CONTROLLING LAWYER BEHAVIOR: THE SOURCES AND USES OF PROTOCOLS IN GOVERNING LAW PRACTICE

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Over the last fifty years, increasingly specific ethical rules—or protocols[1]—have been developed to regulate lawyer and law firm conduct. Many lawyers are now expected to conform to protocols that prescribe behavior in a particular field of law practice or legal arena.[2] For example, tax lawyers must abide by Circular 230,[3] a detailed set of regulations issued by the United States Treasury Department to govern all professionals—nonlawyers as well as lawyers—who practice before the Internal Revenue Service (IRS). The number of lawyers subject to such protocols is

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1. The use of the term "protocol" to describe a highly detailed rule that governs lawyers is attributable to Professor Ted Schneyer. *See* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 649 (1994) [hereinafter Schneyer, *Self-Regulation*] ("Kaye Scholer, for example, has agreed to follow a number of detailed protocols in representing federally insured depository institutions."); Ted Schneyer, *Regulating Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 406 (1998) [hereinafter Schneyer, *Contingent Fee Contracts*] (stating that legal ethics codes are "designed to provide general ethical standards for law practice, not strict protocols or implementing regulations for lawyers specializing in a particular field."); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245, 268 (1998) [hereinafter Schneyer, *Ethical Infrastructure*] ("Less well known are the detailed protocols the firm undertook to follow in its future banking work.").

2. *See* David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, S. CAL. L. REV. 1145, 1150–53 (1993) [hereinafter Wilkins, *Context and Kaye, Scholer*] (discussing the growing number of context-specific ethical rules and enforcement methods and discussing ethical distinctions between "lawyers as counselors" and "lawyers as litigators").

3. Circular 230, 31 C.F.R. pt. 10 (2002).

increasing, as is the number of protocols themselves.[4] As the perceived need for more specific guidance increases, protocols also come from more sources. This Article examines these phenomena and suggests some of the problems and possibilities that this proliferation of protocols creates.

Part I of this Article defines the term "protocol" as it is applies to guidelines or rules that govern law practice. If one envisions the regulation of lawyers along a spectrum of detail, *standards* such as "practice competently" would occupy one end, *protocols* at the other.[5] Part I also describes protocols and discusses the implications of their growing prominence. For example, a lawyer's discretion in ethical decision-making becomes less important when protocals dictate decisions. Furthermore, as more and more protocols originate from sources outside the bar, professional self-regulation through state bar associations and state supreme courts becomes a smaller facet in a multi-faceted regime of lawyer regulation.[6] As "professionals"[7] who take pride in the tradition of self-regulation,[8] lawyers might be surprised and disturbed to learn that self-regulation is becoming a smaller part of the regulatory mix.

Part II discusses the traditional source and nature of lawyers' ethical obligations. It focuses on the characteristics of the traditional ethics regime and examines its regulatory limitations, which ultimately invite other regulators to step in and fill this void, often with protocols. With some exceptions, how a lawyer must practice law has traditionally been governed by state ethical rules, usually as first formulated by the American Bar Association (ABA).[9] These rules tend to be general in nature; many have been aspirational in form. With much discretion built in, they leave considerable room for interpretation and are often difficult to enforce in traditional disciplinary proceedings. With limited budgets, state disciplinary enforcers tend to pursue only those lawyers who have committed the most clear-cut violations.

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4. The development of protocols to regulate lawyer conduct is consistent with the broader trend in legal ethics toward specific rules and away from broad standards and principles. *See* Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668 (2001); Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1150; Fred. C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 224–25 (1993).

5. Kathleen Sullivan describes the distinction between rules and standards on the "continuum of discretion." She describes rules as allowing for less discretion than standards. Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

6. *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 461 (1996) (stating that the term "self-regulating" is misleading, as well as wishful thinking).

7. *Id.* at 461 n.2 (citing to the debate over whether lawyers should be called a "profession"); *see also* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 37–40 (2d ed. 1998) (discussing the history of lawyers as members of a profession).

8. *See* RHODE, *supra* note 7, at 40–46 (noting that regulatory autonomy and ethical codes are among the distinguishing features of a profession); Neil W. Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. Tex. L. Rev. 227, 233–36 (2001) (discussing the legal profession's claim to autonomy).

9. *See* RHODE *supra* note 7, at 41–42; Schneyer, *Self-Regulation*, *supra* note 1, at 665.

In short, as Ted Schneyer notes, "[a]lthough the bar's traditional system of professional self-regulation—ethics rules formulated by the ABA, adopted with local amendments by the state supreme courts, and enforced through state disciplinary proceedings—takes the form of a regulatory system, it has left . . . many lawyers substantially unregulated."[10] To the extent that lawyers are unregulated or perceived to be unregulated, and as public confidence in lawyers erodes, their privilege of self-regulation, and the autonomy that comes with it, diminishes.[11]

One significant gap in traditional self-regulation stems from its failure to address ethical problems specific to highly specialized fields. A key factor in the rise of protocols is the rise of legal specialization. As the perceived need to regulate specialties grows, the sources and uses of ethical protocols increase. Part II also discusses the rise of legal specialization and the concomitant rise of rules and guidelines for specialties. It concludes by explaining why protocols are being used to fill the regulatory gaps and by identifying the functions that protocols can serve.

Reviewing the protocol movement to date, Part III considers protocols emanating from agency (or public) regulators and non-agency (or private) regulators, all with their own regulatory agenda. This section focuses on the contexts in which protocols governing lawyers are currently being employed. In many instances, knowing the source of the protocol is enough to know the function that the protocol is designed to serve. Agency sources tend to use protocols when ease of discipline and enforcement are priorities. Non-agency sources tend to be interested in guiding their bar constituencies through complicated ethical dilemmas, as well as forestalling agency regulation.

Finally, in Part IV, the future role of these highly specialized rules in governing law practice is examined. The rising number of ethical protocols suggests that they are becoming the norm in regulating lawyer conduct. Regulation by protocol reduces discretion in lawyers' decision-making. Some will consider the trend unfortunate. Others may welcome it. The point of this Article is simply to demonstrate that the trend is real and to identify the use of protocols in governing law practice.

I. SETTING THE STAGE: WHAT ARE PROTOCOLS?

> Protocol: a code prescribing strict adherence to correct etiquette and precedence (as in diplomatic exchange and in the military services); code of behavior, conventional practice, regulations, rules, set of rules, set of standards, system of rules.[12]

As an initial matter, protocols are *not* typically found in states' ethics codes. For the most part, these codes provide general standards for lawyers to follow in a

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10. Schneyer, *Self-Regulation*, *supra* note 1, at 666.

11. *See* Ann Morales Olazabal & Elizabeth Dreike Almer, *Independence and Public Perception: Why We Need To Care*, 191 J. ACCT. 69, 70 (Apr. 2001) (discussing the same problems in the accounting profession); David B. Wilkins, *Who Should Regulate Lawyers?* 105 HARV. L. REV. 799, 812–13 [hereinafter Wilkins, *Who Should Regulate*] (discussing the bar's insistence on self-regulation as "the only enforcement system compatible with the fact that lawyers are independent professionals").

12. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 947 (1984).

wide array of circumstances. State codes must be general because they are designed to govern the conduct of all lawyers in all situations.[13] Their provisions do vary in specificity, however, ranging from *standards* to *rules*.[14] Professional responsibility standards tend to be worded broadly,[15] or discretionary in application[16] or phrased in aspirational language, rather than language that clearly tells the lawyer how to behave.[17] A standard requires "context-specific information to be considered each time [it is] applied."[18] For example, a "reasonableness" *standard* defines the required level of competence, diligence, and communication with clients but does not specify the conduct that is reasonable in any given situation.[19] Standards both permit and require the addressee to make judgments as to what conduct they call for in a given situation.[20]

Rules both permit and require less discretion in their interpretation and application. "Rules are designed by generalizing information from prior experiences,"[21] but require the decision-maker to respond in a determinate way if certain facts are present. Thus, rules that address lawyer conduct, as opposed to standards addressing the same, limit the information that lawyers and rule enforcers can or need to consider in applying them.[22] For example, specific *rules* have replaced the "appearance of impropriety" standard that used to play a prominent role in provisions governing conflicts of interest.[23] The Model Rules[24] now rely on more specific, though still quite general, provisions.[25] For example, Model Rule 1.7 states that "a lawyer shall not represent a client if . . . the representation of the client will be directly adverse to another client. . . ."[26] The comment to the rule then elaborates on the lawyer's duty of loyalty, but without dictating the steps that a lawyer must take in

13. *See* Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839, 843 (2001).

14. As indicated earlier, standards, rules, and protocols are not entirely discrete categories; they occupy overlapping places on a continuum of detail or discretion. So, while the terminology suggests a dichotomy or trichotomy, I am really addressing an often subtle decline in lawyer discretion as a result of evermore precise rules. *See* Sullivan, *supra* note 5, at 58.

15. *See* Painter, *supra* note 4, at 668 n.20 (noting that Model Rule 1.5(a) states that a lawyer's fee must be reasonable without providing enough specificity as to what fees are or are not reasonable).

16. *See id.* at 668–69 (noting the frequent use of the word "may" in professional responsibility codes).

17. *See id.* at 669 (citing Model Rule 6.1 which states "[a] lawyer should aspire to render at least fifty (50) hours of pro bono public services per year.").

18. *Id.* at 668 n.13.

19. *See id.* at 668 n.19.

20. *See* Sullivan, *supra* note5, at 58–59.

21. Painter, *supra* note 4, at 668 n.13.

22. *Id.*

23. *Id.* at 668.

24. The Model Rules of Professional Conduct (Model Rules) were promulgated by the ABA in 1983 and have been adopted by most states (with amendments) to govern their lawyers' ethical conduct. *See* Rhode, *supra* note 7, at 41.

25. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002) [hereinafter MODEL RULES] (stating a very general rule that deals with conflicts); *id.* at R. 1.8 (stating another general rule that prohibits the lawyer from entering into certain transactions); *id.* at R. 1.9 (stating another general rule that specifically governs conflicts involving former clients).

26. *Id. at* R. 1.7(a).

order to discharge that duty in specific situations. Thus, rules are more specific than standards, but, like standards, they may not specify the behavior they require in any given situation.[27] In this sense, the Model Rules reflect a trend toward rules and away from standards.[28]

Like rules, protocols are a move away from standards, but they attempt to provide even more clarity and definiteness by dictating lawyer behavior for particular situations. A protocol, as the term is used in this Article, is usually so specific that it has the double-barreled effect of greatly constraining discretion and providing lawyers with a "safe harbor." To the extent that the lawyer adheres to the steps laid out in the protocol, she can feel assured that she has conformed and, if the protocol is legally binding, will not be sanctioned.[29] The same specificity, however, makes it easier for enforcers to recognize and sanction non-compliance. Thus, for regulators and the regulated alike, protocols replace, with step-by-step instructions, the discretion and judgment that are permitted and required in applying *standards* and even many *rules*.

In his recent article, *Rules Lawyers Play By*, Professor Richard Painter describes the various types of rules that govern lawyers.[30] Painter's "tailored immutable rule"[31] most closely resembles a protocol. He states, "[a] *tailored immutable rule* is... designed for a specific subset of actors."[32] As examples, Painter cites the Securities and Exchange Commission's (SEC) and the Office of Thrift Supervision's (OTS) rules governing securities and banking lawyers, respectively.[33] As discussed in Part III, many of the rules these agencies impose on lawyers are protocols *par excellence*. Painter notes that the organized bar has tended to resist such protocols whenever they increase lawyers' legal obligations.[34] He believes, however, that rules designed to govern all lawyers in all contexts may be inappropriate in some practice areas.[35]

Finally, protocols are different in certain respects from "best practices" as that term is used in the medical field. In medicine, best practices are tested practices that have been proven effective and efficient under a particular set of circumstances.[36]

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27. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 669; Zacharias, *supra* note 4, at 231, 237.

28. Professor Richard Painter breaks professional responsibility codes into standards, permissive rules, aspirational rules, and clearly-defined default rules. His proposals for clearly defined default rules come the closest to protocols. *See* Painter, *supra* note 4, at 676.

29. If the rulemaker is a regulatory agency, authority to enforce its rules stems from its rulemaking and executive authorities. When the rulemaker is a private entity, the protocol may not be enforceable, or only enforceable as a contractual obligation. *See infra* Part III.

30. Painter, *supra* note 4, at 674–92.

31. *Id.* at 676.

32. *Id.* (emphasis added).

33. *See id.*; *see also infra* Part III.

34. *See* Painter, *supra* note 4, at 676–77.

35. *See id.* at 677 (citing to David Wilkins' work on context specific rules); David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 482–91 (1996); Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1150.

36. *See* Clark C. Havighurst, *Practice Guidelines As Legal Standards Governing Physician Liability*, 54 L. & CONTEMP. PROBS. 87 (1991) (defining "practice guidelines" or

Protocols, on the other hand, are not ordinarily products of testing or controlled experiments. Therefore, while medical "best practices" can be expected to produce better results for patients,[37] it is far less clear that any given protocol addressed to lawyers is the *best rule* to govern the situations to which it applies.[38] As such, any general claims for or against the use of protocols are likely to be highly contestable. The case for any given protocol will depend on its pedigree and utility.

II. WHY DO WE NEED PROTOCOLS?

> These existing ethics codes merely espouse certain general principles that apply to all lawyers, such as you don't co-mingle a client's funds with your own. They do not provide enough fact-specific provisions that apply directly to many of the various legal specialties.[39]

A. Failures of Existing Ethical Codes

Underlying this examination of the rise of protocols is the question of why existing ethical rules and traditional enforcement mechanisms might be inadequate. Ethics codes that govern lawyers' conduct for purposes of professional discipline exist in every state.[40] Shouldn't the enforcement of these codes through the traditional disciplinary process be enough to ensure ethical behavior? And if not, why aren't they simply amended?

Most commentators agree that state ethics codes should be general purpose codes.[41] This traditional view is that the codes "represent ideals and a model for practice, not enforceable behavioral constraints."[42] Under this view, ethical rules are not designed to prescribe particular lawyer conduct[43] or to "provide strict protocols or implementing regulations for lawyers specializing in a particular field."[44] Because of their generality, the Model Rules, and state ethical regimes patterned after them,

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"best practices" as "systematic, scientifically-validated statements of appropriate measures to be taken by physicians in the diagnosis and treatment of disease"); Eleanor D. Kinney, *The Brave New World of Medical Standards of Care*, 29 J.L. MED. & ETHICS 323 (2001) (stating that medical practice guidelines are systematically developed statements that specify the processes of diagnosing and treating particular conditions to help doctors in specific clinical settings).

