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Setting Standards: The Courts, the Bar, and the Lawyers' Code of Conduct

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"[T]he ABA commission is working to write . . . a code for all lawyers."

"[T]he Association . . . merely promulgates a model code of professional conduct for consideration by the state bodies regulating the practice of law."
- Lawrence E. Walsh, President, American Bar Association, 1976.²

The most fundamental tenet of regulating the practice of law in the United States is that it is a function of the state courts.³ There are a few “patent lawyers” who are not members of the bar, and some non-lawyers who “practice” before various federal agencies, but the right to practice law as it is usually thought of is generally conferred by the state courts, and is generally subject to termination or suspension only by the court or courts that conferred it.

The function of regulating legal practice is often said to be inherent in judicial systems. Although the function has been ostensibly delegated to the courts by legislation in some states, the basic theory is that all courts have inherent power to regulate practice before them, and thus to determine who may, or may not, engage in such practice. That power has been


1. 65 A.B.A.J. 1299, 1300 (September, 1979).
3. In this context, “states” include Puerto Rico and the District of Columbia.
extended to all aspects of the practice of law, and is not just limited to determining who may represent others before a court. This appears to have been a natural concomitant consequence of the development of the legal profession in the United States. Somewhat circularly, the “practice of law” has come to mean “doing the things lawyers do,” and thus the “unauthorized practice of law” has come to mean “doing anything lawyers usually do without a license to practice before the courts.” Organizations of duly licensed lawyers have been quite zealous in protecting the monopoly thus conferred upon their members.

The fact that this has resulted in some “balkanization,” under a federal system in which each state is a separate sovereign entity, has been frequently noted. Standards for admission to practice have varied widely. Some states have granted automatic admission to all graduates of their state law schools (the “degree privilege” system); some have been extremely liberal in granting reciprocal admission to lawyers admitted in other jurisdictions; and some have had extremely rigorous requirements for all applicants for admission. Only in recent years has residency in the state come to be struck down as an almost universal requirement for admission to the bar.4

Similar disparities in the systems and standards for the disbarment, suspension, and other discipline of lawyers have also been noted. These disparities have been substantially reduced since the Clark Commission Report of 19705 focused the attention of bench and bar on the most serious defects in state disciplinary processes, and since the Code of Professional Responsibility (CPR) became the Uniform Code for lawyers’ conduct in all but name in the eleven years following its initial publication in 1969.6

Most of the improvement of state disciplinary systems during the 1970’s was accomplished by the courts exercising their rulemaking power, although some improvements were the result of either legislation or the threat of legislation. The adoption of the CPR was universally effected by court rule in the states, and even the federal courts have furthered that horizontal uniformity by adopting rules creating, in some states, vertical uniformity between themselves and the local courts.7

5. SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, ABA, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Final Draft 1970).
6. The last of the 52 “states” to adopt, in one form or another, the CPR as its official Code was Illinois, on June 3, 1980, see note 27 infra.
7. MODEL FEDERAL RULES OF DISCIPLINARY ENFORCEMENT, Rule IV (approved by the Judicial Conference, September 20, 1978; adopted by 15 United States District Courts as
Some dissatisfaction with the CPR as originally promulgated by the ABA surfaced during the process of its original adoption by the state courts. The variations on the 1969 Code, as adopted by state courts through 1975, were sufficient to create a volume half an inch thick, although that volume did not include any of the most divergent code, California's 1972 Rules of Professional Conduct. The ABA itself approved a number of amendments to the CPR during the 1970's. Some, but not all, of those changes were required by judicial decisions, and not all of those amendments were adopted by all the states. In addition, not only did some states respond to federal mandates by adopting amendments at variance with the ABA's proposed responses, but some states amended their Codes on their own initiative, without the spur of either new ABA doctrine or federal case law.

The federal decisions, particularly Bates v. State Bar of Arizona which overturned the Code's ban on all advertising by lawyers, told the ABA and the states what could not, constitutionally, be prohibited by a state-sanctioned Code, and gave some hints as to what could still be prohibited. The dicta and separate opinions (particularly that of Justice Marshall in In re Primus and Ohralik v. Ohio State Bar Ass'n) posed the vexing question of what should be prohibited or allowed, within the new constitutional parameters of what could be prohibited. The ABA vacillated, but came down in favor of regulations that were about as restrictive as a careful reading of Bates would allow. It recommended two sets of Bates-CPR amendments to the states, but only included the more restrictive set ("Proposal A") in subsequent printings of the CPR.

Thus the ABA's response to Bates was to try to continue to enforce restrictions (in this instance on lawyers' advertising) that limited competition among lawyers, or the individual lawyer's right to free speech, to as great an extent as seemed prudent. Some conservative state bar associations convinced their courts not to go even that far down the road to reform, or to attach additional restrictions to those permitted by the ABA. Others
adopted what the ABA had grudgingly approved as a liberal alternative ("Proposal B") to its basic conservative doctrine ("Proposal A"). But a remarkable number, led by New York and California (with twenty percent of the nation's lawyers), declined to follow either of the ABA proposals. Some of them evidently concluded that Bates necessarily implied an absolute constitutional protection for some activities the ABA still wanted to regulate. As a result, some state courts simply rejected the ABA's conservative guidance and tried to adopt rules embodying their concepts of what the law ought to be on lawyers' advertising and publicity.

The process of developing new policy in this area was remarkably liberating for some state courts. Some held hearings. Some consulted the bar and the public of their states in other ways. Those that did so developed a realization that they were in fact not just approving rules for lawyers, but legislating: developing rules that would affect all users and potential users of legal services. These courts realized that in promulgating Codes of Professional Responsibility, they were indeed, as Bates had held, giving such codes the anticompetitive magic cloak of the state-action exemption from the federal antitrust laws. They were acting as courts, and exercising a judicial prerogative that some of them keenly wished to protect from legislative preemption, a prerogative that might be left open to legislative attack if it were too often used merely to rubber stamp ABA proposals.

