Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics

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I. INTRODUCTION

Over time, the professional codes governing lawyer behavior have become statutory in form.1 Modern codes increasingly tell lawyers how they must act.2 The recent adoption of the ABA's

1 The observation that ethics regulation looks increasingly like legislation is Geoffrey Hazard's. Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239 (1991). His analysis of the "legalization" of legal ethics is discussed in the text accompanying notes 7-9 infra.

2 The early codifications, Hoffman's 1836 "Resolutions of Professional Deportment" and the 1908 ABA Canons, consisted of a series of general, often vague, norms of moral conduct. See, e.g., David Hoffman, A Course of Legal Studies 752 (1836) ("I will never permit professional zeal to carry me beyond the limits of sobriety and decorum"); "In all intercourse with my professional brethren, I will always be respectful"); Canons of Professional Ethics, Canon 15 (1908) ("The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability'"); Canon 16 ("A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do"); Canon 18 ("A lawyer should always treat adverse witnesses and suitors with fairness and due consideration").

The Model Code of Professional Responsibility (1969) [hereinafter CPR] moved from abstraction to an elaborate mixture of norms (i.e., "Canons"), high-minded statements regarding the American lawyer's role (i.e., "Ethical Considerations"), and rules that purport to fix appropriate conduct (i.e., "Disciplinary Rules"). Compare CPR, EC 1-5 ("A lawyer should maintain high standards of professional conduct") with CPR, DR 1-102(A)(1) ("A lawyer shall not violate a Disciplinary Rule").

The more recent Model Rules of Professional Conduct (1983) [hereinafter Model Rules], interrupted the trend toward specificity by deregulating in some respects.
Model Rules has been followed with a series of further proposals designed to control specific lawyer conduct.

This Article analyzes the drift toward specificity in lawyer regulation and suggests that the modern trend may go too far. There is a place for both specific and generalized regulation, depending on the purpose that the drafters have in mind for particular regulation. Before promulgating a code or reform provision, however, it is important that drafters identify their purpose or, when the

See, e.g., MODEL RULES, Rule 1.3 cmt. (tempering the CPR’s requirement of zeal, noting that “[a] lawyer shall act with reasonable diligence and promptness in representing a client,” but “is not bound to press for every advantage that might be realized for a client”). But at the same time, the MODEL RULES included rules further defining the postures lawyers should take in a variety of situations. See, e.g., MODEL RULES, Rule 3.3(b) (requiring disclosure of client perjury); MODEL RULES, Rule 5.1 (spelling out duties of firm members with respect to misconduct of other firm members).

3 See, e.g., MODEL RULES, Rule 5.7 (regulating law firms’ use or operation of ancillary businesses) (adopted in 1991, deleted in 1992); MODEL RULES, Rule 3.8(f) (1990) (regulating prosecutorial subpoenas of attorneys); MODEL RULES, Rule 6.1 (1993) (requiring lawyers to engage in 50 hours of pro bono service per year); OREGON RULES OF PROFESSIONAL CONDUCT DR 5-110 (Proposed Official Draft) (on file with author) (regulating lawyers sexual activities with clients).


5 In Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241 (1992), Professor Pearce suggests that commentators have mischaracterized or forgotten the true historical underpinnings of ethics regulation and thus overemphasize the “adversarial ethic” in the modern codes. Pearce’s rediscovery of an overriding “republican” vision in the early codes may overstate the case, but it does highlight the tension that the codes reflect. Pearce no doubt is correct that legal ethics codes always have had a mix of purposes, encompassing both the notion that lawyers are advocates and that they are moral individuals with responsibility for balancing and tempering their own actions. Id. at 278-82.
regulation serves multiple purposes, assign priorities among them. Only with this foundation can drafters hope to formulate rules that have an optimal effect.

Part I of this Article identifies the various purposes that can be, and cannot be, ascribed to legal ethics codes. Part II defines precisely what the Article means by "specificity." It then offers a model, or continuum, illustrating the different levels of specificity that professional rules may employ. Part III uses the example of the modern codes' highly generalized regulation of prosecutorial ethics to show how making rules more or less specific affects the accomplishment of the drafters' objectives. Finally, Part IV illustrates the practical benefits of analyzing professional rules in specificity terms. It focuses upon one current proposal relating to prosecutorial ethics, Model Rule 3.8(f), governing prosecutorial issuance of attorney subpoenas. Part IV demonstrates how failing to identify the underlying code's purposes and linking the specificity of reform to those purposes leads to poor drafting and a muddled debate.

II. THE PURPOSES OF THE CODES

The legal community does not share a unified view of the goals of lawyer regulation. Nor is there consensus over the nature of the codes that currently exist. Yet any evaluation of a particular provision or set of provisions necessarily turns on one's perspective towards the codes.

Geoffrey Hazard, for example, suggests that lawyer codes have become equivalent to legislation—legalized in format and judicially enforced. To the extent that perspective is correct, it is appropri-
ate to judge the codes and code reforms as one would judge other legislation—in political terms and in terms of their adequacy as a control mechanism for lawyer behavior. In contrast, the more traditional view holds that the legal ethics codes are distinct from typical "law"; they represent ideals and a model for practice, not enforceable behavioral constraints. Under this framework, the day-to-day impact of ethics rules on conduct becomes a secondary consideration in evaluating codes and code amendments. Susan Koniak bridges the two theories, classifying ethics codes as "law,"

HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 17 (1978) (discussing reasons for the pressures); Cramton & Udell, supra note 6, at 300 ("Since about 1930, and with accelerating speed since 1970, ethical codes have developed into law"); Monroe H. Freedman, The Problem of Writing, Enforcing, and Teaching Ethical Rules: A Reply to Professor Goldman, CRIM. JUST. ETHICS, Summer-Fall 1984, at 14-15 (arguing for legislatively written and fully enforced legal ethics rules); Reed Elizabeth Loder, Tighter Rules of Professional Conduct: Saltwater for Thirst?, 1 GEO. J. LEGAL ETHICS 311, 322 (1987) (noting "[t]he trend toward more comprehensive and mandatory codification"); Murray Schwartz, The Death and Regeneration of Ethics, 1980 AM. B. FOUND. RES. J. 953, 953-54 (discussing shift from "articulating professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach"). Hazard concedes the value of looser "aspirational" or "hortatory" guides for lawyer conduct, but suggests that professional rules are an inappropriate medium for such guides because, in practice, the rules tend to be transformed into legislation or "black letter law." Geoffrey C. Hazard, Jr., Legal Ethics: Legal Rules and Professional Aspirations, 30 CLEV. ST. L. REV. 571, 573-76 (1981).

That, in part, is the approach espoused by William Nelson. See William E. Nelson, Moral Ethics, Adversary Justice, and Political Theory: Three Foundations for the Law of Professional Responsibility, 64 NOTRE DAME L. REV. 911, 921-23 (1989) (describing legal ethics as a political device that empowers or removes power from lawyers in exerting influence within the legal system).

8 L Ray Patterson, An Inquiry into the Nature of Legal Ethics: The Relevance and the Role of the Client, 1 GEO. J. LEGAL ETHICS 43, 45-50 (1987) [hereinafter Patterson I] (describing traditional view and positing that "rules of ethics should be an integral part of the law and rules of law should be an integral part of rules of ethics"); L. Ray Patterson, The Function of a Code of Legal Ethics, 35 U. MIAMI L. REV. 695, 699, 702-03 (1981) [hereinafter Patterson II] (same). See also Hazard, supra note 1, at 1251 (describing traditional view, and arguing that codes increasingly have become "legalized"); Cramton & Udell, supra note 6, at 299 (noting changing view that "ethics rules were intended to govern the conscience of the individual lawyer and to be enforced largely by peer pressure").

Professor Patterson's orientation toward the "legalization" of the codes is more normative, and less historical/descriptive, than Professor Hazard's. Patterson seems to accept behavioral control as the single valid purpose of ethics codes. See Patterson II, supra, at 702-03 ("unless one assumes that rules of ethics and rules of positive law have different functions, to superimpose rules of ethics for lawyers on rules of positive law without having them also apply to clients creates a logically untenable situation"). Although I agree with Patterson's conclusion that code drafters should take into account "positive law," id., this Article starts from the realistic premise that the codes have been written (and probably will continue to be written) to serve a variety of functions.
but law that stems from lawyers' unique perceptions of how substantive doctrines should apply to them. Each of these approaches to legal ethics suggests a different starting point from which to analyze regulatory reforms.

What is particularly interesting about the varying perspectives is that they have been engrafted upon the codes after the codes' adoption. Ordinarily, one would expect drafters and enacting bodies themselves to identify what they hope to achieve and to formulate rules furthering that objective. There are a variety of possible objectives that drafters might pursue, ranging in nature from the instrumental (e.g., forcing lawyers to act in a particular way), to the methodological (e.g., influencing lawyer behavior by threatening discipline or encouraging introspection), to the ideological (e.g., setting purely hortatory standards). Historically, however, promulgators of the professional codes have never been clear about their overall goals.

Nevertheless, some consensus exists regarding lawyer regulation. One can list functions regulation might accomplish, but which most observers can agree are not (and should not be) the current codes' goals. One can also identify aspects of the codes that, even under Hazard's and Koniak's view, distinguish regulation of legal ethics from typical legislation.

Perhaps most importantly, the professional codes generally are not conceived as defining moral behavior; that is, setting a prescription for how "good people" should behave. Although the

10 Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. REV. 1389, 1396-98 (1992). After reviewing aspects of professional regulation that are in tension with state law, Professor Koniak argues that code drafters and disciplinary authorities have attempted not only to supplement substantive law governing lawyers, but also to trump it with their own vision. Id. at 1416-27.

11 Ted Schnayer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 LAW & SOC. INQUIRY 677, 688-725 (1989) (describing behind-the-scenes political jockeying that resulted in the adoption of the MODEL RULES). Of course, individual drafters probably have had agendas. Geoffrey Hazard and L. Ray Patterson, for example, were involved in the drafting of the MODEL RULES and may have emphasized their own priorities. See supra notes 7, 9. But the drafters as a body neither came to any agreement nor expressed the overall goals the MODEL RULES were to further.

12 Different justifications for this outlook have been offered, ranging from the notion that "moral" considerations are different than "role morality" to the view that there are reasons to identify "role morality" while leaving consideration of ethical behavior to separate analysis. See, e.g., Virginia Held, The Division of Moral Labor and the Role of the Lawyer, in THE GOOD LAWYER 60, 66 (David Luban ed., 1983) (suggesting that "nearly all morality is role morality"); Bernard Williams, Professional Morality and Its Dispositions, in THE GOOD LAWYER, supra, at 259, 263 (discussing "divergences" between professional and general morality); Susan Wolf, Ethics, Legal Ethics, and the Ethics of Law, in THE GOOD
codes' mandates for behavior often reinforce extra-code moral constraints, the codes help lawyers achieve that type of morality only indirectly. They suggest conduct that is peculiarly appropriate for lawyers, as lawyers, rather than conduct that is "ethical" for moral individuals.

Similarly, the codes do not tell lawyers how to reconcile conflicts between their personal sense of ethics and the rules. To some extent, the codes define how the legal system expects (or needs) lawyers to act if the system is to work in its intended fashion. Yet the codes are, in a sense, morally neutral. They do not establish that moral individuals should be willing to participate in the role-differentiated system. Nor do the codes speak to the issue

\[\text{LAWYER, supra, at 38, 40 (positing that legal ethics "takes as its central focus the study of what ethical principles and virtues are essential, not to being a good person, but rather to being a good lawyer"). In keeping with the orientation of the codes, this Article does not concern itself with the issue of whether any particular rule or action by a lawyer is "moral" or "ethical" in a general sense. It considers how the drafting of the codes affects the codes' ability to accomplish their ends, whatever those ends may be.}

\[\text{13 See Nelson, supra note 8, at 917-18 (describing ways in which codes reinforce society's other moral precepts).}

\[\text{14 Stated another way, professional code drafters have never purported to have the type of answers or threshold for human ethics that philosophy, religion, and criminal legislation struggle to identify. It is precisely because the codes do not attempt to resolve many moral issues that some scholars posit that the codes receive too much emphasis. One such scholar, William Simon, has argued that code prescriptions — for example, those requiring confidentiality — should merely be treated as guides for lawyers in exercising their own ethical "discretion". William Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1083-84 (1988). Thomas Shaffer suggests that code rules are secondary to moral relationships among lawyers, clients, and third parties. Thomas L. Shaffer, The Practice of Law as Moral Discourse, 55 NOTRE DAME LAW. 231 (1979). Assessing the traditional distinction between morality and "role morality," David Luban concludes that "if [the theory of role morality] is to be made coherent, a sophisticated account must be offered of the distinction, an account that spells out exactly how moral responsibility is to be assumed by the role, and how role morality is to be appealed to in offering justifications for action." David Luban, Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics, 40 MD. L. REV. 451, 466 (1981).}

\[\text{15 Wolf, supra note 12 (differentiating "legal ethics" from the "ethics of law"). See also Luban, supra note 14, at 459-61 (distinguishing morality from role morality). Cf. Schwartz, supra note 7, at 953 ("[T]he model rules deliberately eschew references to ethics; they are at least in form more a set of detailed requirements for a regulated industry than a set of ethical principles"); Steven Hartwell, Moral Development, Ethical Conduct, and Clinical Education, 35 N.Y.L. SCH. L. REV. 191, 198-39 (1990) (distinguishing advanced moral development under Kohlberg's theories from ethical conduct under the professional rules).}

\[\text{16 Wolf, supra note 12, at 40-41. See also Alan Donagan, Justifying Legal Practice in the Adversary System, in THE GOOD LAWYER, supra note 12, at 125, 124 ("no justification of [lawyering in] the adversary system is possible except in relation to the various social-juridical systems of which it is a part").}
of how participating lawyers should act, as moral individuals, when they believe the system is flawed.\textsuperscript{17}

Existing ethics codes almost universally disavow any intent to control the substantive content of the prevailing constitutional, statutory, or common law. The codes' preambles typically state the drafters' desire not to affect legal standards regarding attorney liability.\textsuperscript{18} The codes do not rely on traditional evidentiary standards in defining concepts such as confidentiality and do not purport to seek any changes in evidentiary rules.\textsuperscript{19} Throughout, one finds the expressed intent to subordinate lawyers' professional responsibilities to existing legal requirements and norms.\textsuperscript{20}

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\textsuperscript{17} See Donagan, \textit{supra} note 16, at 138 (noting the existence of some "institutional wrongs" for which lawyer must accept responsibility); Gerald J. Postema, \textit{Self-Image, Integrity, and Professional Responsibility}, in \textit{The Good Lawyer}, \textit{supra} note 12, at 286, 309 ("[i]n difficult moral situations . . . , one seeks to determine by reference to one's conception of the right and the good what all things considered is the best and proper thing to do"); William Powers, Jr., \textit{Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory}, 26 UCLA L. REV. 1263, 1264 (1979) (discussing the view that "one is never morally obligated to act in a particular way simply because law commands such action . . . . [L]aw is transparent to relevant moral considerations because it does not affect their impact on moral judgment"). Stated another way, the professional codes, for the most part, assume the ethicality of role-differentiated behavior. \textit{See} Deborah L. Rhode, \textit{Ethical Perspectives on Legal Practice}, 37 STAN. L. REV. 589, 617-26 (1985) (challenging assumptions underlying the reliance on role-differentiation in analyses of moral professional behavior). \textit{Cf.} Powers, \textit{supra}, at 1278 (defining role differentiation as a situation in which "the occupant of . . . a role must consider the effect of disobedience on undermining various benefits of law").
\textsuperscript{18} \textit{MODEL RULES, Scope} cmt. ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached"); CPR, \textit{Preliminary Statement} (asserting that the CPR does not "undertake to define standards for civil liability").
\textsuperscript{19} \textit{See}, \textit{e.g.}, CPR, DR 4-101(C)(2) (allowing disclosure of confidential information when "required by law or court order"); \textit{MODEL RULES, Rule 1.6} cmt. ("The lawyer must comply with the final orders of a court or other tribunal . . . requiring the lawyer to give information about the client").
\textsuperscript{20} \textit{See} Patterson I, \textit{supra} note 9, at 49 ("For almost a century, the bar has denied steadfastly that rules of ethics have any more than a limited legal status."). I do not mean to suggest that lawyers and code drafters never take a position on the correctness of substantive law. As a descriptive matter, much professional regulation can be explained in terms of lawyers' view of how the law should apply to them. \textit{See} Koniak, \textit{supra} note 10, at 1417-26 (interpreting code provisions and ethics opinions in terms of lawyers' "vision" of the substantive law). Particular code provisions can be explained by lawyers' desire to rechannel existing law. \textit{Id.} at 1427-41 (arguing that the bar exalts confidentiality to the point of contradicting existing state law). In practice, the codes often do have an impact, as for example in malpractice cases in which courts—contrary to the codes' disavowals—admit codes as evidence of what constitutes due care. \textit{E.g.}, Fishman \textit{v. Brooks}, 487 N.E.2d 1377, 1381-82 (Mass. 1986); Lipton \textit{v. Boesky}, 313 N.W.2d 163, 166-67 (Mich. Ct. App. 1981). However, with the exception of recent attempts to reform the codes, rulemakers universally have assumed the independence and validity of extra-code legal
Finally, lawyer codes are not designed—or at least should not be designed—to promote the economic self-interest of the bar. Although scholars have questioned numerous provisions on the grounds that they are self-serving, any self-promotion has typically been *sub rosa* and denied. To the extent drafters have sought to prevent outside regulation of the bar’s interests, they have done so ostensibly out of a belief that lawyers can understand lawyers’ professional dilemmas better than laypersons. Provisions that enhance a segment of the bar’s legal practices have been justified either on independent grounds or on the basis that the provisions are needed on an institutional basis. In short, code drafters


have always insisted that the codes be geared towards upholding general societal and systemic interests.

What, then, is left for the professional codes to accomplish? Most commentators agree that, whatever legal ethics means, it has something to do with defining lawyers’ role in a system of resolving disputes.24 For particular situations that pose a dilemma, professional codes are supposed to help lawyers choose among two or more legal courses of conduct. At least part of the codes’ function is to explain the parameters of the system and attempt to identify how, when, and why a lawyer should act differently than well-intentioned laypersons might act.

Patently, however, the codes have subsidiary purposes. One is to provide a basis for sanctioning lawyer conduct that everyone agrees is wrongful, but which typically escapes punishment.26 Another is to create a fraternity, or “profession,” in which the members perceive a norm in dealing with one another.27 The existence of this fraternity arguably facilitates the legal process.28


24 See THE GOOD LAWYER, supra note 12 (collection of essays reflecting common theme that ethical lawyering must be defined with reference to the lawyer’s “role”). I use the term “role” throughout this Article to refer to what Wasserstrom and others have described as those aspects of serving as a lawyer that may shape one’s attitudes toward appropriate conduct in a way that other laypersons do not share. Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. RTS. 1, 5-6 (1975). See also Held, supra note 12, at 60; David Luban, Introduction, in THE GOOD LAWYER, supra note 12, at 1 (describing essays in anthology and discussing fact that “lawyers are professionally obligated to do things on behalf of their clients that would be immoral if done by nonlawyers”); Williams, supra note 12, at 259.


26 See, e.g., Hazard, supra note 1, at 1250 (discussing bar’s historic emphasis on collegiality in dealings among lawyers).

27 Creating rules of behavior for the guild helps normalize and guide lawyer behavior vis-a-vis others. If, for example, lawyers can count on adversaries not to lie, they can themselves negotiate in good faith. See, e.g., MODEL RULES, Rule 4.1 (“a lawyer shall not knowingly make a false statement of material fact or law”); CPR, DR 7-102(A)(5) (same). Similarly, tribunals, clients, and third parties can rely on lawyer representations. See, e.g., MODEL RULES, Rule 3.3 (requiring candor to tribunals).