37. *See* Kinney, *supra* note 36.

38. The ABA Ethics 2000 Commission considered adding a statement of "best practices" to the Comment section of the Model Rules but ultimately rejected that idea because it was concerned that such standards might be used against lawyers in malpractice claims. *See* Painter, *supra* note 4, at 701 n.187.

39. Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993).

40. Disciplinary agencies operating under the supervision of state supreme courts retain primary responsibility for lawyer discipline in most states. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 805.

41. *See* Crystal, *supra* note 13, at 843; Zacharias, *supra* note 4.

42. *See* Zacharias, *supra* note 4, at 226.

43. *See id.*

44. Schneyer, *Contingent Fee Contracts*, *supra* note 1, at 406; *see also* Green, *supra* note 6, at 490 n.146; Schneyer, *Self-Regulation*, *supra* note 1, at 668–69; Zacharias, *supra* note 4, at 224–25.

"have a number of characteristics that make them an incomplete source for determining a lawyer's ethical obligation."[45] At the same time, the notion of a unitary, comprehensive, and detailed statement of a lawyer's legal and ethical obligations in today's world seems fanciful.[46] By analyzing the limitations of state ethics codes and disciplinary enforcement, the regulatory niche that protocols fill can be more clearly understood.[47]

Existing state ethics codes serve two broad goals. First, they serve a disciplinary function.[48] Second, legal ethics codes provide guidance to lawyers in resolving ethical dilemmas.[49] Through their standards and rules, state ethics codes furnish principles that are designed to guide lawyers in maintaining good lawyer-client relationships, conducting transactions with non-clients, and maintaining the integrity of the profession.[50] The guidance provided applies to all lawyers, regardless of specialization. The problems associated with state ethics codes' lack of specificity is discussed in Section B. This section discusses the disciplinary function of state ethics codes and the limitations of professional discipline that have encouraged the development of protocols.[51]

In analyzing the OTS's reaction to the lawyers' role in the Savings & Loan (S&L) crisis in the late 1980s, Ted Schneyer sets out a number of limitations in existing state legal ethics regimes when carrying out their regulatory function.[52] These limitations are particularly pertinent in accounting for the protocols that emerged in the wake of the administrative enforcement actions and civil suits that federal banking agencies brought in the late 1980s and early 1990s against lawyers who had

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45. Crystal, *supra* note 13, at 841.

46. *See id.* The new RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, like the Model Rules, attempts to provide one set of rules to govern all lawyers. The RESTATEMENT (THIRD), like the Model Rules, contains specific rules, but it is likewise filled with regulatory gaps. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

47. *See id.*

48. *See* MODEL RULES, *supra* note 25, at Scope para. 1 (noting that the rules define proper conduct for purposes of discipline). The Model Rules, on which most state codes are based, are "intended principally as a statement of rules, the violation of which can lead to professional discipline." Crystal, *supra* note 13, at 841.

49 The Preamble to the Model Rules states that some rules are cast in permissive terms allowing a lawyer professional discretion, and that the rules provide "guidance for practicing in compliance with the Rules." MODEL RULES, *supra* note 25, at Scope para. 1.

50. *See* Crystal, *supra* note13, at 843. Crystal delineates the eight sections under which the Model Rules are grouped as: (1) client-lawyer relationship; (2) counselor; (3) advocate; (4) transactions with persons other than clients; (5) law firms and associations; (6) public service; (7) information about legal services; and (8) maintaining the integrity of the profession. *Id.*

51. Professor Crystal discusses three reasons why the Model Rules are an incomplete source of professional obligations. First, they are disciplinary rather than aspirational. Second, the rules focus on general duties rather than the obligations of lawyers in specialized practice areas. Third, the rules often refer lawyers to "other law" to determine their ethical obligations. *Id.* at 844. Because protocols are often issued in response to Crystal's first and second sources of incompleteness, and not a result of references to other law, this third source of incompleteness is not discussed in this Article.

52. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 643; *see also* Wilkins, *Who Should Regulate*, *supra* note 11, at 828–29.

represented recently failed savings-and-loan institutions. They provide some insight into both the sources and uses of protocols.

Enforcement of state ethics codes is limited because the disciplinary process is rarely triggered until someone, usually a disgruntled client, files a grievance with the disciplinary authority.[53] Without someone complaining, or significant publicity concerning a lawyer's misconduct, the misconduct will not come to light, let alone be sanctioned. The disciplinary process is traditionally reactive, not proactive. A lack of investigatory and prosecutorial resources partly explains the reactive nature of lawyer discipline.[54] Even when complaints are filed about ninety percent of them are dismissed without investigation for lack of probable cause or agency jurisdiction.[55] Furthermore, although some ethics rules, such as the ban on commingling clients' funds with lawyers' funds, are prophylactic in nature, they are rarely enforced until after harm has actually occurred.[56] Finally, clients often lack information about lawyer misconduct and the grievance processes and, most importantly, have no financial incentives to file with state disciplinary agencies. While a few jurisdictions may fine a lawyer for ethical violations, clients rarely receive adequate restitution and are never awarded damages by the disciplinary system.[57] And when the aggrieved party is a third party, such as the federal government, which paid out millions of dollars in deposit insurance benefits during the S&L crisis and was interested in a significant monetary recovery, the state disciplinary process is again inadequate.[58]

Moreover, disbarment, the harshest disciplinary sanction, can be a blunderbuss. It revokes the privilege to practice law of any kind.[59] Unlike a state disciplinary authority, it is not unusual for a federal regulatory agency to debar a lawyer from practice before it, a more narrowly-tailored sanction.[60] The state bars' lack of such a specialized sanction is not surprising in light of the failure of traditional ethics codes to address specialized forms of law practice. Highly specialized sanctions—or sanction protocols, if you will—are consistent with the rise of substantive protocols.

In addition, traditional ethics rules are addressed to individual lawyers, not to law firms or other practice entities; just as nearly every state disciplinary agency lacks

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53. *See* RHODE, *supra* note 7, at 70; Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 695 (1994).

54. *See* RHODE, *supra* note 7, at 72 (noting that disciplinary agencies are underfunded and understaffed); Schneyer, *Self-Regulation*, *supra* note 1, at 644.

55. *See* RHODE, *supra* note 7, at 72; Rhode, *supra* note 53, at 696.

56. *See* Schneyer, *Self-Regulation*, supra note 1, at 643. Professor Schneyer cites to Model Rule 5.1 as prophylactic in nature because it requires partners to adopt policies that reasonably ensure their firm's compliance with other ethics rules and is thus designed to prevent harm. He also notes that the rule is almost never enforced. *See id.* at 644; *see also* Schneyer, *Ethical Infrastructure*, *supra* note 1, at 248–53.

57. *See* RHODE, *supra* note 7, at 71–72 (noting that one of the strongest criticisms of lawyer discipline is the inadequacy of remedies for clients).

58. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 645–46; Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1179.

59. *See* RHODE, *supra* note 7, at 73.

60. *See, e.g.*, Circular 230, 31 C.F.R. § 10.50 (2002) (authorizing the Department of Treasury to disbar a practitioner from practice before the IRS).

authority to discipline firms.[61] As discussed more fully in Part III, a number of federal administrative agencies and non-agency regulators can and do sanction firms, thereby filling the gap created by the absence of firm regulation through the traditional disciplinary process.[62]

Finally, given the generality, indeed vagueness, of current ethics codes, expecting understaffed and underfunded state disciplinary agencies to apply those rules in highly specialized contexts is extremely unrealistic. For example, federal banking agencies' interpretations of S&L lawyers' ethical obligations that were used during administrative enforcement actions and civil suits were hotly controverted.[63] State disciplinary bodies could never have developed such cutting-edge interpretations of ethics rules. State agencies "have never used their scarce resources to develop understandings of controverted duties through case-by-case adjudication."[64] As a result of all the enforcement limitations of state disciplinary bodies, other regulators are defining and sanctioning lawyer misconduct by formulating and implementing detailed protocols.

B. Specialization and Related Developments

State ethics codes, perhaps in an effort to keep all lawyers under the same regulatory umbrella,[65] provide little guidance on issues peculiar to specialized areas of practice.[66] The Model Rules are intended to apply to all lawyers, regardless of the

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61. *See* RHODE, *supra* note 7, at 78; Schneyer, *Self-Regulation*, *supra* note 1, at 648; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 245–46.

62. *See infra* text accompanying notes 92–96 (discussing the regulation of firms).

63. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 651; Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1149.

64. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 664; *see also* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1178–79.

65. All lawyers, regardless of specialization, are unified in the sense that the same standards for admission and discipline apply to all attorneys within a state. *See* Crystal, *supra* note 1, at 843. As Professor Crystal notes, "A set of rules that attempted to take into account the nuances of various areas of practice would be extremely difficult to produce, unwieldy in length, and of necessity, contain much information that most lawyers would find irrelevant." *Id.* at 843. And yet, specialty lawyers are subject to specialized ethics rules, though not from state regulators. *Id.*

66. In a new book written about conflicts of interest in legal practice, Susan Shapiro quotes a lawyer complaining about the sorry state of professional responsibility literature and the lack of practical guidance in the ethical rules:

> But these guys sit around and the Kutak Commission [which produced the *Model Rules of Professional Conduct*] fooled around for years and years and years. And they ducked all the questions where we need guidance. Any fool could have written [Rule] 1.9, 1.7. "Big deal, thanks a lot." But there's absolutely no guidance on parent/subsidiary . . . You know, "Thanks a bunch, guys!" Because they really haven't dealt with the troublesome issues, where people come to me and want to know answers, and I can't give them answers. And I'm supposed to be up on the rules. I'm up on the rules, and I can tell them that there aren't any answers. . . . And the profession looks to the ABA for this kind of guidance and it's not there.

SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE 313 (2002).

distinctive interests at stake and the distinctive forces operating on lawyers in various fields.[67] For example, Model Rule 1.1 requires that a lawyer provide her client with competent representation, and indicates that competence calls for the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[68] No special preparation or skill level is identified for particular fields. Even the ethics opinions in which bar committees interpret the prevailing ethics code rarely offer guidance in the form of protocols.[69] In contrast, during the S&L crisis, the SEC and OTC mandated that lawyers providing certain legal opinions for banking clients have at least ten years of experience in banking law.[70] Similarly, the IRS requires that, in order to issue a tax shelter opinion, practitioners must comply with a series of requirements for each material tax issue in the opinion.[71] In a profession in which specialization is dramatically narrower and more common than ever before, these developments beyond the ambit of traditional ethics codes and disciplinary enforcement seems more or less inevitable. As Deborah Rhode put it, "[T]he push toward universal rules has led to higher levels of abstraction and lower common denominators in regulatory standards than is desirable for ethical guidance."[72]

Traditional ethics codes are premised on the assumption that detailed rules are not necessary to produce desirable conduct.[73] Highly determinate rules are avoided in deference to the lawyer's conscience.[74] The codes are also explicit in "their desire *not* to affect legal standards regarding attorney liability,"[75] and assume that all lawyers should be subject to the same ethical obligations. However, not everyone accepts these premises.[76] An alternative view regards lawyer codes as the functional equivalent of legislation—"legalized in format and judicially enforced."[77] This model tends to judge the adequacy of a rule in terms of how well it controls lawyer behavior.[78] In addition, commentators have increasingly argued for ethics rules tailored to legal specialties.[79] As discussed in more detail in Section C, protocols take

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67. *See* Crystal, *supra* note 1, at 843.

68. MODEL RULES, *supra* note 25, at R. 1.1 (2002).

69. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 656–57.

70. *See id.* at 649; *In re* Fishbein, OTS AP No. 92-24, 1992 WL 560945, at *2 (Mar. 11, 1992) (Order to Cease and Desist for Affirmative Relief from Kaye, Scholer, Fierman, Hays and Handler) [hereinafter Fishbein, Order to Cease and Desist].

71. *See* Circular 230, 31 C.F.R. § 10.33 (2002); Proposed Circular 230, 66 Fed. Reg. 3276 (proposed Jan. 12, 2001) (to be codified at 31 C.F.R. pt. 10).

72. *See* RHODE *supra* note 7, at 731.

73. *See id.* at 236.

74. *See id.* at 238.

75. *See id.* at 229 (emphasis added); *see also* AM. ACAD. OF MATRIMONIAL LAW., BOUNDS OF ADVOCACY (2000), *at* http://www.aaml.org (last visited Oct. 1, 2002) [hereinafter AAML].

76. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1181–83 (discussing why there are good reasons to impose special duties on banking lawyers).

77. Zacharias, *supra* note 4, at 225.

78. *See id.* at 226.

79. *See* Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001); Nancy B. Rapoport, *Our House, Our Rules: The*

this latter view to an extreme. Existing state ethics codes, however, overwhelmingly continue to reflect the traditional view.

The debate in the early twentieth century over whether the legal profession should engage in legal specialization has given way to debates over whether a legal "generalist" can competently practice law in a world of increasing specialization. With the rise of specialized law practice during the twentieth century, one might have expected state regulators to respond with ethical rules applicable to both general law practice as well as specialty fields.[80] Yet, as previously discussed, state codes remain overwhelmingly general in application. While state ethics codes certainly contain more specificity now than in earlier days, ethics codes overall do not reflect the realities of legal practice, where increasing specialization, even within a particular practice area, is the norm.

The lack of specialized ethics codes might relate to the fact that state supreme courts and state bars do not have exclusive authority to designate various fields as specialties and certify lawyers as specialists.[81] Although this does not preclude the courts and the bar from providing guidance for specialized ethical problems, one could imagine that if the states had won exclusive authority, the regulation of legal specialization would not only include state certification procedures, but also specialized disciplinary oversight. And yet, even in the few states that have adopted specialty certification, specialized ethics codes have almost never followed.[82]

In addition to a powerful trend toward specialization, the increasing dominance of business corporations as purchasers of legal services has fueled two other developments in law practice that encourage the creation and use of protocols by nontraditional institutions. First, corporate counseling, not advocacy, has become the leading form of law practice.[83] And second, corporate demand for legal work has resulted in the proliferation of large law firms.[84] The traditional legal ethics system

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Need for a Uniform Code of Bankruptcy Ethics, 6 AM. BANKR. INST. L. REV. 45 (1998); Sporkin, *supra* note 39, at 149; Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1181.

80. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1149–51.

81. *See* Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) (holding that a state may not prohibit the non-misleading advertising of an attorney's certification as a specialist by an unapproved certification board); Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003 (1994).