Thus, in the wake of Bates, more state courts started to think for themselves about legal ethics than had ever done so before. They had trusted the ABA; now they found that they had been led down the garden path. The state courts even discovered—to stretch the metaphor—that it was the courts, and not the ABA, that were stuck with the bills when their offspring were found in violation of federal law.13

Bates and its progeny thus suggest that the American Bar Association is not, as previously supposed, the appropriate fountainhead for the law of legal ethics or professional responsibility in the United States. The brooding omnipresence in Chicago has never been without substantial self-interest in the "ethical" Canons, Codes, opinions, and rules that it has promulgated, as Jerold Auerbach has demonstrated at some length.14 Indeed, one of the ABA's motives, since it first purported to promulgate Canons of Professional Ethics in 1908, has evidently been to arrogate to itself the de facto, if not de jure, function of being the ultimate authority on questions of lawyers' conduct. That alone should render its authority sus-

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pect. The *bona fides* of nongovernmental bodies that exercise quasi-governmental powers respecting matters in which they are interested are always suspect.

*Goldfarb v. Virginia State Bar*\(^{15}\) made it clear that, without the cloak (or robe) of judicial state action, the ABA’s practice of dictating to its members, and to nonmember lawyers alike, how they could compete for legal business was an attempt to restrain trade. In October, 1980, the Second Circuit held in *American Medical Association v. FTC*\(^ {16}\) that the parallel practices of the American Medical Association violated section 5 of the Federal Trade Commission Act. Subjected to similar challenge under the Sherman and Clayton Acts in 1976, the ABA had escaped a suit filed by the Department of Justice with a consent decree in which it agreed to stop pretending, at least overtly, that its pronouncements on lawyers’ ethics were authoritative.\(^ {17}\) It agreed not to require ABA members to pledge allegiance to the Code as a condition of membership, and to call it the “Model Code,” instead of “The Code of Professional Responsibility.” In moving for dismissal without prejudice, the Justice Department stated that the states in the wake of *Bates* had “approached the job of rewriting advertising rules in a variety of ways,” and that the new rules lacked the stultifying uniformity of earlier versions.\(^ {18}\) It concluded from this trend that:

> There is, thus, both refreshing independence in decision making and local variety in regulation: the ABA code clearly is no longer the central or exclusive source for state rules and interpretations concerning advertising by lawyers. For perhaps the first time in this area, states and state regulators are independently creating regulations to govern lawyer conduct.\(^ {19}\)

As we learned from *Brown v. Board of Education*\(^ {20}\), however, old habits of repression die hard. Both oppressors and oppressed often cling to their chains. Liberation is exhilarating for some, but threatening to others. Whatever the cosmetic, superficial changes in the structure of the process by which ethical standards are handed down by the gods of law, the ABA


\(^{18}\) Justice Department Memorandum, *supra* note 17, at 1540.

\(^{19}\) *Id.*

has continued to regard itself as the chief oracle in the field, even as it has regrettably admitted its lack of divinity.

Or perhaps, as often happens in large organizations, the policy determined by the ABA's high command has not been effectively communicated to the troops in the field. Most of the recent ABA assertions of oracular authority in professional ethics have emanated from the "Kutak Commission," whose alliterative nickname comes from its chairman, Robert J. Kutak of Omaha, Nebraska. The Commission and its capable Reporter, Professor Geoffrey C. Hazard, Jr. of the Yale Law School, have been toiling for almost four years on increasingly grandiose schemes to rework the CPR. The hallmark of that work has been the assumption (usually unstated) that, whoever may have the *de jure* power to write the law of legal ethics, the ABA remains the highest authority in the field, *de facto*.

Appointed in 1977 as a "Commission on Evaluation of Professional Standards," the Kutak Commission quickly decided that mere evaluation and amendment of the CPR was not enough. It reported to the ABA's August, 1979 Annual Meeting that: "After several months of painstaking research and discussion, the Commission has reached agreement that the Code, to be effective, requires complete reconstruction rather than piecemeal amendment. . . ."21 The Commission, therefore, proposed total re-shaping of the Code into a "Restatement" format, as well as a "complete reformulation."22 "The Commission has approached its assignment with the intent to assess and evaluate the Code in terms of the remaining years of this century. . . . We have not strayed from our original course of striving to develop professional standards that are at once comprehensive, coherent and constitutional."23

The Commission was not yet willing to expose its work-product to the world, although it intended to have that product ready for presentation at the 1980 Midyear Meeting—an occasion then less than six months off. The Commission was severely criticized, both by one of its own guest speakers, Professor Monroe H. Freedman, and by the professional press24 for being so secretive with so important a project so close to the purported

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21. COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, ABA, INFORMATIONAL REPORTS TO THE HOUSE OF DELEGATES I (Report No. 37, 1979 Annual Meeting).
22. Id.
23. Id. at 2.
D-Day. The press got the Commission’s secret draft anyway, whereupon the Commission went public with its next effort, a “Discussion Draft” entitled “Model Rules of Professional Conduct (MRPC).”

The format of the MRPC was, as predicted, a sharp departure from the CPR. Taking a cue from those states that had not adopted the “aspirational” Ethical Considerations of the CPR when they adopted its “mandatory” Disciplinary Rules, the Kutak Commission put out a black-letter product consisting solely of “Rules,” each followed by an explanatory “Comment.” This was not an enormous switch. But Kutak & Co. also completely changed the sequence and numbering system of the 1969 CPR Disciplinary Rules. They accompanied their one hundred and thirty-four-page discussion draft with a twelve-page MRPC-CPR, CPR-MRPC table of related sections, but it contained several obvious and curious blank spots. According to the table, the following Disciplinary Rules would disappear if the MRPC replaced the CPR: DR 2-108, prohibiting “Agreements Restricting the Practice of a Lawyer”; DR 2-109, prohibiting “Acceptance of Employment” in certain circumstances; DR 3-101, proscribing “Aiding [the] Unauthorized Practice of Law”; DR 6-102, prohibiting “Limiting [Lawyer’s] Liability to Client”; and DR 7-105, prohibiting “Threatening Criminal Prosecution . . . to obtain advantage in a civil matter.”