The process of creating a “professional” fraternity also tends to produce a monopoly
nally, ethics codes provide standards to which courts can refer in adopting common law doctrine.\textsuperscript{28} Most codes accept, as a given, legal standards that pre-date the codes’ adoption.\textsuperscript{29} However, when such standards are unclear or do not exist, drafters sometimes have attempted to supplement the substantive law.\textsuperscript{30}

This diversity of possible goals suggests that one must qualify the characterization of the lawyer codes as legislation. The characterization seems most apt with respect to the process by which the codes are enacted.\textsuperscript{31} Substantively, however, the codes often

of service-providers. Alternatively, it contributes to a sense that the professionals are an “elite” who deserve higher fees for providing the same service others could provide at lesser cost. See Eugene R. Gaetke, \textit{Lawyers as Officers of the Court}, 42 \textit{VAND. L. REV.} \textbf{39}, 44-45 (1989) (“By asserting that their profession is somehow imbued with a public or judicial element, lawyers distinguish themselves favorably from other occupational groups that serve their own clientele as paid agents, concerned only with their narrow private interests.”); Morgan, \textit{supra} note 21, at 707-12 (describing “legal” functions nonlawyers can perform); Zacharias, \textit{Confidentiality I}, \textit{supra} note 23, at 360 (noting the possible effect of confidentiality rules on a client’s willingness to pay fees). For obvious reasons, accomplishing that result is not an avowed or generally accepted purpose of the ethics codes.

\textsuperscript{28} Patterson I, \textit{supra} note 9, at 55 (describing ways courts have used codes in setting legal standards).

\textsuperscript{29} See authorities cited \textit{supra} notes 18-20 and accompanying text. Cf. Koniak, \textit{supra} note 10, at 1422-41 (suggesting that the codes and their interpretation often are designed to change, trump, or minimize the thrust of the substantive law).

\textsuperscript{30} One notable example is the bar’s development of a virtual monopoly in defining conflicts of interest. Courts often have deferred to the ethical conflict standards in determining when lawyers should be disqualified from representing particular clients. See, e.g., J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975) (relying upon CPR’s conflict rules); Kroungold v. Triester, 521 F.2d 763, 765-66 (3d Cir. 1975) (relying on ABA Canons); Zions First Nat’l Bank v. United Health Clubs, Inc., 505 F. Supp. 138, 140 (E.D. Pa. 1981) (resting disqualification decision on state disciplinary rules).

It is largely when controlling legal standards are absent that code drafters have played a legislative role. Cf. Koniak, \textit{supra} note 10, at 1419, 1461-78 (noting that the bar may resist or try to overrule state law, but is most likely to do so when the state’s “commitment” to its view of the correct law is weak). For example, the codes’ definition of the duty of confidentiality thus far seems to have immunized lawyers from the duty to protect third parties that courts have imposed on other professions. See Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976) (imposing duty on psychiatrist to protect patient’s victim). Cf. Hawkins v. Kings County, 602 P.2d 361, 365 (Wash. Ct. App. 1979) (suggesting lawyer may have a duty to warn potential victim). Cf. \textit{also} Nix v. Whiteside, 474 U.S. 157, 175 (1986) (holding that defense counsel who threatened to disclose client’s intention to commit perjury had satisfied the constitutional requirement of effective representation by following the mandates of the state professional code).

\textsuperscript{31} Recent codes have been adopted under a media spotlight. See, e.g., Stephen Gillers, \textit{What We Talked About When We Talked About Ethics: A Critical View of the Model Rules}, 46 \textit{OHIO ST. L.J.} \textbf{243}, 244 (1985) (describing spotlight placed on proposals leading to adoption of the \textit{MODEL RULES}); Schneyer, \textit{supra} note 11, at 695-701, 734 (same). The proposals of drafting committees have been scrutinized by an active body of the very lawyers the codes regulate. Schneyer, \textit{supra} note 11, at 708-14; Hazard, \textit{supra} note 1, at 1259 (attorneys “reacted with shock and outrage” when committee drafting the \textit{MODEL
do not operate like freestanding legislation. Even when the codes reflect a clear moral consensus—for example, "thou shalt not steal from clients"—that morality generally also is reflected in criminal and civil liability rules. Because the bar has limited enforcement resources and has goals in addition to producing moral behavior, the codes rely on noncode constraints to limit and punish misconduct; they tend to defer the actual control of improper acts to other regulators. As a rule, prohibitive language in the codes

RULES proposed new rules "acknowledging legal realities"). It may therefore be inevitable that interest groups lobby for and affect the codes' substantive provisions. Sometimes provisions clearly are driven by hidden motivations that benefit particular groups of lawyers. See supra authorities cited at note 21. See also Schnayer, supra note 11, at 709-11 (describing political motivations of opponents to the MODEL RULES). In the procedural sense, the way codes are adopted now reflect a legislative model.

Perhaps the most dramatic example of this "procedural-legislative" model of lobbying, compromise, and politics occurred with respect to the MODEL RULES relating to attorney-client confidentiality. As originally proposed, the rules allowed lawyers to reveal confidential information to prevent client fraud. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 47-48 (1987). The ABA's members rejected the disclosure provisions in favor of strict confidentiality. MODEL RULES, Rule 1.6 (permitting disclosure only to prevent "imminent death or substantial bodily harm"). However, in drafting the comments to the adopted rule, the drafters restricted the membership's decision by authorizing lawyers aware of client fraud to "withdraw or disaffirm any opinion, document, affirmation, or the like." MODEL RULES, Rule 1.6 cmt.

I should not be misunderstood to say that scholars who have focused on the changing process of code drafting fail to perceive that the substantive orientation of the codes has also shifted. Indeed, Geoffrey Hazard notes the precise change that I address in this Article; that is, the movement from codes stating abstract norms to conduct-specific, purportedly enforceable rules. Hazard, supra note 1, at 1249-50. Similarly, Susan Koniat discusses the degree to which the bar has attempted to refocus substantive law. Koniat, supra note 10, at 1391. My point is simply that these scholars' designation of the codes as "legislation" stems in large measure from the way drafters have promulgated new rules and hope they will be enforced, rather than from perceived changes in the drafters' guiding goals and principles. See, e.g., Hazard, supra note 1, at 1252-60 (discussing drafting process of the MODEL RULES).

See Nelson, supra note 8, at 917 (relating particular professional regulations to proscriptions against theft).

Often, that is the case even when the codes expressly mandate or forbid particular behavior. For example, the codes universally forbid lawyers to file frivolous lawsuits and make frivolous claims. MODEL RULES, Rule 3.1; CPR, DR 7-102. However, disciplinary bodies rarely have devoted resources to implementing these provisions. In recent years, enforcement has become routine under the separate rubric of Fed. R. Civ. P. 11. See generally Neal H. Klausner, The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility, 61 N.Y.U. L. REV. 500 (1986); Victor H. Kramer, Note, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 MINN. L. REV. 793 (1991).

Sometimes the bar need not write or enforce code provisions because other legal incentives exist to promote appropriate lawyer behavior. The potential for malpractice liability or criminal sanctions may even cause lawyers to act against the apparent mandate of the codes — for example to "maintain inviolate the confidence, and at every peril to
serves primarily as a public relations device.\textsuperscript{35}

Typically, rulemakers are concerned with situations in which they lack anything approaching consensus concerning the correct behavior. Unlike legislators, code drafters perceive their goal as providing guidance for lawyers in choosing from among several permissible courses of conduct.\textsuperscript{36} This approach assumes that most lawyers will act ethically, in a professional sense, if only they know how.\textsuperscript{37} A more cynical view would hold that lawyers will only respond to those rules that parallel their self-interest or those that can be enforced by sufficient sanctions to make compliance worthwhile.\textsuperscript{38} Yet the existing empirical evidence suggests that

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    \item By “public relations device,” I simply mean the inclusion of a provision that seems to serve the public interest and enhances the image of lawyers, but which has little practical effect.
    \item Stated another way, the drafters hope to help lawyers choose from among different courses of conduct upon the appropriateness of which the rulemakers cannot agree. For example, lawyers disagree over when it is appropriate to press client interests in ways that harass opponents or inconvenience adversary lawyers, or in situations where the client interests are minimal. The codes respond to these disagreements by stating principles — often conflicting principles — rather than adopting rules requiring particular behavior. \textit{Compare}, e.g., MODEL RULES, Rule 1.3 cmt. (requiring zeal) and MODEL RULES, Rule 1.4 cmt. (client should be empowered to decide objectives of representation) \textit{with} MODEL RULES, Rule 1.3 cmt. (lawyer need not press for every advantage) and MODEL RULES, Rule 4.4 (lawyer should not pursue objective of harassing or burdening third person). \textit{See also} Simon, supra note 14, at 1083-84 (arguing that lawyers should view most ethics regulations as guides for the exercise of personal discretion).
    \item The \textit{Code of Professional Responsibility} expresses this assumption as follows: “The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor . . . . So long as its practitioners are guided by these principles, the law will continue to be a noble profession.” CPR, Preamble at 1-2. \textit{See also} Fred C. Zacharias, \textit{Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?}, 44 VAND. L. REV. 45, 107 (1991) (discussing hortatory nature of ethics codes and noting that “[u]nethical lawyers always will ignore the codes when the codes conflict with their self-interest; scrupulous attorneys will try to follow the codes’ commands”).
    \item \textit{See} Abel, supra note 21, at 643-44 (“Rules are less likely to influence behavior the more they mandate conduct opposed to self-interest and then create loopholes for those intent on evasion . . . .”). \textit{Cf.} Patterson II, supra note 9, at 725 (“The ultimate function of a code of legal ethics is the same as that of any set of ethical rules: it is to keep
\end{itemize}
people, in general, tend to be more socialized.\(^9\) Common experi-

within reasonable bounds the law of self-interest that operates at all times and in all places.")

This "bad man" approach to the codes, though a minority view, is plausible. It suggests that there is little of value in the relatively vague professional codes. Because proponents of this view do not accept that lawyers respond to unenforced guidance in the codes, they will consider much of this Article's analysis besides the point.

\(^{39}\) Developmental psychology studies support the proposition that morally-developed adults respond even to unenforced ethics norms that do not further their self-interest. Lawrence Kohlberg, for example, identifies five empirically testable stages of advancing moral development, from infancy to adulthood. 2 LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT 174-76 (1984) [hereinafter KOHLBERG, ESSAYS]; Lawrence Kohlberg, Stage and Sequence: The Cognitive-Developmental Approach to Socialization, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347 (David A. Goslin ed., 1969) (longitudinal study confirming Kohlberg's earlier findings); Charles A. Levine et al., The Current Formulation of Kohlberg's Theory and a Response to Critics, 28 HUM. DEV. 94 (1985) (updating Kohlberg's theories); JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965) (analyzing moral growth and development with age). Kohlberg estimates that a majority of society stops developing at Stage III or IV. 2 KOHLBERG, ESSAYS, supra, at 172. Persons who act according to a "bad man theory" correspond to Stage I and II development, in which the threat of punishment or immediate expectation of reward determines appropriate conduct. \(^{17} Id. at 624-26.\) In contrast, persons at Stage IV have the capacity to respect personally unfavorable ethics norms; that is, to obey the law and community standards for the common good. \(^{18} Id. at 631-33.\) See also James R. Rest, Morality, in 3 HANDBOOK OF CHILD PSYCHOLOGY 556, 565-69 (Paul H. Mussen ed., 4th ed. 1983) (reviewing the vast literature on moral development). The studies do not establish the extent to which persons who reason at an advanced stage translate their intellectual response into conduct. Peter Kutnick, The Relationship of Moral Judgment and Moral Action: Kohlberg's Theory, Criticism, and Revision, in LAWRENCE KOHLBERG: CONSENSUS AND CONTROVERSY 125, 126-127 (Sohan Modgil & Celia Modgil eds., 1986) (criticizing Kohlberg); Willging & Dunn, supra, at 307-08. Thus, the psychological literature casts doubt on the "bad man" view of the world, but leaves the truth open to speculation.

Nevertheless, the psychological literature does not conclude the issue. Kohlberg and those who have followed him primarily address the development of individuals' moral reasoning. 2 KOHLBERG, ESSAYS, supra, at 170. See also James R. Rest, Morality, in 3 HANDBOOK OF CHILD PSYCHOLOGY 556, 565-69 (Paul H. Mussen ed., 4th ed. 1983) (reviewing the vast literature on moral development). The studies do not establish the extent to which persons who reason at an advanced stage translate their intellectual response into conduct. Peter Kutnick, The Relationship of Moral Judgment and Moral Action: Kohlberg's Theory, Criticism, and Revision, in LAWRENCE KOHLBERG: CONSENSUS AND CONTROVERSY 125, 126-127 (Sohan Modgil & Celia Modgil eds., 1986) (criticizing Kohlberg); Willging & Dunn, supra, at 307-08. Thus, the psychological literature casts doubt on the "bad man" view of the world, but leaves the truth open to speculation.

Probably, the answer to how lawyers act lies somewhere between the bad man theory and the ideal of the high-minded, socialized professional. One would suspect that lawyers initially react to ethical dilemmas intuitively and then seek "a black letter [ethics] rule to support [the] intuition." Patterson II, supra note 9, at 703. The intuition of some lawyers will be to favor their self-interest; others will wish to act "well." The deciding factor may be how many lawyers fit in each category, because peer pressure not only may influence the individual's view of appropriate conduct, but also may convince the lawyer that his or her intuitive ethical response is consistent with self-interest. See Gordon, supra note 22, at 22 (emphasizing role of peer pressure in shaping lawyer conduct); Luban, supra note 14, at 461 (discussing interrelationship between codes, peer pressure, and economic self-interest); Nancy Moore, The Usefulness of Ethical Codes, 1989 ANN. SURV.
ence bears out the code drafters' assumptions that, at least on occasion, lawyers do consult and rely upon professional codes for guidance even when the codes pose no threat. 40

To the extent the professional codes appropriately rest on the assumption that lawyers will respond to guidance, clear rules and punishment for violation of those rules are not always necessary to produce desirable conduct. 41 Indeed, because code drafters may

40 Compare Abel, supra note 21, at 647-50 (suggesting that rules have little effect because they are rarely enforced) with Deborah L. Rhode, Why the ABA Bother: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689, 708-10 (1981) (describing ways, even absent full enforcement, that professional codes have "instrumental significance").

We often take the influence of professional regulation for granted. One overlooked impact is the way that regulation encourages lawyers to consult ethics codes. For example, a recent survey asked upstate New York lawyers about their obligation of confidentiality in a series of scenarios in which the New York code required confidentiality. Zacharias, Confidentiality I, supra note 23, at 353 (discussing authorities who have questioned the absence of adequate empirical evidence).

Second, many code requirements become so engrained in the professional ethos that lawyers adopt them as givens, even though compliance is not always enforceable or in the lawyers' self-interest. Thus, lawyers draw the line at lying to other lawyers or the court. MODEL RULES, Rules 3.3, 4.1; CPR, DR 7-102. With some exceptions, lawyers avoid paying legal costs for clients even if doing so would be financially advantageous in the long run. MODEL RULES, Rule 1.8(e); CPR, DR 5-103(B). Lawyers often go overboard in avoiding conflicts of interest, turning away clients they could represent with impunity. MODEL RULES, Rule 1.7; CPR, DR 5-101. The principle of zealous advocacy is punctiliously obeyed — sometimes as a means for justifying conduct the lawyers wish to pursue, but often because of the engrained sense that client-centered behavior is ethically required. See Zacharias, Confidentiality I, supra note 23, at 381-82 (33% and 44% of surveyed lawyers maintained confidentiality in situations in which they wished to disclose or believed they should be required to disclose).

The bottom line is that while lawyers often may act unthinkingly or out of self-interest, the characterization of lawyers as pure hired guns or automatons who never exercise independent judgment is overly simplistic. See Schneyer, supra note 39, at 1567-71 (challenging hired gun characterization); Gordon, supra note 22, at 72-73 (questioning view that lawyers act without responsibility or independence).

41 Ehrlich and Posner's seminal work on legal rulemaking assumes, in contrast, that
be unwilling to select a single type of behavior as the "correct behavior," they often opt for rules that promote introspection by lawyers—thought about what conduct is "professional" given the lawyer's "role."\textsuperscript{42} The desire for, or expectation of, discipline in these categories of rules is limited to extreme cases.

This orientation, in part, explains why professional codes must be evaluated differently than ordinary legislation and administrative schemes—even those that include legal "standards" as flexible as the standards in the codes.\textsuperscript{43} Flexible legal standards ordinarily rest on a premise that courts or some other lawmaking body will flesh out the standards and enforce more specific guidelines for behavior. Although those standards may serve the same administrative function as the codes (\textit{i.e.}, setting a norm of conduct that enables parties to deal with each other in a controlled, foreseeable manner), they anticipate that relatively firm, enforceable rules will develop over time.\textsuperscript{44} In contrast, professional code provisions rarely
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\textsuperscript{42} See generally Loder, supra note 7 (arguing for introspective rules). The mandate that prosecutors "do justice" best exemplifies such a rule. \textit{See infra} text accompanying notes 108-17. Other examples include the requirement that lawyers act "competently," "loyally," and "zealously." \textsc{Model Rules}, Rules 1.1, 1.7 cmnt.; \textsc{CPR}, DR 5-101(A), DR 7-101. Some scholars believe that professional regulation is best used to inform individual lawyer's discretion. \textit{See generally} Simon, supra note 14.

\textsuperscript{43} Examples of flexible standards include the reasonableness standards in common law tort rules and the \textsc{Uniform Commercial Code}. \textit{See}, e.g., \textsc{U.C.C.} § 1-204(3) (1989) (defining actions taken "seasonably" to mean "within a reasonable time"); \textsc{U.C.C.} § 1-205(5) (1989) ("usages of trade" ought to govern interpretations of contracts); \textsc{U.C.C.} § 2-602(1) (1989) (rejection of goods must be within a "reasonable time"); \textsc{U.C.C.} § 9-110 (1989) (requiring descriptions of goods to "reasonably identify" them).

\textsuperscript{44} \textsc{U.C.C.} § 1-102, cmnt. 1 (1989) (noting that \textsc{U.C.C.} is intended to enable courts to develop law embodied in the Code in the light of unforeseen and new circumstances and practices); \textsc{Grant Gilmore}, \textsc{The Ages Of American Law} 85 (1977) (describing Karl Llewellyn, the \textsc{U.C.C.'s} principal proponent, as envisioning a "case law code" which would abrogate obsolete rules and allow courts flexibility to devise new rules for changing conditions and business practices); Richard L. Danzig, \textit{A Comment on the Jurisprudence of the Uniform Commercial Code}, 27 \textsc{Stan. L. Rev.} 621, 624 (1975) (discussing \textsc{U.C.C.} drafters' anticipation of development of rules). \textit{See}, e.g., Commonwealth Propane Co. v. Petrosol Int'l, 818 F.2d 522, 529-30 (6th Cir. 1987) (limiting buyer's time to make "seasonable rejection" under \textsc{U.C.C.} § 1-204(3) to sufficient time to determine whether seller or baillee intends to satisfy contract's requirements); Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 791 (9th Cir. 1981) (interpreting \textsc{U.C.C.} § 1-205(5) as including local "usages of trade" that are not the usage of parties' particular trade); EPN-Delaval, S.A. v.
ly are fleshed out; clarifying ethics opinions are scarce, ad hoc, and generally inaccessible.45 The professional codes, in many instances, truly intend to avoid objective rules for behavior and seek to leave the determination of appropriate conduct to individual lawyers’ own consciences.46

Viewed fairly, ethics codes thus are typical legislation only when they try both to fix specific behavior and to anticipate at


45 Until recently, opinions of the bar and bar disciplinary committees were extremely difficult to identify. Few states collected or indexed decisions in a published format. Even when bar associations collected decisions, few lawyers knew of their existence or location. The opinions themselves tended to be limited in number and scope; they focused on extreme violations of unambiguous ethics or criminal rules. Less obvious code provisions were not, and were not expected to be, interpreted in the context of disciplinary proceedings. See Luban, supra note 14, at 452 (“[e]nforcement is generally reserved for the most egregious violations, and consequently the body of case law in professional responsibility is small and the litigation is not very complex”). Cf. Schwartz, supra note 7, at 958 (noting that discipline has rarely been imposed).