82. *See, e.g.*, TEX. BD. OF LEGAL SPECIALIZATION, THE STANDARDS FOR ATTORNEY CERTIFICATION, *at* http:www.tbls.org/Cert/Att.asp (2001) (setting up the procedures for Texas lawyers to become certified as specialists in designated practice areas, but not subjecting certified specialists to ethics rules other then the general ethics code).

83. *See* Ariens, *supra* note 81, at 1019.

84. *See id.* The trial court in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F. 2d 1531 (9th Cir. 1986), *reh'g denied*, 809 F.2d 584 (9th Cir. 1987), found that the size and stature of a law firm was relevant to the court's valuation of its conduct and to the sanction imposed once rule violations were found. *See id.* at 129. The trial court required the law firm to circulate a copy of its opinion to all the firm's members. *See id.* It also concluded that a firm with a greater ability to access information beneficial to its clients, due to its connections and relationships, should be held to a higher standard of conduct. The Ninth Circuit reversed, but its failure to take firm size and corporate

has barely responded to these developments,[85] and this inaction may be hastening the creation of protocols.[86]

First, although more lawyers are now counselors than litigators, state ethics codes are still largely based on the model of the lawyer as advocate.[87] Unlike traditional lawyer/client relationships in the adversary system, where the lawyer's duties run almost exclusively to clients, the transactional lawyer, in many cases, may have or be perceived to have obligations that run to third parties.[88] Furthermore, issues regarding to whom the corporate lawyer owes his or her loyalty within the corporate structure often arise.[89] As transactional/corporate practices grow and become more elaborate, the model of "lawyer as advocate" becomes increasingly irrelevant. Existing ethics codes do almost nothing to clarify the lawyer's responsibilities to non-clients when working in the corporate context. But regulatory agencies like the IRS and OTS can tailor specialized rules and enforcement practices to tax and banking lawyers with minimal vagueness or internal contradiction.[90] Furthermore, because these rules apply primarily to corporate practice, agency rules can take into account corporate externality problems—i.e., non-client interests—without unduly chilling advocacy.[91] As Professor Wilkins has observed,

> corporate clients, with their superior ability to monitor and control lawyer conduct, have the power both to press their lawyers to act in ways that jeopardize systemic norms and the rights of third parties, and to protect themselves against any loss of zealous advocacy or individual autonomy that might otherwise follow from an increase in external regulation.[92]

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clientele into account was not lost on other regulators. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 878.

85. Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939, 947 (criticizing the Model Rules' failure to adequately address the professional responsibility issues associated with law firm governance).

86. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 878.

87. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1152–53. Wilkins discusses the fact that legal ethics discourse is dominated by unitary assumptions about professional norms. He notes, however, that in recent years, the Model Rules have incorporated some distinctions based on whether a lawyer is acting as an "advocate" or a "counselor." *Id.* Wilkins further discusses how these paradigms need to be refined within the specific context in which they are asserted. *Id.* at 1185–1203.

88. For example, the corporate lawyer will have responsibilities to third parties when issuing certain legal opinions or when dealing with administrative agencies. Also, tensions may exist between management and shareholders that make it unclear to whom the lawyer's duties run. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 654–66; Sporkin, *supra* note 39, at 151.

89. *See* Sporkin, *supra* note 39, at 150; *see also* Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L.J. 403, 446 (2000) (describing similar questions regarding who is the client in elder law practice).

90. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 875; *see also* Schneyer, *Self-Regulation*, *supra* note 1, at 665 (noting that the ABA has failed to deliver uniform ethical standards and that states' ethics codes often vary significantly from one another).

91. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 875.

92. *Id.* at 872.

Second, state ethics regimes do not regulate firms.[93] As firms grow and become more decentralized,[94] and as lawyers frequently move from one firm to another, accountability for ethical violations is weakened.[95] By becoming more specialized and compartmentalized, lawyers in large law firms know little about firm colleagues and clients outside their own narrow area of expertise.[96] Thus, unscrupulous lawyers and clients operate unimpeded when one obvious source of oversight is overlooked—the firm. Regulation within a firm through its own internal procedures can be an efficient policing mechanism. The OTS, SEC and the IRS have not overlooked this fact and have not hesitated to impose regulations and sanctions on law firms.[97]

Third, specific rules work well in addressing the problems associated with corporate law practice and large law firms.[98] Richard Painter suggests that protocols (which he calls tailored rules) need to be more common-place because "[t]ailored rules for problems unique to particular practice areas also may be easier to draft, easier to muster political support for, and easier to enforce than pure majoritarian rules."[99] He concludes that the "[r]epresentation of organizational clients is one area that badly needs tailored rules."[100] The recent Enron bankruptcy highlights the problems with representing organizations that have plagued regulators in the past.[101] Judge Stanley Sporkin articulated several key problems in the S&L crisis that also appear to be factors in the Enron bankruptcy.[102] For example, in corporate practice, determining to whom the lawyer owes her loyalties is complicated (i.e., shareholder derivative suits).[103] The lawyer's duties may not be clear when conflicts arise between

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93. *See* Schneyer, *Ethical Infrastructure*, *supra* note 1, at 246. During the Ethics 2000 meetings, the discipline of firms under Model Rule 5.1 for failure to carry out supervisory responsibilities was proposed. This proposal was later dropped. *See* STANDARDS OF TAXATION COMM., AM. BAR ASS'N SECTION OF TAXATION, REPORT OF THE ETHICS 2000 TASK FORCE TO COUNCIL 11, *available at* http://www.abanet.org/tax/groups/stp/home.html (Apr. 19, 2001).

94. "Decentralized" refers to both decentralization within one office of lawyers as it grows in numbers, and decentralization of a firm through many office and locations.

95. *See* Frederic G. Corneel, *Guidelines to Tax Practice Second*, 43 TAX LAW. 297, 298 (1990) [hereinafter Corneel, *Tax Practice Second*].

96. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1209.

97. *See infra* Part III; Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1212; *see also* Harvey L. Pitt et al., *Law Firm Policies Regarding Insider Trading and Confidentiality*, 47 BUS. LAW. 235 (1991) (noting that in the wake of a new federal securities statute, law firms quickly implemented their own internal procedures to protect themselves from insider trading liability).

98. Similar problems arise in other specialized areas of law, such as family law and bankruptcy law. *See infra* Part III B (discussing the similarity between divorce situations and corporate law problems).

99. *See* Painter, *supra* note 4, at 730–31.

100. *See id.* at 731.

101. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1209 (discussing Charles Keating's success in exploiting large law firms and problems in decentralized corporate law practices).

102. *See* Sporkin, *supra* note 39 (discussing the need for specialized ethics rules in highly specialized fields, such as corporate and securities law, because the general ethical standards do not make sense in these arenas).

103. *See* MODEL RULES, *supra* note 25, at R. 1.13 cmt. (stating that "most derivative actions are a normal incident of an orgization's affiars, to be defended by the organization's

management, corporate shareholders and the board of directors. In addition, when public documents such as registration statements are prepared, the lawyer's disclosure duties are not clear. Furthermore, a whole host of problems arise when dealing with regulatory agencies, such as whether lawyers may use litigation tactics to delay agency investigations or inquiries.[104] Thus, agency regulators, who responded to the S&L crisis with protocols, are likely to respond in a similar fashion to the most recent wave of corporate scandals.

As the rules of professional ethics have developed over the last century, a "drift toward specificity"[105] has been observed. However, few ethical rules are designed to regulate a particular class of lawyers with specificity.[106] As discussed in Part A, state ethics codes are arguably not the appropriate place for such specific regulation. Professor Zacharias emphasizes that an ethics code addressed to all lawyers is limited in the extent to which it can specify the conduct required of lawyers in any specialty field.[107] He also believes that the Model Rules are already approaching these limits.[108] Zacharias notes that ethics codes function to promote lawyer introspection, not to resolve particular dilemmas.[109] The ABA also holds the official view that the Model Rules are designed to provide general ethical standards, and are not the place for strict protocols that govern lawyers specializing in a particular area. According to the ABA, "the proper role of the Model Rules is best served by preserving their character as relatively general statements of principle rather than detailed prescriptions for implementation of those principles."[110]

As the lawyer specializes to meet the demands of increasingly complex laws and sophisticated clients, the regulation of lawyer conduct needs to address increasingly complex ethical issues.[111] To the extent that traditional regulation fails to keep up with this increasing complexity, and substantive law failures such as the S&L crisis and the recent Enron bankruptcy occur,[112] regulators within these specialized

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lawyer like any other suit." But if the suit involves charges of wrong doing by those in charge of the orgainzation, the lawyer will have to resolve any conflict that arises between the organization and its' board of directors before defending any such suit.).

104. *See* Sporkin, *supra* note 39, at 151.

105. *See* Zacharias, *supra* note 4, at 224–25.

106. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 668.

107. *See* Zacharias, *supra* note 4, at 224.

108. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 668; Zacharias, *supra* note 4, at 224.

109. *See* Zacharias, *supra* note 4, at 226.

110. Green, *supra* note 6, at 490 n.146 (citing David B. Isbell, Chair, Am. Bar Ass'n Standing Committee on Ethics and Professional Responsibility, *Letter to various Federal and State Bar Associations* Apr. 2, 1992, at 1–2); *see* Schneyer, *Contingent Fee Contracts*, *supra* note 1, at 406 n.156.

111. *See* Sporkin, *supra* note 39 (discussing the need for specialized ethics rules in highly specialized fields, such as corporate and securities law, because the general ethical standards do not make sense in these arenas).

112. By "substantive law failures," I refer to a failure to abide by the law, as in the S&L crisis, or a failure of the law to prevent abusive, but perhaps technically legal, transactions, such as tax shelters. David Wilkins discusses Congress' deregulation of the banking industry, which reduced the public oversight of thrifts. He argues that deregulation ultimately resulted in the need to shift the oversight burden to lawyers and law firms as gatekeepers for the government and the public. *See* Wilkins, *Context and Kaye, Scholer*, *supra*

practice areas will promulgate their own rules governing lawyers. And unlike state bar associations or state supreme courts, these regulators will view enforcement as a primary goal. As Professor Zacharias discusses, ease of enforceability increases as rules become more specific.[113] Thus, regulators are much more likely to use protocols to control lawyer behavior and, ultimately, client behavior in order to rectify those substantive law failures. Furthermore, Zacharias notes that the more general ethical rules tend to lose their impact when administrative agencies promulgate more specific rules.[114] Therefore, regulators who promulgate specific rules can exert greater influence on lawyer behavior.

Perhaps state ethics codes cannot effectively provide the rule specificity that is necessary to combat certain problems. Professor Zacharias suggests that increasing the level of specificity of state ethics codes may be viewed as good self-regulation, but may also be perceived as self-serving, depending on the circumstances.[115] To the extent that other legal regulators step in to regulate, the specificity of their rules should escape the criticism that they are self-serving to lawyers. Thus, depending on the confidence placed in the outside regulator, specific rules could be perceived as necessary to address the problem. On the other hand, public confidence in the legal profession is probably not enhanced as lawyers become increasingly regulated by outside forces, particularly when regulations are enacted to police lawyers who are perceived as unable to police themselves.[116]

Ethics codes may serve to enhance the public image of the bar.[117] Enhancing this image can increase a lawyer's credibility and ability to deal with clients, gain their trust, and fend off unreasonable client demands.[118] However, existing rules and lawyer misconduct have failed to convince the public that lawyers can act selflessly and control unreasonable client behavior. Because of this negative reputation, other regulators, such as federal agencies, have intervened to regulate lawyers and clients with greater particularity. Hot on their heels, private sources of legal regulation, such as specialty bar associations, malpractice insurers and law firms themselves, are also crafting specialized rules. These groups are responding, not only to this same public perception, but also to their constituencies' needs for guidance and a felt need to persuade public regulators to back off.

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note 2, at 1174 n.120. In the case of the failed thrifts, where the law firms failed to assume this greater oversight burden, the OTS used protocols to clarify the role that lawyers and law firms were expected to assume. *Id.*

113. *See Zacharias*, *supra* note 4, at 254.

114. *See id.* at 254–55.

115. *See id.* at 271. For example, states' rules prohibiting advertising and solicitation were viewed as anticompetitive and serving lawyers' economic self interest. *Id.* at 271 n.138.

116. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (creating a new federal oversight board to monitor public accounts in response to the wave of corporate accounting scandals); Adam Wasch, *House, Senate Overwhelmingly Approve Conference Agreement on Accounting Reform*, BNA DAILY TAX RPT., July 26, 2002, at GG-1.

117. *See* Zacharias, *supra* note 4, at 267.

118. *See id.* at 267 (noting that the rule on perjury, Model Rule 3.3(a)(2)(b), which allows lawyers to disclose client perjury, can be used by lawyers to convince clients not to commit perjury).

C. Protocols Pick Up Where Traditional Ethical Rules Leave Off

Because traditional state ethics systems leave wide regulatory gaps, other regulators, public and private, are increasingly using protocols to provide the detailed ethical guidance that is missing in specialized law practice, and some are enforcing these protocols through procedures and sanctions that are more tailored to the problems at hand than the traditional disciplinary process and sanctions. All legal ethics rules (including protocols) attempt to define the *lawyer's role* in a system of resolving legal problems (including legal disputes), advising clients, drafting legal documents, and negotiating transactions. For the most part, traditional legal regulation regards lawyers as independent actors, i.e., "professionals," with a right and a duty to exercise discretion and judgment in carrying out their roles, subject to discipline if they fail in this duty. For particular situations that pose a dilemma, professional codes are supposed to help lawyers "choose among two or more legal courses of conduct."[119] As discussed in Part A, state ethics codes often assist the lawyer by providing general principles to ground lawyer judgment.

Specific rules are needed, however, when recurrent problems elicit nonuniform responses by similarly situated lawyers or when lawyers face situations where their natural incentives are apt to lead them astray. "In short, specific rules are best suited to situations in which code drafters can not trust lawyers to use good judgment in implementing their role."[120] Code drafters have occasionally used protocols in response to both types of problems. "Protocols," however, are distinguishable from most traditional ethical rules by their *level of specificity* and the *sources* from which they emanate. Through their specificity, protocols regulate conduct to a much greater extent than ethics codes by reducing lawyer discretion. Moreover, different protocol drafters may have different purposes in mind, apart from assisting lawyers in their decision-making. For example, agency protocols are designed to further an agency's mission by either directly controlling lawyer conduct or indirectly controlling client conduct. This section explores the reasons why protocols are being used to fill the regulatory gaps left by conventional ethics systems.

Prophylactic protocols can require or restrict lawyer behavior in ways that reduce the risks of harm to clients or non-clients.[121] Their specificity makes it easy to identify rule infractions.[122] Through the use of compliance reports, disclosure requirements and periodic audits, regulators can identify and remediate not only individual infractions, but systemic problems before significant harm occurs.[123] Therefore, if proactive regulation is a priority, protocols are well-suited to the task.[124]

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119. *Id.* at 231.