Careful study of the MRPC reveals that these CPR prohibitions have not really disappeared. They are subsumed, sometimes in broader, sometimes in narrower form, in various MRPC Rules. But this patent defect in the only index provided with the Kutak draft suggests a certain arrogance: “trust me,” Mr. Kutak (or Professor Hazard) seems to say. It’s there somewhere.

It was arrogant enough for the Kutak Commission to assume, with the recent track record of the CPR there for all to see, that its ipse dixit would be acceptable to the state courts. The further assumption that its product should be bought on faith, when it could only be compared to prior law

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28. MRPC at 136-47.
29. Id. at 142, 144, 146.
with difficulty, and when the Commission seemed to be hiding the ball, approached sheer chutzpah.

Nor was that the end of Kutak’s Napoleonic self-crowning. In August, 1979, having learned the tenor of the Commission’s still-secret initial efforts, the new president of the Association of Trial Lawyers of America announced in his inaugural address that he too was appointing a commission to draft a new Code. Losing sight of the doctrine by which the ABA had escaped the Justice Department’s antitrust net, Kutak said he would “welcome ATLA input . . . on responsibility code issues.” Had he forgotten that he was chairman of the Professional Standards Commission of an association whose pronouncements are mere “advice” to the state courts which constitute the ultimate arbiters of responsibility code issues? So it would seem. As the ABA Journal quoted him: “. . . the ABA commission is working to write not just a code for a specialized area, but a code for all lawyers.’ . . . Writing a code is easy, Kutak said. ‘I’m only perplexed at how they [ATLA] would enforce it.’

It was evidently inconceivable to Mr. Kutak that any group except the ABA and the Commission he chaired could produce a viable and enforceable code. He could not recognize the fact that, in the free marketplace of ideas about legal ethics created by Goldfarb, Bates, and the Virginia three-judge court’s recent decision in Consumers Union of the United States v. American Bar Association, the ABA’s ideas were no longer ex officio those of the states. Four years of legal history had apparently passed him by.

That indeed the ABA was no longer the emperor of ethical ice cream became clearer as 1979 turned into 1980, and as that year ran its course.

In November, 1979, ATLA President Theodore I. Koskoff appointed his commission—not through ATLA but through an affiliated, independent body, the Roscoe Pound-American Trial Lawyers Foundation. Though studded with ATLA luminaries, the Koskoff Commission included prominent non-lawyers. One was a labor leader, and one a former Executive Director of the ACLU. Among its lawyer members were the legal coun-

31. Id. (direct quotation as shown).
32. 470 F. Supp. 1055 (E.D. Va. 1978), vacated and remanded sub nom. Supreme Court of Va. v. Consumers Union of the United States, 99 S. Ct. 1967 (1980). The only effect of the Supreme Court’s remand was to change the theory on which CU’s attorneys fees might be assessed against the Virginia Court, and to render the Virginia State Bar equally likely to have to pay such fees.
sel of the NAACP and the Executive Directors of both the ACLU and the Consumer Federation of America.\textsuperscript{34} The Commission also featured two state-court judges\textsuperscript{35} and two university professors from disciplines other than law.\textsuperscript{36} The Reporter for the Koskoff Commission was Professor Monroe H. Freedman—perhaps the most published writer on the subject of lawyers' ethics in the United States.\textsuperscript{37}

The Kutak Commission published its Discussion Draft MRPC in January, 1980. The bar's reaction was at best skeptical, and substantially antagonistic—of which more later. In June of the same year, Koskoff's commission countered with its Public Discussion Draft, entitled "The American Lawyer's Code of Conduct" (ALCC).\textsuperscript{38} This too took the form of a complete revision of the CPR. Unlike the Kutak Commission's MRPC, however, the ALCC resembled the CPR in that each of its sets of Rules was printed together, with explanatory matter that frequently illustrated both the interrelationship between the Rules in each "Part," and how they related to Rules in other Parts. It also provided, to demonstrate precisely its points of difference with both CPR and MRPC doctrine, "Illustrative Cases." Here was a new phenomenon in legal drafting—a pre-annotated code. It carried the beginnings of its own decisional gloss, so that there would be no doubt of the drafters' intentions. The contrast with the Kutak MRPC, which was quite close-mouthed about its relationship to prior law, was striking.

Again, press and professional comment was mixed, but the ALCC was clearly viewed by those outside the Kutak Commission as a worthy rival to the MRPC for adoption by the courts.\textsuperscript{39} The National Association of Criminal Defense Lawyers printed the text of the ALCC Rules (without the "Illustrative Cases" and "Comment") with the subheading: "ATLA Alternative to ABA Disaster."\textsuperscript{40}

Now there were two champions in the field. A third was already prepar-

\textsuperscript{34} Charles N. Carter, Ira Glasser, and Kathleen O'Reilly.
\textsuperscript{35} Judges Thomas L. Hayes, Superior Court of Vermont, and William S. Thompson, Superior Court of the District of Columbia.
\textsuperscript{36} Hugo A. Bedeau (Philosophy), Tufts, and Gary T. Marx (Urban Studies and Planning), MIT.
\textsuperscript{38} \textit{Commission on Professional Responsibility, Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct} (public discussion draft released June, 1980) [hereinafter cited as ALCC].
\textsuperscript{40} \textit{The Champion}, Aug., 1980, at 2. The ALCC discussion draft has also been reprinted in \textit{Trial}, Aug., 1980, at 44.
ing to enter the lists. At the same ABA Mid-Winter Meeting that first saw the Kutak Commission's work in formal dress—indeed, before the ink was dry on the MRPC's first printing—the National Organization of Bar Counsel (NOBC) adopted a resolution condemning the Kutak Commission's "radical departure in form, style and substance" from the Code of Professional Responsibility.41 The NOBC, a previously somewhat inactive group, consists entirely of bar counsel—the disciplinary prosecutors whose principal duty is the enforcement and interpretation of the state Codes. Despite its lack of a prior track record as a promulgator of Codes, it was an ominous antagonist for the Kutak or Koskoff Commission, for ATLA or the ABA. Though small in number of members, NOBC is, on responsibility code issues at the state level, probably second in influence only to the Conference of Chief Justices, or perhaps the Council of State Representatives that governs the National Center for State Courts,42 were it to take an interest in such matters.

