that their purpose is less to implement a normative judgment about the complexity of balancing competing interests than to promote the perceived interest of particular lawyers in "bring[ing] their personal conscience and morality to bear in deciding whether to . . . prevent criminal activity by a client."¹³⁷ Alternatively, their purpose may be to provide some margin of error in the space between those situations in which lawyers *must* disclose client confidences (e.g., when necessary to avoid assisting a client's crime or fraud)¹³⁸ and those situations where lawyers *may not* disclose intended client wrongdoing (e.g., when it is not sufficiently certain that the client's conduct is criminal or fraudulent, that substantial harm will result, or that the lawyer's services are implicated).¹³⁹ As discussed below in Parts III.B and

134. Letter from ABA to SEC, *supra* note 25 (arguing that a proposed requirement that lawyers notify the SEC of withdrawal and disaffirm specific documents would undermine corporations' trust in their lawyers); Letter from the Bd. of Dirs. of the Am. Corporate Counsel Ass'n to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/bnagler1.htm> [hereinafter Letter from ACCA to SEC] (same).

135. *See* Letter from ACCA to SEC, *supra* note 134.

136. That does not mean, however, that lawmakers always agree. Indeed, in some instances, code drafters have adopted ethics regulations for the very purpose of influencing or contradicting contrary substantive law. *See* Koniak, *supra* note 125, at 1411.

137. Steven C. Krane, *Don't Tell Anyone (Our Confidentiality Rules Are Changing)*, N.Y. ST. B. ASS'N J., May 2005, at 28, 29.

138. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2006).

139. *See id.* R. 1.6(b)(2)–(3).

III.C, the provisions might equally be explained on the basis of separate reasons that do not reflect any normative judgment to which the drafters would want, or expect, other lawmakers to defer.

B. THE NORMATIVE JUDGMENT THAT THE PERMISSIVE APPROACH IS PREFERABLE FOR DISCIPLINARY PURPOSES BUT NOT NECESSARILY FOR OTHER LEGAL PURPOSES

Code drafters might adopt permissive ethics provisions assuming that they reflect the preferable disciplinary standard, yet nonetheless anticipate that other lawmakers may appropriately set regulatory standards mandating or forbidding specific conduct within the area of discretion identified by the ethics code. There are a variety of reasons for code drafters to adopt this approach.

One set of rationales stems from the difficulty of drawing bright-line rules that cover all situations lawyers are likely to confront. Consider, again, the confidentiality exceptions permitting disclosure of client wrongdoing. There are strong policy justifications for and against these exceptions. On the one hand, clients' interests in secrecy and loyalty and the legal system's interest in promoting future clients' trust in lawyers favor confidentiality. On the other hand, society's immediate interest in preventing misconduct often favors disclosure. The appropriate balance in any case may well depend upon the nature of the misconduct and its effect, the likelihood that it will occur without disclosure or be prevented with disclosure, the impact of disclosure on the client, and other fact-sensitive considerations. Bright-line rules—for example, requiring lawyers to report a client's intent to commit specified crimes of violence but forbidding lawyers to disclose other intended wrongdoing—arguably are both over- and under-inclusive; in at least some cases, violent crimes should not be reported and other wrongdoing should be reported.¹⁴⁰

140. Consider, for example, two clients. The first tells the lawyer, "I'm going to punch my neighbor in the nose for killing my dog," while the second—a client in a routine real estate closing—confides that he plans to launder money for Al Qaeda. Disclosing the first client's confidence may destroy the working relationship the lawyer has with the client in the separate representation, and the warning to the neighbor may add little to what the neighbor already knows. The importance to society of disclosing the second client's confidence, in contrast, may outweigh the need to preserve the client's trust.

Code drafters might reasonably conclude that according lawyers discretion to make appropriate decisions in individual cases is a better alternative than binding lawyers to an inflexible categorical mandate. This drafting choice, however, may not reflect an expectation that other lawmakers will defer to lawyer discretion. It may simply reflect a judgment that reasonable observers can take opposite positions on the disputed issue. The fact that the code takes one approach does not mean that the drafters would not accept that external lawmakers might reach the conclusion—perhaps even the correct conclusion—that a mandatory rule is preferable.

More significantly, the drafters' conclusion that only a permissive standard can adequately address the plethora of potential cases is perfectly consistent with the expectation that other lawmakers may adopt mandatory rules for subcategories of cases in which concrete standards make sense. A state legislature, for example, might adopt a reporting law that requires all professionals, including lawyers, to report ongoing incidents of serious child abuse.¹⁴¹ Although it is conceivable that the drafters of the permissive ethics rule would conclude that lawyers should have discretion not to report child abuse, it is equally conceivable that the drafters would agree that disclosure should be made in that subclass of cases.

Likewise, a rule permitting lawyers to counsel clients about moral and political considerations¹⁴² may be based on the drafters' judgment that such counseling is sometimes appropriate and sometimes not, and that no uniformly correct approach can be encapsulated in a single rule. The conflict-of-interest rules, in allowing lawyers to accept particular conflict waivers,¹⁴³ arguably reflect the drafters' understanding that sometimes clients who understand the consequences will benefit by waiving the conflict, while in other cases lawyers' refusal to accept waivers will best serve the clients' interests.¹⁴⁴ Neither of these permissive rules, however, eliminates the possibility that the drafters would accept a legislative conclusion that lawyers should act in a particular way in subcategories of cases.¹⁴⁵

141. See MISS. CODE ANN. § 43-21-353 (2005); OR. REV. STAT. § 419B.005-.010 (2003).

142. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006).

143. See, e.g., *id.* R. 1.7.

144. See Zacharias, *supra* note 88, at 412–23 (discussing the reasons for honoring and for overriding client consent to conflicted representation).

145. For example, Congress has adopted legislation that precludes conflict

A second set of reasons why code drafters might adopt a permissive rule yet accept the possibility that alternative lawmakers will produce mandatory or prohibitive standards derives from the limited interests that the professional codes typically address. Most ethics regulation focuses on particular systemic concerns, including client protection, enhancing public trust and respect for the profession, assuring that legitimate third-party interests are safeguarded (in at least a procedural sense), promoting the operation of the adversary system, maintaining efficient judicial administration, and (occasionally) implementing more general societal interests. Code drafters often adopt permissive rules that, in their view, properly balance the interests that the codes address, while still assuming that other lawmakers might adjust the balance when taking other considerations into account.

A permissive exception to confidentiality, for example, may reflect a judgment that the lawyer should be given a choice about how to proceed, based on the assessment that this approach best accommodates client, third-party, and societal interests in disclosure. That conclusion does not, however, gain-say the possibility that societal interests in mitigating widespread corporate misconduct at a particular time in history might justify an SEC regulation that mandates disclosures by corporate attorneys.