This state of affairs has begun to change. Several legal reporters now attempt to canvass ethics decisions throughout the country. E.g., LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) [hereinafter ABA/BNA MANUAL]; RECENT ETHICS OPINIONS (ABA) (1991); NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (UPA) (1993). Some states have invested resources in enforcing more rules and publishing decisions. See, e.g., CAL. BUS. & PROF. CODE § 6086.9 (West 1975) (referring to California’s legislatively created State Bar Discipline Monitor); CALIFORNIA COMPENDIUM ON PROFESSIONAL RESPONSIBILITY (1987) (containing post-1983 opinions of California State Bar and several local bar associations); ASS’N OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS (containing post-1980 opinions of various local bar associations); REVIEW OF SELECTED 1986 CALIFORNIA LEGISLATION: BUSINESS ASSOCIATIONS AND PROFESSIONS, 18 PAC. L.J. 467, 469-72 (1986-87) (discussing establishment of a full-time California State Bar Court to hear disciplinary cases). Nevertheless, the number and accessibility of interpretive ethics opinions remains limited. Perhaps more significantly, disciplinary authorities and ethics opinions are likely to continue to focus on the clear instances of lawyer misconduct despite the fact that much professional regulation is intended to guide lawyer behavior in the more ambiguous situations. See Wilkins, supra note 25, at 821 (assuming enforcement officials will only impose sanctions when a lawyer has violated a relatively unambiguous professional norm); Patterson II, supra note 9, at 709 (discussing the guidance function of ethics codes).

46 See Zacharias, supra note 37 (discussing hortatory code provisions). Cf. Gail L. Heriot, A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches, 1992 B.Y.U. L. REV. 917, 935-36 (noting that a lawmaker with “a definite sense of the right way and the wrong way to resolve each [case]” may adopt a standard, and thereby give discretion to a law administrator, because of the difficulty of articulating “a full set of rules to apply to every set of circumstances”).
least some measure of discipline for violation of the rules.\textsuperscript{47} To the extent code drafters expect codes to have an effect (\textit{i.e.}, in promoting some goal) even without significant prospects of sanctions, the regulation departs from traditional lawmakering.\textsuperscript{48} The more codes focus on "defining lawyers' roles" and creating a "fraternity," the less they look like ordinary laws or administrative rules. As a consequence, the function code drafters have in mind for the regulation should shape how code rules, and reforms to those rules, are framed.

III. THE MEANING OF SPECIFICITY IN CODE-DRAFTING

At the outset, let me define what I mean by "specificity" in code-drafting. One can identify four elements commonly attributed to specificity in legal rules: (1) language—the absence of vague terms that defy understanding,\textsuperscript{49} (2) observability—the ease of determining whether a rule has been complied with,\textsuperscript{50} (3)
scope—the range of events or conduct that a rule covers, and (4) particularity—the existence of a mandate for or prohibition against particular acts. Scholars typically have focused on the first and second aspects. I concentrate on the latter two. For purposes of this Article, I assume that the language of a code or provision in question is clear; everyone knows what it means and when it applies. I also assume that the code is self-sufficient. In other words, the drafters do not anticipate a common law development that will give the code (or provision) additional meaning. My focus is on the extent to which the terms of the code designate particular lawyer behavior in response to the covered situation as appropriate or inappropriate.

As I have already suggested, the issues raised by specificity in drafting professional rules are not identical to those raised by the more general debate over "rules" and "standards" in lawmaking. The rules-standard debate focuses upon the likely effect of particular laws in inducing agreed-upon, desirable behavior. The terms of the debate are relevant to those parts of the professional codes that are intended to control lawyer behavior. However, some code provisions simply seek to influence behavior—sometimes in an un-

51 The most notable study in this vein is Ehrlich and Posner's seminal article on the use of language and the ability of targets or enforcing bodies to identify the requirements of law. Ehrlich & Posner, supra note 41, at 261.

Professor Abel challenges the usefulness of the proposed MODEL RULES on the grounds that they "are drafted with an amorphousness and ambiguity that render them virtually meaningless." Abel, supra note 21, at 641-42. Part of Abel's claims can be seen as linguistic; that is, that the terms of some of the rules are so vague as to be indeterminate. Other parts of Abel's analysis share the focus of this Article; namely, the effectiveness of using comprehensible terms that provide varying degrees of, and sometimes too little, guidance. The difference in these aspects of specificity analysis are important to note, lest one confuse my suggestion that the modern codes tend to mandate more specific conduct, see supra text accompanying notes 1-3, with Abel's perfectly consistent claim that some of the new code provisions are linguistically vague.

52 Thus, in Frederick Schauer's terms, I do not focus on how codes define the factual predicates of the rules, in the sense of defining whether a rule binds a lawyer in a particular situation. See SCHAUER, supra note 50, at 24. I assume situations in which reasonable lawyers can look at a rule and agree that, in their circumstances, the rule applies (or does not apply). I address the information that the applicable rules give the lawyers about how they should act.

defined direction—by shaping lawyer attitudes. These provisions set guidelines for conduct about which the rulemakers do not share, and do not expect to attain, a consensus. They contemplate that the targeted lawyers themselves will identify the relevant conflict of values and choose a permissible course of conduct.

54 See, e.g., CPR, EC 5-1 ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties"); CPR, EC 7-1 (a lawyer "is to represent his client zealously within the bounds of the law"); MODEL RULES, Rule 1.3 ("A lawyer shall act with reasonable promptness and diligence"); MODEL RULES, Rule 1.7 cmt. ("Loyalty is an essential element in the lawyer's relationship to a client").

Of course, many laws address attitudes. Some, for example, attempt to guide interpreters of vague provisions on how they should develop further principles. See, e.g., U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/CONF. 97/18, Annex 1, Art. 7 (1980), reprinted in 19 I.L.M. 668, 673 (1980) (telling interpreters of the Convention to have regard for need to promote uniformity, foster good faith in trade, and follow Convention's principles of developing trade "on the basis of equality and mutual benefit" and removing "legal barriers"); U.C.C. § 1-102(1) (1992) (urging courts to construe the code liberally "to promote its underlying purposes and policies"); Baird & Weisberg, supra note 53, at 1227-28 (discussing U.C.C. "standards" that suggest criteria by which courts can decide cases guided by the code drafters' intended goals). What makes professional codes unique is that they seek to shape the attitudes of their targets and expect the targets to engage in behavior because the targets, rather than the code or a code interpreter, determine it is the appropriate thing to do.

Similarly, many rules reflect a compromise among disagreeing drafters, establish fixed principles that seemingly ignore necessary exceptions, or set standards that leave the task of agreeing on exceptions for a future time. See SCHAUER, supra note 50, at 42-52 (discussing the relationship between regulatory generality and "entrenched" exceptions). Unlike professional code drafters in the situations I discuss, however, the drafters of most "incomplete" rules anticipate that, despite their current disagreement, a majority view will develop over time and become part of the law.

55 See Robert H. Aronson, Professional Responsibility: Education and Enforcement, 51 WASH. L. REV. 273, 289 (1976) (describing lack of consensus underlying some professional rules, with the result that lawyers can justify varying conduct in the same situation); Loder, supra note 7, at 324 (suggesting that "[t]he search for a consensus-based body of enforceable legal rules may . . . be a quest for the unattainable"); Patterson II, supra note 9, at 709 (noting that the ethics codes are primarily directed at "the unusual situations that call for the lawyer's exercise of discretion"). Given the limited number of ethics decisions most states issue, drafters of these open provisions probably envision little future development of precise rules. See supra text accompanying notes 43-46. Cf. Danziger, supra note 44, at 624-27 (discussing view of U.C.C. drafters that law would be discovered over time, enabling drafters to adopt a more passive role in defining specific rules for conduct).

56 For example, the MODEL RULES note the lawyer's duty of zeal and loyalty to clients, MODEL RULES, Rules 1.3 cmt., 1.7 cmt., but also state that lawyers are "not bound to press for every advantage." MODEL RULES, Rule 1.3 cmt. Similarly, lawyers must "keep a client reasonably informed about the status of a matter," MODEL RULES, Rule 1.4, but "may be justified in delaying transmission of information when the client would be likely to react imprudently." MODEL RULES, Rule 1.4 cmt. Clients have the right to make decisions concerning the objectives of litigation, MODEL RULES, Rule 1.4 cmt., but lawyers
Almost by definition, structuring a code with such components is a different enterprise than drafting ordinary laws.\footnote{57}

This Article, therefore, studies more than the effect of linguistic clarity in bringing about particular conduct.\footnote{58} It addresses the relationship between substantive specificity, as I have defined it, and the most significant factors that bear on the peculiar purposes of professional regulation. Highlighting that relationship should, at a minimum, help future drafters write more coherent codes. Perhaps more important, it will focus debates over proposed reforms by forcing proponents and opponents alike to identify the purpose of the reforms and to support their claims that the reforms will or will not work.

Consider, for example, the role-setting function of the codes. In order to establish appropriate responses to a context or set of situations, drafters need not always designate specific, enforceable conduct. The rules can, alternatively, define the lawyer's role by must decide if particular decisions concern those objectives or merely the means of carrying out the lawsuit. Id.

\footnote{57} The uniqueness of the codes rest on the combination of generalized rules and the absence of common law development of the rules. Many legal principles are vague or attempt to shape attitudes, but rest on the assumption that courts will define the content of the principles over time (e.g., a "reasonableness" standard). Similarly, many laws are sufficiently clear that the drafters envisage no substantial future development (e.g., no "intentional murder"). The ethics codes are unusual in that many provisions state no clear prescriptions, but also do not expect future courts or bar committees to provide substantial guidance.

One consequence is in the considerations relevant to analyzing the effects of generalized versus specific rules. Gail Heriot notes that lawmakers, in selecting a law along the rule-standard continuum, typically will need to consider:

1. the ability of the formulation to guide law administrators to achieve appropriate case outcomes;
2. the ability of the formulation to guide actors towards appropriate conduct;
3. the relative importance of guiding law administrators to achieve appropriate case outcomes and guiding actors to appropriate conduct;
4. the practical ability of the formulation to attract the consensus of fellow lawmakers who make up the law-making body.

Heriot, supra note 46, at 994 (footnotes omitted). When we compare a specific legislative or judicial rule (e.g., a categorical approach) to a "standard" (e.g., a balancing approach), other key considerations may be institutional; that is, how the subsequent interpreter will be able to reach effective decisions, consistent with their role in a democratic system. See Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 24, 63-68 (1992) (discussing rules and standards in constitutional decisionmaking). However, because intermediate interpretation of a code (i.e., "administration") is unlikely to occur, only substantive considerations seem relevant in deciding upon code specificity; that is, how provisions will affect the targets' actions. Heriot's second and third factors and institutional concerns become less important.

\footnote{58} See H.L.A. Hart, THE CONCEPT OF LAW 123 (1961) (discussing "uncertainty" of the law's ability to communicate in a way that always achieves the law's intended end).
expressing principles, prescribing postures lawyers should adopt towards particular considerations, setting priorities among potentially conflicting interests, and identifying goals lawyers should pursue or avoid. Indeed, overly precise codes have the defect of appearing all-inclusive, rather than setting standards lawyers can apply in a variety of situations.

On the other hand, drafters sometimes may prefer provisions that direct particular conduct because they are simpler to enforce. Narrow provisions make sense when the resolution of an issue is obvious and when special aspects of a given situation demand a uniform response to a recurring dilemma that has many feasible answers.\textsuperscript{59} The desire for uniform adherence to the rules in these situations means that code drafters must focus more on the enforceability of the rules and the cost of enforcing them.\textsuperscript{60} Conversely, when drafters cannot discern a consensus over appropriate behavior and there is no imperative to adopt a uniform rule, the drafters may be justified in leaving more outcomes to individual discretion.\textsuperscript{61}

\textsuperscript{59} Uniformity may be desirable for a variety of reasons other than a moral imperative. By informing clients how lawyers will act in a particular situation, professional codes may help clients order their own conduct and exercise their own autonomy (e.g., in deciding what to tell their lawyer). Moreover, clients sure of uniform lawyer behavior in one respect can choose their lawyer based upon other criteria. Reassured by the code, clients may also be more willing to trust and use lawyers. Concomitantly, requiring uniform conduct may enable other lawyers to trust and depend on particular responses from their adversaries, such as truthfulness in conducting negotiations. In the long run, these mutual expectations can smooth the practice of law and the operation of the legal system.

\textsuperscript{60} The costs of enforcing rules include the expense of accepting complaints, investigating violations, making decisions on which complaints to pursue, providing due process, supervising sanctions, responding to appeals, and foregoing opportunities for other bar activities that require resources.

\textsuperscript{61} A code's failure to set priorities for situations in which lawyers lack other sources of guidance may, however, have costs for individual lawyers and for the system itself. See infra text accompanying notes 110-11.

One example of the tension between providing guidance and avoiding over-regulation is the question of how the generalized ethical duty of "zealous representation" applies when a criminal defense lawyer is tempted to advise a witness to assert a fifth amendment privilege against self-incrimination in a way that borders on obstruction of justice. Bruce Green chides the codes for failing to provide guidance to lawyers in this situation and thereby leaving them at the mercy of ambiguous criminal laws. Bruce Green, Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law, 69 N.C. L. Rev. 687, 689-90 (1991). Considering the package of ethics regulation as a whole might lead one to view the codes' approach more favorably. Criminal defense lawyers must assess the dividing line between zeal and improper conduct in many aspects of their practices. See, e.g., Monroe Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966) (discussing difficult
These observations suggest a "specificity continuum" for provisions in the professional codes. The extremes of the spectrum are easy to identify, while the middle ranges blur at the margins. Yet four basic categories of specificity exist, to which I refer as Points I through IV for ease of discussion. The drafters' choice of specificity typically reflects the degree to which they intend the codes to establish uniform conduct, on the one hand, or to rely on extra-code constraints to establish and enforce specific standards of behavior, on the other. Concomitantly, the choice of specificity ordinarily determines how a provision's mandate will, or can, be enforced.

**FIGURE A**

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<tr>
<th>I</th>
<th>II</th>
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<th>IV</th>
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<tbody>
<tr>
<td>Offers Axiom</td>
<td>Suggests Process</td>
<td>Suggests Result</td>
<td>Requires Result</td>
</tr>
<tr>
<td>(i.e. suggests no result)</td>
<td>(i.e. suggests factors to weigh)</td>
<td>(i.e. prioritizes and calls for self-restraint)</td>
<td>(i.e. threatens discipline)</td>
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ethics scenarios for criminal defense lawyers). To the extent the codes provide a laundry list of solutions, they run the risk of (1) suggesting that all unspecified conduct is permissible, and (2) muting lawyers' need to hunt for appropriate solutions. See Loder, supra note 7, at 312 ("rules which embody minimum standards . . . may discourage practitioners from reaching beyond moral mediocrity"). The significance of the codes' generalized approach in the obstruction of justice context is not that the codes unthinkingly defer to the criminal law to set limits, Green, supra, at 712, but that the codes require lawyers to research the law. Doing so arguably encourages lawyers to take seriously their legal obligations and to measure those obligations against their duties to clients. To the extent this approach risks ambiguity and nonuniform responses by lawyers, that simply may reflect the difficult, ambiguous, and case-sensitive nature of the problem.

62 It is possible for this Article to discuss a single "specificity continuum" only because its discussion is limited to a particular type of specificity; namely the extent to which codes identify and designate desired conduct. If one considered the subject of specificity more broadly, one would have to envision a multidimensional graph. The four elements identified above would all be relevant to ascertaining the degree of specificity of particular rules. See supra text accompanying notes 49-50. Other attributes might also play a part, though these may be subsumed elsewhere within the four elements; for example, the degree to which the instructions in a rule are fact-based or rely on normative factors (e.g., reasonableness).

63 I use the term "extra-code constraint" to refer to the entire body of noncode regulation that affects lawyer behavior, including criminal laws, malpractice and other civil liability, administrative rules, and noncode-related institutional pressures. For a discussion of the relative merits of different mechanisms for disciplining lawyer misconduct, see generally Wilkins, supra note 25.

64 Illustrations in the text of this Article will be labelled alphabetically (i.e., Figures A through F). Illustrations in the margin will be labelled numerically (i.e., Figures 1 through 6).
As Figure A illustrates, Point I reflects a code provision that establishes a general role for lawyers, but leaves all further definition and implementation of lawyers' responsibilities to the courts or legislatures. For example, most professional codes prescribe a duty of lawyers to act competently and loyally towards their clients. To the extent other provisions fail to flesh out the meaning of these duties, the codes rely upon malpractice, tort, criminal liability, and constitutional standards, among others, to constrain lawyer behavior and set parameters for how lawyers should implement their role. Point I rules do not themselves identify behavior for which a lawyer may be punished.

At the Point IV extreme, a code sets out specific, understandable rules that identify or require behavior, violation of which should result in discipline. For example, "lawyers must maintain clients' confidences." Point IV rules may leave lawyers with a limited range of discretion. However, for enforcement of conduct-specific rules to be workable, the rules must be narrow and relatively unambiguous.

Between the poles lie two related approaches. At Point II, a code defines the relevant criteria lawyers should consider but omits any (or provides only limited) prescriptions for appropriate results in any given set of circumstances. The current rules governing delay tactics and courtesy to other lawyers typify this approach: lawyers are told delay and discourtesy are wrong, but also that lawyers must take client interests into account in avoiding them. In actual cases, the lawyer's exercise of informed discretion will determine the outcome.

Point III reflects a more specific, but still not outcome-deter-

65 See, e.g., MODEL RULES, Rule 1.1; CPR, DR 6-101(A).
66 See, e.g., MODEL RULES, Rule 1.7 cmt.
67 See, e.g., MODEL RULES, Rule 1.6; CPR, DR 4-101(B).
68 For example, strict confidentiality rules that forbid disclosure of client information may contain limited exceptions. See, e.g., MODEL RULES, Rule 1.6(b)(1) (lawyers may disclose to prevent imminent death or substantial bodily harm). Similarly, MODEL RULES, Rule 3.7 forbids lawyers to act simultaneously as a lawyer and witness in a case, but contains limited exceptions to the general, strict rule.
69 See Ehrlich & Posner, supra note 41, at 271 (describing how enhancing detail in a rule may make enforcement more difficult). Thus, for example, MODEL RULES, Rule 1.8(a) allows lawyers some discretion to enter into "fair and reasonable" business transactions with clients, but adds a series of specific provisions that clearly define how the lawyer must act.
70 Compare, e.g., MODEL RULES, Rules 3.2 and 4.4 with MODEL RULES, Rule 1.3 cmt. Compare CPR, DR 7-101(A)(1) and DR 7-102(A)(1) with CPR, DR 7-101(A)(1).
The code not only suggests criteria for consideration, but also sets priorities among the relevant factors. Thus, for example, lawyers are required to keep clients informed about matters and to assist clients in making informed decisions about the representation. However, the level of information imparted to clients is left largely for the individual lawyer to decide. In other words, Point III rules suggest results for most cases, but recognize that the need for leeway in others forecloses a strict, enforceable standard. In nonextreme cases, the only mechanism for implementing a hortatory provision of this type is self-regulation on the part of lawyers and their peers.