120. *Id.* at 284.

121. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 667.

122. Protocols can also be used to restrict a regulator's discretion in sanctioning violators similar to the federal sentencing guidelines' restrictions on a judge's discretion when imposing sentences on criminal defendants. Likewise, protocols allow regulators to impose narrowly tailored sanctions on violators. *See infra* text accompanying notes 190–92.

123. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §102, 116 Stat. 745, 753 (requiring accounting firms to submit periodic reports to be filed with an independent board); *id.* §104, 116 Stat. at 757–58 (requiring periodic inspections of public accounting firms).

124. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 667.

In addition, the detailed nature of protocols provides lawyers with clear-cut behavioral guidelines for complex situations. Lawyers and law firms are thus protected from unexpected interpretations of a broad rule applied in a specialized context.[125]

The use of protocols as regulatory tools may suggest a lack of trust in the lawyer's judgment or competence or both.[126] Agency protocols may also signal a lack of trust in client behavior. By compelling lawyers to abide by protocols, regulators can indirectly coerce client compliance with substantive laws that might otherwise be difficult to enforce. Commentators have criticized the use of protocols for this purpose.[127] In several instances, federal agencies have more or less deputized lawyers and their firms as agency watchdogs through rules that require the lawyer or firm to discourage questionable client behavior.[128] The SEC explicitly states that lawyers are to assist the agency in its enforcement of securities laws.[129] The SEC has also taken responsibility for preventing accountants and lawyers from inflicting irreparable harm on "the investing and usually naive public [that] needs special protection in this specialized field."[130] The IRS perceives tax lawyers in the same way.[131] Furthermore, the IRS's Circular 230 regulations wield a heavy stick, stating that lawyers can be debarred, from practice before the IRS, for violating the regulations, even when violations are not willful.[132] Thus, to the extent that the organized bar fails to provide more discipline or greater guidance in specific situations where lawyer trust is at issue, lawyers will have to fulfill government objectives while still maintaining loyalty to their clients. Arguably, these regulatory agencies are not merely elaborating on the lawyer's ethical obligations, but modifying them, at least as they are interpreted under state ethics codes.

To be fair, specialty bar organizations have tried to work with government agencies on these matters in an arrangement Professor Schneyer terms "bar

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125. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 672 n.667.

126. *See* Zacharias, *supra* note 4, at 234 (noting that traditional ethical codes assume lawyers will behave ethically).

127. *See* Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173, 200 (1984); *cf.* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1171–78.

128. *See* Richard Lavoie, *Deputizing the Gunslingers: Co-opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43 (2001); Schneyer, *Self-Regulation*, *supra* note1, at 648.

129. *See* SEC Procedural Rule 102(e), 17 C.F.R. § 201.102(e) (2002); Cox, *supra* note 127, at 196; Manning Gilbert Warren III, *The Primary Liability of Securities Lawyers*, 50 SMU L. REV. 383, 395 (1996).

130. Norris & Hirshberg v. SEC, 177 F. 2d 228, 233 (D.C. Cir. 1949); *see* Daniel L. Goelzer & Susan Ferris Wyderko, *Rule 2(e): Securities and Exchange Commission Discipline of Professionals*, 85 NW. U.L. REV. 652 (1991).

131. *See* Cox, *supra* note 127, at 197.

132. *See* Circular 230, 31 C.F.R. §10.51 (k)–(l) (2002) (stating that a practitioner can be censured, suspended or disbarred for contemptuous conduct which includes, "use of abusive language, making false accusations and statements, knowing them to be false, or circulating or publishing malicious or libelous matter," or for "engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws"); Cox, *supra* note 127, at 197.

corporatism" rather than professional self-regulation.[133] Bar organizations have also issued their own rules hoping to dissuade the agencies from doing likewise. These specialty groups often want to protect their constituents by providing them with safe harbors to resolve ethical dilemmas. While these groups cannot sanction attorneys in the same manner as state disciplinary agencies or other public regulators, they can try to fill the guidance gaps left by state ethics codes.[134] This is particularly true in situations where there may be huge *ex post* liability for violations of vague and controverted professional standards.[135] Under these conditions, regulatory agencies and bar specialty groups are much more inclined to develop a system that uses prophylactic rules and *ex ante* enforcement.[136] In circumstances where lawyers are seeking more guidance and regulators are seeking more compliance and less costly enforcement, protocols emerge as the norms of choice. With this brief introduction to protocols, the next section explores in more depth the sources and uses of protocols.

III. THE PHENOMENA TO DATE: THE SOURCES AND USES OF PROTOCOLS:

> The new regime must provide relatively detailed *protocols* specifying how banking lawyers are to perform their tasks. Those protocols will amount to prophylactic rules designed to help regulators prevent failures by preventing unduly risky conduct by bank officers and directors.[137]

The lack of specificity in states ethics codes, coupled with weak disciplinary enforcement, encourages *entities other than state bars* to respond to problems with their own rules governing lawyer behavior. These *other entities* include regulatory agencies, specialized bar groups, legal malpractice insurers, and professional organizations. By issuing much more specific rules/protocols to guide those practicing under their auspices or in their special fields, these groups, each with its own agenda, can exert considerable influence over lawyer behavior. For example, tax lawyers who practice before the IRS must abide by a detailed set of regulations issued by the Treasury Department, commonly known as Circular 230, and face administrative sanctions if those rules are violated.[138] The SEC also regulates lawyers who practice securities law, primarily under Rule 102(e).[139] Legal malpractice insurers sometimes require their insureds to comply with detailed protocols as a

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133. *See* Schneyer, *Self-Regulation*, *supra* note1, at 671–74.

134. Some private regulators can punish noncomplying lawyers, typically through their contractual relationships. For example, malpractice insurers can refuse to insure lawyers who fail to abide by the insurers' ethical protocols and procedures. *See infra* text accompanying notes 327–30. Likewise, law firms can fire employees who breach a firms' ethical policies or procedures. *See infra* text accompanying notes 324–25.

135. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 667 (discussing the huge settlements that the OTS extracted from law firms charged with violating ethics standards during the S&L crisis).

136. *See id.*

137. *Id.* (emphasis added).

138. *See* Circular 230, 31 C.F.R. § 10.0 (2002).

139. *See* SEC Procedural Rule 102(e), 17 C.F.R. § 201.102(e) (2002) (authorizing the SEC to regulate those lawyers practicing before it based on their professional conduct).

condition of coverage.[140] Some liability insurers will only retain lawyers to represent those insureds who are willing to abide by the insurers' practice guidelines.[141] A number of specialty bar organizations, like the American College of Trust and Estate Counsel or the ABA Business Law Section, issue protocols to help guide lawyers who practice in specialty fields.[142] This section identifies those entities that are issuing protocols and examines their reasons for doing so.

A. Agency Regulators

Federal agencies are a prime source of protocols. As legal complexity and lawyer specialization increases, agencies have issued regulations that govern lawyers—and sometimes nonlawyers—who "practice" before them.[143] Typically, agencies desire rules that make infractions easy to identify and enforce. Highly detailed rules, like protocols, serve this goal. Furthermore, as law enforcers, agencies seek to *prevent* misconduct, either by lawyers or perhaps their clients; thus, agencies also tend to choose rules that can be enforced *ex ante*—before harm occurs. Protocols can provide structured remedies that incorporate both vicarious responsibility and firm liability. This enables agencies to enlist law firms to police their own lawyers.[144]

Agencies also need the professionals who advise their regulatees to be skilled in their specialties and understand the agencies' expectations. In addition, because state ethics codes can vary dramatically, some federal agencies possess and exercise authority to issue rules that apply uniformly to all who practice under their jurisdiction.[145] SEC officials consider it "essential for attorneys practicing before the SEC to be subject to standards of professional conduct which are clearly understood by both the regulators and the attorneys, which are uniform, and which balance the needs both of the regulatory scheme and of the profession and the clients it serves."[146] These goals have spawned several different types of protocols, including highly detailed rules that emerge from rule-making proceedings (e.g., certain provisions of

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140. *See* Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 210 (1996); Charles Silver, *When Should Government Regulate Lawyer-Client Relationships? The Campaign To Prevent Insurers From Managing Defense Costs*, 44 ARIZ. L. REV. 787 (2002).

141. Silver, *supra* note 140.

142. *See* Am. Bar Ass'n Bus. Law Section Comm. on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) [hereinafter Am. Bar Ass'n, *Silverado Accord*]; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 270; THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1993), *available at* http://www.actec.org/pubInfoArk/comm/toc.html.

143. *See* Cox, *supra* note 127, at 179–88 (discussing the authority of federal agencies to regulate lawyer behavior).

144. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1211–12; *see also supra* Part II.

145. *See* Green, *supra* note 6, at 464, 524.

146. Paul Gonson & John W. Avery, *Practicing Securities Law: A Search for Uniformity of Professional Standards*, *in* REFORMING LEGAL ETHICS IN A REGULATED ENVIRONMENT, THE REPORT ON THE CONFERENCE ON LAWYER AND ACCOUNTANT LIABILITY AND RESPONSIBILITY DEC. 10–11, 1993 IN WASHINGTON D.C. 489 (Am. Law Inst.-Am. Bar Ass'n. Comm. on Continuing Prof'l Educ. 1994).

Circular 230)[147] as well as requirements imposed in consent decrees or settlement agreements (for example, certain provisions in the settlement agreements that the OTS reached with law and accounting firms from whom the government sought to recoup its losses from all the S&L failures in 1988–92).[148] These protocols function both as the agency's ideas of "best practices" and as *ex ante* safe-harbors from the lawyers' standpoint.

Agencies have a direct opportunity to observe and react to the actions of lawyers.[149] Agencies are also in a good position to describe appropriate professional behavior in the contexts in which they operate, to determine what guidelines should be enforceable and enforced, and to address recurrent problems.[150] Arguably, agencies can consider, in a more comprehensive manner than the drafters and enforcers of traditional ethics codes, the factors to be taken into account in providing guidance for the lawyers who practice before them.[151] The agency role in this context can be compared to the role of courts in formulating and enforcing rules of civil and criminal procedure.[152] As Professor Bruce Green states, agencies can develop "rules that are both more certain and better tailored to particular aspects of professional conduct than the bar association rules of general applicability."[153] Formulated pursuant to executive rule-making authority, agency rules are public in nature and legally enforceable. State bar codes, in contrast, only have the force of law in traditional disciplinary proceedings, though they are sometimes influential in disqualification, fee-disputes, and malpractice cases.[154] Recall too, that the enforcement of state ethics codes through the disciplinary process is notoriously reactive and weak.[155] Furthermore, in an effort to prevent future law violations, agencies can enlist both lawyers *and law firms* as regulatory "gatekeepers"[156] and "whistleblowers."[157]

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147. *See* Cox, *supra* note 127, at 184 (noting that "Congress has expressly delegated rulemaking authority to regulate attorneys to some agencies, including the Patent and Trademark Office under 35 U.S.C. § 31 (1976) and the Department of the Treasury under 31 U.S.C. § 1026 (1976).")

148. *See In re* Keating, Muething & Klekemp, Exchange Act Release No. 15,982 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82, 124 (July 2, 1979); Fishbein, Order to Cease and Desist, *supra* note 69; Cox, *supra* note 127, at 186–88, 198–99 (discussing the implied authority of some federal agencies to regulate attorneys); Schneyer, *Self-Regulation*, *supra* note 1, at 649–52, 657–58, 662–64, 671–74.

149. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 808.

150. In addition, agencies can take a proactive approach to enforcement. For example, SEC officials, as part of ongoing oversight, review formal submissions and public documents prepared by lawyers. The SEC also investigates specific market transactions for compliance with securities laws. Both of these activities would supply the SEC with significant information about the lawyers involved in these transactions. *See id.* The SEC also has authority to conduct investigations "to determine whether any person has violated, is violating, or is about to violate any [securities laws]." Securities Exchange Act of 1934, 15 U.S.C. § 78u(a) (2002); Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU. L. Rev. 225, 227 (1996).

151. *See* Green, *supra* note 6, at 467.

152. *See* Schneyer, *Ethical Infrastructure*, *supra* note 1, at 255.

153. Green, *supra* note 6, at 467.

154. *See id.* at 462; *cf.* RHODE, *supra* note 7, at 42.

155. *See* Green, *supra* note 6, at 521 n.314.

156. Schneyer, *Self-Regulation*, *supra* note 1, at 648.

As Professor Green notes, however, one serious objection to lawyer regulation by agencies is the lack of objectivity on the part of the agency promulgating the rules.[158] "Administrative regulations," he writes, "will therefore overvalue the interests of the government as a litigant."[159] Furthermore, as political bodies, the views of regulatory agencies are likely to shift with the political winds. Controlling lawyers who represent an agency's direct regulatees may be inappropriate insofar as protecting clients from government overreaching is a value that lawyers are supposed to uphold.[160]

As was true of the S&L crisis, regulatory agencies are apt to craft rules to prevent further client misconduct in the wake of massive or egregious wrongdoing that lawyers are thought to have failed to prevent. As Professor Zacharias has written, "[n]arrow provisions make sense . . . when special aspects of a given situation demand a uniform response to a recurring dilemma that has many feasible answers."[161] Law practice protocols enable agencies to dictate to lawyers an acceptable and uniform response to such dilemmas. Thus, rule infractions become easier to avoid, identify, and enforce all at once.

Lawyers who practice before agencies may also seek more specific guidance where the relevant rules are unclear and the agency could conceivably hold the lawyer accountable for what are declared *ex post* to be violations.[162] While protocols may appear to decrease lawyer autonomy, they may actually enhance a lawyer's ability to convince unwieldy clients to abide by the rules.[163] Professor Wilkins discusses the ways in which such regulation can actually increase lawyer independence:

> By exposing and sanctioning a broad range of externality problems that would otherwise be hidden from view, these systems ensure that lawyers take seriously their duties as officers of the court when advising clients about matters such as regulatory compliance, even when a plausible argument could be made that compliance was not required. The additional check provided by an enforcement system is particularly needed in the corporate sphere, where lawyers are especially prone to undervalue their duties as officers of the court.[164]

Liability or sanction (i.e., state discipline) concerns are not enough to prevent lawyers from engaging in questionable conduct or giving suspect advice, considering the significant financial and other rewards of a "cutting edge" corporate

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157. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1164.

158. *See* Green, *supra* note 6, at 467; *see also* Schneyer, *Self-Regulation*, *supra* note 1, at 671; Wilkins, *Who Should Regulate*, *supra* note 11, at 836.