Indeed, a permissive ethics rule may reflect the code drafters' indifference to how lawyers act, at least with respect to the interests that the ethics code is intended to further. This attitude helps explain the rule permitting contingent fees. Outside the matrimonial and criminal contexts, code drafters may perceive no ethics-based interest that would justify either compelling or forbidding a lawyer to represent a client for a contingent fee. That does not mean, however, that society should be power-

waivers in the bankruptcy context. *See* 11 U.S.C. § 327(a) (2000). A legislature might also reasonably adopt bright-line rules forbidding lawyers to accept conflict waivers from minors or mentally disabled persons. In the counseling situation, it might be appropriate for a legislature to insist upon moral counseling when a corporate client determines that its product threatens to harm some users (or employees involved in the manufacturing process) but that the benefit of the product outweighs the potential liability costs. *Cf.* Gantt, *supra* note 109, at 419–20 (“[A]ttorneys may be ethically obligated at times either to advise clients on the nonlegal issues that relate to the legal issues in the representation or, at a minimum, to raise the nonlegal issues with their clients and instruct them to seek expert advice in those other fields.”).

less to conclude that in particular types of litigation, limits are necessary to protect clients from exploitation.¹⁴⁶

Alternatively, one can conceive of situations in which code drafters view the competing ethics interests as being in complete equipoise and therefore allow lawyers' personal interests to tip the balance. This approach might explain aspects of rules allowing lawyers to withdraw from representation, for example when a client uses (or has used) a lawyer's services to commit a fraud.¹⁴⁷ The interests in protecting the public and in promoting public confidence in the profession compete against client interests in confidentiality and zealous representation. To the extent the code drafters determine that neither set of interests is dominant, they may deem it fairest to allow each lawyer to decide whether to continue the representation in light of the lawyer's own interests.¹⁴⁸

Insofar as a grant of discretion is a product of indifference, the code drafters presumably do not mean to supersede alternative regulation that narrows the lawyer's discretion in order to promote interests different from those underlying the ethics codes.¹⁴⁹ The rulemakers may even invite external lawmakers

146. For example, Congress might have adopted legislation forbidding representation of parties on a contingent fee basis before the September 11 claims tribunal, based on a legislative view that the claimants had adequate access to lawyers who would competently represent them at lower cost for a fixed or hourly fee and that, insofar as possible, the awards should be preserved for the benefit of the claimants, not their lawyers. Such legislation would not necessarily have been inconsistent with the judgments underlying the general rule permitting contingent fees. See MODEL RULES OF PROF'L CONDUCT R. 1.8(i)(2) (2006); see also Assistance Program Under the 9/11 Heroes Stamp Act of 2001, 70 Fed. Reg. 43,214, 43,215 (July 26, 2005) (to be codified at 44 C.F.R. pt. 153); Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Compensation Fund*, 53 DEPAUL L. REV. 457, 496 n.219 (2003) (citing Kenneth Feinberg, Presentation at Brooklyn/Cardozo Faculty Workshop on Ethical, Economic, and Social Issues in Mass Torts (Nov. 4, 2003)) (observing that when families of those who died in the September 11, 2001 terrorist attacks were represented on a contingent fee basis, the fee was ordinarily eight to ten percent of the recovery).

147. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(2)–(3) (2006).

148. The lawyer's own interests may include, for example, the lawyer's business interest in continuing lucrative engagements, on the one hand, or the interest in avoiding civil liability and preserving a reputation for professional integrity, on the other.

149. It is important to note the difference between the normative judgment that fairness requires a sanction-free zone, on the one hand, and purely self-serving judgments on the part of the bar, on the other. Rules that provide a zone of discretion as a means of enabling or facilitating the exercise of lawyers' responsibilities to clients or the system reflect a normative judgment that a safe harbor for lawyers helps the system operate appropriately. Self-serving

to restrict the lawyer's discretion. Standard withdrawal rules, for example, identify circumstances in which lawyers may terminate representation, but specifically note that courts have supplemental interests in avoiding undue delay or expense arising from substitution of counsel. These rules contemplate that when a lawyer seeks judicial permission to withdraw, the ruling court will take its own institutional interests into account. A denial of leave to withdraw is not inconsistent with the judgment underlying the permissive withdrawal provisions, at least insofar as the court is implementing institutional concerns that the ethics rule did not resolve.

One can interpret the permissive withdrawal rules in yet another way that reflects both a normative judgment by the drafters and an acceptance of the possibility that other law-making institutions may disagree. Code drafters know that at least some of their rules will, or may, co-exist with inconsistent judicial or legislative requirements, with each standard governing decision making in the sphere controlled by the rule-making institution. Thus, for example, code drafters seem to envision conflict-of-interest rules as governing disciplinary cases, but judicial disqualification standards as governing lawyer conduct within litigation.¹⁵⁰ One can conceptualize attor-

rules, which sometimes include immunity from sanctions for improper conduct, simply seek to confer a benefit upon the bar.

Of course, some rules can be viewed as fitting either category. For example, the permissive future harm exceptions to attorney-client confidentiality facilitate lawyers' ability to make the difficult decision to turn against the client, but they also arguably provide a shield for lawyers who fail to disclose confidences in order to preserve third-party interests. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(1) (2000) ("A lawyer is not liable under § 48 or § 49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule."). Rules allowing lawyers to counsel clients regarding ongoing or planned illegal conduct purport to relieve lawyers of uncertainty in determining whether their counsel constitutes unlawfully assisting the clients in the commission of the crime, but they ostensibly provide a similar shield. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 9 (2006) ("Nor does the fact that a client uses [a lawyer's] advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action.").

150. *See, e.g.,* N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 720 (1999) ("The standard employed in ruling on disqualification motions is not invariably the same as the standard under the applicable disciplinary rules. In some cases, courts will decline to disqualify a law firm, even though its representation would appear to be forbidden by the disciplinary rules, in light of the client's interest in preserving an ongoing . . . relation with its chosen counsel and other considerations of fairness and economy."); *see also* Green, *supra* note 11, at 74–83 (describing courts' development of disqualification doctrine inde-

ney-client secrecy standards in the same way. The code drafters have a normative view concerning appropriate secrecy; professional confidentiality rules control lawyer discipline. But the drafters also seem to acknowledge that other institutions, especially courts, have a narrower normative view (reflected in attorney-client privilege standards) which takes precedence once lawyers become involved in litigation.¹⁵¹

Finally, code drafters might adopt a discretionary approach simply because they despair of resolving a controversial issue for whole categories of cases in which reasonable observers differ about the correct approach. The debate regarding the appropriate conduct of lawyers when they believe (but do not know) that a client's testimony is false has long divided the bar.¹⁵² A rule leaving the decision to lawyers¹⁵³ not only allows individual attorneys to resolve diverse cases differently, but also avoids having proponents of one arguably legitimate normative view impose their beliefs on proponents of the opposite, but also legitimate, view. The decision to leave the issue to individual decision making is normative in the sense that code drafters conclude that individual decisions will be at least as valid as a categorical decision encapsulated in a rule, yet it is also non-normative in the sense that it fails to adopt any solution as correct. A decision by alternative lawmakers who believe that they can reach a correct conclusion on the issue therefore cannot be viewed as inconsistent with the normative judgments of the professional rulemakers.

pendently from the conflict rules).

151. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2006) (authorizing lawyers to disclose confidences in order "to comply with other law or a court order").

152. The most pointed example of this debate was the work of Monroe Freedman in the mid-1960's and the responses of David Bress and John Noonan. Compare Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478 (1966) (discussing, *inter alia*, defense lawyers' obligations when a client wishes to commit perjury), with David G. Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1494-97 (1966) (disagreeing with Monroe Freedman's resolutions of "the three hardest [ethical] questions" for criminal defense attorneys), and John T. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1487-92 (1966) (responding to Freedman's arguments in favor of broad confidentiality).

153. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2006).

C. PROCEDURAL OR STOP-GAP JUSTIFICATIONS FOR PERMISSIVE RULES

Thus far, we have considered only normative justifications for permissive rules—decisions by code drafters to adopt a permissive rule because they have a normative preference for lawyer discretion. Permissive rules may be adopted for many other reasons, however.

One can easily imagine situations in which code drafters adopt permissive rules for practical reasons. Of course, when doing so, code drafters ordinarily will make their best efforts to define an appropriate ethics standard. Nevertheless, the code drafters may be perfectly willing to defer to external lawmakers' alternative resolutions of the issues. Indeed, the drafters may even be attempting to codify or predict what they believe to be the external lawmakers' preferences. Under these circumstances, the code drafters should be prepared to cede authority to the alternative regulatory institutions when those institutions adopt a contrary standard.

One important function of the legal ethics codes is to inform lawyers about the lawfulness and appropriateness of behavior.¹⁵⁴ In adopting some permissive rules, code drafters perceive themselves merely as codifying¹⁵⁵ or supplementing existing legal standards.¹⁵⁶ Other permissive rules seek to fill gaps in the law¹⁵⁷ or, as discussed below, clarify extra-code standards.

Lawyers are particularly likely to be confused about how to act when legal standards are ambiguous or in flux. Permissive rules can serve the codes' guidance function by advising the practicing bar that conduct deemed improper under previous legal standards or professional norms is becoming accepted. By making the standard discretionary, code drafters either inform

154. See Zacharias, *Specificity in Professional Codes*, *supra* note 8, at 231–32 (discussing the purposes of ethics codes).

155. See Munneke & Davis, *supra* note 9, at 42–43 (asserting that Model Rule 1.9 is a codification of court-made law defining “the substantive standard for successive conflicts of interest”).

156. Zacharias, *Specificity in Professional Codes*, *supra* note 8, at 232 (noting that “drafters sometimes have attempted to supplement the substantive law”).

157. See Munneke & Davis, *supra* note 9, at 43 (discussing Model Rule 1.5 as an example in which the codes recognize lawyers' customary standard of behavior in dividing fees).

lawyers to look to the changing case law or suggest directly that particular conduct is legal but remains controversial.

Perhaps the best examples are ethics rules that allow lawyers to accept contingent fees¹⁵⁸ and to advance certain costs on behalf of some litigants.¹⁵⁹ When adopted, these rules addressed doubt about the propriety of such conduct that stemmed from nineteenth- and early twentieth-century law deeming activities promoting litigation to be improper champerty or barratry.¹⁶⁰ With the due process¹⁶¹ and legal advertising¹⁶² revolutions came acceptance of the notion that behavior by lawyers that informs the public and makes representation more freely available to consumers of legal services can be beneficial to society.¹⁶³ Traditional restrictions on lawyer activities that served these ends—including restrictions on advertising, contingent fee representation, certain kinds of solicitation, and providing financial support for class action litigation and indigent plaintiffs—changed slowly, and some of these limitations remained on the books even as it became clear that courts would no longer countenance them.¹⁶⁴ The modern contingent

158. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(i)(2) (2006).

159. See, e.g., *id.* R. 1.8(e).

160. In other words, the earlier law deemed litigation to be a bad thing, and financial devices that enabled lawyers to facilitate the filing of lawsuits were to be discouraged. See R.D. Cox, *Champerty as We Know It*, 13 MEMP. ST. U. L. REV. 139, 153 (1983) ("The common law . . . prohibited one from even encouraging a present or prospective plaintiff in his lawsuit, absent a justifying relationship."); Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 473 (1998) ("[M]edieval society frowned on lawyers marketing their services [I]t was the financing of litigation that was disquieting and prohibited.").

161. See Zacharias, *supra* note 78, at 1318–20 (discussing the effects of the due process revolution in criminal cases on the role of lawyers in civil litigation).

162. See J. GORDON HYLTON, PROFESSIONAL VALUES AND INDIVIDUAL AUTONOMY: THE UNITED STATES SUPREME COURT AND LAWYER ADVERTISING 36–41 (1998) (discussing the shift in legal doctrine governing legal advertising); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 995–96 (2002) (discussing the history of lawyer advertising regulation).

163. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (allowing limited regulation of lawyers' in-person solicitation of clients); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383–84 (1977) (finding lawyer advertising to be constitutionally protected).

164. See Zacharias, *supra* note 162, at 996 n.116 (discussing the regulatory resistance to changes in advertising and solicitation rules).

fee and financial support rules served notice on lawyers of the change in legal standards.