As one would expect in codes that have varying purposes, the prevailing rules reflect a mix of these approaches. Moreover, the demarcation between points on the spectrum is not always obvious, particularly with respect to the intermediate points on the spectrum. For example, a rule requiring lawyers to "provide competent representation" can be perceived to fall at Point IV; although the standard may be difficult to apply, it tells the lawyer specifically what he or she must do. Analyzed more realistically, however, the provision probably fits closer to Point I. It sets a general norm, but suggests no particular behavior for any particular case. Only if other provisions in the code supplement the rule with more concrete directions (e.g., the competent lawyer main-

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71 Model Rules, Rule 1.4; CPR, EC 7-8.
72 The Model Rules explicitly note that the adequacy of communication varies from context to context, that lawyers have the authority to make some decisions (i.e., as to "means" or "tactics"), and that sometimes lawyers are justified in withholding information from clients. See Model Rules, Rule 1.4 cmt. The CPR leaves the issue to lawyers' imaginations.
73 The fact that some cases of obvious misconduct exist under the rule—for example, a lawyer's failure to tell the client of a settlement offer (see Model Rules, Rule 1.4 cmt.)—does not change the rule's basic charge that appropriate conduct may vary from context to context. Model Rules, Rule 1.4 cmt.
74 It is important to note the difference between designating a decision as "discretionary" and leaving enforcement of a standard to "self-regulation." Ordinarily, emphasizing discretion implies that two or more responses to a situation are equally good. Relying on self-regulation may not contain the same implication. There may be correct or incorrect responses to a particular situation, given the priorities set in the rules. Drafters nevertheless may rely on a Point III provision because of their inability to predict the situation or to write a useful rule that is sufficiently broad to encompass that and other situations.
75 See Schwartz, supra note 7, at 957 (arguing that "the effectiveness of promulgated standards of behavior depends on a combination of coercion (legally imposed sanctions), informal sanctions (peer pressure), and voluntary compliance").
76 See, e.g., Model Rules, Rule 1.1.
tains confidences and zealously makes all nonfrivolous arguments) does the rule even rise to the Point II or Point III levels that require lawyers to exercise thought and self-restraint.\footnote{Arguably, all of the rules contained in the professional codes purport to require compliance and permit discipline for lawyers who deviate from the rules' commands. Even a generalized rule, like, "prosecutors must do justice," could in theory result in discipline whenever a prosecutor fails to "do justice." The absence of discipline results from the use of a vague term that makes enforcement difficult. This view of the codes is either simplistic or assumes that drafters and lawyers are incapable of making a realistic assessment of the enforceability and likely enforcement of rules. In practice, prosecutors know that rules calling for "just" conduct will result in discipline only in extreme cases, if at all. Similarly, drafters cannot delude themselves into believing that such a mandate poses a real threat or even provides criteria that prosecutors can use in assessing their own conduct. If the drafters nevertheless employ a "justice rule," they probably do so intentionally, rather than as an accidental by-product of poorly-chosen language.}

Similarly, one could characterize a particularized rule like Model Rule 1.8(c) in a variety of ways. On the surface, it is highly specific; it forbids a lawyer to prepare an instrument giving the lawyer a substantial gift. Arguably, however, the term "substantial" is so subject to interpretation that it prevents the provision from being understood universally or enforced through discipline. If so, the provision must be seen as more of a Point III rule that suggests an outcome, but leaves room for discretion.

The interrelationship among code provisions may exacerbate the task of determining where on the continuum a particular provision fits. Model Rule 7.1, forbidding "misleading" advertising, seems to fit at Points I or II, but when combined with the more specific directives in Model Rules 7.2-7.5 provides strict controls on lawyer behavior. Model Rule 4.1's prohibition on making false statements to third parties is highly specific (i.e., like a Point IV rule), but the rule's comments permitting puffing introduce enough discretion that the rule seems, at most, to fit at Point III.\footnote{The behavioral control purpose of MODEL RULES, Rule 4.1 is further undermined by other code provisions urging lawyer zeal. As a result, few lawyers take the absolute tone of MODEL RULES, Rule 4.1 seriously.}

The point of these examples is not to undermine the thrust of this Article. Just because specificity analysis involves some uncertainty in application does not render it useless. On the contrary, considering where on the spectrum proposed provisions fit, how they interrelate with other provisions, and how a package of regulation at that level of specificity effectuates the codes' goals helps identify meaningful rules. Similarly, as illustrated in Parts III and...
IV of this Article, specificity analysis can further the backward-looking process of evaluating existing provisions or proposed reform. The analysis will disclose the direction, or tendency, that provisions have in producing various results. My point here is simply that, in applying specificity analysis, one can neither expect easy answers nor ignore the combining effect of various rules.\(^7\)

It is because of the latter considerations that I choose regulation of prosecutorial ethics as the illustration for this Article's model. The "package" of prosecutorial ethics regulation is easily identifiable and limited in scope.\(^8\) With the exception of a few rules regarding pretrial decisionmaking, all past and present codes regulate prosecutorial conduct at the most general possible level: prosecutors must only "do justice."\(^9\) Although one might argue that the existence of the pretrial rules suggest a thought process to guide prosecutors throughout their practice,\(^2\) the reality is that most of the unique ethical dilemmas prosecutors face are governed solely by the "justice" requirement. That generalized regulation clearly fits at Point I; it neither sets out criteria for how pros-

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\(^7\) It is easy to illustrate that judging rules in isolation can mislead. A provision alone may have little effect—say, on the degree to which lawyers introspect—but, in combination with other parts of the code can help achieve a package of effective regulation. Thus, for example, a narrow conflict of interest rule alone may not persuade lawyers to think about factors that impair their independent judgment. See, e.g., MODEL RULES, Rule 1.8 (governing conflicts in family transactions). However, in conjunction with the extensive regulation of MODEL RULES, Rules 1.7-1.11, the rule helps raise lawyer consciousness.

Conversely, a provision designed to promote one purpose can be undermined by other rules. For example, rules that forbid lawyers to disclose information under any circumstances may limit the introspective effect of rules that forbid lawyers to participate in misconduct or require lawyers to remedy frauds. Compare MODEL RULES, Rule 1.6 (confidentiality) with MODEL RULES, Rule 8.4 (forbidding lawyers to engage in dishonesty).

\(^8\) Perhaps the next best examples of sets of self-sufficient code sections are those relating to confidentiality and conflicts of interest. Individual provisions that cover unique situations also can be analyzed without reference to other sections of the codes. See, e.g., MODEL RULES, Rule 1.17 (governing sales of law practices); MODEL RULES, Rule 7.5 (governing use of firm names and letterheads).

\(^9\) CPR, EC 7-13 (providing that government lawyers must "seek justice"); MODEL RULES, Rule 3.8 cmt. (stating that government lawyers are "minister[s] of justice").

\(^2\) See, e.g., MODEL RULES, Rule 3.8(a)-(d) (detailing limited obligations of prosecutors); CPR, DR 7-103(A)-(B) (describing prosecutorial obligations in charging defendants and making evidentiary disclosures). The American Bar Association has adopted, and twice amended, supplemental "standards" governing prosecutorial conduct. AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION (3d ed. 1992) (amending AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Ch. 3 (2d ed. 1980) (The Prosecution Function), reported in 50 Crim. L. Rep. 2061 (March 4, 1991)). However, the ABA has never made these standards part of its model codes, nor has any state adopted them. Although a few prosecutors may look to the standards for occasional guidance, the standards remain largely unknown and unused.
ecutors, *qua* prosecutors, should act nor prioritizes among relevant considerations.\(^{83}\) It just proposes a prosecutorial orientation within an otherwise adversarial system of resolving disputes.

The following section analyzes how the "justice" standard correlates with the purposes of professional regulation. It attempts to identify the benefits and costs of relying on a highly generalized rule and considers when more specific guideposts are necessary to effectuate the regulatory goals. Evaluating the effectiveness of the justice standard in these terms provides insights both for drafting regulatory responses to questionable prosecutorial tactics and for drafting professional codes more generally.

IV. THE RELATIONSHIP BETWEEN SPECIFICITY AND REGULATORY GOALS

Categorized loosely, one can identify five possible goals of professional regulation. Like ordinary legislation, codes may seek to prevent or produce particular lawyer conduct that the drafters perceive to be appropriate, moral, or necessary for the legal system to operate. Codes may seek to provide guidance for lawyers in deciding how to act. Codes also may serve an administrative function, either in coordinating the activities of lawyers or facilitating the work of the profession as a whole. On occasion, codes have been used to influence substantive law doctrines. Finally, interrelated with all of these goals, the phrasing of codes may serve pragmatic or political considerations that the drafters have in mind when formulating particular provisions. Each of these diverse goals and functions of professional regulation will be discussed in turn.

A. The Relationship Between Regulatory Specificity and the "Legislative" Purposes of Ethics Codes

To the extent that one views code provisions as legislation, one would expect them to prescribe or forbid particular conduct, encourage uniform behavior, and set the stage for punishment of persons who depart from the norm. Alternatively, they would provide standards for a neutral body (e.g., a court, jury, or administra-

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83 Prosecutors are subject to most of the professional requirements applicable to other lawyers. *See infra* note 134. The justice mandate recognizes that prosecutors face additional issues and may have unique responsibilities. The codes, however, fail to identify those issues or define the obligations explicitly. For an interpretation of the meaning of the justice provision itself, see generally Zacharias, *supra* note 37.
tor) to refine over time.\(^8^4\) Laws and administrative regulation may incorporate elements that have varying degrees of certainty.\(^8^5\) But, on the whole, they share a realistic expectation that they will affect the behavior of the target group in a particular, foreseeable direction.

The justice standard for prosecutorial ethics does not serve these goals. By definition, Point I rules are not effective in educating targets regarding what acts are socially desirable.\(^8^6\) Different prosecutors, for example, can justify diametrically opposite conduct as serving justice—dismissal of a charge or pursuing conviction, avoiding evidence of questionable admissibility or using the evidence without revealing its questionable aspects. As Figure B illustrates, professional rule’s effectiveness as a behavioral control is largely proportional to its conduct specificity because, at each increasing level of specificity, the rule’s terms tell the targets more about what is permissible and call for increasing uniformity of conduct.\(^8^7\)

84 *See supra* text accompanying notes 43-45.

85 Legal elements such as “intent” and “reasonableness,” for example, contain significant flexibility. In relying on such standards, courts and lawmakers ordinarily expect either that the meaning of the standards are sufficiently clear that people can gauge what a jury would require, or that the standards will become more certain as they are interpreted over time.

86 Arguably, Point I rules that incorporate normative factors, (e.g., those mandating “just” or “reasonable” behavior), do identify socially desirable acts, but are simply difficult to apply. Here is where the distinct nature of professional codes comes into play. Typically, when lawmakers expect targets of normative laws to understand what constitutes reasonable behavior, they provide an enforcement system that will punish aberrational behavior and develop standards for what is reasonable over time. When the professional code drafters rely on general normative terms (e.g., “justice”), the meaning often is unclear except in marginal cases and the terms perpetually will remain subject to individual interpretation. In such circumstances, it is fair to conclude that the rule does not, in fact, inform or guide behavior to the extent of identifying acts the codes expect the target to engage in.

87 Although the points on the continuum increasingly insist on behavior, the correlation between that insistence and achieving uniform conduct is not necessarily direct, for reasons of psychology. Consider the effect of the following four variations of a withdrawal rule, ranging from Point I to Point IV in form:

1. When X occurs, a lawyer must act reasonably;
2. When X occurs, a lawyer must consider whether to withdraw based on a balance of the criteria (that are specified below);
3. When X occurs, a lawyer must withdraw unless the client will suffer irreparable harm;
4. When X occurs, a lawyer must withdraw.

Version (4) clearly identifies the expected conduct while version (1) does not. In some cases, however, a lawyer governed by version (1) may be more likely to withdraw than under versions (2) or (3), either because the lawyer wants to bend over backwards to “do the right thing” or because, not understanding what he should do, the lawyer
Absent external forces that enhance their effect, Point I rules themselves cannot be expected to produce specific socially desirable acts.

Nevertheless, in combination with factors outside the codes, a general rule can produce desired uniform conduct. When substantive law and administrative regulation of lawyers mandate particular acts, the codes often do not need to duplicate their specific mandates. Under other circumstances, however, parallel professional standards may reinforce extra-code standards by providing additional deterrence. For a code provision to have measurable, re-

chooses to avoid problems when in a grey area. In general, however, versions (2) and (3) give the lawyer more instruction, and therefore function better (though not proportionally better) as a behavioral control.

88 Cf. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT §§ 101-03, at lvii-lxiv (2d ed. 1990) (noting that lawyers are subject not only to professional codes, but also "a whole panoply of legally binding rules that prescribe or proscribe various kinds of professional conduct" and discussing interrelationship among the various norms).

89 Consider, for example, provisions that forbid lawyers to engage in "conduct unbecoming a lawyer" or to commit a criminal act that "reflects adversely on the lawyer's honesty, trustworthiness or fitness." See, e.g., MODEL RULES, Rule 8.4. Many jurisdictions
inforcing impact, it must appear to be realistic;\textsuperscript{90} it will have no coercive influence when its targets consider the provision unenforceable or unlikely to be enforced.\textsuperscript{91}

Although the correlation between a professional rule’s specificity and its enforceability is not always clear, some loose generalizations are possible. The ability to establish code violations and uphold convictions depends on the presence of a rule with sufficient scope to cover the offending conduct, but which defines the elements of the offense in a way susceptible of proof.\textsuperscript{92} The more

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use these generalized rules in disciplinary proceedings to sanction lawyers who have committed crimes unrelated to their legal practices. Clearly, the threat of professional sanction adds little deterrence to criminal laws forbidding murder. However, a lawyer who knows that he may be suspended or disbarred for lesser crimes, such as drunk driving or purchasing prostitution, may be affected by the presence of the ethics rule. The penal law provides the definition for the generalized professional regulation, while the regulation itself provides supplementary sanctions. See MODEL RULES, Rule 8.1 (setting stage for discipline or disbarment for “fraud” or “misrepresentation” presumably already sanctioned by civil liability rules); Gaetke, \textit{supra} note 27, at 53-54 (discussing code requirements that “are merely coextensive with obligations resulting from law applicable to laymen”); Gillers, \textit{supra} note 31, at 248 (“The fact that an ethical duty is also a legal one does not make it redundant. Placing an obligation in both categories may enhance compliance by providing a second, perhaps more influential sanction.”); Kramer, \textit{supra} note 33, at 808 (proposing use of professional sanctions to “maximize the deterrent effect of Rule 11 sanctions”).

\textsuperscript{90} See Abel, \textit{supra} note 21, at 647-49 (questioning effectiveness of current professional rules because of lack of enforcement and lawyers’ perception that the rules will not be enforced).

\textsuperscript{91} Targets may still engage in appropriate behavior on personal or moral grounds, or because peer pressure prompts that response. See Gordon, \textit{supra} note 22, at 34 (discussing influence of peer pressure); Moore, \textit{supra} note 39, at 14 (same). But the behavior will not result \textit{because of} the rule.

A prime example of the interplay between code prohibitions and other constraints concerns recent attempts to amend the codes to forbid lawyers to engage in sexual conduct with clients. See, \textit{e.g.}, \textit{CALIFORNIA RULES OF PROFESSIONAL CONDUCT} Rule 3-120 (1992); \textit{ILLINOIS RULES OF PROFESSIONAL CONDUCT} Rule 1.17 (Proposed Official Draft) (on file with author); \textit{OREGON RULES OF PROFESSIONAL CONDUCT} DR 5-110 (Proposed Official Draft) (on file with author). Most conduct forbidden under these rules not only represents bad judgment by the offending lawyers, but also subjects the lawyers to suit for malpractice and breach of their fiduciary duties. See \textit{generally} \textit{CHARLES W. WOLFRAM, MODERN LEGAL ETHICS} § 10.11.2 (2d ed. forthcoming 1993) (discussing remedies for improper sexual relations between lawyers and clients). In most instances, the conduct probably also violates conflict of interest rules, because the relationship is likely to impair the lawyers’ independent judgment. See \textit{MODEL RULES}, Rule 1.7. Yet because improper sexual conduct persists, proponents of strengthened rules argue that specifying the forbidden conduct—either by a separate rule or by incorporating the comments to the existing conflict rules—will inform lawyer judgment and pose an additional sanction that will help limit the conduct. See \textit{WOLFRAM, supra} (discussing the proposals).

\textsuperscript{92} Linguistic aspects of rules that are not the subject of this Article also affect the enforceability of rules. The use of vague or unclear terms, for example, makes it difficult for disciplining authorities to determine what is forbidden and makes decisionmakers
objective the elements and the easier it is for enforcers to find evidence (e.g., witnesses), the more likely it is that enforcers will seek and be able to maintain a conviction. The enforceability of professional regulations, therefore, should vary directly—though perhaps not proportionally—with the specificity of the regulations. The correlation may decline when a rule's specific elements are not easily susceptible of proof, but the general correlation holds true.  

hesitate to impose sanctions. Lawyers, in particular, typically hold disciplinary bodies to full due process. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 654-55 (1985) (discussing and rejecting due process challenge to advertising rules); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 277 n.3 (1985) (noting lower court's failure to address lawyer's due process challenge to residency requirement); Hirschkop v. Snead, 594 F.2d 356, 370-71 (4th Cir. 1979) (per curiam) (striking down gag rule on due process, vagueness grounds); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 255-56 (7th Cir. 1975) (same), cert. denied, 427 U.S. 912 (1976). See also Abel, supra note 21, at 642 ("The very lawyers who drafted the Rules would be the first to attack them as unconstitutionally vague if they were defending a client accused of violating them."); Martha E. Johnston, Comment, ABA Code of Professional Responsibility, 57 N.C. L. Rev. 671, 693 (1979) (arguing that many aspects of the CPR are constitutionally void for vagueness).

By making the elements of misconduct unambiguous, drafters run the risk of defining the misconduct so narrowly that it becomes inapplicable to most situations sought to be covered or impossible to prove. For example, adding a state of mind element (e.g., intent) or a reasonableness element to the confidentiality rules might eliminate those situations in which lawyers gossip irresponsibly about their clients or use confidential information, without authority, for the clients' benefit. If the amended rule is deemed to cover those situations, enforcers must deal with the fact that extrinsic proof of intent and reasonableness generally are not available.

In other words, a conduct-specific rule (e.g., "lawyers may not commingle clients' funds") becomes less enforceable if an even more specific, but hard to prove element is introduced (e.g., "lawyers may not intentionally commingle clients' funds"). Cf. Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1429-35 (1987) (discussing "systemic costs of intent-based analysis" of prosecutorial conduct).

The relationship between specificity and enforceability might thus be graphed as follows:

**FIGURE 1**

At the highest levels of generality, there may be some difference between provisions
Because resource considerations often control enforcement policies, one cannot predict whether even highly specific rules are likely to be enforced. For purposes of our analysis, however, let us assume the existence of an ethics provision that is, at least sometimes, successfully prosecuted. To what extent will that provision help produce uniform desirable behavior?

The answer again turns upon the existence and nature of extra-code constraints. Presumably, enforced specific rules are more likely to produce uniform conduct than enforced general rules because they inform the targeted lawyers what to do. But when extra-code constraints already provide information regarding the appropriate behavior, the difference between generalized and that specify some criteria and those that specify none. At least to the extent a lawyer ignores a key factor in determining a course of conduct (e.g., the client's interest in winning), arguably he exposes himself to discipline. The real bite to professional regulation, however, only begins at Point III regulation that suggests answers for routine cases. Even Point III regulation is often difficult to enforce. See, e.g., MODEL RULES, Rule 1.5 (detailing criteria for lawyers fees that "should be reasonable"); CPR, DR 2-106 (same); MODEL RULES, Rule 1.4 (requiring lawyers to inform clients and enable them to make "informed decisions").

Initially, one might assume that, for financial reasons, the likelihood of enforcement varies with a rule's specificity. The cost of enforcement depends in part on the ease with which a violation can be proven. As we have seen, there is a positive relationship between specificity and proof.

At some level, however, increasing specificity can make successful prosecution more difficult. Adding an intent or lack of reasonableness element, for example, requires enforcers to produce a history of misconduct or circumstantial evidence from which an arbiter can infer the requisite state of mind.

Conduct-specific rules may ease the cost of detecting violations by laying the groundwork for self-identifying violations. For example, requiring lawyers to place client funds in reported, auditable escrow accounts and authorizing random audits reduces uncertainty in assigning investigative resources. Potential witnesses who know of violations also tend to be more willing to come forward when a rule's requirements leave no doubt about whether misconduct has occurred.

Arguably, the positive correlation between specificity and ease in identifying witnesses exists only for rules of increasing specificity from Points II through IV. A highly generalized Point I provision that neither sets standards nor identifies criteria for behavior may invite victims and witnesses to complain. In the criminal context, one would expect many persons convicted of a crime to claim that a prosecutor has failed to "do justice." A somewhat more specific Point II rule that suggests considerations but no outcome may, perhaps unintentionally, seem to victims to afford the prosecutor more discretion.

But see supra note 87.
specific rules in influencing conduct diminishes. Moreover, if informative extra-code constraints are already enforced in a way that provides substantial deterrence, a parallel ethics rule will have marginal impact on behavior however it is phrased. Indeed, a highly specific provision that merely restates, or duplicates, extra-code standards may influence behavior less than a general rule that lawyers might interpret as applying more broadly.