159. Green, *supra* note 6, at 467.

160. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 671.

161. *See* Zacharias, *supra* note 4, at 243.

162. *See* Gonson & Avery, *supra* note 146, at 490–92; Schneyer, *Self-Regulation*, *supra* note 1, at 665 n.106. Note that traditional ethics opinions by bar associations are rarely a source of protocols.

163. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 19 n.57 (1988); Wilkins, *Who Should Regulate*, *supra* note 11, at 869, 878.

164. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 868.

legal practice.[165] Therefore, while lawyer representation in some contexts might be "chilled" by such regulatory measures, that does not appear to be the case in the corporate context.[166] And yet, the more aggressive lawyers and clients become, the more agencies are tempted to respond with protocols that attempt to reach that "chill" level.[167]

One final point regarding agency regulation: Because banking lawyers work in a highly specialized, highly regulated field, Professor Wilkins argues that they should be subject to at least three context-specific duties that would supplement state ethics codes.[168] First, thrift lawyers should be expected to give advice that is "independent" and "candid."[169] Such advice "requires a thorough review of any contrary position taken by the regulators as well as an unbiased assessment of how relevant legal decision makers would rule on the matter *if they knew all of the pertinent facts*."[170] Second, banking lawyers must cooperate with banking regulators in collecting information about their clients' businesses.[171] Finally, thrift lawyers should notify both the regulator and the "most disinterested thrift decision maker" (usually the board of directors) when a position is taken on an issue that the lawyer knows is contrary to the regulator's position on that issue.[172] The justification for imposing these duties stems from regulatory imperatives that traditional ethics codes have arguably failed to take into account.[173] These "special" duties are instructive, because several regulatory agencies have already used protocols to impose these duties on lawyers who practice before them.

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165. *See id.* at 871. Other rewards include prestige and fame. This is very true in the world of tax-shelter lawyers. The value of reputation, however, also increases the potential downside of disciplinary proceedings. Painter discusses the significant value of reputational capital for securities lawyers. He notes that

> The reputational paradigm in the legal profession is thus particularly sensitive to an allegation of improper professional conduct.... Attorneys, perhaps even more than accountants, would thus benefit from clear and predictable rules that help them avoid even being named as defendants in a lawsuit or as respondents in disciplinary proceedings.

Painter & Duggan, *supra* note 150, at 239–40.

166. Wilkins discusses claims that such regulation may cause the lawyer to avoid pursuing his client's interests to the fullest extent when he is worried about his own risk of sanction. On the other hand, the lawyer may charge more to compensate for the extra exposure, passing the costs of liability to his client. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 869–70, 878.

167. *See supra* text accompanying note 132 (discussing specific rules that allow for sanctions regardless of intent or willfulness by the lawyer).

168. *See* Wilkins, *Context and Kaye Scholer*, *supra* note 2, at 1181–82.

169. *See id.*

170. *See id.* (emphasis added).

171. *See id.*

172. *See id*; *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 §307, 116 Stat. 745 (2002) (imposing a similar duty to go "up the chain" on securities lawyers if there is evidence of a securities laws violation).

173. *See supra* text accompanying notes 121–32 (discussing obligations that operate to prevent harm and are proactive in nature); *see also* Model Rules, *supra* note 25, at R. 3.9 (Model Rule 3.9 does not extend to Model Rule 3.3(d)'s duty to disclose adverse facts in *ex parte* proceedings to bank examinations and other non-adjudicative administrative proceedings.).

1. The Securities and Exchange Commission

The SEC, under Rule 102.2(e) of its Rules of Practice, is authorized to deny the privilege to practice "before it" to anyone that it determines: (1) "not to possess the requisite qualifications to represent others;" (2) "lacking in character or integrity or to have engaged in unethical or improper professional conduct;" or (3) "to have willfully violated or willfully aided and abetted [a] violation of... Federal securities laws" or SEC regulations.[174] The SEC's sanctioning power serves to protect its processes and arguably permits it to set professional standards.[175] But unlike state disciplinary authorities, the SEC's primary objective is *not* to promote good lawyering, but rather to protect investors.[176] The SEC has repeatedly emphasized that securities lawyers must assist it in its enforcement of securities laws.[177] In both administrative actions and judicial enforcement actions, the SEC has targeted law firms as well as individual lawyers.[178] These matters are typically settled by consent agreements[179] in which the SEC has often used protocols to dictate lawyer and law firm behavior. But the SEC's provision of detailed guidance through protocols has been somewhat haphazard as a result of announcing rules or policies through consent agreements rather than administrative rulemaking procedures.[180]

The most comprehensive example of SEC ethical guidance is the well-known case of *In re Carter*,[181] where the agency interpreted SEC practice under then Rule 2(e). The SEC held that a lawyer with significant responsibilities in assuring a company's compliance with disclosure requirements under federal securities law violates professional standards if he becomes aware of the client's non-compliance and fails to take prompt steps to remedy the non-compliance.[182] The SEC set out several specific steps for the lawyer to take in these circumstances. The lawyer should initially counsel the client to make an accurate disclosure.[183] If the client rejects this

174. SEC SEC Procedural Rule 102(e),17 C.F.R. § 201.102(e) (2002); Schneyer, *Ethical Infrastructure*, *supra* note 1, at 264 (discussing the SEC's power to "discipline" lawyers). However, the SEC can also enter cease and desist orders under the 1990 Remedies Act. 15 U.S.C. § 77h-1 (2002); 15 U.S.C. § 78u(a)(3) (2002). The Fletcher-Rayburn Securities Act of 1933 is codified at 15 U.S.C. § 77(a)–(aa) (2002). The Securities & Exchange Act of 1934 is codified in scattered sections of 15 U.S.C. § 78. The SEC also has the power to prosecute aiders and abetters of securities laws violations. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. § 78, amending § 20 of The Securities & Exchange Act of 1934 Act).

175. *See* Goelzer & Wyderko, *supra* note 130, at 653–54; *see also* Sarbanes-Oxley Act, Pub. L. No. 107, § 307, 116 Stat. 745, 784 (2002).

176. Painter & Duggan, *supra* note 150, at 227.

177. *See* Warren III, *supra* note 129, at 395.

178. *See In re* Keating, Muething & Klekemp, Exchange Act Release No. 15,982, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) §82,124, at 81,981 (July 2, 1979); Schneyer, *Ethical Infrastructure*, *supra* note 1, at 264;

179. *See* Schneyer, *Ethical Infrastructure*, *supra* note 1, at 264.

180. *See infra* text accompanying notes 231–35 (discussing the IRS rulemaking approach).

181. *In re* Carter, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (Feb. 28, 1981); Cox, *supra* note 127, at 195.

182. *See* In re Carter, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH), at 84,172; Cox, *supra* note 127, at 195.

183. *See* In re Carter, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH), at 84,172

advice and continues to violate the securities laws, "the lawyer must take further, more affirmative steps in order to avoid the inference that he has been co-opted willingly or unwillingly, into the scheme of non-disclosure,"[184] i.e., promptly take action that "leads to the conclusion that the lawyer is engaged in efforts to correct the underlying problem, rather than having capitulated to the desires of a strong-willed, but misguided client."[185] The Commission stated that resignation is one option, but "a direct approach to the board of directors or one or more individual directors or officers may be more appropriate; or [the lawyer] may choose to try to enlist the aid of other members of the firm's management."[186] The Commission added that premature resignation may undermine the administration of the securities laws and that the lawyer's continued relationship with the client often holds the most promise for corrective action. "So long as a lawyer is acting in good faith and exerting reasonable efforts to prevent violations of the law by his client, his professional obligations have been met."[187] Thus, the SEC provides the securities lawyer with relatively detailed options and prescribes his or her responsibilities in *preventing* harm.[188] These responsibilities parallel Professor Wilkins' special duty to disclose to the board of directors when the lawyer becomes aware of a banking law violation.[189] No provision of similar specificity exists in state ethics codes.[190]

Because of the significant role lawyers play in the administration of securities laws, the SEC from time to time investigates and prosecutes lawyers who have helped clients break those laws.[191] Some commentators believe that the SEC has been *too* zealous in this regard.[192] However, the SEC's positions are consistent with its interpretation of its authority to take measures to prevent harm.[193] An example of law firm protocols implementing this principle of harm prevention was announced in *In re Keating, Muething, & Klekamp*,[194] where, as a part of a consent order, the SEC

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184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. In the recently enacted Sarbanes-Oxley Act, the SEC is essentially required to codify the requirements outlined in *In re Carter*. Sarbanes-Oxley Act, Pub. L. No. 107, § 307, 116 Stat. 745 (2002).
189. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1181–82; *see also* MODEL RULES, *supra* note 25, at R. 1.13(b)–(c).
190. The ABA has expounded on the principles articulated in the Model Rules through formal opinions of its Ethics Committee. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001) (stating that a lawyer's compliance with insurer litigation management guidelines must not impair the lawyer's independent judgment to his/her client). *But cf.* MODEL RULES, *supra* note 25, at R. 1.13 (providing vague guidelines regarding the lawyer's obligation to disclose problems to the board of directors).
191. *See* Wilkins, *Who Should Regulate*, *supra* note 11, at 836.
192. Former SEC Commissioner Roberta Karmel has sharply criticized the Commission for promulgating rules that go beyond maintaining order and integrity in its proceedings, and for attempting to use lawyers as substantive law enforcers. She believes that these problems should be addressed by state disciplinary authorities. *See In re* Keating, Muething & Klekamp, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,992; Cox, *supra* note 127, at 199–200.
193. Goelzer & Wydecko, *supra* note 130, at 655.
194. *See In re* Keating, [1979 Transfer Binder] Fed. Sec. L. Rep.(CCH) at 81,989.

required the law firm to "'adopt, maintain, and implement additional . . . supervisory procedures' that would ensure the adequacy of its representation in matters involving federal securities laws . . . ."[195] In this case, the SEC exercised its authority to regulate the firm, forcing individual lawyers to be accountable within the firm structure but also provided itself with an additional (and efficient) layer of enforcement.[196]

In an earlier example *SEC v. National Student Marketing*,[197] the SEC issued several ethical protocols that heightened securities lawyers' standard of care. The SEC required that in future securities work, the law partner handling a transaction must consult with at least two other partners when possible client misconduct arises and that an experienced partner must independently review some of the registration statements and opinion letters.[198] The SEC has also imposed specific requirements for lawyer engagement letters in *In re Ferguson*.[199] Written engagement letters were required to emphasize that the lawyer's duties extend to both the issuer and the investors in the issuer's securities.[200] In addition, when acting as bond counsel, the firm was required to investigate, not only their own client, but other participants in the securities offering to ensure that information in the disclosure document was correct.[201] Finally, this investigation had to be documented and reviewed by the firm's partners.[202] These requirements incorporate the same kinds of duties that Professor Wilkins articulated for thrifts: independent and candid advice, and cooperation with the regulator.[203]

In addition to setting specific standards of practice, the SEC has also used sanction protocols to discipline attorneys. For example, in *SEC v. Ezrine*, the SEC obtained an injunction that not only prohibited the lawyer from practice before the agency, but also prohibited the lawyer from giving advice, written or oral, with respect to the legality of conduct under the federal securities laws.[204] Ezrine was also prohibited "from requesting, accepting, receiving or retaining in any manner any or

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195. *Id.* The firm also agreed not to accept new securities matters for sixty days until the additional procedures were put in place. *See* Schneyer, *Ethical Infrastructure*, *supra* note 1, at 265.

196. *See supra* text accompanying notes 93–97 (discussing ethical regulation of law firms).

197. *See* SEC v. Nat'l Student Marketing Corp., CIV. A. No. 225-72 [1977–78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,027, at 91,598 (D.D.C. 1977); SEC v. Nat'l Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978). Note, however, that even though the court found that the law firm had committed securities violations, it did *not* grant the SEC's request for injunctive relief. The case is nonetheless viewed as heightening securities lawyers' standard of care. *See* Warren III, *supra* note 129, at 395.

198. *See* Nat'l Student Marketing Corp., [1977–78 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 91,598; Nat'l Student Marketing Corp., 457 F. Supp. 682; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 264 n.87.

199. Exchange Act No. 3-4528 (Aug. 21, 1974), *available at* 1974 SEC LEXIS 2779.

200. *See id.*

201. *See id.* at *3 n.3; *see also* Warren III, *supra* note 129, at 397.

202. *See In re Ferguson*, 1974 SEC LEXIS 2779, at *3 n.3.

203. *See supra* text accompanying notes 168–73 (discussing Wilkins' additional duties for thrift lawyers).

204. *See* SEC v. Ezrine, No. 72-3161, slip op. (S.D.N.Y. Aug. 3, 1972) (summarized in SEC v. Ezrine, [1972–73 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,594 (Aug. 2, 1972)).

all legal fees . . . received . . . for services rendered in violation of the [SEC's] order. . ."[205] The SEC has also ordered a lawyer not to "prepare or disseminate any oral or written opinions involving matters arising under the Federal Securities Laws. . . [or] directly advise, either orally or in writing, any issuer with regard to any security to be offered to the public."[206]

While the SEC, through Rule 2(e) (now Rule 102(e)) proceedings, has provided securities lawyers with a number of protocols regarding their ethical obligations, its approach has been piecemeal. Some commentators have criticized the SEC because these rules overreach the agency's authority,[207] while others argue that its approach is not comprehensive or specific enough to provide clear guidance to securities lawyers.[208]

2. The Office of Thrift Supervision

For many years, the OTS regulated lawyers in banking practice. Through administrative enforcement actions, it disciplined banking lawyers for unethical behavior.[209] Consistent with the philosophy of other administrative agencies, the OTS asserted that banking lawyers were responsible for maintaining "the safety and soundness of the banking system."[210] The OTS maintained that banking lawyers had greater responsibilities to protect the public interest than did lawyers whose clients were less heavily regulated and that the OTS should enforce these responsibilities.[211] In the early 1990s, following the S&L crisis, the OTS brought charges against the lawyers who allegedly assisted thrift institutions in violating federal banking laws and regulations.[212] The OTS's action against the law firm, Kaye Scholer, charged the firm not only with violating banking laws, but also with breaching its fundamental duties under the prevailing rules of legal ethics.[213] The resulting agreement between the OTS and the firm required the firm to comply with a number of protocols in its future banking work.[214] These protocols required: (1) that the firm review the finances of

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205. *See id.*

206. *In re* Hodgin, Exchange Act Release No. 16,225 [1979–80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,334 (Sept. 27, 1979).

207. *See In re* Keating, Muething & Klekamp, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,992; Cox, *supra* note 127, at 199–200.