Similarly, rules allowing lawyers to inform the courts about known client perjury were adopted in the wake of a heated debate about whether lawyers must honor confidentiality, on the one hand, or their disclosure obligations as officers of the court, on the other.¹⁶⁵ Lawyers' legal obligations in the perjury context were unclear and, as a result, the early codes also remained ambiguous on the issue.¹⁶⁶ The Supreme Court's decision in *Nix v. Whiteside*, however, tipped the balance.¹⁶⁷ In that case, the Supreme Court held that a defendant has no right to commit perjury and therefore no right to assistance in doing so.¹⁶⁸ *Nix* by itself did not change the law, for the Court had no jurisdiction to revise state ethics codes. The *Nix* decision itself purported to apply Iowa's standards.¹⁶⁹ Nevertheless, the Court's pronouncements signaled that requiring lawyers to disclose perjurious clients' confidences was a legitimate, constitu-

165. See *supra* note 152 and accompanying text.

166. In *Nix v. Whiteside*, for example, the court of appeals concluded that the defendant's lawyer had failed to provide effective assistance of counsel when he threatened that if the client testified falsely, the lawyer would disclose to the court that the client had done so. See 744 F.2d 1323, 1330-31 (8th Cir. 1985). But the Supreme Court squarely disagreed, holding that a defendant has no right to commit perjury and therefore no right to assistance in doing so. See *Nix v. Whiteside*, 475 U.S. 157, 168 (1986). This disagreement reflected the ambiguity of the then-prevailing codes of ethics. The Model Code, which was still the model for many states' rules, prohibited lawyers from "[k]nowingly us[ing] perjured testimony" but did not authorize them to disclose after-the-fact that a client had committed perjury because the confidentiality duty took precedence. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980). Further, many courts believed that the criminal defendant's right to testify meant that, to comply with the prohibition of presenting false testimony, lawyers were required to offer their clients' false testimony in the form of a "narrative." The then-existing Model Rules, in contrast, did not allow a lawyer to disclose a client's intent to commit perjury, but did require lawyers to remedy past frauds upon a tribunal. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b), 3.3(a) (1983).

167. See 475 U.S. 157 (1986).

168. See *id.* at 163 (rejecting the Eighth Circuit's holding that the defendant's lawyer failed to provide effective assistance of counsel when he threatened that he would inform the court if the defendant testified falsely).

169. Ironically, the Supreme Court misread the professional rules, stating that the Iowa code and the Model Code both provided that an "attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony." *Id.* at 170. These codes, however, only forbade a lawyer's knowing use of perjured testimony, but did not necessarily allow disclosure of perjury after the fact. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980).

tional approach,¹⁷⁰ and as a result many states adopted such a requirement.¹⁷¹ The ABA's promulgation of a model rule that implemented *Nix's* approach, allowing lawyers to disclose client perjury in criminal cases, foreshadowed this result.

What is important to note about these changes is that the code drafters' standards arguably were not intended to establish a unique normative view that might stand in opposition to the view of other law-making institutions. Rather, the drafters either followed changes in legal standards already in progress or anticipated that the law would change. Viewed fairly, code provisions adopted for these reasons should not inhibit lawmakers from later departing from the code drafters' formulation, either because the drafters misunderstood how the law was evolving or because further change seems desirable.

This situation arguably differs from one in which legal standards for lawyer behavior are clear and established, yet fail to specify behavior for particular circumstances. The law of attorney-client privilege, for example, encompasses lawyers' obligations to maintain client secrets and to disclose limited categories of information, but it applies only in litigation.¹⁷² It does not tell lawyers how to act when possessed of secrets they would like to disclose for moral reasons, but which have not been demanded in testimony or discovery. Attorney-client confidentiality rules fill that gap. The future harm exceptions to confidentiality arguably require lawyers to balance and consider factors that are pertinent to disclosure in the nonlitigation setting.¹⁷³

170. See *Nix*, 475 U.S. at 171 (finding professional standards allowing the disclosure of client perjury to be "reasonable" and constitutional).

171. See, e.g., Bruce A. Green, *Lying Clients: An Age Old Problem*, 26 LITIGATION 19, 23 (1999) (categorizing Tennessee as an example of a state that adopted the ABA's view, New York as "adher[ing] to the [ABA's] earlier position," and Florida as "tak[ing] a more demanding view than the ABA"); cf. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353 (1987), in PROFESSIONAL RESPONSIBILITY ANTHOLOGY 65 (Thomas Metzloff ed., 1994) (revising the ABA's position on lawyers' obligations in light of the new Model Rules).

172. See Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 125, at 71.

173. Lawyers thus may consider the likelihood and extent of the harm the client will cause, but may also consider such factors as the need for disclosure, the effect disclosure will have on the lawyer's relationship with the client, and the impact on the legal system (in particular, on other clients' willingness to trust lawyers) if the disclosure is publicized. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358-62 (1988) (discussing the justifications for maintaining strict confidentiality).

When code drafters fill gaps in the law, their intentions typically are unclear. The drafters may simply be trying to predict the alternative lawmakers' preferences, in which case the code should be deemed subordinate to, and anticipatory of, subsequent decisions by the alternative regulators. It is, however, equally possible that the code drafters are seeking to influence subsequent decisions or that they perceive that the alternative regulators have intentionally left the matter subject to their control. The resulting ethics provisions may constitute a determination that discretion is an appropriate resolution that all regulators should accept.

D. SELF-SERVING JUSTIFICATIONS FOR PERMISSIVE RULES

Bar associations rarely advocate the adoption of rules on the express basis that the rules benefit lawyers (economically or psychologically) or the bar organization itself. Yet there is little doubt that ethics codes traditionally have included self-serving propositions.¹⁷⁴

Discretionary rules can benefit lawyers financially. Grants of permission to accept waivers of conflicts of interest can authorize lawyers to accept some lucrative representations that, on a strict reading of a client's best interests, the lawyer should perhaps refuse.¹⁷⁵ Rules allowing lawyers to accept cases on a limited basis¹⁷⁶ or to advance expenses¹⁷⁷ also facilitate lawyers' ability to secure business.

Similarly, agency law generally informs lawyers of their obligations to their principals, including clients. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (2006) (“[A]n agent must act loyally in the principal's interest as well as on the principal's behalf.”). Yet it is silent on whether and how agents are permitted to consider moral and political factors in advising their principals. Rules like Model Rule 2.1 serve to fill that gap. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006).

174. *See* Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 628 nn.138–39, 629–30 nn.144–45 (1989) (identifying rules that have been questioned as self-serving).

175. On the surface, when conflict-of-interest rules allow lawyers to accept client waivers, the rules authorize the representation so long as the rules' prerequisites are satisfied. An alternative interpretation of the rules is that the lawyer still may have some obligation to consider systemic interests and the lawyer's own fiduciary obligations to the clients in deciding whether to participate. *See* Zacharias, *supra* note 88, at 432–33 (discussing the limits of permissible waivers); *see also* Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 222 (2001) (discussing the reasons for limiting client autonomy in the conflict-of-interest context).

176. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2006); *cf.* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They*

The bar organization itself may have self-serving—typically political—reasons for adopting discretionary rules. Making conduct permissive often enables the drafters to obtain consensus concerning a rule that otherwise would not be adopted by the voting body, because the discretion enables both proponents and opponents of the conduct in question to continue acting as they prefer. Such a compromise probably accounts for the ABA's continued reliance on a permissive form of the harm-prevention exception to attorney-client confidentiality.¹⁷⁸ Alternatively, changing mandatory requirements into permissive standards can be part of a log-rolled package that enables the drafters of a whole code to secure adoption of other provisions.¹⁷⁹

To the extent one identifies self-interested financial or political motivations for adopting a permissive rule, the code drafters' imprimatur on discretion provides little support for the proposition that other lawmakers should respect the rule. It is, however, important to distinguish purely self-serving provisions from those that purport to immunize lawyers from discipline or liability on the basis that failing to do so may chill ef-

Pay For?, 11 GEO. J. LEGAL ETHICS 915, 946 (1998) (arguing that the ability of lawyers to limit the scope of representation may be constrained by fiduciary obligations to clients); Fred C. Zacharias, *Reply to Hyman and Silver: Clients Shouldn't Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS 981, 984–85 (1998) (clarifying when lawyers should be limited in their ability to accept limited engagements).

177. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2006).

178. See Kalish, *supra* note 9, at 656 (explaining that code drafters are often influenced by "politics and lobbying"); Manuel Berrelez et al., Note, *Disappearing Dilemmas: Judicial Construction of Ethical Choice as Strategic Behavior in the Criminal Defense Context*, 23 YALE L. & POL'Y REV. 225, 262 (2005) (lauding the drafters for attempting to reach "workable compromises" for moral dilemmas).

179. Code drafters' political motivations may be at odds with their genuine normative judgments. Consider, for example, the ABA's post-Enron adoption of additional future harm exceptions to address financial misconduct. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2006); Am. Bar Ass'n Task Force on Corporate Responsibility, *supra* note 25. For years, the ABA leadership considered and rejected these additions, believing that lawyers should be required to preserve confidentiality in cases of client fraud. In 2003, however, the ABA anticipated that unless it adopted a provision permitting lawyers to report client frauds (under narrow circumstances), the SEC would adopt an administrative regulation mandating disclosure. See Morgan, *supra* note 23, at 15–17. The normative view underlying the rule was probably not that lawyers should sometimes report client fraud or that, as a matter of autonomy, lawyers should be allowed to do so. Rather, the judgment was simply that, as between a permissive or mandatory reporting rule, a permissive rule is preferable.

fective representation. In the latter context, lawyers benefit from receiving immunity, but the separate interests of clients or the legal system may justify the benefit.

IV. RAMIFICATIONS FOR CODE DRAFTERS AND OTHER LAWMAKERS

A. UNCERTAINTY REGARDING THE CODE DRAFTERS' INTENT

This Article has noted a range of reasons why professional code drafters might adopt a permissive rule that seems to give lawyers discretion to determine appropriate conduct. Some of these reasons reflect a normative judgment that attorney discretion in the covered situation is valuable in its own right. In reaching that judgment, the code drafters sometimes intend or anticipate that other lawmakers will respect the grant of discretion, sometimes expect the development of external limitations on the general grant of discretion, and sometimes expect the grant of discretion to be honored only in particular contexts. With respect to other permissive rules, the justifications are more practical—sometimes even self-serving—and do not warrant deference when other regulators consider diverging from the rules.

Whether particular rules contemplate that external regulators will defer to the code drafters' judgments often is not clear from the face of the rules. For example, in adopting discretionary waiver provisions in conflict-of-interest rules, the drafters of the 1983 Model Rules knew that courts would need to address the same issues in deciding disqualification issues.¹⁸⁰ The drafters may have sought to influence court decisions. Alternatively, they may have anticipated that courts would rely on their own institutional interests to disqualify lawyers in some cases even when the conflict rule permits the representation.¹⁸¹

180. See Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 288 (1982) (analyzing the proposed Model Rules and concluding that it "would be far better to acknowledge the difficulty of review in some cases and admit that in some of those situations the enforcement goal must be subordinated to the goal of articulating standards that allow an honest practitioner to make decisions that he believes are consistent with relevant ethical principles").

181. The drafters knew that courts would diverge from the rules in the opposite direction. They surely anticipated that courts, for institutional and practical reasons—including clients' interest in preserving an ongoing attorney-client relationship—sometimes would *not* disqualify lawyers even though

The rules may not even reveal whether they reflect a normative judgment that lawyer autonomy should be respected or whether the drafters simply were unable to draft a mandatory rule that captured appropriate distinctions. The rule on moral and political counseling, for example, might have been intended to encourage lawyers to provide moral and philosophical perspectives to clients or it might reflect the difficulty of distinguishing cases in which lawyers should be required to give such counseling from those in which lawyers should be forbidden from doing so as a matter of competence. Similarly, conflict-of-interest rules permitting lawyers to accept particular conflict waivers can be explained in alternate ways.¹⁸²

This kind of ambiguity presents a conundrum. If external regulators cannot tell whether a permissive rule contemplates a universal grant of discretion, how can those regulators decide whether to defer? In the short run, the only response is that they must do their best to ascertain the normative judgments underlying the rule based on its context, drafting history, and likely effects. In the long run, however, recognizing the existence of alternative justifications for permissive rules has specific implications for how external regulators should proceed.

B. IMPLICATIONS FOR COURTS, LEGISLATURES, AND OTHER LAWMAKERS CONSIDERING PARALLEL OR SUPPLEMENTAL REGULATION

When rules of professional conduct give lawyers discretion to decide how to act, the argument that other lawmakers should not encroach on that discretion initially seems powerful. Cynical observers of the professional code-drafting process might argue that ethics codes are self-serving and that lawmakers should chart their own course; in other words, that the

the mandatory aspects of the conflict rules suggest that a prudent lawyer should have avoided the representation. *See generally* Green, *supra* note 11 (discussing judicial disqualification of counsel in civil cases); Bruce A. Green, "Through a Glass, Darkly": *How the Court Views Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989) (discussing judicial disqualification of counsel in criminal cases).

182. Arguably, for example, Model Rule 1.7 gives primacy to the lawyer's business, reputational, and philosophical preferences. Alternatively, it reflects the difficulty of distinguishing between cases where a lawyer should be allowed to accept or required to continue a representation because clients who understand the risks will benefit from the particular lawyer's services and cases where a lawyer's refusal of the waiver clearly would be in a client's best interest.

rules are generally biased in favor of lawyer interests over client and third-party interests, and in favor of client interests over public interests. With respect to the Sarbanes-Oxley Act, for example, the ABA amendments to Model Rules 1.6 and 1.13 arguably were a calculated effort to forestall external regulation¹⁸³ and, as such, deserved no deference from the external regulators. As a general matter, however, external lawmakers have not adopted the cynical view. They have tended to value the codes for several good reasons, including respect for the legal profession's tradition of self-regulation, respect for state supreme courts that (in most jurisdictions) oversee and adopt the rules, and a preference for avoiding inconsistent regulation. External lawmakers may defer to permissive rules, in particular, on the assumption that the rules reflect a reasoned normative judgment that, for the given categories of conduct, it is wiser not to draw categorical lines.