NOBC's February resolution said it would "submit its views to the [Kutak] Commission with specificity at an early date."43 To show that he took the matter seriously, NOBC's President appointed his successor-elect, Allen B. Zerfoss, Chief Disciplinary Counsel of Pennsylvania, chairman of a special committee. Serving with Zerfoss on the four-man committee were another state bar counsel, an assistant to the only bar counsel on the ABA Standing Committee on Ethics and Professional Responsibility, and a branch staff counsel of another state. The Zerfoss Committee drew up a lengthy draft report consisting primarily of how the Code of Professional Responsibility would look if the Kutak Commission's recommendations were written into it—or rather, what Kutak & Co. would have written if they had been willing to cast their recommendations in the form of a revi-

41. The Resolution was adopted by NOBC in Chicago on February 2, 1980. See ZERFOSS REPORT, infra note 45, at 99 app. A.
42. The National Center for State Courts has been described by the Washington Post as "a judicial think-tank." Washington Post, Oct. 31, 1980, at 31, col. 1. Started in 1971 with Law Enforcement Assistance Administration funds, the Center was designed to give state court systems the same research-and-development support supplied to federal courts by the Federal Judicial Center. It is run by a Board of Directors who are elected by the Council of State Court Representatives. The Council consists of one member from each "state," including Guam, American Samoa, the Virgin Islands, Puerto Rico, and the District of Columbia, appointed by the highest administrative authority of the jurisdiction's court system (usually the highest court, but sometimes a judicial council or conference). As of June 1, 1980, 19 of the 54 representatives were chief justices, and 21 were other justices, of highest courts; 4 were judges of other courts; and 10 were the chief administrative officers of state court systems. 4 STATE COURT J. No. 3, at 44 (Summer, 1980).
sion of the Disciplinary Rules of the CPR. Whatever else it did, the Zerfoss Committee thus provided the bench and bar with the cross-reference between the CPR and the MRPC that the Kutak Commission had either found itself reluctant, or been unable, to provide.

The bar counsel group did not stop there. Meeting as a committee of the whole at the ABA Annual Convention in Honolulu, NOBC went through the Zerfoss Committee's draft report item by item, from start to finish, in a session that took the better part of two days. As each item was debated, points that were not the subject of clear consensus were put to the vote of all members present. The final product was then approved on August 2, 1980, by a unanimous vote. After some redrafting and preparation of clean copy for reproduction, the Zerfoss Report was printed and transmitted to the Kutak Commission, and to the profession.

The Zerfoss Report is a remarkable document in many ways. First, it constituted the first authoritative attempt not just to plump for retention of the format of the CPR, in diametric opposition to the Kutak-Hazard and Koskoff-Freedman revisions, but actually to put that position in concrete form. Of its one hundred seven pages, sixty-three consist of existing ABA (or "Model") CPR provisions (Canons and Disciplinary Rules), together with NOBC's recommendations for changes ("Proposed Rules" and, in one instance, "Proposed Canon Retitling") and explanatory comments. Twenty-eight pages consist of MRPC (Kutak) provisions "not recommended for adoption[,] together with reasons and comments." The last nine pages reproduce the February 2, 1980, NOBC Resolution and give a Kutak-Zerfoss cross-reference table.

Because of its source, the Zerfoss Report is a formidable rebuttal of the Kutak Commission's draft MRPC, both respecting its form and, on occa-


46. ZERFOSS REPORT, supra note 45, at 7-69.

47. Compare ABA Code of Professional Responsibility and Code of Judicial Conduct, Canon 9 (1979) ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety.") with ZERFOSS REPORT, supra note 45, at 67 ("A lawyer should safeguard funds and property of others entrusted to the lawyer").

48. ZERFOSS REPORT, supra note 45, at 70-98.

49. Id. at 99-107.
sion, its content. The only comparable document in recent legislative history is probably the Department of Justice’s response to the proposed new federal criminal code—and that was not, as this was, the work-product of the lawyers who actually worked day-to-day with the existing codification. The primary working professionals in the field of lawyer discipline were thus criticizing the work of a committee consisting of former ABA Presidents, active and former judges, academics, corporate lawyers, and public-interest types, together with the Yale professor and former ABF Director who was its Reporter, and its two other law-teacher consultants. In short, the NOBC was telling the Kutak Commission, as politely as possible, that it didn’t know its business.

Furthermore, the Zerfoss Report was extraordinary because it was couched, at least formally, as NOBC’s “recommendations to the [Kutak] Commission.” The NOBC appears, on the surface, to be pulling its forelock to the ABA and the Commission. It goes through the motions of deference—but so did Iago to Othello, and Macbeth and his Lady to Duncan, even as they plotted the overthrow of their gullible masters. One paragraph, however, shows that this velvet glove conceals an iron fist:

The NOBC applauds the conscientious efforts of the Commission to improve the standards for the legal profession and pledges its continuing efforts to assist. But it will continue to advocate revision to the present Code without abandonment of its present form, style and content for which most of us have developed great familiarity and respect if not admiration.

How smoothly the bar counsel organization says that it means business! It pledges its continuing assistance but states in the next breath that it will continue to advocate a position that is, in many respects, diametrically opposite to the position of those it says it will continue “to assist.” The prefatory section concludes by saying that NOBC “strongly recommends” that the Kutak Commission “adopt the recommendations contained in this Report in the general interests of the legal profession to improve and update their ethical standards in the best form and manner possible.”