208. *See* Painter & Duggan, *supra* note 150, at 271.

209. *See* 12 C.F.R. § 513.4(a) (2002); Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1155.

210. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1155.

211. *See id.* at 1161.

212. *See In re* Fishbein, OTS AP No. 92-19, *available at* 1992 WL 560939 (Mar. 1, 1992) (Notice of Charges and of Hearing for Cease and Desist Orders to Direct Restitution and Other Appropriate Relief, Notice of Intention to Remove and Prohibit from Participation in the Conduct of the Affairs of Insured Depository Institutions, and Notice of Intention to Debar from Practice before the Office of Thrift Supervision) [hereinafter Fishbein, Notice of Charges]; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 264.

213. *See* Fishbein, Notice of Charges, *supra* note 212, at *5–37 (listing the charges against Kaye Scholer); Schneyer, *Ethical Infrastructure*, *supra* note 1, at 268.

214. *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, 1000 (1993).

every new banking client;[215] (2) that the firm come to a written understanding with each banking client concerning the scope of its engagement;[216] (3) that every legal opinion concerning a client's compliance with federal banking laws be prepared under the supervision of a partner with at least ten years of experience in banking law and be approved by a second banking partner;[217] (4) that most of the firm's other banking work be monitored by a designated partner with at least ten years of experience;[218] and (5) that the firm omit no material facts related to any matter addressed in a submission to federal banking regulators, even if, under its theory of the applicable law, the firm has determined that those facts are not relevant if the firm "knows that the agency may have a different view of the law."[219] The OTS subsequently suggested that, even though these protocols were negotiated as part of a settlement agreement with Kaye Scholer, all firms in banking practice should follow them.[220] These protocols implement the special duties for thrifts that were outlined by Professor Wilkins, notably through regulation of the firm as opposed to regulation of individual lawyers.

Furthermore, sanction protocols were used to suspend two partners from practice before the OTS and from engaging in banking or thrift practice.[221] In one example, the OTS spelled out the exact procedures the sanctioned lawyer was to follow if she were ever again engaged by a thrift or banking institution.[222] The ABA challenged the OTS's view that many banking lawyers had behaved unethically,[223] and state disciplinary agencies, the ABA's preferred enforcers, did nothing to contradict the ABA's conclusions.[224]

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215. *See* Fishbein, Order to Cease and Desist, *supra* note 70, at *2.; Schneyer, *Self-Regulation*, *supra* note 1, at 649; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 268.

216. *See* Fishbein, Order to Cease and Desist, *supra* note 70, *4; Schneyer, *Self-Regulation*, *supra* note 1, at 649; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 268.

217. *See* Fishbein, Order to Cease and Desist, *supra* note 70, at *2; Schneyer, *Self-Regulation*, *supra* note 1, at 649; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 268.

218. *See* Fishbein, Order to Cease and Desist, *supra* note 70, at *2; Schneyer, *Self-Regulation*, *supra* note 1, at 649; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 268.

219. *See* Fishbein, Order to Cease and Desist, *supra* note 70, at *4; Schneyer, *Self-Regulation*, *supra* note 1, at 649; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 268.

220. *See* Schneyer, *Ethical Infrastructure*, *supra* note 1, at 268; Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1169 n.104 (referring to an OTS release of August 10, 1992).

221. *See* Curtis, *supra* note 214, at 1001 (citing to *In re Fishbein*, OTS AP 92-25 (Dep't Treasury 1992) and *In re Katzman*, OTS AP 92-26 (Dep't Treasury 1992)).

222. *See In re* Fishbein, OTS AP No. 92-27 (March 11, 1992) (Order to Cease and Desist to Lynn Toby Fisher), *available at* 1992 WL 560948 (listing two pages of steps that Fisher must follow if retained to represent a thrift or bank after her suspension). For example, she was required to "develop and apply procedures reasonably designed to enable her to determine the accuracy or reliability of any statement made by her to a federal banking agency." *Id.*

223. *See* AM. BAR ASS'N. WORKING GROUP ON LAWYERS' REPRESENTATION OF REGULATED CLIENTS, LABORERS IN DIFFERENT VINEYARDS? THE BANKING REGULATORS AND THE LEGAL PROFESSION (Discussion Draft Jan. 1993).

224. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 650; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 269 nn.119, 199; Hal R. Liebermen, *Letter Clearing Lincoln S&L Lawyer*, NAT'L L.J., Dec. 27, 1993–Jan. 3, 1994 at 10, 10 (discussing New York's investigation of Kaye, Scholer lawyers, which was dropped for lack of evidence).

As with the SEC, the OTS's treatment of the lawyers who represented failed banking institutions was criticized as overreaching.[225] Holding regulatory lawyers to distinctive standards of professional responsibility, however, can be justified on several grounds. First, "many of the worst abuses in the thrift and banking industry could not have occurred without the cooperation of lawyers."[226] Second, bank and thrift owners have strong incentives to pursue risky strategies that favor equity interests over depositors and public insurance funds.[227] These incentives, perhaps to a lesser extent, exist in all entities that are funded by both fixed and residual claims.[228] Finally, regulatory lawyers can be a cost-effective source of oversight, saving the resources of regulatory agencies.[229] Thus, greater professional obligations can force regulatory lawyers to act in ways that reduce risky client behavior. In addition, market forces work against lawyers in upholding higher obligations without protocols to assist them. As is true in tax, intellectual property and securities work, banking clients generate a high volume of complex (and thus costly) legal work.[230] Highly specialized, very large law firms must compete for clients that are demanding and sophisticated.[231] In the end, protocols can assist agencies in protecting the public, and assist lawyers in protecting themselves.

3. The Internal Revenue Service

Examples of protocols that emerge from a rulemaking proceeding were the Department of the Treasury's Regulations Governing Practice Before the IRS (proposed Circular 230) regulations concerning tax shelters, issued in January 2001.[232] With Congress unable to pass legislation quickly enough to shut down abusive tax shelters,[233] the Treasury is attempting to curb the growth of corporate tax shelters through increased regulation of those who practice before the IRS.[234] The

225. *See* Curtis, *supra* note 214, at 1003.

226. *See* Howell E. Jackson, *Reflections on Kaye, Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1040 (1993).

227. *See id.* at 1042.

228. *See id.* at 1042–43.

229. *See id.* at 1044–45.

230. *See* Wilkins, *Context and Kaye, Scholer*, *supra* note 2, at 1204–05.

231. *See id.*

232. On July 26, 2002, the Treasury issued final Circular 230 regulations that omitted the proposed tax shelter rules. Circular 230, 31 C.F.R. §10.51 (k)–(l) (2002). Due to the controversy over the scope of these proposed rules, the Internal Revenue Service decided to re-issue the proposed tax shelter rules next year. *See id.* The rules discussed in this section continue to be relevant to protocol discussions because the revised tax shelter rules, like these proposed rules, will be very specific and will likely contain many protocols. Furthermore, the IRS's reworking of these rules provides an excellent example of bar corporatism through agency and non-agency (the ABA, AICPA, etc.) regulators working together to formulate rules that balance agency and non-agency objectives. *See* Schneyer, *Self-Regulation*, *supra* note 1, at 671–74.

233. *See* Martin J. McMahon, Jr., *Economic Substance, Purposive Activity and Corporate Tax Shelters*, TAX NOTES, Feb. 25, 2002, at 1017, 1019.

234. The regulations define "Practice before the Internal Revenue Service" as including "all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under the laws or regulations administered by the Internal Revenue Service. Such presentations include, but

proposed tax shelter rules apply to those who advise clients regarding whether a particular "tax shelter" may be a good investment for the client or whether the client's own "tax shelter" can deliver to investors the tax benefits it promises.[235] In most instances, the regulations will affect *lawyer* behavior because lawyers (and perhaps accountants) typically provide the type of advice described in Circular 230.[236]

The proposed regulations include many protocols that identify the steps necessary to "satisfy the practitioner's responsibilities."[237] Protocols are also used to require firms that employ practitioners to implement procedures that ensure individual lawyer compliance.[238] The proposals expand the scope of advice subject to regulation and clarify what practitioners must do in order to safely give such advice.[239] Unlike the ad hoc approach used by the SEC and OTS, Circular 230 takes a comprehensive approach to laying out the agency's expectations of lawyers.[240]

To give a "tax shelter" opinion, the practitioner must (I) gather all the relevant facts, (ii) relate the applicable law to these facts, (iii) consider all material tax issues and adequately address all questionable issues, (iv) provide a clear conclusion on the likelihood of success of each tax shelter item if challenged by the IRS, and (v) ensure that the opinion is accurately represented in any written or promotional materials.[241] Protocols describe exactly how the practitioner is to carry out these steps. For example, the proper depth of legal analysis is as follows:

> The opinion must state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant statutory and regulatory anti-abuse rules, and the

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are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, and representing a client at conferences, hearings, and meetings." Proposed Circular 230, 66 Fed. Reg. 3276, 3284 (proposed Jan. 12, 2001) (to be codified at 31 C.F.R. pt. 10) (citing proposed § 10.2(e)). These rules are not intended to apply to tax return preparation. *See* Alison Bennett, *IRS Ready to Fight Tax Shelters, But Needs Resources, Legislation Needed, Rossotti Says*, BNA DAILY TAX REP., May 16, 2002, at G-11 (discussing the need for legislation to help battle tax shelters).

235. Proposed Circular 230, 66 Fed. Reg. at 3291–93 (citing proposed §§ 10.33(c), 10.35(c)).

236. *See generally*, Proposed Circular 230, 66 Fed. Reg. 3276. The Secretary of the Treasury is authorized to regulate the practice of representatives before the Treasury Department and suspend or disbar those who are incompetent or disreputable, or those who violate Circular 230 regulations. *See* Circular 230, 31 C.F.R. § 10.50 (2002).

237. *See* Proposed Circular 230, 66 Fed. Reg. at 3295 (citing proposed § 10.35(d)); *id.* at 3279 (discussing proposed §§ 10.33, 10.35); *infra* text accompanying notes 238–45.

238. *See* Proposed Circular 230, 66 Fed. Reg. at 3281–82 (discussing proposed § 10.36).

239. *See id.* at 3279–80 (discussing proposed § 10.33).

240. The Patent and Trademark Office has also issued its practice rules through a rulemaking procedure. *See infra* Section B IV. Since both agencies allow nonlawyers to practice before them, perhaps the more comprehensive approach stems in part from the fact that *other* professionals do not have ethics codes (like the Model Rules) governing their behavior.

241. *See* Proposed Circular 230, 66 Fed. Reg. at 3291–92, 3294–95 (citing proposed §§ 10.33(a)(1)–(5), 10.35(a)(1)–(5)).

> opinion must analyze whether the tax shelter item is vulnerable to challenge under all potentially relevant doctrines and anti-abuse rules. In analyzing such judicial doctrines and statutory and regulatory anti-abuse rules, the opinion must take into account the taxpayer's non-tax and tax purposes (and the relative weight of such purposes) for entering into a transaction and for structuring a transaction in a particular manner.[242]

Another protocol adds that the practitioner may not consider the possibility "that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled" when evaluating the tax treatment of a tax shelter item.[243] These requirements again comport with Professor Wilkin's special duty of independence and candor.

When issuing an opinion that a promoter will use to market the shelter to third parties, the practitioner is subject to very strict disclosure requirements. For example, if the practitioner can not conclude that the proposed tax treatment of an item is "more likely than not" proper, this fact "must be clearly and prominently disclosed on the first page of the opinion."[244] Practitioners are also required to disclose, upon request by the IRS, all relevant information that is not subject to the attorney-client privilege.[245] One particularly controversial new protocol requires the practitioner to promptly notify the IRS when requested records are not in the possession or control of either the practitioner or the client, and to provide the IRS with "any information that either the practitioner or the practitioner's client has regarding the identity of any person who may have possession or control of the requested records or information."[246]

Furthermore, these regulations require firms to put "adequate procedures in effect for purposes of ensuring compliance" with the regulations.[247] An individual in the firm is subject to sanctions if *other* members of the firm do not comply with the regulations, and the individual "fails to take prompt action, consistent with his or her authority and responsibility for the firm's practice advising [tax] clients" to correct such noncompliance.[248] The agency is attempting to use the firm as an efficient source of accountability for lawyers practicing under its jurisdiction. In conjunction with other obligations that these rules impose on lawyers, these firm requirements are remarkably similar to the requirements that the OTS imposed on firms.

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242. *See id.* at 3294–95 (citing proposed § 10.35(a)(3)).

243. *See id.* at 3299 (citing proposed § 10.35(a)(4)(iii)).

244. *See id.* at 3292 (citing proposed § 10.33(5)(ii)).

245. *See id.* at 3289 (citing proposed §10.20(a)); Circular 230, 31 C.F.R. § 10.20(a) (2002) (final regulations retain this requirement).

246. *See* Proposed Circular 230, 66 Fed. Reg. at 3289 (citing proposed § 10.20(a)). The final regulations retain this requirement, but clarify that the practitioner has no obligation to ask third parties about information or independently verify information provided by the client. *See* Circular 230, 31 C.F.R. § 10.20(a)(2).

247. *See* Proposed Circular 230, 66 Fed. Reg. at 3295–96 (citing proposed § 10.36).

248. *See id.* at 3296 (citing proposed § 10.36(b)).

4. The Patent and Trademarks Office

The Rules of Practice in Patent Cases offer a second example of protocols issued by rulemaking.[249] The Commissioner of Patents has the authority to regulate those who practice before the Patent and Trademark Office (PTO).[250] Like the IRS, the PTO allows both lawyers and nonlawyers to qualify for practice.[251] Patent attorneys, like tax, securities, and banking attorneys, owe duties not only to their clients, but also to the PTO.[252] Many of these duties are spelled out in protocols in the PTO's Rules of Practice and its Manual of Patent Examining Procedure (MPEP).[253]

Many ethical issues in patent law concern whether a patent applicant has provided the PTO with all the material information necessary to determine whether or not to issue a patent. Because patents are conferred by the government and, are therefore, public in nature, the lawyer has duties that run to the public when applying for a patent on behalf of a client. The PTO's Rules of Practice impose on patent attorneys a special duty of disclosure, candor and good faith.[254] These requirements again mirror the requirements that Professor Wilkins would impose on thrift lawyers. Rule 56 states that "[t]he public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability."[255] A patent can be denied or withdrawn if a practitioner breaches these duties by intentionally withholding or misrepresenting material information, such as the existence of prior art.[256] The PTO may also sanction attorneys (and agents) who violate these duties through reprimands (public and private), suspensions, and debarment.[257]

In 1992, the PTO amended Rule 56 "to present a clearer and more objective definition of what information the Office considers material to patentability."[258]

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249. *See* 37 C.F.R. pt. 10 (2002); 37 C.F.R. § 1.56 (2002); 37 C.F.R. § 10.23 (2002).