Nevertheless, as we have shown, there are reasons why even a lawmaker who starts from a deferential position should not hesitate to probe the precedential value of grants of discretion in the codes. The drafters of permissive rules themselves may not have meant to afford lawyers unfettered discretion. The drafters may have understood the rules to contain intrinsic limitations (such as a requirement that discretion be exercised in light of particular considerations) or as being subject to limitations derived from other rules or extra-code constraints. Under these circumstances, external lawmakers should feel free to impose restrictions consistent with the limits implicitly incorporated into, or anticipated by, the rules.

Moreover, even a permissive rule that was meant to insulate lawyers from professional discipline does not necessarily intend to foreclose other lawmakers from reaching supplemental judgments restricting lawyers' discretion. Some rationales for permissive rules have implications for other areas of law, but many do not.

Consider the relationship between the permissive future harm exceptions to confidentiality and the proposed SEC regulations governing disclosures by corporate attorneys.¹⁸⁴ Some

183. See Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1111–12 (2006) (describing ABA decisions designed to “side-track” aspects of the federal legislation).

184. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2006) (providing examples of permissive future harm exceptions), with Letter from ABA to

have argued that the SEC should not adopt a rule requiring corporate lawyers to report client wrongdoing to the SEC, but instead should defer to the permissive ethics rules that are in effect in most states.¹⁸⁵ It is far from clear, however, that the ethics rules provide as much discretion as this argument assumes. Model Rule 4.1 and its state equivalents arguably require lawyers to disclose wrongdoing in many situations potentially covered by the SEC regulations.¹⁸⁶ The confidentiality exceptions also may require lawyers to exercise discretion in a principled manner that, in at least some cases, points the way to disclosure. If the SEC is capable of defining when the rules themselves mandate or anticipate disclosure, the SEC can reasonably adopt regulations putting those definitions into effect without contradicting the ethics codes. Doing so would clarify the uncertainty inherent in the future harm provisions themselves, thereby giving greater guidance to lawyers who might mistakenly believe that the provisions allow unlimited discretion and who, adhering to the ABA's pre-Enron philosophy, are disinclined ever to exercise their discretion in favor of reporting.

So what should the SEC do, given the competing arguments? In the absence of better information from the code drafters, the SEC has little choice but to try to divine the justifications for the confidentiality exceptions from extrinsic evidence and then to determine whether those purposes merit respect. Suppose the SEC initially accepts that the permissive future harm provisions were intended to grant relatively unbridled discretion. Whether the rationale for that intent is normative remains uncertain. The permissive provision may simply reflect a political compromise within the ABA between those, previously in the majority, who wanted a stronger confidentiality rule, and those who preferred mandatory reporting of certain client misconduct. If that is the reality, the SEC can reasonably resolve the dispute.

SEC, *supra* note 25 (describing the proposed SEC regulations).

185. See, e.g., Letter from Litig. Section of the State Bar of Cal. to Jonathan G. Katz, Sec'y, Sec. & Exch. Comm'n (Apr. 4, 2003), <http://www.sec.gov/rules/proposed/s74502/lssbc040403.htm> (urging the SEC to defer to permissive state rules); see also Bost, *supra* note 183, at 1132–35 (discussing California's continuing opposition to the Sarbanes-Oxley rules).

186. See MODEL RULES OF PROF'L CONDUCT R. 4.1 (2006) (declaring that lawyers "shall not knowingly . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client").

Moreover, even if the SEC agrees with the principles, or guidance, provided in the codes, it may reasonably diverge from the discretionary rule because, when evaluating how lawyers implement the discretion in the SEC's field of interest, the SEC finds that lawyers generally do not exercise discretion in accordance with the spirit of the rule.¹⁸⁷ Market forces may be so strong that they prevent securities lawyers from ever disclosing client misconduct,¹⁸⁸ even though the code drafters may sometimes expect disclosure. To the extent the SEC determines that the normative aspirations have not been, or cannot be, realized as a practical matter, deference to the rule seems inappropriate.

Insofar as the premises of the permissive confidentiality exceptions *are* normative, it also is not clear that the drafters meant to foreclose the imposition of restrictions by external lawmakers. The drafters may have concluded that discretion is preferable in most cases, but that mandatory reporting would be acceptable in a subset of cases, including certain cases involving misconduct by public corporations. Or, in opting for discretion, the drafters may have overlooked unique considerations relating to the regulation of public companies with which the SEC has greater concern and expertise—including the importance of enhancing investor confidence in those companies in the post-Enron world. Although the current opponents of SEC regulation are able to posit rationales for the permissive rules that appear to be relevant to the non-disciplinary contexts,¹⁸⁹ these may be *ex post* rationales.

As a historical matter, one cannot be entirely certain why the SEC has scaled back, and in part deferred, its initial proposals. The SEC may have been persuaded by the argument that discretion is a preferable regulatory approach in general, not just for disciplinary purposes. But this Article's analysis suggests that the SEC should have weighed those arguments

187. See Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 382 (2004) (“[T]he real benefit of mandatory complete withdrawal is the leverage it gives to attorneys who will not look for loopholes but will adhere to the rules.”).

188. See Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 466–74 (2006) (discussing the incentives of corporate lawyers).

189. Cf. Letter from ABA to SEC, *supra* note 25 (arguing that certain proposed SEC requirements would undermine corporations' trust in their lawyers).

on the merits and should not have relied exclusively on the fact that the bar itself adopted the permissive approach. If, hypothetically, the SEC found the bar's premises unpersuasive, the SEC should not have hesitated, purely out of deference to the codes, to cut back on the discretion afforded by confidentiality rules.

It is important to recognize that some forms of lawmaking—such as code drafting and the promulgation of statutes and administrative rules—are legislative in nature, while others—such as judicial development of liability standards—are not. When legislative forms are in play, as in the case of the SEC disclosure proposals, negotiation between the code drafters and other lawmakers is possible.¹⁹⁰ This negotiation may be explicit¹⁹¹ or implicit, through parallel action.¹⁹² Indeed, such negotiation is precisely the process that appears to have developed between the ABA and the SEC regarding their various positions on disclosures by corporate attorneys.¹⁹³ This Article's analysis suggests that the extent of discretion anticipated by permissive rules is a subject particularly warranting direct attention in such negotiations, lest the expectations of either regulatory party be unduly discounted or misunderstood.