As a result, when viable extra-code constraints already define appropriate behavior, the value of ethics regulation usually must be found in the nonlegislative functions of the codes. An ethics provision will have significant effect in mandating desirable behavior only if it educates targets regarding the existence of the extra-code constraints or itself supplements inadequate extra-code constraints.

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98 Figure 2 illustrates the shifting relationship between specificity and achieving uniform conduct.

**FIGURE 2**

When extra-code constraints already define appropriate conduct, the code's reinforcing effect lies in the additional deterrence provided by the threat of discipline, rather than in the additional guidance the code provides lawyers. The precision of the rules thus becomes less important.

99 A rule can educate lawyers concerning constraints about which lawyers otherwise would give no thought. Agency law may, for example, already require attorney-client confidentiality in most situations, but the professional confidentiality rules define the obligation. Similarly, a rule forbidding sexual relations with clients may restate existing fiduciary obligations, but arguably raises the consciousness of lawyers who might be unaware of their fiduciary duty.

100 Arguably, stating even an unenforced professional norm informs lawyers and may reduce lawyers' resistance to the extra-code constraints. See Nelson, supra note 8, at 917-23 (describing correlation between code provisions and other constraints); Wilkins, supra note 25, at 848 (noting complementary effect of different constraints on lawyer miscon-
What does all of this say for the Point I prosecutorial ethics standard? Because such a general rule is itself unenforceable and provides little information, one would expect to find that it relies upon criminal and civil liability rules and appellate procedures that already sanction prosecutorial misconduct. In practice, however, the "do justice" rule defers to substantive law in a context in which few realistic legal constraints exist; constitutional constraints have proven ineffective and civil liability and administrative schemes pose little deterrence to prosecutorial misconduct.101

101 Although scholars have long questioned the propriety of much prosecutorial conduct, pressures inducing appropriate behavior are virtually nonexistent. Due process and other constitutional requirements set standards for some prosecutorial conduct in disclosing evidence, conducting trials, presenting grand jury evidence, and assisting defendants. See, e.g., Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (discussing prosecutors' limited obligation to preserve evidence); Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring disclosure of exculpatory evidence); McFarland v. Smith, 611 F.2d 414, 419 (2d Cir. 1979) (forbidding appeals to racism); United States v. Basuto, 497 F.2d 781, 785-86 (9th Cir. 1974) (sanctioning use of perjured grand jury testimony). But courts have limited constitutional remedies in specific reliance on the existence of alternative professional regulation of prosecutorial conduct. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) (holding state prosecutors immune from civil liability for malicious prosecution, in part, because of perceived amenability of prosecutors to professional discipline); United States v. Dinitz, 424 U.S. 600, 613 (1976) (Burger, C.J., concurring) ("a bar association conscious of its public obligations would sua sponte call to account a [prosecuting] attorney guilty of the misconduct shown here"); United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (noting that the constitution prescribes a baseline of minimally appropriate conduct, while ethics codes safeguard the integrity of the profession and preserve
This suggests either that the behavioral control purposes of ethics regulation do not drive the standards for prosecutorial conduct or that code drafters have written a misguided rule.102 Justification for an ethics standard as general as “do justice” must be found, if at all, in some separate regulatory goal.

B. The Relationship Between Regulatory Specificity and Defining Guidance-Providing “Roles”

At an elemental level, providing lawyers with a clear sense of “role” is designed to guide lawyers in selecting their own conduct.103 This “guidance” aspect of codes is different from what I


Similarly, the combination of special defenses and practical obstacles to winning civil suits against prosecutors virtually immunize prosecutors from personal liability. Prosecutors are insulated not only by immunity doctrines, but also by such factors as (1) the hesitation of defense lawyers to bring suit against them for fear of retaliation, (2) the tendency of jurors to side with prosecutors and disbelieve criminal defendants who might sue them, and (3) the limited recovery that aggrieved criminal defendants are likely to achieve. See, e.g., Burns v. Reed, 111 S. Ct. 1934, 1937-45 (1991) (state prosecutors absolutely immune from civil liability for their participation in pretrial proceedings); Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) (prosecutors absolutely immune from civil liability for malicious prosecution); Haynesworth v. Miller, 820 F.2d 1245, 1263 (D.C. Cir. 1987) (prosecutors absolutely immune against charges of retaliatory prosecution); Martinez v. Winner, 778 F.2d 553, 555 (10th Cir. 1985) (prosecutor absolutely immune from civil liability for misrepresentation); Briggs v. Goodwin, 712 F.2d 1444, 1448 (D.C. Cir. 1983) (prosecutor absolutely immune from civil liability for lying to grand jury), cert. denied, 464 U.S. 1040 (1984). Even when potentially liable, prosecutors routinely are indemnified by their employing jurisdictions. See, e.g., 4 U.S. Attorney’s Manual § 5.212(F) (1988) (discussing circumstances in which U.S. Justice Department officials are entitled to indemnification); Romanski v. Barra, 574 N.E.2d 1206, 1207 (Ill. App. Ct. 1991) (rejecting challenge to indemnification and provision of legal services to state’s attorney); Diaz v. Allstate Insurance Co., 435 So. 2d 699, 701 (La. 1983) (requiring state to indemnify employees of district attorney’s office); Rosen & Bardunias v. County of Westchester, 552 N.Y.S.2d 134, 136 (N.Y. App. Div. 1990) (discussing indemnification of prosecutors for all but punitive damages), cert. denied, 498 U.S. 1086 (1991).

102 One cannot justify the justice standard on the basis that “adopting it “cannot hurt.” There clearly are costs to employing rules that purport to affect conduct but that are not, and cannot be, enforced. At a minimum, targets, and others, come to disrespect the codes and observers of the regulatory scheme perceive the need to replace it.

103 This Article does not analyze whether lawyers, in practice, ever respond to “guidance” that calls for behavior inconsistent with their self interest. See supra text accompanying notes 38-40. However, one observation bears making. Even accepting the assumption that codes affect some lawyers’ attitudes, the extent of the effect probably depends upon the subculture within which the lawyers operate.
have previously labelled the "legislative" function in several respects. First, in guiding lawyers rather than directing (or enabling future regulators to direct) particular acts, the codes acknowledge that there may be more than one appropriate response to the situations in question. Second, in focusing upon role, the codes do not address a single fact pattern or set of fact patterns, but rather hope to address a perhaps unpredictable variety of dilemmas lawyers may face. Third, to the extent the codes do address particular dilemmas, they attempt to provide a response that makes the lawyer act for ethical or systemic reasons rather than because of the coercive force of potential discipline.

Big city, large firm lawyers accustomed to "hardball litigation" and sophisticated, demanding clients may be less susceptible to professional "guidance" than small town practitioners. Alternatively, out of concern for maintaining "reputation" for purposes of hiring and attracting clients, these lawyers may be more prone to peer scrutiny and behavioral conventions than other subgroups.

In settings more personal than big city practice, a subgroup of lawyers who see each other on a regular basis may adopt their own set of norms. Group reputations may develop, resulting in attitudes like "you can't trust prosecutors" or "defense attorneys never have facts to justify their claims." Communities of lawyers may evolve. For example, criminal defense lawyers, as a community, may develop a unique ethos that influences their willingness to follow generally prescribed rules.

The existence of these subgroups interpose a filter between the professional codes and individual lawyers that necessarily affects how the codes will affect behavior. Nevertheless, because code drafters have had the role-setting function in mind in designing many of the professional rules, it is appropriate to attempt to evaluate generally how the drafting of provisions bears on the role-setting function.

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104 See, e.g., MODEL RULES, Rule 1.6(b) (permissive exceptions to confidentiality rules); MODEL RULES, Rule 1.4(a) (requiring lawyer to keep client "reasonably informed"); CPR, DR 4-101(C) (permissive exceptions to confidentiality rules); CPR, DR 5-101(A) (requiring lawyer to refuse employment when his professional judgment "reasonably may be" affected). As we have already seen, a societal consensus in favor of particular conduct—or at least a clear majority—is a sine qua non for legislative drafting.

105 The paradigms of this attitude are the requirements that lawyers act competently, MODEL RULES, Rule 1.3, and that prosecutors "seek justice." CPR, EC 7-13. Cf Johnston, supra note 92, at 686 ("when prohibited conduct is narrowly defined, there is a greater likelihood that some types of conduct generally thought to be undesirable . . . will not be covered by the proscription").

106 A developing literature focusing on the interplay of linguistics and philosophy takes as one premise the notion that "linguistic structures" or "signs" in codes of conduct influence behavior. See, e.g., ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS 114-17 (1988) and authorities cited therein; MAX H. FISCH ET AL., THE NEW TOOLS OF PEIRCE, SCHOLARSHIP (1979). Scholars in the field suggest that only rules that signal ideals while allowing "play"—that give actors a choice of conduct that includes straying from the community norm—create the potential for truly moral (or role appropriate) behavior. See KEVELSON, supra, at 119 (discussing work of Charles Sanders Peirce and concluding that he should be viewed "as the founder of a new mode of philosophical inquiry which identifies freedom as the highest value and which looks to law to release such value"). Cf 6 CHARLES SANDERS PEIRCE, COLLECTED PAPERS 1 200, at 136-37 (3d ed. 1965) (dis-
forcing lawyers to think in ethical and systemic terms, the codes hope to promote an introspective process that carries over to situations the drafters do not, and perhaps cannot, foresee.  

The justice standard for prosecutorial ethics highlights the relationship between specificity and role-setting. Perhaps the primary benefit of the generalized standard is that it addresses, in short form, a large variety of situations prosecutors face. Inevitably, the more general a rule, the broader its application. Here, prosecutors are required to achieve justice in all their official acts.

In this respect, Point I rules comport with the philosophy underlying the role-definition purpose of the professional codes. Defining roles helps lawyers understand how they should act throughout their practices. That, in theory, helps lawyers extrapolate; that is, exercise whatever discretion they are accorded in a manner consistent with the system’s expectations. Underscoring the need for prosecutorial justice, for example, tells prosecutors that their role includes more than seeking conviction at all cost.  

107 In economic terms, provoking introspection may be a wasteful endeavor. Lawyers who stop to question their own conduct practice inefficiently in seeking the clients’ goals. Moreover, encouraging lawyers to raise ethics issues and, in some cases, ask clients to forego permitted tactics or ends creates a measure of unpredictability in the system. If clients cannot know how lawyers will react to particular situations, they may have difficulty making informed choices on retaining lawyers and using their services.

Nevertheless, the codes clearly endorse a measure of soul searching and discretion by lawyers. See MODEL RULES, Preamble cmt. (“a lawyer is also guided by personal conscience and the approbation of professional peers”); CPR, Preamble (“Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards”). Moral introspection is seen as part and parcel of the concept of “professional” lawyering. See John J. Flynn, Professional Ethics and the Lawyer’s Duty to Self, 1976 WASH. U. L.Q. 429, 436 (discussing introspection as essential aspect of ethical lawyering); Alan H. Goldman, Confidentiality, Rules, and Codes of Ethics, CRIM. JUST. ETHICS, Summer-Fall 1984, at 13 (arguing that “diversity among the moral judgments of lawyers in certain controversial areas is preferable to an enforced consistency”); Gordon, supra note 22, at 49-51 (discussing claim that lawyer independence has declined over time); Loder, supra note 7, at 319-37 (emphasizing importance of introspection); Simon, supra note 14, at 1108-09 (describing lawyers’ obligation to exercise moral discretion); Wasserstrom, supra note 24, at 5 (noting importance of ethical thought by lawyers).

108 See Zacharias, supra note 37, at 49 (discussing possible meanings of the codes’ “justice” provisions).
At the same time, the justice standard illustrates the hazards of employing a short-form approach to role definition. In adopting the broadly applicable concept of doing justice, drafters define the prosecutor's role simplistically. The general definition gives prosecutors only one factor, or non-factor, to consider: conviction is not all that counts. A definition further down the specificity continuum—say, at Points II or III—could still be role-oriented, but would identify positive factors that might provide more guidance and facilitate the prosecutor's exercise of discretion.\footnote{109} Ironically, the Point I approach to prosecutorial ethics contributes to the absence of any recognized norms.

At least one valuable conclusion follows. Unless highly general rules are combined with constraints or criteria found elsewhere (in or out of the codes), the correlation between regulatory generality and broad behavioral guidance disappears.\footnote{110}

Moreover, although a Point I provision covers many situations, it does not necessarily apply more broadly than a Point II provi-

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure3.png}
\caption{FIGURE 3}
\end{figure}

\footnote{109} Figure 3 correlates the proportional relationship between specificity and guidance:

\footnote{110} See Aronson, \textit{supra} note 55, at 286 ("The view of professional responsibility as dependent upon the moral responsibility of individual lawyers has resulted in a set of rules which give attorneys little guidance as to what the profession expects of them."). Geoffrey Hazard correctly notes that, because of the correlation between specificity and interpretable guidance, the legislative and role-providing aspects are interconnected. Hazard views the historical trend toward specificity favorably, concluding that practicing lawyers are "entitled to legal rules that are not confounded by appeals to moral regeneration." Hazard, \textit{Legal Ethics}, \textit{supra} note 7, at 574.
sion. Each category relies on flexible factors that can have some (though varying) meaning in a large number of cases. A Point II approach also can provide significantly more information. However, as one moves further along the specificity continuum towards Points III and IV, a negative correlation between specificity and coverage becomes apparent because the rules delimit their own application (Figure C). In identifying relevant considerations and their importance, specific rules by definition narrow the number of cases in which the rules are useful.111

**FIGURE C**

<table>
<thead>
<tr>
<th>LEVEL OF SPECIFICITY</th>
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<tbody>
<tr>
<td>Large # of cases</td>
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<td>Few cases</td>
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The codes' reliance on a prosecutorial "justice" standard, despite its obvious weaknesses in providing guidance and meaningful coverage, suggests that guidance and coverage may be secondary aspects of role-setting. Arguably, if the codes are successful in promoting introspection, lawyers will develop reasonable standards of conduct on their own and apply them throughout their practices. One benefit of writing rules generally is that leaving implementation to lawyers may encourage lawyers to think about the appropriateness of their conduct—be it in "ethical" or simply "role-appropriate" terms. Moreover, a general rule may produce more self-restraint on the part of some lawyers than quantified

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111 See Loder, *supra* note 7, at 313 (noting that "loss of flexibility accompanies more numerous and specific rules").
prohibitions, because those lawyers may wish to avoid getting even close to the line. Conversely, as I, and others, have pointed out, strict rules tend to prevent lawyers from engaging in serious introspection concerning their personal responsibility to help achieve good results.

Interestingly, however, there is an ambiguity in the correlation between specificity and the degree to which lawyers will think about the ethics of their conduct. At one level, the correlation seems clear. A highly specific professional requirement (e.g., at Point IV of the spectrum) risks stultifying lawyers’ independent evaluation of appropriate responses, because violating the rule is likely to result in discipline. Rules further down the spectrum, near Points III and II, expressly call upon lawyers to exercise discretion and, therefore, to engage in thought; such provisions do not require a particular response, so lawyers cannot easily conceive of them as establishing a threshold of appropriate conduct.

Yet when one moves further down the spectrum from a reg-

112 The usefulness of rules in producing these effects—and therefore the need to emphasize them—depends on the degree to which the rules reproduce existing cultural or legal extra-code constraints. Gail Heriot uses the example of a standard-like law that prohibits “cruelty to animals.” Heriot suggests that “reasonable pet owners will not engage in activity that is even remotely close to the line,” so that from the standpoint of affecting primary behavior there is little need for “rule-like certainty” in the prohibition. Heriot, supra note 46, at 940. The presence of a general cruelty rule raises the issue; once reasonable targets recognize the issue, presumably they will control themselves. Heightening specificity runs the risk of suggesting that the minimum behavior society will accept is actually the norm.

On the other hand, the benefits of the generalized rule may arise because extra-legal moral constraints already tell reasonable people not to be cruel to animals. If so, a rule is arguably important only as a tool for restraining the unreasonable person. In this scenario, the factors of providing more guidance and setting the stage for enforcement become more significant.

113 See, e.g., Flynn, supra note 107, at 442-43 (discussing rules that emphasize duty of zeal); Wasserstrom, supra note 24, at 5 (arguing that rules that encourage lawyers to analyze issues exclusively in terms of what the rules require or forbid cause lawyers to become indifferent “to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance”); Zacharias, Confidentiality I, supra note 23, at 372-73 (discussing potential effect of confidentiality rules in keeping lawyers from thinking about disclosing where disclosure might be morally justified or required).

114 Reed Loder defends the use of generalized professional rules on the grounds that they promote moral introspection and thereby lawyers’ moral development. Loder, supra note 7, at 314 (arguing that “prepackaged rules discourage individual . . . moral evolution” and that “the threat of sanctions will pressure lawyers to abandon their reasoned judgments about right and wrong”). Loder’s focus is different than mine, for she is concerned with “ethics” in the lay sense and assumes the purpose of professional codes is to promote ethical behavior. Id. at 318. I, in contrast, do not attempt to characterize any particular lawyer conduct as moral or immoral. My analysis considers the effect of specificity on a code’s ability to accomplish its purposes, whatever those purposes may be.
ulation that prioritizes \( i.e., \) Point III) or suggests criteria (\( i.e., \) Point II) to one that merely states a principle (\( i.e., \) Point I), the correlation disappears. A highly generalized mandate may not increase lawyers' willingness to engage in thought.\(^{115}\) For example, the requirement that "prosecutors should do justice" affords prosecutors leeway to take ethics considerations (including "role") into account, but at the same time enables prosecutors to justify virtually any response to any ethical dilemma.\(^{116}\) Most prosecutorial tactics can be defended on the ground that the defendant is guilty and conviction would therefore be "just." Conversely, prosecutors can rationalize most actions that undermine the government's (or victim's) case on the basis that they have a responsibility to preserve defendants' rights. By failing to set criteria and prioritize, the Point I provision makes decisions easy for prosecutors; anything they decide is professionally correct, so long as it does not violate the limited constraints the Constitution and

\[115\] Point II rules, by suggesting criteria, clearly emphasize introspection and discretion. Point III rules also afford lawyers leeway, though to a somewhat lesser extent. However, Figure D's graphical depiction of the correlation between specificity and introspection steepens from Points III to IV, because Point IV rules effectively remove lawyer choice and thus the need for thought.

I do not mean to suggest that the correlation in the range between Points II through IV is totally unambiguous. Figure D represents a depiction of general (presumably accurate) conclusions about most rules at different points along the spectrum. Yet individual rules may have unexpected effects. A Point IV rule, for example, sometimes can provoke introspection by alerting targets to a problem they otherwise do not notice or by emphasizing to them that society takes the issue seriously. Similarly, Point II and III rules may have varying impact, depending on the number and nature of the factors they call upon the targets to consider. A Point II or III rule that simply suggests or prioritizes a long laundry list of obvious considerations may have no more effect than a Point I rule that offers a general statement of principle. Perhaps most importantly, the degree of lawyer introspection always will be influenced, whatever the rule, by the environment, or subgroup, in which the targets practice. Peer pressure and practice norms are significant determinants of lawyers willingness to consider a range of alternatives in response to an ethical dilemma. See supra note 104. Nevertheless, to the effect rules have any effect on lawyer introspection, the general correlations described above typically hold true.

\[116\] Zacharias, supra note 37, at 48, and examples cited and discussed therein. Of course, a highly determinate rule also can be subject to manipulation because specific elements of the rule may invite lawyers and judges to engage in creative fact-finding and arguments over interpretation.
courts impose. As Figure D illustrates, these conflicting effects make it impossible to determine precisely how heightening generality beyond the initial level affects lawyer introspection and behavior on the whole.

117 Because generalizing provisions reduces their effectiveness as a foundation for discipline, some lawyers may refuse to consider them at all. The extent of this effect depends, in part, on a key assumption underlying ethics codes that serve nonlegislative purposes; that is, that most lawyers are well-intentioned and will attempt to follow the codes' mandates even in the absence of discipline. See supra authorities cited at notes 39-40. See also Hazard, Legal Ethics, supra note 7, at 576 ("General normative propositions have a limited place, and... we should not try to force them to use beyond that place.").