250. *See* 35 U.S.C. § 2 (2002) ("The Office . . . may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office, and may require them . . . to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications . . . before the Office.")

251. *See id.*

252. *See* 37 C.F.R. pt. 10 (2002); 37 C.F.R. § 1.56 (2002); 37 C.F.R. § 10.23 (2002).

253. UNITED STATES PATENT AND TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE (2001) [hereinafter MPEP], *available at* http://www.uspto.gov/web/offices/pac/mpep/ (last visited Oct. 23, 2002) (providing guidelines for submitting patent applications to the PTO).

254. *See* 37 C.F.R. § 1.56(a) (2002).

255. *Id.*

256. *See* Edwin S. Flores and Sanford E. Warren, Jr., *Symposium: Intellectual Property Litigation in the 21st Century: Inequitable Conduct, Fraud, and Your License to Practice Before the United States Patent and Trademark Office*, 8 TEX. INTELL. PROP. L. J. 299, 301–02 (2000).

257. 35 U.S.C. § 32 (2002); 37 C.F.R. § 10.156(b) (2002); *see also* Flores and Warren, *supra* note 256, at 313–14.

258. MPEP, *supra* note 253, at § 2001.04 (Information Under 37 C.F.R. 1.56(a), discussing the duty of disclosure).

Specific rules now clarify the lawyer's responsibilities under this definition. In one example, the term "information" is defined very broadly to include prior art as well as "information on possible prior public uses, sales, offers to sell, derived knowledge, prior invention by another, inventorship conflicts, and the like."[259] Moreover, the applicant is under a duty to disclose to the PTO all material information, regardless of its source or the circumstances under which the information is obtained.[260] Furthermore, the applicant must assume that the Examiner is not aware of other applications that might impact the Examiner's decision on this application, and must inform the Examiner of any other application that might be "material to patentability."[261] Some MPEP protocols help patent lawyers establish procedures that ensure compliance with the duty of disclosure.[262] Although these procedures are not mandatory, they presumably provide a safe-harbor to the patent attorney who implements them.[263] Under these procedures, each client should respond to a questionnaire about (1) "the origin of the invention and its point of departure from what was previously known and in the prior art;" (2) "possible public uses and sales;" (3) "prior publication, knowledge, patents, foreign patents, etc."[264] The questionnaire should also "explain the duty of disclosure and what it means to the inventor."[265] The lawyer should also ask the client about inventorship, and if concerns arise, they should be disclosed to the PTO.[266] The MPEP goes on to recommend eighteen detailed procedures for lawyers (and nonlawyers) to implement in order to prevent duty-of-disclosure problems.[267]

B. Non-Agency Regulators

Protocols governing lawyer conduct have also been issued by other organizations, such as state bar associations, ABA sections, law firms, and malpractice insurers. Typically, the protocols that emanate from these sources are private in origin and not legally binding, except as contractual obligations. Protocols from these sources often serve different functions than agency protocols serve; different, but perhaps complimentary. Sometimes, they are intended to forestall or influence pending agency regulations.[268] Sometimes, they are issued in response to a specialized bar's need for guidance.[269] Malpractice insurers, interested in reducing the

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259. *Id.*

260. *Id.* at § 2001.06 (Sources of Information).

261. *Id.* at § 2001.06(b) (Information Relating to or From Copending United States Patent Applications).

262. *Id.* at § 2004 (Aids to Compliance With Duty of Disclosure).

263. *Id.* (stating that the procedures "are presented as helpful suggestions for avoiding duty of disclosure problems.").

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *See* Painter, *supra* note 4, at 718 n.268.

269. *See* John R. Price, *Ethics In Action Not Ethics Inaction: The ACTEC Commentaries on the Model Rules of Professional Conduct*, U. MIAMI SCH. LAW PHILIP E. HECKERLING INST. ON ESTATE PLANNING ch. 7 (1995); AM. BAR ASS'N, STANDARDS FOR THE OPERATION OF A TELEPHONE HOTLINE PROVIDING LEGAL ADVICE AND INFORMATION (August

risk of liability-generating harm (like agencies), increasingly require compliance with their own protocols as a condition of insurance coverage.[270]

The organized bar, through specialized associations and bar sections, is a frequent source of protocols. Like administrative agencies, these groups possess an in-depth understanding of the practice area and can comprehensively address the ethical dilemmas facing their members.[271] Some of these protocols have been designed to help parties to transactions minimize potential misunderstandings and disputes, as well as to coordinate and perhaps streamline their negotiations.[272] The Silverado Accord on Third-Party Opinions, produced by the ABA Business Law Section in response to regulators' concerns, is the best-known example.[273] The Silverado Accord identifies and defines standard terms for third-party opinions and provides its own set of "opt-in" rules.[274] Since the Silverado Accord was written, similar accords have appeared.[275] This section discusses a few examples of these types of protocols and elaborates on their sources and uses.[276]

1. The ABA Business Law Section

In *The Ethical Infrastructure of Law Firms*, Professor Schneyer discussed the influence of the bar in curtailing the impact of direct administrative regulation on internal law firm controls.[277]

2001 ed.), *available at* http://www.povertylaw.org/legalresearch/hotline/hotline2B.cfm (last visited Oct. 15, 2002); AAML, *supra* note 75.

270. *See* Davis, *supra* note 140, at 210. Law firm policies and procedures can operate in a similar way. *See infra* text accompanying notes 299–324.

271. *See* Price, *supra* note 269, at 7–5, ¶700.3 (stating that the ACTEC Commentaries represent the "first comprehensive statement made by a professional association regarding the professional responsibility of estate planners").

272. Schneyer, *Ethical Infrastructure*, *supra* note 1, at 270 n.123.

273. Am. Bar Ass'n, *Silverado Accord*, *supra* note 142; Schneyer, *Ethical Infrastructure*, *supra* note 1, at 270.

274. *See* Am. Bar Ass'n, *Silverado Accord*, *supra* note 142.

275. *See* Am. Bar Ass'n Bus. Law Section Comm. On Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 345 (2001); N.Y. County Lawyers' Ass'n, *A Report by the Special Committee on Legal Opinions in Commercial Transactions (in cooperation with the Corporation Law Committee, Association of the Bar of the City of New York, and the Corporation Law Committee, Banking, Corporation and Business Law Section, New York State Bar Association), reprinted in Legal Opinion to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979); Fed. Communications Bar Ass'n, *Report of the Subcommittee on Legal Opinions of the Transactional Practice Committee of the Federal Communications Bar Association*, 48 FED. COMM. L.J. 389 (1996).

276. There are many more examples of protocols emanating from private sources, but it was impossible to fit them all into this Article. *See, e.g.*, AM. ACAD. OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS WITH COMMENTARY (1995); AM. BAR ASS'N, *supra* note 269; AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed., 1993); AM. BAR ASS'N CTR. ON CHILDREN AND THE LAW, ABA STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING A CHILD IN ABUSE AND NEGLECT CASES, *at* http://www. abanet.org/child/childrep.html (Feb. 5, 1996).

277. *See* Schneyer, *Ethical Infrastructure*, *supra* note 1, at 269.

> To promote satisfactory law firm controls, federal agencies sometimes rely on bar-developed standards. A bar specialty group develops 'best practice' guidelines for performing a legal task, and the appropriate agency encourages law firms to conform to those guidelines by signaling that it will not proceed against law firms that comply with them.[278]

Many of these guidelines, although called "best practices," are simply protocols. As previously mentioned, the ABA's Silverado Accord set forth its own "opt-in" rules in response to a number of OTS enforcement actions during the S&L crisis.[279] The Silverado Accord standardizes the preparation and drafting of third-party opinions in an effort to reduce misunderstandings.[280] This standardization increases the consistency of interpretation and thus, the reliability of these opinions.[281] Where an opinion letter is part of a transaction, the parties may agree to adopt the Accord.[282] By adopting the Accord, the opinion giver and the opinion recipient agree that the opinion letter will be written and interpreted in accordance with its terms.

In one example of the Accord's standardization efforts, the opinion recipient can assume that the opinion giver has reviewed all documents and matters of law deemed appropriate to render the opinion.[283] This assumption is not limited by a list of documents reviewed *unless* the opinion expressly states that the listed documents were the *only* ones reviewed.[284] Thus, the default position is standardized, allowing parties, who prefer, to opt out. Furthermore, in several OTS consent agreements with law firms during the S&L crisis, the agency accepted the Accord's protocols as sufficient for its professional responsibility standards.[285] Since the Accord provides comprehensive guidelines for legal opinions, compliance with it can provide a "safe harbor" from enforcement actions to the parties who use it.

2. American Academy of Matrimonial Lawyers

In one of the best-known attempts by a voluntary bar association to draft ethical standards for a specific practice area, the American Academy of Matrimonial

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278. *Id.* For example, in consent agreements with several of the law firms that had represented failed thrift institutions, the OTS accepted the guidelines included in the "Silverado Accord" as an appropriate measure of lawyers' duties in preparing third-party opinions. Those complying with the guidelines were accorded "safe harbor" protection from enforcement actions. *See id.* at 270.

279. Painter, *supra* note 4, at 718 n.268.

280. Schneyer, *Ethical Infrastructure*, *supra* note 1, at 270 n.123.

281. *Id.*

282. *See* Am. Bar Ass'n, *Silverado Accord*, *supra* note 142, at § 22.

283. *See id.* at § 2.

284. *See id.*

285. *See e.g.*, Fishbein, Order to Cease and Desist, *supra* note 70; Fleischer, Order to Cease and Desist for Affirmative Relief from James S. Fleischer, OTS Order No. AP 92-53 (May 21, 1992), *reprinted in* Stephen Gillers, *After Kaye Scholer: the Risks of Regulatory and Corporate Lawyers*, *in* 24TH ANNUAL INSTITUTE ON SECURITIES REGULATION 219, 237 (PLI Corp. Law & Practice Course Handbook Series No. B4-7017, 1992); Schneyer, *Ethical Infrastructure*, *supra* note 1, at 270.

Lawyers (AAML) issued *Bounds of Advocacy* in 1991.[286] Updated in November 2000, *Bounds of Advocacy* provides guidance to lawyers practicing family law.[287] It's purpose is to assist family lawyers when dealing with moral and ethical problems.

> Existing codes often do not provide adequate guidance to the matrimonial lawyer. The ABA's Model Rules of Professional Conduct ("RPC") are addressed to all lawyers, regardless of the nature of their practices. This generally means that, with rare exceptions, issues relevant only to a specific area of practice cannot be dealt with in detail or cannot be addressed at all. Many Fellows of the American Academy of Matrimonial Lawyers have encountered instances where the RPC provided insufficient or even undesirable guidance.... These Goals... constitute an effort to provide clear, specific guidelines in areas most important to matrimonial lawyers.[288]

The AAML states that while the provisions of *Bounds of Advocacy* aspire "to a level of practice above the minimum" standards established in the Model Rules, they should not be used to determine malpractice liability.[289] Of particular interest are the rules concerning clients with children. This aspect of family law involves ethical problems analogous to those encountered in the corporate setting. Special duties run, not only to the client, but to other family members (especially children) as well, just as banking and securities lawyers are said to owe special duties to the government or shareholders.

In its Preliminary Statement, *Bounds of Advocacy* asserts that "zealous advocacy" is not always appropriate in family law matters, and that a problem-solving approach is preferable.[290] "An attorney should not condone, assist, or encourage a client to transfer, hide, dissipate, or move assets to improperly defeat a spouse's claim."[291] Moreover, a lawyer must tell his client "Don't do it" if the client proposes to move assets out of the state or country.[292] The lawyer should suggest including the spouse in certain discussions in order to prevent the client from defrauding the spouse or the court. In advocating for a client in a matrimonial matter, the lawyer is to consider what is best, not only for the client, but also for "the children, family peace and economic stability."[293]

Bounds of Advocacy asserts that the most significant problem in family disputes is harm inflicted on children and that existing ethical codes have failed to provide lawyers with sufficient guidance in this area.[294] The comments to Rule 5.2 specify that the lawyer should describe the potential harmful consequences to the

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286. *See* AM. ACAD. OF MATRIMONIAL LAW., BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT, Preface (1991).

287. *See* AAML, *supra* note 75.

288. *Id.* at Preliminary Statement.

289. *See id.*

290. *See id.*; *see also* Rosenberg, *supra* note 89, at 406 ("The principles of the Code and the Model Rules provide limited guidance for attorneys grappling with varied and complex ethical dilemmas, particularly in practice contexts that depart from the adversarial model.").

291. *See* AAML, *supra* note 75, at R. 5.1.

292. *See id.* at R. 5.1 cmt.

293. *See id.* at R. 6.1 cmt.

294. *See id.* at Preliminary Statement.

children (and to the client in legal proceedings) of substance abuse, abusive or derogatory behavior toward the other parent, prematurely introducing the children to a new romantic partner, or other inappropriate behavior.[295] Rule 6.1 adds that the attorney should consider the welfare of children by trying to minimize the negative consequences of the divorce.[296] The comments recommend that the lawyer "warn the client against leaving papers from the attorney out where children can read them and to avoid talking about the case when children can overhear."[297] Rule 6.2 admonishes the lawyer not to permit a client to "contest child custody, contact, or access for either financial leverage or vindictiveness."[298] Rule 6.4 also specifies that the lawyer "should not bring a child to court or call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interests of the child."[299]

3. Law Firms

Law firms have also adopted protocols to monitor and regulate their lawyers. Firms have developed internal procedures, for example, in response to legislation exposing them to new liability risks,[300] to protect themselves from malpractice liability, and to deal with the increasing decentralization (i.e., branching and departmentalization) of large firms.[301] As discussed in Part A, several federal agencies have also required firms to develop internal procedures to monitor certain ethical problems.[302] This section presents a few of these firm-initiated protocols.