C. IMPLICATIONS FOR COURTS FILLING OTHER LAW-MAKING ROLES

Thus far, this Article has focused on external law-making institutions (including courts, legislatures, and administrative

190. See Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 *FORDHAM L. REV.* 429, 460–61 (1996) (discussing negotiations among the ABA, the Department of Justice, and the courts with respect to the development of rules against communicating with represented persons and against subpoenaing of attorneys).

191. For example, representatives of the code-drafting body and the administrative agency can meet to discuss issues, provide testimony at each others' hearings, submit comments, or provide task force reports.

192. The parallel institutions can simply produce parallel legislation on a step-by-step basis that responds to the legislation of the other body.

193. In other words, the ABA had adopted a rule to which the SEC responded with proposed regulations that would have produced dramatic change. The ABA countered with a negative task force report and the adoption of permissive changes to the rules. The SEC then adopted regulations largely consistent with, but which went slightly further than, the ABA rules, but which deferred action on its more dramatic proposals. No word has been heard on the deferred proposals since. For a further description of this history, see Zacharias, *supra* note 188, at 457–58.

agencies) when they are considering promulgating law that supplements or potentially preempts the ethics codes. Courts, however, fulfill at least two other relevant law-making functions that merit attention. State supreme courts review and are responsible for adopting or rejecting code drafters' proposals,¹⁹⁴ including proposals for permissive rules. Trial courts exercise supervisory authority over lawyers appearing in court, sometimes defining the lawyers' so-called duties as "officers of the court."¹⁹⁵ In doing so, trial courts often interpret or build upon the meaning of the professional rules.

This Article's analysis suggests that state supreme courts should pay particular attention to proposals for permissive rules. As this Article has shown, permissive rules can easily be misinterpreted as giving lawyers more-than-intended discretion and thus are unusually likely to be self-serving. The supreme courts therefore should take care not to rubber-stamp them.

A good example is California's recently-adopted future crime exception to attorney-client confidentiality. California lawyers used to be governed by a near absolute confidentiality provision,¹⁹⁶ but were forced to promulgate an exception by legislation mandating a change.¹⁹⁷ The code drafters selected a permissive exception similar to the original version of Model Rule 1.6(b)(1).¹⁹⁸ They made two pertinent changes to the model rule, however. They added a provision stating that a lawyer "who does not reveal information permitted [under the

194. See Zacharias & Green, *supra* note 96, at 1308 ("Most state supreme courts claim plenary law-making and rule-making authority to regulate the conduct of lawyers whom they have authorized to practice law.").

195. Zacharias & Green, *supra* note 39, at 50, 63.

196. See CAL. BUS. & PROF. CODE § 6068(e) (West 2003); Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367, 372-73 (1995) (discussing the near absolute character of confidentiality in California).

197. Assemb. 1101, 2003 Gen. Assemb., Reg. Sess. (Cal. 2003), available at http://www.leginfo.ca.gov/pub/03-04vill/asm/ab_1101-1150/ab1101_bill_20031011_chaptered.pdf (calling for a task force "to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to this act").

198. Compare CAL. RULES OF PROF'L CONDUCT R. 3-100 (2004) (providing that a lawyer "may, but is not required to," reveal information necessary to "prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual"), with MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) (providing that a lawyer "may" reveal information necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").

exception] does not violate this rule.”¹⁹⁹ They also added a comment stating that a lawyer is “not subject to discipline for revealing confidential information as permitted under this Rule.”²⁰⁰ Together, these changes provided lawyers with absolute immunity from discipline for any choice of conduct, however self-serving.²⁰¹ In preserving the interests of lawyers, the drafters may have undermined the legislative intent to produce at least some disclosures that further the public interest.

Unlike the state supreme courts, which can actually reject or rewrite proposed rules, trial courts have only implementation power. They supervise the conduct of litigators on a day-to-day basis. This role requires them to oversee conflicts of interest, disputes between lawyers and clients (e.g., about fees and advice lawyers have, or have not, given clients), disclosures that lawyers might wish to make or refuse to make, and other activities that are initially governed by permissive ethics rules.²⁰² Issues within these subject matters involving the limits, if any, to lawyer discretion and the obligations of lawyers as officers of the court are not often addressed in appellate decisions because the issues tend to be procedural in nature and the conduct in question generally occurs outside the courtroom. When the permissive rules are unclear, supervisory courts serve a useful function in spelling out their meaning.²⁰³ It may be uniquely important for trial courts to write opinions that provide guidance concerning the nature of lawyers’ discretion.

D. IMPLICATIONS FOR CODE DRAFTERS

This Article has highlighted several aspects of code drafting that lawyers and the drafters themselves may not sufficiently have acknowledged. Not all discretionary professional rules are the same. Even on their own terms, permissive rules authorize varying degrees of discretion. Other lawmakers

199. CAL. RULES OF PROF'L CONDUCT R. 3-100(E) (2004).

200. *Id.* R. 3-100 discussion.

201. The only legal restraints that appear to remain are the potential for civil *Tarasoff* liability for failure to disclose and independent malpractice liability for excessive disclosure. *See Zacharias, supra* note 196, at 402–03 (discussing *Tarasoff* liability). Lawyers will undoubtedly argue that the permissive professional rule was intended to immunize them from such liability, leaving courts to assess that argument.

202. *See, e.g., McClure v. Thompson*, 323 F.3d 1233, 1242 (9th Cir. 2003) (interpreting the future crime exception to attorney-client confidentiality).

203. *See Zacharias & Green, supra* note 39, at 39–41 (discussing judicial supplementation of ethics rules).

sometimes may have reasons to accept the permissive standards outside the disciplinary context and sometimes should feel free to chart their own course.

These practical realities have significant ramifications for code drafters. Lawyers, by training, are most likely to read their professional obligations in the same way they read statutes and other legal rules.²⁰⁴ Many will view the codes as a collection of rules proscribing and allowing specific conduct that creative lawyers should try to circumvent (within the bounds of the law) in their own and their clients' interests. One of the goals of the professional codes is to guide lawyers,²⁰⁵ so it becomes especially important for discretionary rules to identify how the code drafters expect discretion to be exercised and whether that discretion is limited in scope. Thus, for example, to the extent that the drafters envision lawyers implementing discretionary confidentiality exceptions with a view to the competing client, systemic, and third-party interests rather than the lawyers' own (or exclusively the clients') interests, the code drafters can note that fact and suggest methods by which the competing considerations can be balanced.²⁰⁶

The above discussion also highlights the reality that code drafters do not always, or necessarily, adopt permissive rules

204. Cf. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249–60 (1991) (discussing the apparent increase in legalization of ethics codes over time).