To return to the point where we began, what NOBC is very gently telling the Kutak Commission is that the professional standards for lawyers are not promulgated and enforced by the American Bar Association, or by its Commissions and Committees: they are adopted and enforced by the fifty-odd state courts of last resort, or lower courts with power to admit and

50. Id. at 6.
51. Id. (emphasis in original).
52. Id.
to discipline the members of the bar; and that the bar counsel of the states are, individually and collectively, the lawyers whom those courts have appointed to perform the key enforcement function of exercising discretion to prosecute, or not to prosecute, allegations of professional misconduct. NOBC has not thrown down the gauntlet to the Kutak Commission. It has, however, at the very least, forcefully reminded the Commission that its work is not only subject to review by the House of Delegates before it can become ABA or national bar policy, but must also, to obtain the force of law, pass muster with the fifty-odd rulemaking state courts. And on that last lap—or, if you will, the fifty-odd last laps—it will be the NOBC, not the ABA, that has the inside track.

The bar counsel also have many allies at an intermediate stage in the somewhat Byzantine process by which recommendations, even from the ABA, become amendments to the states’ versions of the CPR. While each rulemaking court has inherent authority to amend its CPR on its own motion, such action is somewhat unusual. Courts are much more likely to act on the recommendation of their state bar groups, integrated or voluntary, or at least not to act until the representatives of the lawyers whom they govern have had their say. In the past, state bars may have had a tendency to transmit the ABA’s pronouncements on legal ethics to their governing courts without change or even comment. Mere men, at what is sometimes disparagingly called “the state level,” did not question national oracles. But that is changing. The men and women in the state bar associations have become increasingly aware, through the study of such decisions as Goldfarb, Bates, and Supreme Court of Virginia v. Consumers Union, that the people at “the national level,” the panjandrums of the ABA, are also mere men (and occasionally women). Some of the state bar members, black or Jewish, remember that the ABA refused to admit them to membership not so long ago. All of them know that it was one Virginia couple, followed by two ordinary Arizona lawyers who held no bar committee positions whatsoever, who demonstrated before the Supreme Court that the emperor of legal ethics was, in fact, but a group of naked, unaccommodated men using their power, and that of state courts and bars, to restrain

53. In New York, this power lies with the Appellate Division of the Supreme Court, divided into four geographic Departments; in Connecticut, it has been assigned to the Superior Court, the court of general trial jurisdiction.

54. See, e.g., Rules 27 E-27 L of the Superior Court of Connecticut, which authorize each Local Grievance Attorney appointed by the court to appeal, to a Statewide Grievance Committee, the dismissal of a misconduct complaint by a Local [Judicial District] Grievance Committee, or the imposition of discipline short of a “presentment” to the court for public discipline.

55. See note 32 supra.
commercial speech and competition by and between lawyers. The state bars must also be suspicious of the workmanship of the craftsmen whose last "comprehensive, coherent" set of disciplinary rules (now renamed) were sufficiently lacking in constitutionality to subject Virginia's courts and bar to a substantial bill for the attorneys' fees of the consumer groups who challenged them. In the well-worn cliche, the natives are restless.

ATLA and NOBC have, indeed, already been joined by several state bar groups in opposition to the Kutak Commission's proposals. In September, 1980, the largest state lawyers' group, the State Bar of California, had so pronounced an "anti-Kutak" consensus at its annual convention that the only question seriously debated by the Bar Delegates was how their convictions could be most tellingly couched. They heard from both Kutak and Koskoff during the convention. Kutak was all but hooted from the platform; Koskoff received a standing ovation. (The occasions were separate; Kutak refused an invitation to debate.) The California Bar's Conference of Delegates voted 203-118 to reject a resolution which "could be construed as meaning that California might eventually support Kutak's ideas," and approved a Board of Governors resolution "opposing the philosophy" of the MRPC.

That was not the first time a state bar group had expressed doubts about the Kutak Commission's work, or even rejected it. Indeed, the reaction of the bar to the draft MRPC has been generally negative, both as to the substance of its many recommendations, and as to the form in which the recommendations were cast. There appears to be a growing consensus in favor of retaining the format of the 1969 CPR, at least as to the Disciplinary Rules which are the guts of the Code. The NOBC is far from alone in its position that the 1969 codification format is a useful instrument and should be retained.

Indeed, a stronger argument than NOBC's can be made for extensive modification, rather than scrapping, of the CPR. The bar counsel appear to be concerned that if the CPR is entirely replaced, they will have to learn a new system of rule numbers. They also seem to fear that during the changeover period there will be unnecessary litigation regarding the issue of whether particular preamendment conduct, clearly proscribed by the old Code, has been legitimated by the new Rules and should no longer be

56. Although New York is estimated to have more working lawyers (61,600) than California (59,896) (Mar., 1980 ABA estimates), it does not have an integrated bar. With 68,464 active, and 6,639 inactive members (Oct. 16, 1980 actual count), the State Bar of California is exceeded in membership, among American bar groups, only by the ABA.

prosecuted, or vice versa. If the entire structure of the Code is changed, will lawyers be properly on notice of some of the changes? 58

These are not inconsiderable concerns. Nor is NOBC's fear that a wholesale change of the Code will lead to years of unnecessary wrangling over the meaning of the new Rules. Not only would this make the work of Bar Counsel harder, but it could create unnecessary litigation by reducing the precedential value of the eleven years of decisions interpreting the 1969 Code. The purpose of any recodification should be to clarify, not to obfuscate.

Indeed, the fact is that the 1969 Code substantially clarified the state of the law of professional conduct for attorneys (despite an overall quality of draftsmanship reminiscent of IRS regulations), and it continues to do so. Paradoxically, this basic overall strength is sometimes misinterpreted as a weakness, because it allows the defects of particular components of the Code to be more readily obvious. It is not, after all, necessary to redesign an automobile completely because the clutch or the transmission, or both, have a poor frequency-of-repair record. The new model will surely have bugs of its own to be worked out, as every buyer from the first year of a Detroit production run can attest. There is much merit to the old maxim, "if it ain't broke, don't fix it." This point may be demonstrated, if one agrees with the essentially similar basic philosophy of the Kutak Commission draft and NOBC's Zerfoss Report, by reference to Canon 5 of the CPR, entitled *A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.*

The Kutak Commission proposes, according to its cross-reference table,59 to divide the seven Disciplinary Rules that now comprise Canon 5 into various segments of some eleven Rules scattered in six parts of the MRCP. One suspects that this list is incomplete, as the cross-reference for the Ethical Considerations in Canon 5 adds four more MRCP provisions.60 Even without going into the details, this enumeration demonstrates that the Kutak recodification is difficult to track.