As the likelihood of enforcement declines, generalizing the rules will have less impact in influencing behavior in a broad variety of situations. Figure 4 illustrates this effect.

FIGURE 4

If a rule intended to impact broadly (e.g., "do justice" or "be loyal") becomes unlikely to be enforced, lawyers will tend to consider its mandate only when it clearly is relevant. The category of cases in which lawyers feel a need to question their conduct thus decreases, though perhaps not all the way to the level of a Point IV rule that mentions only particular cases.

The correlation would be similar when parallel extra-code constraints are enforced, but bar rules are not. Again, the fact that particular rules never result in disciplinary proceedings may cause some lawyers to treat all the rules as empty. This effect should be especially pronounced when the unenforced rule is unambiguous. Thus, specific (e.g., Point IV) unenforced rules seem particularly unsuited to promoting a sense of role that will affect lawyer thought and behavior in a broad variety of situations.
This analysis leaves one with the sense that some hidden agenda is at play in the prosecutorial justice provisions. One could understand a code drafter's desire to avoid Point IV regulation that limits coverage or mutes introspection. Reliance on a standard as general as "justice," however, eviscerates the codes' effect in guiding prosecutorial behavior and promoting ethical self-analysis. The justification for the broad regulation of prosecutorial ethics must be found, if at all, in one of the subsidiary regulatory goals discussed below.

C. The Relationship Between Regulatory Specificity and the Fraternal Purposes of Ethics Rules

Scholars have tended to discuss the fraternal aspects of lawyer regulation in historical terms. In other words, they have identified periods in which lawyers have looked to the codes as a means of establishing a group or "club" mentality to heighten the profession's prestige. Nevertheless, the fraternal features of the

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118 I use the term "fraternal" rather than a gender neutral term because, historically, the bar has been male-dominated and commentators conventionally have referred to the "fraternity" or "brotherhood" of lawyers. Using a gender neutral term would, at this stage, create unnecessary linguistic confusion.

119 See, e.g., HAZARD, supra note 7, at 15-16 (discussing fraternal control prompted by
profession's organization and regulation have served a number of valid, instrumental functions that help justify the codes in a way the quest for economic benefit cannot.

Perhaps most important, creating a community or "brotherhood" of lawyers can advance the administrative function of standardizing and facilitating communications—both between competing lawyers and between lawyers and supervisory tribunals. A professional standard that forbids lawyers to lie enables lawyer-adversaries to rely on procedural assurances without resort to judicial supervision. Rules that encourage lawyers to cooperate with their "brother" and "sister" lawyers—for example, in granting extensions and negotiating stipulations—promote efficiency and avoid friction that increases transaction costs. Similar reasoning drives regulation imposing on lawyers obligations of truth and fair dealing toward tribunals. To the extent codes define and fix the extent of those obligations, they inform judges as to the matters in which the court reasonably can rely on lawyers to depart from a purely adversarial posture. As Professor Koniak notes,
in so doing the codes promote the profession’s vision of its legal responsibilities and counteract any judicial tendency to invade the adversarial role that lawyers have established for themselves.\footnote{See, e.g., Koniak, supra note 10, at 1460-78 (describing areas in which states are not prepared to force lawyers to abandon their adversarial posture).}

Part and parcel of the fraternal purposes of lawyer codes is the intent to enhance, or at least control, the public image of the bar. There are noncynical justifications for this concern with image. At one level, enhancing the professional image makes it easier for lawyers to deal with, and ultimately to serve, clients. When the profession can convince the public that it acts on a selfless plane, clients will trust and confide in lawyers.\footnote{Arguably, promoting client trust enables lawyers to represent clients better, which in turn enhances the legal system as a whole. See Zacharias, Confidentiality I, supra note 23, at 366-67 (discussing argument in context of confidentiality rules, and citing authorities).} Moreover, reputable professional regulation is a tool by which lawyers can fend off unreasonably self-serving client demands. To the extent that the codes create a baseline for conduct that most lawyers follow, lawyers can dissuade the client by pointing to the professional norm established in the codes.\footnote{Robert Gordon has pointed to the existence of strong professional norms as a key to maintaining independent judgment among lawyers. Gordon, supra note 22, at 34. A prime example of the way in which codes can help serve this function is the newly adopted MODEL RULES, Rule 3.3(a)(2), (b), which allows lawyers to disclose client perjury. Lawyers now can refer to this rule in attempting to dissuade clients who seek help in committing perjury. See Nix v. Whiteside, 475 U.S. 157, 174-76 (1986) (holding that lawyer acted properly in threatening client with disclosure if client perjured himself).} The presence of the norm encourages lawyers to attempt dissuasion with less fear that the client will go elsewhere to obtain the requested service.\footnote{L. Ray Patterson has long argued that existing professional codes are deficient in failing to take into account client obligations in defining how lawyers should act. See, e.g., Patterson I, supra note 9, at 45; Patterson II, supra note 9, at 699. It is true that the codes establish a strong ethic of loyalty to clients and their wishes. Nevertheless, at least the modern codes emphasize lawyers’ duty to consult with clients and discuss tactics and objectives with them. See MODEL RULES, Rule 1.2 cmt. Provisions that forbid or disapprove of particular lawyer conduct are tools by which lawyers may persuade clients to meet some of the client “obligations” to which Patterson refers. Cf. Stephen L. Pepper, Autonomy, Community, and Lawyers’ Ethics, 19 CAP. U. L. REV. 939, 946 (1990) (discussing lawyers’ ability to influence clients); Shaffer, supra note 14, at 231 (“The beginning and end of a lawyer’s professional life is talking with a client about what is to be done . . . . [T]he role orientation is a way to pretend that the law office conversation is not a moral conversation.”).}
Nevertheless, it cannot be gainsaid that, in promoting a fraternity of lawyers, the lawyer codes are inward as well as outward looking. From its inception, professional regulation has been designed to enhance lawyers' self-image and economic self-interest. By creating an aura of "professionalism"—the notion that lawyers are, by intellect, training, and special characteristics, unique—the codes enable lawyers to command respect and financial reward exceeding that of blue collar workers and other professionals who perform similar services. From a cynical perspective, using the codes to create a public image that secures these benefits merely reflects greed. More charitably, enhancing lawyers' self-image and well-being promotes their enjoyment in being a member of the profession. Economic advantages and a sense of self-respect give lawyers a reason to bear the significant psychological and personal moral costs of professional role-differentiation.

The correlation between regulatory specificity and the administrative/communications aspects of fraternity seems clear. A rule's influence may vary among subcultures of lawyers. But if one

based on a variety of factors other than "law"). Paralleling the effect on clients is the effect on lawyers themselves. Code provisions that most lawyers follow enable lawyers who actually wish to act "well" to do so with less fear of losing clients as a result. Luban, supra note 14, at 461. This effect, however, may depend on whether the provisions are sufficiently enforced to induce general compliance. Id.

128 By convincing the public that lawyers can be counted on uniquely to maintain confidentiality, the bar gains a competitive advantage over other professionals, such as accountants, who are equally qualified in some legal endeavors. Morgan, supra note 21, at 707-12; Zacharias, Confidentiality II, supra note 23, at 629.

129 See Abel, supra note 21, at 653-67 (describing codes in terms of their effects as market controls); Gillers, supra note 31, at 259, 275 (describing lawyer self-interest underlying the MODEL RULES).

130 One should not dismiss the real personal cost that lawyers assume in accepting the system's ethics requirements. The obligations to represent clients zealously, to maintain confidentiality, and sometimes to set aside personal ethics can take a heavy psychological toll. See Andreas Eshete, Does a Lawyer's Character Matter?, in THE GOOD LAWYER, supra note 12, at 270, 274 (discussing "trace" on lawyer as a person acting as adversary); Postema, supra note 17, at 286-88 (discussing strategies by which lawyers can come to terms with the "knavery" of the professional role). Recent studies show that, more and more, lawyers are dissatisfied with their professional lives, suffer from unusual stress, and turn to substance abuse for relief from the pressures of practice. See, e.g., Andrew Benjamin et al., The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers, 13 INT'L J. L. & PSYCHIATRY 233 (1990); Andrew Benjamin et al., The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers, 1986 AM. B. FOUND. RES. J. 225.

131 See supra note 104. For example, communications among a subculture of lawyers may be controlled by the degree of personal contact they have had and shared experiences that define their outlook toward adversarial lawyering. If a highly specific rule seems arbitrary or indefensible to a subculture of lawyers—in light of their shared expe-
assumes some level of obedience to the codes, rules fix expectations regarding fraternal behavior in proportion to their specificity (Figure E).

**FIGURE E**

<table>
<thead>
<tr>
<th>POINT I</th>
<th>POINT II</th>
<th>POINT III</th>
<th>POINT IV</th>
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<tr>
<td>LEVEL OF SPECIFICITY</td>
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In the context of prosecutorial ethics, for example, communication between defense attorneys (or the courts) and prosecutors is facilitated best by rules that enable the defense attorneys (or judges) to know prosecutors' perspectives toward the communications. Most commentators assume that prosecutors are bound to the same rules as other lawyers: they may not lie or mislead a
tribunal, must treat defense lawyers with courtesy, and follow the other general mandates of the codes. However, insofar as the codes seek to impose additional obligations upon prosecutors—for example in disclosing evidence—a general "justice" standard does not enable defense attorneys to predict how a particular prosecutor will act. It thus fails to inform or guide defense counsel in structuring informal requests or bargaining positions and keeps judges in the dark concerning how much discovery they must require as a matter of law. In contrast, specific disclosure provisions in the codes (i.e., Point IV rules) or explicit standards for when disclosure is appropriate (i.e., Point III rules) would help facilitate communications.

There is some, though less, linkage between regulatory specificity and the public image of the bar. To the extent that lawyers wish to refer to code norms in negotiating with clients over tactics, clients must be able to understand that a clear norm exists. Heightened specificity, though limiting in terms of coverage,

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135 See generally Zacharias, supra note 37, at 56-60 and authorities cited therein.
136 See supra text accompanying notes 111-12.
highlights behavioral baselines. The effect of specificity upon the bar’s public image is uncertain. Depending on the circumstances, specifying prohibited conduct can be perceived either as confronting a particular ethical dilemma—and thereby exhibiting the bar’s willingness to regulate itself—or as engaging in politics as usual. Generalizing regula-

137 An appropriate pictorial representation would be as follows.

**FIGURE 5**

LEVEL OF SPECIFICITY

138 Narrow rules that limit themselves to particular conduct have, in the past, often been characterized as self-serving. See, e.g., Abel, supra note 21, at 655-56 (discussing confidentiality rules); Gillers, supra note 31, at 275 (discussing the MODEL RULES as a whole); Rhode, supra note 23, at 326 (discussing solicitation rules); Zacharias, Confidentiality II, supra note 23, at 629 (discussing confidentiality rules). For example, rules specifically forbidding advertising and solicitation have been challenged as furthering lawyers' economic self-interest. See Bates v. State Bar of Ariz., 433 U.S. 350, 377 (1977) (noting negative effect of advertising rules on competition). Cf. Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 490 (1988) (O'Connor, J., dissenting) (discussing anticompetitive effects of advertising and solicitation rules); Supreme Court of N.H. v. Piper, 470 U.S. 274, 278 (1985) (noting anticompetitive effect of local practice rule). Rules forbidding lawyer criticism of judges and other lawyers arguably project an incorrect, self-serving image of lawyer competence. See Zacharias, Confidentiality II, supra note 23, at 629 n.144 and authorities cited therein.

Specific rules are prone to foster a negative public image because the process of reaching consensus on a circumscribed rule may include logrolling among affected segments of the bar. Cf. Schneyer, supra note 11, at 689-90 (discussing way in which narrow MODEL RULES, Rules 1.11(a) and 4.1(b) responded to the lobbying of the “elite firms that cared about” revolving door and SEC whistleblowing issues). This in turn may create an image that the rulemakers have engaged in unseemly politics.

Of course, this trend does not always hold true. Generalized provisions can seem
tion—limiting it to basic role definition—can help avoid any appearance of impropriety. No one could reasonably argue that requiring lawyers to act zealously on behalf of clients promotes lawyers' self-interest. Professional standards of diligence, confidentiality, and loyalty can hardly be viewed as special-interest legislation. Nor, in the area of prosecutorial ethics, would anyone dare quibble with the requirement that prosecutors "do justice".

On the other hand, overgeneralization may itself be an attribute of self-serving regulation. A rule that leaves lawyers free to do as they wish ducks the issue of appropriate conduct. Point I regulation that does not even suggest appropriate results allows lawyers—in the "justice" example, prosecutors—to act in their own interests without fear of repercussions. That, in turn, may breed distrust of the bar. It is thus impossible to identify a strict correlation between specificity in drafting and the way the public will react to the rules. Probably, the public's sense of lawyers will depend more on independent factors such as the performance of lawyers and the circumstances under which particular rules are proposed.

The picture is less ambiguous with respect to the effect of specificity on lawyers' self-image. General rules which, by definition, accord lawyers discretion inevitably promote lawyers' sense of self-respect. This effect is particularly strong where extra-code constraints are also limited, as in the prosecutorial context, for

self-serving as well. See infra text accompanying notes 144-45. And some strict rules clearly are designed to protect consumers of legal services. See, e.g., MODEL RULES, Rule 1.5(a) (limiting fees); CPR, DR 2-106(B) (same).

139 See MODEL RULES, Rule 1.3 cmt.; CPR, Canon 7.
140 See MODEL RULES, Rule 1.9; CPR, DR 6-101(A)(3).
141 See MODEL RULES, Rule 1.6; CPR, DR 4-101.
142 See MODEL RULES, Rule 1.7 cmt.; CPR, EC 5-2.
143 Heightening specificity (e.g., to the Point II level) may appear to provide at least minimal control. Some laypersons will recognize that, in a closed society of lawyers dependent on mutual cooperation and referral of business, peer opinion can be counted on to constrain self-serving behavior. See Gordon, supra note 22, at 34 (noting impact of peer pressure); Rhode, supra note 17, at 624-25, 639 (discussing effect of institutional pressures on lawyer behavior); Zacharias, supra note 37, at 109 (discussing importance of peer influence).
144 This discussion, of course, assumes that the public knows about the rules. Generalized provisions that have no obvious practical effect on particular situations are more likely to escape public, and media, attention.
145 See Gaetke, supra note 27, at 77 (discussing generalized "officer of the court" provisions and concluding that "the profession reaps public esteem, self-satisfaction, and other benefits from its allegedly critical and quasi-official role in the judicial system").
then society truly delegates control to the individual lawyer.

Increasing specificity from a Point I to a Point II level should not significantly erode lawyers' self-image. At either level, the message is clear that society trusts the targeted lawyers to govern their own conduct. As a regulation moves to Point III, however, it signals that lawyers are to be trusted less. Moreover, to the extent the rule is enforced, it warns lawyers their conduct is being watched. Inevitably, the individual lawyer's sense of power diminishes, and with it the sense of personal professionalism.

146 Lawyers know that other lawyers have written the codes. They therefore may attach no significance to the "trust" that the codes embody. On the other hand, the importance bar leaders and judges seem to attribute to the notion of professionalism suggests that lawyers tend not to think in these terms or to give the matter of who writes the rules much thought at all. See, e.g., Eugene A. Cook, Professionalism and the Practice of Law, 23 TEX. TECH L. REV. 955, 958 (1992) (discussing role of self-governing rules in establishing lawyers as public servants); Marvin E. Frankel, Why Does Professor Abel Work at a Useless Task?, 59 TEX. L. REV. 723 (1981) (justifying codes as meaningful part of establishing lawyers as professionals); Kenneth Kipnis, Professional Responsibility and the Responsibility of Professions, in PROFITS AND PROFESSIONS 9, 17 (Wade L. Robinson et al. eds., 1983) (the "codes embody a theory about the relationship between the profession and the community"); Rhode, supra note 17, at 592, 606 ("attorneys have variously appeared [in the discourse] as 'sentinels,' 'ministers,' and 'high priests of justice,'" and "legal practice is still idealized as a self-directed calling, informed by the spirit of 'public service'") (citations omitted). Cf. James R. Elkins, Ethics: Professionalism, Craft, and Failure, 73 KY. L.J. 937 (1985) ("Professionalism is a sort of devil-term that allows members of a profession to enjoy status and claim lofty ideals while avoiding responsibility"); Stanley Fish, Anti-Professionalism, 7 CARDOZO L. REV. 645 (1986) (viewing professionalism as a self-satisfied and self-serving invocation of special privilege). To the extent professional regulation defers to the profession's judgment, thus establishing a legislatively or judicially adopted norm, lawyers seem ready to accept that the codes say something favorable about the place of lawyers in society.

147 See Hazard, supra note 1, at 1242 (stating that the trend toward "legalization" of the codes has "resulted in the disintegration of the profession's sense of self"). The correlation between specificity and lawyer self-image would take this graphical form:

FIGURE 6
The prosecutorial "justice" provision can be seen as serving the function of promoting prosecutors' self-image. On the surface, the provision also appears to set a high-minded standard that the public can accept and which individual prosecutors can use to counteract supervisory and public disapproval of their choice of tactics. The public's view of a particular prosecutor's decisions, however, is unlikely to be influenced significantly by the common sense, and elusive, concept of prosecutorial "justice." And, once the codes' Point I orientation becomes subject to public scrutiny, the positive "public image" effect of an unanchored "justice" standard is likely to disappear. The fraternal purposes of ethics codes thus do not provide firm support for the prevailing approach to prosecutorial ethics.

D. The Relationship Between Regulatory Specificity and Influencing Judicial Standards

Most codes disclaim any intention to influence substantive, extra-code legal standards. But Professor Koniak makes a persuasive case for the proposition that many aspects of the code are designed precisely to establish lawyers' own vision of the law of lawyering. The legitimacy of the profession's special point of view depends, of course, on the degree to which lawyers uniquely appreciate the problem in question. In some instances, the profes-

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148 Unlike the situation in which a lawyer can use an ethics rule to dissuade individual clients from undesirable conduct, see supra notes 126-27, the generality of the term "justice" limits its persuasive effect. A prosecutor who argues that justice requires her conduct must recognize that other conduct the public prefers will usually fit the requirement as well.

149 That is because the standard will be exposed as establishing no norm in practice. See supra text accompanying note 109.

150 See, e.g., MODEL RULES, Scope 11 3, 6; CPR, Preliminary Statement; CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-100(A) (1988) ("Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers."). See also Miami Int'l Realty Co. v. Paynter, 841 F.2d 348, 352 (10th Cir. 1988) (malpractice decision refusing to rely on standard of care in Colorado ethics code because of code's disclaimer of intent to influence substantive law); Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.) (same for Tennessee), cert. denied, 449 U.S. 888 (1980); Carlson v. Morton, 745 P.2d 1133, 1136 (Mont. 1987) (same for Montana). Cf. Ellen S. Podger, Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession, 61 TEMP. L. REV. 1323, 1335 (1988) (positing that courts use ethics rules as guides, but specifically disclaim their effect as rules of law).

sion truly may know best because they have more information concerning the interaction of clients, lawyers, and the law.\(^{152}\) In other instances, the profession’s vision is simply driven by its self-interest or self-image.\(^{153}\) Whether the bar should use the codes to press the profession’s perspective on the substantive law is a normative question beyond this Article’s scope.

The ability of the bar to influence substantive law turns on a variety of factors. Perhaps most important is the extent to which extra-code standards already determine the legal principles. If “law” precedes the codes, courts considering changes are likely to be persuaded by the codes’ disclaimers that judges should not rely on the codes.\(^{154}\) Moreover, once courts fix standards independently of the codes, they set a precedent for the sources that future courts should use in assessing changes in the standards; one of the best reasons courts have for looking to the codes is that alternative sources for decisionmaking are unavailable. Finally, the legitimacy of code standards is often open to question because of the danger that the bar has promulgated self-serving standards. Courts will inevitably hesitate to rely on lawyers’ own interpretation of how they themselves should be regulated.\(^{155}\)

The sum of these considerations is that codes are most likely

\(^{152}\) Thus, for example, lawyers may be in a superior position to appreciate the difficulties in screening cases for conflicts of interest or in supervising partners and associates in a large law firm.