205. See Zacharias, *Specificity in Professional Codes*, *supra* note 8, at 257–65 (discussing the codes' guidance function).

206. See Zacharias, *Harmonizing Privilege and Confidentiality*, *supra* note 125, at 108–09 (discussing guidance that code drafters might provide with respect to discretionary attorney-client confidentiality exceptions). The guidance currently provided by the Model Rules is minimal at best. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 (2006) ("In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client . . . , the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question."). Other ethics codes, such as New York's Code of Professional Responsibility, provide slightly more guidance and in more emphatic terms:

In exercising this discretion [to report a client's intended crime], however, the lawyer should consider such factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any other possibly aggravating or extenuating circumstances.

N.Y. CODE OF PROF'L RESPONSIBILITY EC 4-7 (2006).

hoping to influence or control alternative regulators. The mere fact that an ethics rule expresses a normative judgment that lawyers should be allowed to exercise discretion for disciplinary purposes does not signify that the drafters intended to foreclose complementary, supplemental, or even contradictory regulation.

At times, the drafters may intend to establish discretion as a regulatory norm, fully expecting or hoping that courts and other law-making institutions will accept their approach.²⁰⁷ That intent was apparent in 2003 when the ABA added exceptions to the confidentiality rule permitting lawyers to disclose confidences in limited circumstances to prevent certain client harms and wrongdoing.²⁰⁸ The ABA anticipated impending administrative regulation that threatened to make disclosure mandatory (and, in the ABA's view, might have undermined lawyer-client relationships).²⁰⁹ When, as in this case, the code drafters believe that other lawmakers should not encroach on lawyers' discretion, they should say so, rather than preserve the fiction that the ethics rules are drafted without regard to how other lawmakers will view them.²¹⁰ Otherwise, faced with ambiguity regarding the purposes of permissive rules, external regulators will justifiably feel free to ignore them.

Occasionally, code drafters have deliberately adopted permissive rules in the teeth of existing law that deprives lawyers of discretion. In pursuing this course, the drafters may simply believe strongly in their normative vision and hope to influence the other institutions to cede the point or take it into serious consideration when adopting supplemental regulation. Alternatively, they may be prepared to live with clashing standards, either (1) to make a strong point that they fully expect to lose or (2) because the code and alternative standards have force in independent spheres, and the drafters are unwilling to employ the disciplinary rules to reinforce a legal standard with which

207. See Koniak, *supra* note 125, at 1411.

208. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2003) (allowing disclosure of confidences to avert financial harms when a client misuses the lawyer's services); *id.* R. 1.13(c) (allowing lawyers to reveal information under limited circumstances when necessary to prevent injury to an organizational client).

209. See, e.g., Morgan, *supra* note 23, at 15–17 (noting that the ABA Task Force's decision to amend the Model Rules after the enactment of the Sarbanes-Oxley Act was partly influenced by Senator Edwards' proposal that the SEC promulgate rules relating to professional conduct).

210. See *supra* notes 13–14 and accompanying text.

they disagree. By adopting a conflicting approach, the drafters essentially signal that, with respect to this particular subject matter, lawyer-regulators are better able to judge how the competing public policies—protecting third-party interests versus protecting attorney-client relationships, or the importance of aggressive advocacy to the system versus judicial economy—should be resolved.

This approach is a challenge to external regulators. Again, it is one that is better made explicitly. Unless the other lawmakers are told that the bar claims superior judgment in this area and are educated about the reason for that superiority, they are unlikely to assess the bar's claim and take it into account. After all, the codes themselves deny any intent to influence substantive law.²¹¹ An alternative explanation for the drafters' positions usually will exist.

In short, once code drafters acknowledge that some justifications for discretionary rules do not support immunity standards for lawyers in other contexts and that external regulators have a role to play in setting alternative or supplemental standards, it becomes important that code drafters identify their expectations for particular permissive rules. One might anticipate that bar association drafters, who are aligned with members of the profession, will try to protect the membership by positing that all, or most, permissive rules justify immunity standards. But that is where the participation of the supervising state supreme courts becomes important. Although the courts often rubber-stamp bar proposals,²¹² they have a particular interest in the demarcation of lawyer discretion. If the bar fails to present permissive rules honestly, the courts are likely to intervene.²¹³

211. See MODEL RULES OF PROF'L CONDUCT pmb. ¶ 20 (2006); MODEL CODE OF PROF'L RESPONSIBILITY pmb. (1980).

212. See Zacharias, *supra* note 101, at 375 n.180 ("Courts or the legislature ordinarily rubber-stamp professional codes that have been drafted behind closed doors by a select group of the profession itself.")

213. Increased participation by the courts at the rule-making stage probably would be a valuable development in any event. See Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33, 41 (1996) ("The view that legislatures and executive-branch agencies are better occupational rulemakers than either the judiciary or a peak professional association, however sound as a generalization, is not necessarily sound when it comes to setting standards for law practice. The judiciary's expertise, its interest in the integrity of the legal process, and its legitimate need for independence from the 'political' branches must be considered."); cf. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control*

CONCLUSION

On the surface, the permissive ethics rules seem simple: they give lawyers a choice. This Article has demonstrated that this appearance is deceptive. From the face of most permissive rules, it is not clear how much of a choice the rules mean to accord lawyers or what the effect of that choice should be—on potential discipline and, more importantly, on the judgment of other lawmakers considering the same conduct.

This analysis has important implications for lawyers, code drafters, and the alternative regulators. The beguiling simplicity of the codes' permissive provisions creates a significant risk both that lawyers will overemphasize their discretion and that the various regulators will misunderstand the import of the rules. In the short run, this risk calls for greater care on the part of regulators implementing or responding to the rules. In the long run, the permissive rules must become more transparent—an eventuality that calls for greater clarity by the drafters and increased scrutiny by supervisory courts. This Article's distillation of the complexities of the permissive rules provides a foundation upon which the subsequent analysis should build.

Lawyer Regulation—Courts, Legislatures, or the Market?, 37 GA. L. REV. 1167, 1188 (2003) (“[A]lthough there may be excellent reasons to favor courts as *adjudicators*, when regulating lawyers state supreme courts act as *legislators*, they are not as independent or free from self-interest in that role.”); Wilkins, *supra* note 5, at 887 (discussing the attributes of various policymakers in the enforcement of professional standards).