In contrast, the Zerfoss Report makes it quite clear what NOBC would retain and change in Canon 5. It proposes no changes whatever in four of the seven present Disciplinary Rules, DR 5-102 and DR 5-105 through

58. See *In re* Koffler, 79 A.D.2d 252, 420 N.Y.S.2d 560 (1979), rev'd, — N.Y.2d —, 412 N.E.2d 927 (1980), where the respondents' reliance on what the lower court incorrectly held to be a mistaken interpretation of *Bates,* was held to exempt them from discipline. Cf. *In re* Ruffalo, 390 U.S. 544, 552, 554-56 (White, J., concurring) (1968).
59. MRPC at 144.
60. *Id.* at 143-44.
DR 5-107. It would amend DR 5-101 only by adding a new paragraph.\textsuperscript{61} It would change DR 5-103 by amending and clarifying one paragraph.\textsuperscript{62} It would similarly revise DR 5-104 only by rewriting one paragraph.\textsuperscript{63} And it would propose adding, as a new DR 5-108, an only slightly modified version of one of the Kutak Commission's more controversial proposals.\textsuperscript{64}

Whether one agrees with these proposals or not, at least one can understand them. One can see, by holding the new and the old Codes side by side, exactly how the drafters intend to change the law. And one is inexorably led to agree with the conclusion stated in the preface to The American Lawyer's Code of Conduct: "With all its serious flaws, the Code of Professional Responsibility is preferable to the Model Rules."\textsuperscript{65}

The ALCC shares with the MRPC the defect of proposing a wholly new structure and organization to replace the CPR. Unlike the Kutak Commission's rather turgid product, however, the ALCC balances that defect with the virtue of clarity of expression, and by its drafters' willingness to advance alternative proposals. It does not read like the bureaucratic prose George Orwell dubbed "newspeak,"\textsuperscript{66} as both the CPR and the MRCP often do. When it makes cross-references to other Rules, it explains them. Moreover, it contains in Part IX, Responsibilities of Government Lawyers,\textsuperscript{67} a pioneering attempt to deal with an area of lawyers' conduct that the MRCP, for all its vaunted focus on the differences between lawyers' responsibilities in different roles,\textsuperscript{68} almost wholly fails to address.\textsuperscript{69}

This demonstrates a basic philosophical divergence between the ALCC and the MRPC. The MRPC sees all lawyers as having responsibilities both to their clients and to the legal system—a view much more compatible to the civil law, or to a totalitarian state, than to the adversary system (and to the concept that a citizen's having interests adversary to the state is a healthy phenomenon) which is woven into the American constitutional fabric. The ALCC, taking the contrary view, sees the lawyer as primarily

\textsuperscript{61} ZERFOSS REPORT, supra note 45, at 39 (ZERFOSS REPORT DR 5-101(c) derived from MRPC Rule 3.11(b)).

\textsuperscript{62} Id. at 41 (substituting MRPC Rule 1.9(e) for DR 5-103(B)).

\textsuperscript{63} Id. at 42 (substituting MRPC Rule 1.9(a) for DR 5-104(A)).

\textsuperscript{64} Id. at 42-44 (incorporating MRPC Rule 1.13 with only technical changes).

\textsuperscript{65} ALCC, supra note 38, at 1 (preface by Irwin Birnbaum).

\textsuperscript{66} G. ORWELL, NINETEEN EIGHTY-FOUR (1949).

\textsuperscript{67} ALCC Rules 9.1 through 9.17 at 901-03, and "Supplementary Provisions" 9.18 through 9.21 at 904, with Comment and Illustrative Cases at 905-14.

\textsuperscript{68} MRPC Preamble at 1-2.

\textsuperscript{69} The only apparent exceptions are MRPC Rules 1.11, "Government Lawyer Conflict of Interest," and 3.10, "Special Responsibilities of a Prosecutor."
responsible to his or her client; it modifies the duties of government lawyers to reflect their clients' responsibilities to the system.

The ALCC's special provisions on government lawyers also reflect the reality, well known to every lawyer who has ever worked for the government, that the government lawyer frequently has such responsibility for government policy that he or she almost becomes the client. As in Gertrude Stein's famous dictum about Oakland "There's no there there", the government lawyer often has no client either to counsel or to consult. When there is a client such as a county council, or even a President, whose wishes must be considered, the peculiar constraints of our system of limited government often leave the lawyer no better off than before if the government officials' aims are clearly illegal or unconstitutional. In such situations the government lawyer is bound by an oath of office to uphold the constitution and laws to such an extent that the difference from private counsel is not just one of degree; it is a difference in kind.

The ALCC incorporates that difference in a one-sentence Rule: "A lawyer in public service shall not knowingly violate the rights of any person, or knowingly tolerate the violation of any person's rights by any other public employee."\(^{70}\) One may argue with the specifics of this Rule by saying that it is too broad; the word "rights," it may be said, is too all-encompassing. But, the philosophy behind the Rule can scarcely be challenged. The same may also be said of the remainder of the ALCC Rules, 9.1 through 9.9, which relate solely to prosecutors, and 9.10 through 9.13, applicable to all "lawyer[s] in public service."

These provisions demonstrate, particularly when contrasted to their skimpy counterparts in the MRPC, the essentially libertarian bent of the ALCC. Koskoff's Introduction to the ALCC describes its drafters' work thus: "We rejected, as best we could, every proposal that would have weakened the protection of clients' rights."\(^{71}\) Koskoff also portrays the ALCC as "not just a code of conduct for lawyers, but a bill of rights for clients."\(^{72}\) That may seem a grandiloquent phrase, but it expresses an important concept that obviously guided the ALCC drafters, and that seems to have been intermittently absent from the deliberations of the Kutak Commission and the NOBC: that the legal profession does not just regulate itself when it adopts new rules of professional conduct. Koskoff puts it thus:

We need to realize, not just intellectually, but in our bones, that

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\(^{70}\) ALCC Rule 9.12 at 903.