\(^{153}\) Koniak, \textit{supra} note 10, at 1486-87 (discussing negative aspects of lawyers’ vision).

\(^{154}\) For example, many courts have accepted the proposition that a state’s governing ethics code does not provide a standard for malpractice liability, even though the code requires all lawyers in the jurisdiction (not only the average lawyer and better) to satisfy the code standards. \textit{See}, e.g., Miami Int'l Realty Co. v. Paynter, 841 F.2d 348, 352 (10th Cir. 1988) (holding that violation of \textit{COLORADO CODE OF PROFESSIONAL RESPONSIBILITY} is not malpractice \textit{per se}); \textit{Woodruff}, 616 F.2d at 936 (concluding that the \textit{TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY} does not define standards for civil liability), \textit{cert. denied}, 449 U.S. 888 (1980); Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986) (holding that a violation of ethics rule itself is not an actionable breach of duty to a client). One court recently held that expert witnesses testifying to the malpractice standard of care may not even refer to professional code standards. \textit{Hizey} v. Carpenter, 830 P.2d 646, 654 (Wash. 1992), \textit{noted in} 8 ABA/BNA \textit{MANUAL, supra} note 45, at 159, 160.

Although the above analysis mentions only courts, it applies to legislative decisionmaking as well. But one significant difference is apparent. In the legislative arena, lawyers and bar associations can, and do, influence lawmaking by direct lobbying as well as by example in the codes.

\(^{155}\) Zacharias, \textit{Confidentiality II}, \textit{supra} note 23, at 625-28. \textit{See also} \textit{Cramton} & \textit{Udell, supra} note 6, at 317-18 (arguing that, in interpreting ethics codes and deciding whether to give them legal effect, courts should take into account the “strong evidence that lawyers, when they regulate themselves, are inclined to take positions that favor the use of lawyers and enhance their authority and prestige”).
to influence extra-code standards significantly when several elements are present. Gaps in the prevailing law must be evident. Traditional sources for resolving the issues (or setting the standards) must be absent or have failed. And the standard setter (e.g., the courts) must have reason to believe the bar’s response is measured.\textsuperscript{156} In these circumstances, courts may feel justified in relying on the special expertise of bars or bar drafting committees.

Let us assume a situation in which courts might look to the codes. How might the specificity of the code provisions in question affect their influence? For obvious reasons, a highly generalized provision cannot assist the courts in filling gaps in the substantive law. In the prosecutorial ethics context, for example, courts have focused on prosecutorial misconduct in determining whether due process is violated. Yet the courts have rarely cited the ethics codes in fleshing out the meaning of misconduct, largely because the codes’ general justice terminology fails to supply the ingredient of concreteness that the term “due process” lacks.\textsuperscript{157} In contrast, more specific code provisions regarding prosecutorial disclosure of evidence have had somewhat greater impact.\textsuperscript{158}

The relationship between specificity and influence on the substantive law, however, may not be completely proportional. Conduct-specific rules tend to be frozen in time; they are incapable of adjusting with changing notions of reasonable conduct.\textsuperscript{159} This has at least two consequences. First, because codes historically have tended to be amended relatively rarely,\textsuperscript{160} courts may hesi-

\textsuperscript{156} In other words, the court must believe that the bar has studied the matter carefully, reached its conclusions by virtue of its special experience or expertise, and avoided adopting a position to further the membership’s self-interest.


\textsuperscript{158} See Zacharias, \textit{ supra} note 97, at 74-76 (canvassing ethics rules and constitutional decisions relating to disclosure of evidence).

\textsuperscript{159} See Ehrlich & Posner, \textit{ supra} note 41, at 278 (“the more detailed a rule is, the more often it will have to be changed”); Powers, \textit{ supra} note 53, at 31 (noting that one cost of “formal rules” is their inability to take account of changing values over time); Powers, \textit{ supra} note 17, at 1280-81 (same).

\textsuperscript{160} For the most helpful history of the various codes, see generally Hazard, \textit{ supra} note 1. Of course, since the promulgation of the CPR and MODEL RULES, state codes have seen more frequent amendments than in the past. However, if one looks at most...
tate to delegate authority for the standard to the bar. In other words, courts are unlikely to accept proposed legal standards that are satisfied whenever, and simply because, lawyers obey the codes.\textsuperscript{161} Second, a highly specific ethics rule is likely to seem anachronistic by the time a court considers its adoption.\textsuperscript{162}

I do not mean to overstate the significance of code specificity in judicial decisions involving professional responsibility issues. Courts routinely have followed the codes' conflict of interest rules in reaching attorney disqualification decisions and have relied on a variety of provisions as evidence of malpractice.\textsuperscript{163} Yet typically, courts have ignored code provisions that are either highly general or highly specific. By adopting general code standards as substantive law, a court ordinarily would be according individual lawyers discretion to govern their own conduct. As in the case of the "justice" standard for prosecutors, judges hesitate to abdicate control in this way. Conversely, in the context of adversarial lawsuits, adopting a highly specific code standard would favor one type of litigant or lawyer over another—again removing case by case control from the courts.\textsuperscript{164} The courts' universal refusal to accept specific code constraints on prosecutors' ability to speak with represented witnesses in favor of rules that give courts discretion to judge prosecutorial conduct on a case by case basis typifies the judicial response.\textsuperscript{165}

jurisdictions individually, one finds that their codes have remained fairly stable even in recent years.

\textsuperscript{161} One extraordinary departure from this tendency is Nix v. Whiteside, 475 U.S. 157 (1980) (lawyer's conduct satisfied the constitutional requirement of effective assistance of counsel by virtue of the lawyer's compliance with local bar requirements).

\textsuperscript{162} In a different context, H.L.A. Hart has expressed a preference for generality in lawmaking when legislating in new areas of law, because this generality enables the law to evolve more easily (usually judicially) over time. By contrast, highly specific laws tend to remain fixed. See HART, supra note 58, at 123-32. The same analysis applies with respect to judicial adoption of specific professional code provisions. These tend to control courts and limit their ability to adjust as unforeseen cases arise.

\textsuperscript{163} See supra cases cited at notes 20, 30, and 154. The malpractice cases present a conundrum. The courts' general refusal to rely on code violations as proof of malpractice could be characterized as representing judicial reluctance to adopt the codes as substantive law. Yet the codes specifically state that their provisions should not be used as liability standards. The courts' hesitance to rely on the provisions thus could be seen, in fact, as adopting the codes.

\textsuperscript{164} For example, a strict rule forbidding or permitting lawyers to represent multiple defendants before the same grand jury would give a tactical advantage to prosecutors or defendants, respectively. The Supreme Court has opted for a case-by-case approach. Wheat v. United States, 486 U.S. 153, 164 (1988).

\textsuperscript{165} Under MODEL RULES, Rule 4.2 and CPR, DR 7-104(A)(1), the criminal defense
What these observations suggest is that a measure of specificity, but not too much specificity, is usually a *sine qua non* for provisions intended to influence the substantive law. To have influence on the courts, ethics provisions must be sufficiently concrete to supplement gaps in legal standards. Point I provisions like the prosecutorial justice rule and most Point II provisions are likely to fail in this regard as well. As one moves up the spectrum towards Point III, the codes attach priorities to a series of criteria. Provisions that operate in this way may be useful to courts in establishing legal doctrines that set presumptions, without eliminating judicial flexibility. On the other hand more specific provisions tend to scare judges. They raise the specter of potentially biased standards and of tying judges’ hands. As Figure F suggests, one therefore can expect the influence of rules on substantive law to decrease as their level of specificity moves from Point III to Point IV.

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bar (and the ABA) contend that the government may not use undercover agents to obtain statements from suspects who have lawyers. Prosecutors contend that these rules, at least to the extent they apply pre-indictment, cannot apply to the government. By adopting and enforcing either of these interpretations, courts would be establishing new legal principles governing criminal investigations that would favor either criminal defendants or the government. Most courts have avoided such a strong position, preferring to adopt a case-by-case approach that enables courts to permit some use of undercover agents, while preserving the option of curbing some prosecutorial conduct. See United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (holding that investigative needs sometimes allow contact with represented party), *cert. denied*, 498 U.S. 871 (1990); United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991) (upholding application of anti-contact rule to prosecutors, but suggesting in *camera* proceeding through which prosecutors can sometimes speak with represented parties), *vacated and remanded on other grounds*, 989 F.2d 1032 (9th Cir. 1993).

166 *See supra* notes 138-39.
E. The Relationship Between Regulatory Specificity and Pragmatic Considerations Relevant to Code Drafting

Generalized regulation has few direct consequences upon lawyers, so it is by definition unthreatening. Code drafters ordinarily prefer to avoid antagonizing groups that might defy the rules. Because in the past many codes only have had the force of "moral persuasion," controversy threatened to undermine their adoption or impact. Even in jurisdictions where the rules have legal effect, as is the case with most current codes, defending them against defiant lawyers can be expensive, time consuming, and beyond the resources of the bar.¹⁶⁸

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¹⁶⁷ I term one extreme of the vertical axis of Graph F the “strongest chance of influence” rather than “strong chance,” in recognition of the fact that other factors significantly influence the likelihood that any code provision will have an effect on the substantive law. See supra text accompanying notes 154-56.

¹⁶⁸ See Zacharias, supra note 37, at 105-06 (discussing resource considerations) and authorities cited therein; Kennedy, supra note 53, at 1706 (noting that particular rules "may be advocated because they fit a political strategy for dealing with conflict rather than for reasons intrinsic to the social situation in which they will be applied, or to the substantive content of the law in question") (emphasis in original).

With respect to traditional laws, Gail Heriot suggests that it is easier for lawmakers to attain a consensus over a rule than a standard, because standards reveal the principles underlying the law better than rules and these may provoke disagreement. See Heriot, supra note 46, at 941-42. Although I question whether standards necessarily reveal more information than rules even in the traditional lawmaking context—consider "reasonable-
One might reasonably question whether it is appropriate for code drafters to cave to the desire to avoid conflict. If, for example, drafters respond to prosecutors' potential defiance of specific code reforms by avoiding appropriate regulation of prosecution tactics, the drafters seem to abdicate their function.\(^{169}\) Nevertheless, becoming embroiled in disputes concerning regulatory jurisdiction inevitably diverts the bar from other important and valuable tasks. This is a cost reasonable drafters must take into account.

Specific rules tend to affect the practices of some subgroups of lawyers more than others. When an affected subgroup is organized, the mere proposal of a specific rule almost automatically induces it to lobby. If the subgroup is not organized, but the impact on its individual lawyers is likely to be significant, the cost of organizing the subgroup will be relatively small because its interest is defined by the provision. In contrast, the general membership of the bar may have only an intellectual interest in the provision's promulgation. The effort to organize the membership to support the rule can be prolonged and expensive.\(^{170}\) Moreover, because

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\(^{169}\) See DOJ Memo, supra note 100, at 7 (Justice Department memo challenging validity, and threatening to defy, anti-contact rules). See also Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (4th Cir. 1989) (removal proceeding in which federal prosecutor claimed exemption from local ethics rules); United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (accepting federal prosecutors' claim that investigative needs sometimes excuse strict compliance with ethics rules), cert. denied, 111 S. Ct. 192 (1990); Foreman v. Attorney Registration and Disciplinary Comm'n, No. 91-C8257 (N.D. Ill. filed Dec. 24, 1991) (local U.S. Attorney's complaint challenging to Illinois anti-subpoena rule); Baylson v. Disciplinary Bd., 764 F. Supp. 328, 337-41 (E.D. Pa. 1991) (upholding federal prosecutor's challenge to the applicability of Pennsylvania anti-subpoena rule); Linda Himelstein, Top Lawyers Are Subpoened in BCCI Probe, LEGAL TIMES, Apr. 27, 1992, at 1, 18 (recounting Justice Department policy that the government's subpoena power may not be saddled by overly technical ethics requirements); Norton, supra note 134, at 207 (concluding that DOJ may claim an unlimited exemption from ethics rules); F. Dennis Saylor, IV & J. Douglas Wilson, Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors, 53 U. PITT. L. REV. 459, 483 (1992) (DOJ attorneys taking position that states are barred from enforcing disciplinary rules against federal prosecutors whenever the prosecutors comply "with the Constitution and all applicable federal statutes").

\(^{170}\) The prime example is the six year process by which the MODEL RULES were adopted. The Kutak Commission was first appointed in 1977. Apparently, its first several years of business were devoted not only to identifying appropriate changes in the professional rules, but also to deciding how to package the rules, sell them to the public, and
code drafters can anticipate a divisive political process, they become prone to misspending resources upon unnecessary committees and issue-study groups in order to create a record that will facilitate adoption of the measure.

To the extent specific rules carry with them significant potential for opposition and debate, they also tend to focus media attention upon the ethics regulation process. Sometimes that attention has beneficial effects in informing the debate and providing the public with insight into the way lawyers regulate themselves. But almost inevitably, the spotlight has negative effects as well. Because specific rules typically can be attacked, rightly or wrongly, as promoting the interests of a select group of lawyers, some observers will be persuaded that the rules are self-serving. Highly generalized rules can be attacked similarly, as a cowardly "ducking" of the issues. Thus, as soon as media attention is drawn to the debate, the pressure increases to preserve the bar's "public image" by adopting compromise provisions at Points II and III levels of specificity. Compromise based on factors other than principle may diminish the rule's capacity to achieve its objectives.

These attributes of code drafting help explain the historical approach to prosecutorial ethics. Within the profession, prosecutors are an organized group. Trained politicians head most state prosecutors' offices. In resisting controls on prosecutorial behavior, they understand how to harness the public's natural fervor for law enforcement. Similarly, federal prosecutors have ready access to Congress and the media. By adopting regulation of prosecutorial ethics that sounds high-minded but, in practice, defers to prosecutorial discretion, code drafters can avoid in-fighting, media attention, and any questioning of the motives underlying the codes. The drafters may find it especially appropriate to emphasize these concerns in the law enforcement area because internal administra-

convince lawyers to be receptive to them. See Schneyer, supra note 11, at 695-97. The next few years were spent educating the bar and reacting to lobbying by disaffected sub-groups of lawyers. Id. at 700-07. The final stage, which Ted Schneyer characterizes as the "endgame," consisted of negotiating behind-the-scenes, informing the ABA House of Delegates on the merits, and convincing it to accept the commission's proposals. Id. at 714-24.

171 See supra note 138.
172 See supra text accompanying notes 140-45.
173 An unprincipled rule may cause lawyers to disregard it. To the extent the rule attempts to shape or influence substantive law, an appearance of "politics" may also persuade courts and lawmakers to give the rule less credence.
tive mechanisms\textsuperscript{174} and external media oversight independently exert some constraint on prosecutorial behavior.\textsuperscript{175} Thus, for purely practical (some would say "unprincipled") reasons, code drafters may assign a low priority to the regulation of prosecutorial ethics as a whole.\textsuperscript{176}

F. Lessons for the Code Drafters

What does this analysis of regulatory specificity and the codes' "justice" provisions teach us for purposes of drafting ethics codes? The costs and benefits of flexible standards and the overinclusiveness and underinclusiveness of specific rules rest on many considerations that are common to legal and ethics provisions. Insofar as professional codes are designed to produce uniform behavior (e.g., through the threat of discipline), to define appropriate conduct, and to achieve broad coverage, they can be analyzed in traditional rule-standard terms. But other factors underlying the codes demand special analysis. The expectation that lawyers will produce their own norms through introspection is an element uniquely relevant to the codes. Enforcement concerns, in many respects, are less important. By definition, considering the effect of a provision on substantive law makes sense only in the code context, where the provision in question is not itself the substantive law. Many of the practical concerns that influence code-drafters' drafting decisions differ from those that influence legislators and administrative rulemakers.

One can draw some loose conclusions concerning the effectiveness of schemes at different levels of specificity. A generalized code provision offers less guidance and produces less uniformity in

\textsuperscript{174} These include peer pressure, supervisory controls, and institutional guidelines. See Zacharias, supra note 37, at 108-09 (discussing internal control mechanisms).

\textsuperscript{175} Because of the public's fascination with criminal law, prosecutors' decisions are, perhaps to a greater extent than the decisions of lawyers in other areas of practice, subject to media attention. At least in published cases, elected prosecutors inevitably take public opinion into account.

\textsuperscript{176} See Bennett L. Gershman, The New Prosecutors, 53 U. PITt. L. Rev. 393, 444-45 (1992) (documenting failure of disciplinary bodies to act against prosecutors and giving reasons); Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for "Brady" Violations: A Paper Tiger, 65 N.C. L. Rev. 693 (1987) (criticizing the absence of discipline against prosecutors); Zacharias, supra note 37, at 104-07 (explaining hesitation of disciplinary authorities to enforce codes against prosecutors and citing authorities). Cf. McKay Report, supra note 22, at 9 (ABA study documenting inability of disciplinary authorities to respond to all meritorious claims that the codes have been violated and assuming need for disciplinary authorities to set priorities); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13.6 (1985 & Supp. 1991) (general discussion of professional discipline of prosecutors).
conduct than a specific provision, but not necessarily "insufficient" guidance or uniformity to accomplish some regulatory purposes. How much guidance lawyers need from ethics codes depends upon the availability of other sources that lawyers can consult. Behavioral uniformity is valuable in that it leads to similar results in similar cases. However, the benefit of achieving this "equality" may be offset by the loss of individual ethical thought and the risk of unfairness when lawyers lack flexibility and leeway, for example to "do justice" in a given case.

Nevertheless, our analysis illustrates that a Point I rule makes little sense when it supplies the sole, or primary, standard by which lawyers are to determine their conduct. In effect, Point I rules defer to substantive law for enforcement and further guidance, a process which proves counterproductive if "law" fails to provide standards of conduct. Greater specificity in this limited range of circumstances comes at no cost to coverage or to the appearance of well-intended rulemaking, and arguably enhances the possibility of independent moral behavior. At the same time, greater specificity has the benefit of regularizing lawyer conduct and enhancing potential enforcement of the rule.

Point II rules emphasize introspection and self-regulation. They thus make most sense where two elements are present: (1) the affected lawyers are able to balance relevant considerations, and (2) no consensus exists with respect to the appropriate outcome to the covered set of problems. The first element requires the lawyers to have, by virtue of other provisions, a good sense of the role they are to play; in other words, an internal mechanism for setting priorities. When such a mechanism exists, society can trust the lawyers to exercise discretion in cases in which society itself has no ready solution to the problems in question.

Point III regulation bridges the desire for more uniform behavior and the need to accord lawyers leeway to depart from the rule to achieve a better result at the margins. But as regulation becomes more specific in this way, two potential dangers become prominent: first, that lawyers will cease to reflect on ethical matters; second, that the rule itself will be (or be perceived as) a product of special interest influence.

177 See supra text accompanying note 110.
178 See supra text accompanying notes 115-18.
179 See supra text accompanying notes 72-73.
180 See supra text accompanying note 139.
Highly specific, Point IV regulation usually is the most enforceable and provides the clearest guidance to lawyers. Yet Figures C and D show that typically it has significant costs in terms of lawyer introspection and, often, to coverage. Strict professional rules are rarely necessary when the lawyer's role is clear or when extra-professional standards direct the lawyer's conduct, but sometimes it is useful to avert possible misunderstanding by prescribing obviously appropriate behavior. Alternatively, specific rules may be necessary when the solutions suggested by the relevant decision-making criteria are inevitably ambiguous, yet society (or the legal system) prefers one answer over another. One would therefore expect code drafters to rely on Point IV rules either with respect to recurrent problems with a history of nonuniform response by similarly situated lawyers or with respect to situations where lawyers' natural incentives lead them to seek the wrong result. In short, specific rules are best suited to situations in which code drafters cannot trust lawyers to use good judgment in implementing their role.