Many law firms that engage in tax practice have developed guidelines for their lawyers.[303] Fred Corneel's *Guidelines to Tax Practice Second* offers a set of guidelines for firms to adopt.[304] Some of these guidelines take the form of protocols. With regard to diligence, the *Guidelines* call for "reasonable efforts to obtain all relevant information from the client, reviewing last year's income tax return for any changes, obtaining confirmation as to the client's record keeping procedures (where they are relevant to the tax result), considering the tax position of other related taxpayers (to the extent known to us), and researching any doubtful questions of

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295. *See id.* at R. 5.2 cmt.
296. *See id.* at R. 6.1.
297. *Id.* at R. 6.1 cmt.
298. *See id.* at R. 6.2.
299. *See id.* at R. 6.4.
300. *See* Corneel, *Tax Practice Second*, *supra* note 95, at 298; Susan Saab Fortney & Jett Hanna, *Legal Malpractice and Professional Responsibility: Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669 (2002); Harvey L. Pitt et al., *supra* note 97; Stephen R. Volk et al., *Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Sruvey of Law Firms*, 48 BUS. LAW. 1567 (1993); Frederic G. Corneel, *Guidelines to Tax Practice Third* (unpublished draft, on file with the author) [hereinafter Corneel, *Tax Practice Third*].
301. *See* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002) (discussing the increasing trend of large law firms to employ in-house ethics counsel to deal with the complexity of professional regulation in one central location at the firm).
302. *See, e.g.*, *supra* text accompanying notes 201–207.
303. *See* Corneel, *Tax Practice Second*, *supra* note 95.
304. *See id.*

law."[305] In discussing conformity to the law, the *Guidelines* caution lawyers not to "participate in the preparation of a return containing a clear error or frivolous position merely to have a 'bone to throw' to the agent on audit in the hope that the error will not be discovered, or because the client cannot afford or wants to postpone a current tax payment."[306] The most recent iteration of *Guidelines*, not yet published, adds sections that deal with distinctive issues faced by in-house counsel, criminal tax practitioners, and lawyers who work in accounting firms.[307] These new sections testify to the increasing complexity of practice and the high degree of legal specialization, even within the field of tax law.

In a 1988 survey by an ABA Subcommittee on Civil Litigation and SEC Enforcement Matters, most of the law firms surveyed had implemented formal, written policies regarding insider trading and client confidentiality.[308] Within a year of the enactment of the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA),[309] thirty-three out of forty firms had adopted formal insider trading policies because of concerns that they could be vicariously liable for trading violations by firm members or employees.[310] These policies were designed

> (1) to educate employees as to what constitutes unlawful securities trading or tipping; (2) to articulate the firm's ban on unlawful trading and tipping by its members and employees is prohibited; (3) to institute some policy, procedure and/or rules designed to make it unlikely that such trading or tipping would occur; and (4) to maintain and enforce new policy, procedures and/or rules.[311]

Most firms implemented very specific procedures. For example, although every firm prohibited "insider trading," one particular firm articulated two additional ethical obligations arising from this prohibition.[312] This firm provided that, because lawyers and non-lawyers routinely learn "material non-public information" about clients and others, they must neither trade on such information nor communicate it to anyone outside the firm.[313] These duties supplement the lawyer's duty under the prevailing ethical codes not to disclose, or personally profit from, client confidences.[314]

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305. *See id.* at 304.
306. *See id.* at 305.
307. *See* Corneel, *Tax Practice Third*, supra note 300.
308. *See* Pitt et al., *supra* note 97, at 239.
309. ITSFEA is codified at 15 U.S.C. § 78u-1, 15 U.S.C. § 80b-4a, 15 U.S.C. § 78t-1 (2002).
310. *See* Pitt et al., *supra* note 97, at 238 n.3, 240 (citing to statements made by the SEC Chairman and the SEC Enforcement Director warning law firms of potential liability). Former SEC Commissioner Philip R. Lochner stated that the ITSFEA "can be viewed as imposing an affirmative obligation on law firms to take appropriate action to prevent insider trading." Id. at 238 (citing P. Lochner, Jr., Remarks Before the Securities Law Committee of the Federal Bar Association, Washington, D.C. (Jan. 24, 1991)); *see id.* at 240 n.9.
311. Pitt et al., *supra* note 97, at 240.
312. *See id.* at 241.
313. *Id.* at 241.
314. *See id.*

Because only "material" information is prohibited from being traded on or communicated, each firm defined "materiality" and included specific examples of what it considered "material information."[315] Most policies adopted a very broad view of materiality. One firm specifically included the following information as "material":

> (i) acquisitions of other companies (including the possibility of a tender offer for or merger with another company) and dispositions of existing operations; (ii) the possible initiation of a proxy fight; (iii) a change in dividend rates; (iv) a change in earnings or earnings estimates; (v) major new products, discoveries or services; (vi) significant litigation or litigation developments; (vii) significant shifts in operating or financial circumstances, such as cash-flow reductions, major write-offs and strikes at major plants; (viii) significant new contracts or loss of business; (ix) significant changes in a company's asset value or composition; (x) the possibility of a recapitalization or other reorganization; (xi) a planned repurchase of shares; and (xii) the possibility of a public offering of securities.[316]

In defining "nonpublic information," several firms prescribed an "absorbing period" during which information is deemed "nonpublic," even though the information has been published. For example, one firm stated that the absorbing period should be forty-eight hours, while another stated it should be two business days after public disclosure.[317] Both firms required that, even beyond the specified absorbing period, the matter should be discussed with a designated individual in the firm before trading could occur.[318]

Firms typically used one or more of the following three practices to monitor compliance with their insider trading prohibitions. First, most firms required employees to sign an agreement acknowledging, and agreeing to abide by, the firm's policies.[319] Second, some firms required pre-clearance for securities transactions by firm personnel.[320] Several firms required, for example, that employees receive pre-clearance before trading in the securities of *any* publicly traded company. One such policy stated:

> Prior to effecting any securities transaction, whether buying or selling, all employees must make at least the following two calls in the order indicated: (a) [named person] in [named department] which maintains a list of all clients and parties to litigation involving clients, and (b) [named person] who maintains a "restricted" list *i.e.*, a list of companies or other entities about which the Firm may possess material, nonpublic information. YOU MUST MAKE BOTH CALLS IN ALL INVESTMENT SITUATIONS.[321]

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315. *Id.* at 243.
316. *Id.*
317. *See id.* at 245.
318. *See id.*
319. *See id.* at 247.
320. *See id.* at 248.
321. *Id.* at 250.

The firm adds that if an employee gets clearance for a proposed transaction, the clearance is effective *only* on the day that it is granted to the employee.[322] Third, some firms adopted specific confidentiality requirements to guard against tipping violations.[323] Many firms maintain detailed lists of the types of information requiring a presumption of confidentiality.[324] For example,

> [(1) p]apers relating to confidential matters should not be left lying in conference rooms or anywhere else where they might be seen by visitors to the office[;] . . . [(2) c]onfidential matters should not be discussed in elevators, restaurants, taxis, subways, airplanes or other public places[;] . . . [(3) c]onsideration should be given to using code names in documents (i.e., in tender offers and merger agreements) relating to material non-public transactions[;] . . . [(4) t]elephone conversations (whether or not a speaker phone is used) or meetings in which confidential information is discussed should be conducted behind closed doors[;] . . . [(5) i]n appropriate cases, billing codes that are not associated with a particular client should be used to protect the identities of both the client and the matter[;] . . . [(6) t]he office shredding machine may be used to destroy superseded drafts containing confidential materials.[325]

These are but a few of the protocols that firms have implemented to deal with the risks of insider trading liability. Firms enforce these provisions with the threat of dismissal (and at least in one case, automatic dismissal). In short, the policies identified comprehensively consider the risks of insider trading liability. They leave little room for firm lawyers who want to trade in securities to interpret insider-trading prohibitions for themselves. Furthermore, the specificity of these policies make it easy for firms to identify infractions.

4. Malpractice Insurers

Legal malpractice insurers have recommended or required certain practices and procedures to reduce the exposure of lawyers and law firms to malpractice claims.[326] These protocols have become a significant feature of the regulatory landscape as more insurance carriers now require their insured lawyers and firms to adhere to them as a condition of coverage.[327]

Malpractice insurers often recommend or require that their insureds use certain practices and procedures "to reduce the probability of legal malpractice loss *ex*

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322. *See id.*

323. *See id.* at 247.

324. *See id.* at 259. Independent of securities laws, many firms adopt procedures to protect confidentiality. By adopting procedures that protect all firm confidences, specific provisions that deal with tipping were viewed as unnecessary. *Id.* at 257.

325. *Id.* at 263–64.

326. *See* George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305 (1997); Davis, *supra* note 140; Susan Randall, *Managed Litigation and the Professional Obligations of Insurance Defense Lawyers*, 51 SYRACUSE L. REV. 1,1–2 (2001); Silver, *supra* note 140.

327. *See* Schneyer, *Self Regulation*, *supra* note 1, at 667.

ante."[328] Some policy provisions restrict or prohibit conduct not expressly or clearly forbidden by the ethics codes by excluding it from coverage.[329] Malpractice insurers increasingly use law firm audits to identify and reform "troubled" lawyers or firms,[330] and require improved management practices as a pre-condition to providing or renewing coverage.[331]

Insurance provisions that restrict or prohibit otherwise ethical behavior are typically formulated as protocols. For example, most policies contain a "business pursuits" exclusion.[332] The following policy clause excludes:

> Any Claim based on or arising out of the conduct of any business enterprise (including the ownership, maintenance or care of any property in connection therewith) owned in whole or in part by any Insured or Related Individual or in which any Insured or Related Individual is an officer, director, partner, trustee or employee, or which is directly or indirectly controlled, operated or managed by any Insured or Related Individual either individually or in a fiduciary capacity.
>
> Any Claim arising out of Professional Services rendered by any Insured in connection with any business dealings with a client or former client and/or any business enterprise owned in whole or in part by any Insured or Related Individual or in which any Insured or Related Individual is an officer, director, partner, trustee or employee, or which is directly or indirectly controlled, operated or managed by any Insured or Related Individual, either individually or in a fiduciary capacity, when such Professional Services are in conflict with the interest of a client or former client of any Insured or in conflict with the interest of any person or entity claiming an interest in the same or a related business enterprise.[333]

Such detailed provisions bar behavior that is not prohibited under traditional ethics rules.[334] Unlike agency regulators, who are using protocols to assist in protecting the public at large, the federal fisc, or investors, malpractice insurers are using protocols to protect their own financial interests.[335] The above example is only one of numerous protocols that are routinely included in legal malpractice insurance

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328. Cohen, *supra* note 326, at 326.

329. *See* Davis, *supra* note 140, at 211. Loss prevention strategies also include "general education services, such as newsletter, seminars, and speeches, to more individually tailored consulting services, such as firm audits." Cohen, *supra* note 326, at 326–27; *see also* Davis, *supra* note 140, at 220.

330. Cohen, *supra* note 326, at 327.

331. Davis, *supra* note 140, at 211, 221.

332. *See* Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 98. Model Rule 1.8, however, allows lawyers to enter into business transactions with their clients, provided that they meet certain requirements, such as fair and reasonable terms and client consent in writing. MODEL RULES, *supra* note 25, at R. 1.8(a); Davis, *supra* note 140, at 212.

333. Hanen & Hanna, *supra* note 332, at 98–99. Legal clients are presumably *also* served by malpractice insurer provisions that, in effect, reduce risk of harm to clients. *See id.* at 214.

334. Fortney & Hanna, *supra* note 300, at 705–707.

335. *See* Davis, *supra* note 140, at 213.

The firm adds that if an employee gets clearance for a proposed transaction, the clearance is effective *only* on the day that it is granted to the employee.[322] Third, some firms adopted specific confidentiality requirements to guard against tipping violations.[323] Many firms maintain detailed lists of the types of information requiring a presumption of confidentiality.[324] For example,

> [(1) p]apers relating to confidential matters should not be left lying in conference rooms or anywhere else where they might be seen by visitors to the office[;] . . . [(2) c]onfidential matters should not be discussed in elevators, restaurants, taxis, subways, airplanes or other public places[;] . . . [(3) c]onsideration should be given to using code names in documents (i.e., in tender offers and merger agreements) relating to material non-public transactions[;] . . . [(4) t]elephone conversations (whether or not a speaker phone is used) or meetings in which confidential information is discussed should be conducted behind closed doors[;] . . . [(5) i]n appropriate cases, billing codes that are not associated with a particular client should be used to protect the identities of both the client and the matter[;] . . . [(6) t]he office shredding machine may be used to destroy superseded drafts containing confidential materials.[325]

These are but a few of the protocols that firms have implemented to deal with the risks of insider trading liability. Firms enforce these provisions with the threat of dismissal (and at least in one case, automatic dismissal). In short, the policies identified comprehensively consider the risks of insider trading liability. They leave little room for firm lawyers who want to trade in securities to interpret insider-trading prohibitions for themselves. Furthermore, the specificity of these policies make it easy for firms to identify infractions.

4. Malpractice Insurers

Legal malpractice insurers have recommended or required certain practices and procedures to reduce the exposure of lawyers and law firms to malpractice claims.[326] These protocols have become a significant feature of the regulatory landscape as more insurance carriers now require their insured lawyers and firms to adhere to them as a condition of coverage.[327]

Malpractice insurers often recommend or require that their insureds use certain practices and procedures "to reduce the probability of legal malpractice loss *ex*

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>
> Any Claim arising out of Professional Services rendered by any Insured in connection with any business dealings with a client or former client and/or any business enterprise owned in whole or in part by any Insured or Related Individual or in which any Insured or Related Individual is an officer, director, partner, trustee or employee, or which is directly or indirectly controlled, operated or managed by any Insured or Related Individual, either individually or in a fiduciary capacity, when such Professional Services are in conflict with the interest of a client or former client of any Insured or in conflict with the interest of any person or entity claiming an interest in the same or a related business enterprise.[333]

Such detailed provisions bar behavior that is not prohibited under traditional ethics rules.[334] Unlike agency regulators, who are using protocols to assist in protecting the public at large, the federal fisc, or investors, malpractice insurers are using protocols to protect their own financial interests.[335] The above example is only one of numerous protocols that are routinely included in legal malpractice insurance

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328. Cohen, *supra* note 326, at 326.

329. *See* Davis, *supra* note 140, at 211. Loss prevention strategies also include "general education services, such as newsletter, seminars, and speeches, to more individually tailored consulting services, such as firm audits." Cohen, *supra* note 326, at 326–27; *see also* Davis, *supra* note 140, at 220.

330. Cohen, *supra* note 326, at 327.

331. Davis, *supra* note 140, at 211, 221.

332. *See* Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 98. Model Rule 1.8, however, allows lawyers to enter into business transactions with their clients, provided that they meet certain requirements, such as fair and reasonable terms and client consent in writing. MODEL RULES, *supra* note 25, at R. 1.8(a); Davis, *supra* note 140, at 212.

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334. Fortney & Hanna, *supra* note 300, at 705–707.

335. *See* Davis, *supra* note 140, at 213.

problems and problems that are truly trans-contextual, and protocols for providing step-by-step instructions for problems that are unique to particular practice fields, clienteles, forums, and workplaces.

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