\(^{71}\) ALCC at vi.

\(^{72}\) Id. at ii.
the legal profession exists to serve people, and that, when we write codes to regulate what lawyers may and may not do, we are writing legislation that affects the rights of every person in the country. Just as we cannot regulate trial lawyers apart from other lawyers, we cannot regulate lawyers without profoundly affecting their clients, and their potential clients, in the exercise of basic rights.  

* Bates * and its progeny demonstrate that rules of professional conduct, concocted by the organized bar, all too frequently constitute regulation of the bar, by the bar, and for the bar. That the ABA's substitutes for the rules invalidated by * Bates * were also unsatisfactory has been acknowledged both by the Kutak Commission, which liberalizes them,  

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and by the NOBC, who advise dropping some restrictions that the Kutak Rules retain.  

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We have also seen, in the disciplinary proceedings of the Securities and Exchange Commission  

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and in the pronouncements of various SEC officials,  

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that there is substantial danger in having rules for lawyers written by disciplinary prosecutors and government regulators whose interests are inherently adverse to the zealous representation of citizens' interests.  

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We have seen the Attorney General oppose even the tentative, modest attempts of the Kutak Commission to place professional restraints on misconduct by prosecutors.  

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One is constrained to conclude that the processes heretofore used to produce standards for lawyers' professional conduct have not served the public interest—the interest of American citizens in the functioning of the legal system that protects and embodies their liberties—as well as they
should. We have progressed beyond the era of the Canons of Professional Ethics, which were clearly the product of an establishment elite, the ABA of that time, reflecting its biases and protecting its interests. We have seen the Canons replaced by a Code of Professional Responsibility that, while it substantially codified the Canons and perpetuated many of their defects, was the product of an Association that had begun to become less elitist, although its councils still consisted primarily of establishment attorneys. We have seen the greater specificity of that codification lead to the demise, in the courts, of its most restrictive provisions.

What we are seeing now, in the debate over the revision of the Code of Professional Responsibility, may be the final breakdown of the ABA's *de facto* dominance of the standard-setting process. The ABA is no longer the only national body that can claim to act as a promulgator of uniform ethical standards for lawyers in all states. Its credibility has been weakened, and two other national groups have challenged both its authority and the correctness of its new rules. There is now, as there was not when the Code was written and promulgated in 1969, a real debate over how it should be changed, what the new document should look like, and what it ought to say.

Mr. Kutak and his Commission delude themselves if they truly believe that this debate is merely "input" into their deliberations. Neither the Kutak Commission nor the ABA House of Delegates is going to be the final arbiter of this argument. It will be resolved, as de Toqueville noted, where all American political questions tend to be resolved: in the courts. The practice of setting standards of professional conduct for lawyers is finally catching up with the theory that the state courts determine both the qualifications, and the disqualifications, for the practice of law.

What remains to be seen is how the state courts will go about the job of exercising this responsibility. If the three contending views of reform (Kutak, Koskoff, and NOBC) continue to be embodied in three separate formats, it seems likely that form will dominate over substance, and that the format most like that of the present Code (the NOBC Zerfoss Report) will prevail.

It is also entirely possible that, if the Kutak Commission insists on keeping its proposals in their current form, those proposals will not pass the ABA House of Delegates. The ABA's *imprimatur* may no longer be almost equivalent to having ethics proposals adopted by the states, but it would seem to remain a *sine qua non* for proposals originating within the ABA. State bar groups are not likely to put the Model Rules before their state courts if the ABA rejects them. Nor are the courts likely to adopt so
radical a revision of the Code without state bar recommendations. Whether either Koskoff's ALCC or the NOBC-Zerfoss Report could command the support of the ABA House of Delegates or state bars as a complete package is problematical.

Because it is cast in the form of amendments to the current Code, the Zerfoss Report is the only one of the three versions that could be partially adopted by a state or approved by the ABA—and also partially rejected. Among NOBC's proposed amendments to Canon 5,80 for example, only the addition of a new DR 5-108 is likely to be controversial. But the other provisions, as incorporated in the Kutak Model Rules, cannot be adopted piecemeal. Nor can one pick and choose among the reform proposals of the ALCC, except to accept or reject the two sets of alternative and supplemental proposals. Both the Model Rules and ALCC can be considered, as of this writing,81 only on a take-it-or-leave-it, all-or-nothing basis.

This result is unfortunate because it is likely to lead to a debate, before the fifty-odd deciding tribunals, in which the soundest, most philosophically consistent positions will be given short shrift because they are inadequately presented. Taken as a package, Professor Freedman's views, as modified by the Koskoff Commission in the ALCC, stand up well against those of Professor Hazard, as modified by the Kutak Commission in the MRPC. The ALCC is thoroughly grounded on the premise, assumed by the fifth and sixth amendments, that the lawyer is the confidential servant of the client. Professor Freedman has expounded upon that premise eloquently and at length in these pages;82 an exposition that can scarcely be improved upon. Suffice it to say, for present purposes, that the ALCC embodies a similar conviction that the purpose of American law, and of American lawyers, is to enable individuals, as clients of lawyers, to preserve and maintain their individual autonomy and responsibility for their actions.

If it has a contrasting philosophic base, the MRPC seems to rest on an

80. ZERFOSS REPORT, supra note 45, at 37-48.

81. On December 5, 1980, Mr. Kutak issued a status report advising the bench and bar that the Commission would release "a revised draft" of the MRPC in May, 1981, not in February as previously proposed. The apparent reason for this change was the Commission's determination "that its recommendations should be circulated in two formats, one employing the framework of the January, 1980 Discussion Draft, and one consisting of the current Code text amended to reflect the Commission's substantive recommendations." "Dear Colleagues" Letter by Robert J. Kutak, Chairman, ABA Commission on Evaluation of Professional Standards, at 7 (Dec. 5, 1980). The report suggests, however, that the Kutak Commission remains committed to the MRPC format, which it somewhat disingenuously characterizes as "a more traditional form" than that of the CPR. Id. at 6.

unstated conviction that the CPR leaves lawyers too free to do their clients' bidding when, according to the drafters' judgment, doing otherwise would better serve the public interest. The ALCC may not be sufficiently explicit in stating its implicit qualification on client autonomy: that the full and free exchange of views protected by the attorney-client privilege imposes on the lawyer a duty to advise the client not to do what the client has a legal right to do, if the lawyer believes that the public interest, or the client's enlightened self-interest, lies in another course of action. But the MRPC is much further from the mark in its curious assumption that the public interest is better served by judgmental lawyers, who refuse to do their clients' bidding when they think their clients' actions are against the public interest, and in its bizarre suggestions that client confidences should be revealed whenever to do so would bring the greatest good to the greatest number. Both ideas smack of the paternalistic attitudes of totalitarian states, not of American democracy.83

It will serve no purpose for the proponents of the ALCC to win the academic arguments between these two diametrically opposed concepts of the lawyer's role, if their views are not put in such a form that, having won the argument, they can get their views adopted as law. To paraphrase Mr. Kutak,84 demonstrating that his Commission is wrong is easy; one is only perplexed as to how to get the right alternative enforced.

It is an ancient truism of negotiation that the party who writes the basic draft gains an incalculable advantage. At this stage in the great legal ethics debate, it seems unlikely that the basic format of either the MRPC or the ALCC can gain acceptance as the new Code over whose details we shall then go on to haggle. Both the Kutak and Koskoff Commissions would be well advised to admit defeat on this secondary issue and to advance their proposals, as NOBC has done, in the form of amendments to the CPR. Once they do that, the courts will be able to decide who should win the argument on the merits. Until they do that, we will not have a debate so much as a confusion of tongues.

It is increasingly clear that the practice of law has become part of interstate commerce. The growth of national law firms (including Mr. Kutak's) is one indication. Jetting across the country—and even to other countries—to conduct specialized practice is not a phenomenon limited to superstar trial lawyers, or even to litigation specialists. Over the last two

83. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (footnote omitted).

84. See note 31 and accompanying text supra.
decades, revolutionary improvements in long-distance transportation and communications have combined with the complexity of the law to produce a new generation of legal specialists with national, or even international, practices. Moreover, the number of such lawyers is increasing, as is the number of less specialized lawyers whose practice regularly crosses state lines.

Given these phenomena, there is a greater need today than there was yesterday for the standards governing American lawyers’ conduct to be uniform from state to state. Tomorrow the need will be yet greater. The California lawyer retained by one prospective plaintiff in a multi-victim air crash, for example, should be under fairly uniform constraints as to what he or she may do to try to represent as many of the survivors of the disaster as possible. Moreover, in the ensuing settlement negotiations and/or litigation, wherever brought, the lawyers for all the potential defendants should be subject to similar standards of conduct, and those standards should not vary widely from one potential litigative forum to another.

Thus, the need for a substantial degree of state-to-state uniformity, in whatever codes of conduct emerge from the current debate, is manifest. Given the collapse of the ABA’s old imperial order, and the open revolt of many segments of the bar against the Kutak Commission’s proposals, it seems likely that the ABA will no longer be able to provide such uniformity. It may be able to do so, to some extent and somewhat paradoxically, through the very Code the Kutak Commission wants it to disavow, as the NOBC and various state bar groups continue to use the organizational skeleton of the CPR. Moreover, it may be a healthy sign for the future of professional conduct standards in the United States if the ABA plays no more of a role than this indirect one. The House of Delegates is not, if it ever was, the appropriate deliberative body for extensive debates over disputed questions of legal ethics.

One is constrained to suggest, however, that the courts should take it upon themselves to create an interstate body, under judicial auspices, for the purpose of formulating uniform standards of conduct. Such a group could perform, better than the ABA, the functions the ABA has, faute de mieux, arrogated to itself. It need not, indeed it should not, be composed entirely of judges, or even entirely of lawyers. But it should be primarily responsible to the courts. It should be, in that sense, a judicial body performing the essentially judicial function of regulating the practice of law.

86. See In re Florida Bar, 316 So. 2d 45, 47 (Fla. 1975), holding that officials of an
It is a curious fact, traceable to the English origins of the American legal system,\textsuperscript{87} that the American courts have generally been more passive than active in the development of both disciplinary systems and disciplinary standards. They have often abdicated, as much as delegated, those functions to local bar associations: only in 1980 did the Association of the Bar of the City of New York cease to provide the bar counsel, and Grievance Committee, for Manhattan and the Bronx. Like the ABA, the voluntary New York City bar had simply assumed, in the absence of any other appropriate group, the tasks now assigned by most state court systems to the integrated bar.\textsuperscript{88}

We have no national integrated bar, nor should we. But neither should the courts allow the role of national integrated bar to be played by the ABA, as it has been in the past. The state courts now have, in the National Center for State Courts founded in 1971, a national coordinating mechanism. They are no longer an archipelago of fifty-odd insular entities with no common councils except the Conference of Chief Justices and the National Conference of State Court Administrators. The furor generated by the Kutak Commission proposals, and by the counter-proposals of the Koskoff Commission and the Organization of Bar Counsel, provide a unique opportunity for the state courts to assert their theoretical authority over the standards for lawyers' conduct in a real way. Such tides in the affairs of men\textsuperscript{89} come but seldom.

\textsuperscript{87} See, e.g., People ex rel. Karlin v. Culkin, 248 N.Y. 465, 471-79, 162 N.E. 487, 490-92 (1928) (Cardozo, C.J.), discussing "[p]recedents far more ancient" than American decisions, upholding "the power of a court" to conduct "a general inquisition" into allegations of attorney misconduct. Cardozo describes a special "jury" of "officers, clerks and attorneys" appointed by the Court of Common Pleas in 1567 to inquire into the activities of those he calls "the ambulance chasers of the day," and the resort to "a like expedient" in 1654. 248 N.Y. at 474-75, 162 N.E. at 491.


\textsuperscript{89} W. SHAKESPEARE, JULIUS CAESAR, IV, iii. 218-21 (Craig & Bevington eds. 1973).