Our analysis of the code drafters' approach to prosecutorial ethics illustrates that the justice provisions serve only the function of defining a role. Yet one comes away with the conclusion that they serve even the role-defining goal badly. The Point I approach contributes to broad coverage; that is, it ostensibly requires prosecutors to consider "justice" in a broad spectrum of situations. Together with the few pretrial rules, it highlights prosecutors' obligation to preserve defendants' rights. However, the approach provides little guidance regarding the nature of the rights which should be protected or the emphasis they should receive. A Point II approach would apply just as broadly and could guide prosecutors better. A Point II or Point III approach would provoke more introspection. And, because discipline for violating any Point I rule is unlikely, the justice provisions have minimal direct impact on behavior. If the initial code drafters had analyzed the subject carefully, they probably would have had no choice but

181 For example, the codes try to create black letter rules for when lawyers who appear as witnesses should be disqualified from representation, even though the balance of hardship may vary from case to case. See Model Rules, Rule 3.7; CPR, DR 5-101-02.
182 Arguably, the justice provisions also enhance prosecutors' sense of self-respect and, at the time of their adoption, avoided political conflict within the bar concerning appropriate regulation. However, these attributes have dissipated as attention to the subject of regulation of prosecutorial activity has increased. See supra text accompanying note 149.
183 Model Rules, Rule 3.8; CPR, DR 7-103.
to embrace a Point II or III approach to accomplish their role-defining goal.

V. MODEL RULE 3.8(F) — A CASE STUDY

This Article’s analysis of the prosecutorial ethics experience suggests three drafting principles. First, it is critical that code drafters identify the purposes of the code generally, and of parts of the code that form their own unit. Second, when codes or code segments stem from multiple purposes, the drafters must set priorities among them; for purposes of drafting and justifying the provisions, it is important that the drafters note which purpose should take precedence in the event that all cannot be served. Third, in writing or reforming the rules, the drafters should focus on the purpose or purposes they have identified and select the drafting approach—or level of specificity—that best effectuates those purposes. Specificity can be correlated with each goal and attribute of the goal. Only by recognizing those correlations at the outset can rulemakers hope to draft provisions that accomplish their objectives.

Code drafters who learn these lessons will undoubtedly write better, or at least more rational, codes. But the long term effects may be even more pronounced. By identifying and pursuing particular objectives, the drafters make it possible for subsequent reformers of the rules to see how proposed reforms fit within the codes’ scheme. That in turn should help focus the debate surrounding reforms upon the relevant issues.

The final section of this Article illustrates the usefulness of the specificity model in analyzing code reforms. It takes a brief look at one area in which the ABA has proposed new limits on prosecutorial behavior; in particular, the area of prosecutors’ decisions to issue subpoenas directed at attorneys.184 Consistent with its model, the Article identifies the goals of the proposed regulation and urges each jurisdiction responding to the ABA proposal to determine how those goals fit with the thrust of their own codes.185 To the extent adoption of some rule governing attorney subpoenas would be compatible with the priorities embodied in a

184 MODEL RULES, Rule 3.8(f).
185 Because the issue of whether local jurisdictions should adopt the ABA’s proposed reform depends, in part, on the goals embodied in each jurisdictions’ codes, this Article does not attempt to resolve that issue. Instead, it analyzes the ABA proposal in light of the ABA’s own model codes.
particular jurisdiction's code, the Article encourages the rulemakers to consider what level of regulatory specificity can best achieve the reformers' legitimate goals.

A. The Background: Model Rule 3.8(f)

Whether and when prosecutors should subpoena defense attorneys to testify about client affairs has long been a topic of debate.8 The number of attorney subpoenas rose dramatically in the 1980's,187 in large part because legislatures increasingly criminalized conduct in which lawyers themselves may be intimately involved.188 Beginning in the mid-1980's, the ABA began to consider whether it would be appropriate to adopt a professional rule to circumscribe prosecutors' discretion to issue attorney subpoenas.190 In 1990, the ABA adopted a highly specific (i.e., Point IV) Model Rule.190 Six states have followed suit,191 and two have rejected a similar proposal.192 Numerous jurisdictions are in the process of considering regulatory reform.193

190 Model Rules, Rule 3.8.
192 See D.C. Adopts New Ethics Rules, Permits Non-Lawyer Partners, 6 ABA/BNA MANUAL, supra note 45, No. 3, at 53-55 (Mar. 14, 1990) (reporting D.C.'s rejection of Model Rules, Rule 3.8(f)); New York's Courts Adopt Changes to Ethics Rules, 6 ABA/BNA MANUAL, supra note 45, No. 9, at 172, 175 (June 6, 1990) (reporting N.Y.'s rejection of Model Rules, Rule 3.8(f)).
193 After litigation, Illinois reconsidered its adoption of the rule. See 8 ABA/BNA MANUAL, supra note 45, No. 21 at 367 (Nov. 18, 1992) (reporting Illinois Supreme Court's adoption, stay pending reconsideration, and subsequent repeal of Model Rules, Rule 3.8(f)).
Model Rule 3.8(f) states, in pertinent part:

(f) [A prosecutor shall] not subpoena a lawyer in a grand jury or other criminal proceeding unless:

(1) the prosecutor reasonably believes:
   (i) the information sought is not protected from disclosure by any applicable privilege;
   (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
   (iii) there is no feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Ostensibly, Rule 3.8(f) was prompted by several valid concerns concerning attorney subpoenas. Unless carefully employed by the prosecutor and dutifully resisted by the lawyer-witness, a subpoena may prompt a lawyer inadvertently to disclose privileged information. A defense lawyer will ordinarily lose his client's trust by appearing as an adverse witness. Even when the lawyer protects the privilege and remains silent, a client may doubt the lawyer's loyalty if the testimony has occurred in secret grand jury proceedings. And, in highlighting an actual or potential conflict between the interests of the lawyer and client, attorney subpoenas increase the likelihood that defense lawyers will be forced to withdraw from the representation or be disqualified. Thus, attorney subpoenas are prone to prosecutorial abuse.

194 See Zacharias, A Critical Look, supra note 23, at 925-35 (discussing concerns raised by attorney subpoenas) and authorities cited therein. As I have previously discussed, in today's world, attorney subpoenas validly may seek unprivileged information concerning such matters as the identity of an attorney's client, the source of attorney fees, and wrongdoing by the attorney himself or herself. Id. at 920.

195 In re Harvey, 676 F.2d 1005, 1009 n.4 (noting chilling effect on attorney-client relations), vacated, 697 F.2d 112 (4th Cir. 1982) (en banc); In re Sturgis, 412 F. Supp 943, 946 (E.D. Pa. 1976) (noting danger of creating "doubts" about the attorney in the client's mind).


198 Roughly speaking, an abusive subpoena can be described as one that interferes with defendants' counsel of choice without adequate justification. These may include subpoenas issued to selected defense counsel who the prosecutor perceives to be a strong adversary or whom the prosecutor dislikes personally. See Robert Burkart Ellis, Attorney Subpoenas: The Dilemma Over a Preliminary Showing Requirement, 1991 U. ILL. L. REV. 137,
Nevertheless, numerous criticisms have been leveled at the new Model Rule. The rule seems to set legal obstacles to the prosecutor's subpoena power that find no justification in the law of privilege or the limited constitutional right to choose counsel. In other words, the Model Rule sets a substantive standard for discovering information from lawyers which diverges from the law and in favor of which there is no consensus among courts and lawmakers. Concomitantly, critics claim that the rule represents an attempt by the bar to control the courts. Arguably, this oversteps the bar's proper role.

Because the rule attempts to control prosecutorial conduct rather than guide it, the rule does not fit the traditional view of the discretionary prosecutorial role. Moreover, the rule tends to undermine ethical introspection by prosecutors; prosecutors bound by such tight rules may lose the sense that they have a duty to judge the ethics of their own conduct in this and other areas.

Perhaps most significant, some critics perceive the rule to be a self-serving attempt by the defense bar to preserve and entrench

139 (describing defense bar's fear that prosecutors will use attorney subpoenas to eliminate skilled attorneys from important cases). Alternatively, prosecutors have been criticized for issuing subpoenas for tactical, rather than substantive, reasons. See, e.g., Himelstein, supra note 169, at 17 (reporting view of defense bar that attorney subpoenas are part of an assault on confidentiality and attorney-client privilege); Stern & Hoffman, supra note 25, at 1791-92 (arguing that unscrupulous prosecutors will use attorney subpoenas to intimidate); Tom Watson, Clash Over Lawyer Subpoenas: DOJ Bids to Block ABA Rule Change, LEGAL TIMES, Feb. 12, 1990, at 1, 14 (reporting fear that prosecutors will use subpoena to deprive defendants of counsel of choice).

199 To justify a subpoena under MODEL RULES, Rule 3.8(f), a prosecutor not only must show that she seeks unprivileged information, but also that the information is "essential" and unavailable from any other source. In addition, MODEL RULES, Rule 3.8(f)'s prohibition extends to all information "about a client," a category that exceeds the scope of the privilege. See 8 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (J. McNaughten ed., rev. ed. 1961) (limiting attorney-client privilege to communications between attorney and client made for the purpose of giving or obtaining legal advice).

200 MODEL RULES, Rule 3.8(f) is geared, in part, towards avoiding the disqualification of defense attorneys who develop a conflict of interest because of an attorney subpoena. The Supreme Court's interpretation of the Sixth Amendment precludes claims to any constitutional right to keep an attorney with a conflict. Wheat v. United States, 486 U.S. 153, 162-63 (1988).

their practices, even at the cost of legal and appropriate law enforcement.\footnote{202}{Largely for this reason, federal and some state prosecutors have challenged the new model rule and refused to obey its mandates.\footnote{203}{A major difficulty in analyzing Model Rule 3.8(f) is the possibility that its proponents were dishonest in their justifications for the rule. Publicly, the reformers based their proposals on the need to avoid an inadvertent chill on attorney-client relationships. They consistently disavowed any intent to question prosecutorial good faith, weaken prosecutorial subpoena power, or change the substantive law. In practice, however, the reformers proposed a remedy that goes well beyond preventing the inadvertent chill. In reality, they probably did not trust prosecutors to implement ethical guidance and may have been trying to revise attorney-client privilege so as to exempt lawyers from the grand jury's reach.\footnote{204}{Whatever the merits of these positions, I assume they are best dealt with in the open. Analyzing reforms on a specificity basis has the benefit of forcing proponents to identify the true, or best, justifications for reform proposals, thus focusing the debate on the real issues. In the actual and continuing debate over Model Rule 3.8, proponents and critics have tended to talk past each other.\footnote{205}{Proponents focus on the alleged evils of attorney subpoenas.}}}

\section*{B. Model Rule 3.8(f)’s Ambiguous Goals}

A major difficulty in analyzing Model Rule 3.8(f) is the possibility that its proponents were dishonest in their justifications for the rule. Publicly, the reformers based their proposals on the need to avoid an inadvertent chill on attorney-client relationships. They consistently disavowed any intent to question prosecutorial good faith, weaken prosecutorial subpoena power, or change the substantive law. In practice, however, the reformers proposed a remedy that goes well beyond preventing the inadvertent chill. In reality, they probably did not trust prosecutors to implement ethical guidance and may have been trying to revise attorney-client privilege so as to exempt lawyers from the grand jury’s reach.

Whatever the merits of these positions, I assume they are best dealt with in the open. Analyzing reforms on a specificity basis has the benefit of forcing proponents to identify the true, or best, justifications for reform proposals, thus focusing the debate on the real issues. In the actual and continuing debate over Model Rule 3.8, proponents and critics have tended to talk past each other. Proponents focus on the alleged evils of attorney subpoenas.
Critics focus on the motives of rulemakers and the alleged adverse impact of the rule on law enforcement. The two sides largely ignore the underlying issues of whether an ethics rule is an appropriate mechanism for addressing the legitimate concerns the proponents assert, what regulatory purposes an ethics rule would serve, and how best to draft an effective rule.

The form of an appropriate rule should depend, in part, on the precise purpose the rulemakers identify. If, in considering provisions like Model Rule 3.8(f), rulemakers propose to create uniformity in prosecutorial conduct and to set the stage for disci-

L. J. 802, 806 (1987) (claiming criminal defense practitioners raised a "red herring argument. . . in order to inflame the issue and to deflect rational discussion of the real issue"); Moore, supra note 134, at 550-59 (discussing prosecutors' tactic of "deriding[ing] defense efforts like the subpoena rule as 'an attempt to elevate lawyers to an exclusive status'").

206 See, e.g., Genego, supra note 186, at 874-75 (discussing threat to ability of lawyers to continue representation); Genego, supra note 23, at 18 (discussing threat to maintenance of defense bar); Marjorie E. Gross, The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility, 18 FORDHAM URB. L.J. 283, 320-22 (1990) (discussing prosecutorial abuse of subpoena power).

207 Proposals like MODEL RULES, Rule 3.8(f) have been driven by the defense bar. Defense lawyers have both personal (i.e., selfish) and ideological reasons to support MODEL RULES, Rule 3.8(f). The defense bar is accustomed to advocating defendants' interests. Limits on prosecutorial discretion and investigative tools benefit defendants. Moreover, the limits on attorney subpoenas arguably help encourage good lawyers to continue practicing criminal law. At the same time, however, the precise prosecutorial tactics upon which defense-oriented code reformers recently have focused (e.g., subpoenas and fee forfeitures) are those that most threaten the pocketbooks of defense lawyers. See Cramton & Udell, supra note 6, at 921, 360 (discussing orientation of defense bar and its arguments); Koniak, supra note 10, at 1998-1402 (same). State and federal prosecutors, therefore, have responded to the attorney subpoena proposals bitterly, immediately questioning the proponents' good faith. See DOJ memo, supra note 100, at 1 (decrying defense bar for broad interpretation of ethics rules); Rooney, supra note 100, at 14 (chronicling claims by Attorney General that the Criminal Justice Section of the ABA is a "stacked deck" made up mostly of criminal defense lawyers attempting to develop standards for prosecutors); Watson I, supra note 100, at 1, 6 (reporting DOJ's belief that ABA's amendments exceed ABA's jurisdiction, interfere with Federal Rules of Criminal Procedure, and represent biased attempt by defense bar to sabotage legislative choices of the people); Watson, supra note 198, at 15 (same). Cf. Playing Politics, NAT'L L.J., Aug. 20, 1990, at 12 (criticizing Attorney General Thornburgh for betraying a bias against defense attorneys who do their jobs by zealously advocating the proposed ethics rules).

208 See, e.g., Richard Thornburgh, Ethics and the Attorney General: the Attorney General Responds, 74 JUDICATURE 290, 291 (1991) (arguing that to interpose ethics rules between prosecutors and represented individuals would make investigation and prosecution of federal criminal offenses nearly impossible); Tom Watson, supra note 198, at 15 (discussing DOJ's fear that the anti-subpoena rules obstruct and delay the grand jury's functions and provide opportunity for the destruction of evidence); Daniel Wise, Are Federal Prosecutors Beyond State Discipline?, N.Y. L.J., Mar. 8, 1991, at 1, 2 (chronicling U.S. Attorney's suggestion that the defense bar has significant influence over the formation of ethics rules, and that the rules are being asserted to gain "a litigation advantage").
pline, then highly specific regulation can be an appropriate drafting response. On the other hand, the thrust of most codes' regulation of prosecutorial ethics is to identify a prosecutorial role and to rely upon individual prosecutors to consider the ethics of each situation. If the rulemakers continue to accept role definition as the overriding purpose of ethics regulation of prosecutors' conduct, Point II or III regulation makes more sense. A departure from a code's general thrust would not necessarily be wrong, but should be justified specially, since such a departure can erode the code's capacity to accomplish its primary purpose.

Model Rule 3.8(f)'s specificity suggests that its proponents hope to influence the substantive law of attorney-client privilege. The rule seeks to convince courts that unprivileged communications between attorneys and clients deserve protection from discovery that other unprivileged communications do not enjoy. Yet the abstractness of the debate over the rule has meant that the reformers never have had to discuss the validity of that objective or whether a specific rule is the best way of accomplishing the objective. Moreover, any attempt by the bar to influence substantive law makes sense only when certain prerequisites are present, including gaps in the substantive law, a failure by the judiciary to identify traditional sources upon which to base legal decisions, and a reason for the courts to trust the bar in this area. Yet the debate has not focused on the presence of these factors.

My point here is simply that different types of rules governing attorney subpoenas may be appropriate, depending upon the goals the drafters set. The discussion surrounding Model Rule 3.8(f) never reached the stage of identifying goals and drafting methodology. As a result, the new rule is singularly vulnerable to criticism and legal challenge.

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209 See supra text accompanying note 87.
210 See supra text accompanying notes 114-15.
211 For example, by reducing introspection.
212 In particular, MODEL RULES, Rule 3.8(f) incorporates the unique requirement that prosecutors first must seek information from alternative sources. See Koniak, supra note 10, at 1400 (discussing likely goals of MODEL RULES, Rule 3.8(f)).
213 See generally Deborah L. Rhode, The Rhetoric of Professional Reform, 45 Md. L. REV. 274, 275-76, 286 (1986) (discussing "abstract mode of most reformist discourse" and urging "less categorical rhetoric and more contextual analysis").
214 See supra text accompanying notes 163-67.
215 See generally the criticisms in Cramton & Udell, supra note 6; Zacharias, A Critical Look, supra note 23.
216 Thus far, versions of MODEL RULES, Rule 3.8(f) have been challenged in federal
C. A Specificity Analysis of Model Rule 3.8(f)

Let us briefly consider the merits of the attorney subpoena question. And let us assume the validity of at least some of the substantive concerns of the rule's proponents; in other words, that attorney subpoenas may interfere unduly with attorney-client relationships and may cause some qualified members of the bar to forego a criminal defense practice. What does our discussion of regulatory specificity say for code drafters attempting to formulate a response to those concerns?

1. Reform As a Part of Role-Definition

To remain most consistent with the codes' role-setting approach to prosecutorial ethics, reformers might simply leave the question of attorney subpoenas to prosecutors' general sense of "justice." Arguably, by telling prosecutors to do justice in all their actions, the codes already inform them that they must take into account the effect of attorney subpoenas on attorney-client relationships and upon defense representation as a whole. For obvious reasons, however, the "justice" approach seems inadequate to reformers, both as a general method of role definition and as a means to alleviate the reformers' specific concerns regarding attorney subpoenas. Empirically, the justice provisions have not worked. This Article's theoretical discussion of regulatory specificity illustrates that, in the absence of other constraints, a Point I rule provides minimal behavioral guidance and, in practice, may even reduce prosecutors' ethical introspection.  


217 See supra text accompanying notes 116-17.  

219 See Figure 3, supra note 109, and accompanying discussion.  
220 See supra Figure D and related discussion at text accompanying note 117.
At the other extreme, reform might take the form of a highly specific, behavior-controlling rule like Model Rule 3.8(f). Point IV rules are generally inconsistent with the role definition purpose of ethics regulation; they tend to cover only few cases,\textsuperscript{221} to mute introspection,\textsuperscript{222} and to have the least effect on the targets' general ethical outlook.\textsuperscript{223} Arguably, however, reformers in the prosecutorial ethics realm may perceive highly specific regulation as a means to counteract the "justice" approach's overgenerality; perhaps a mix of general and specific regulations can illustrate a prosecutor's appropriate role in a way the Point I approach alone does not.

If a Point IV rule, like Model Rule 3.8(f), were the only rule purporting to govern prosecutorial behavior with specificity, the appeal to symmetry and balance might be persuasive. In the example of the ABA's approach, however, the Model Rules already include some Point III and IV provisions relating to pretrial prosecutorial decisionmaking.\textsuperscript{224} The presence of an increasing series of Point IV reforms magnifies the negative impact on the Model Rules' ability to influence introspection; the more a code appears to define appropriate behavior specifically, the more likely targets are to assume that other, undefined behavior is permissible.\textsuperscript{225}

Moreover, to the extent any reform is intended to become part of a code's effort to define the target-layers' roles, the reform must be one that engenders the target's respect for the code. Point IV regulation often runs special risks both of appearing self-serving on the part of a segment of the bar and of creating dissatisfaction on the part of the targeted lawyers.\textsuperscript{226} The proponents of attorney-subpoena reform, for the most part, come from the defense bar.\textsuperscript{227} Prosecutors have perceived Model Rule

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{221} See supra Figure C and related discussion at text accompanying note 111.
\item \textsuperscript{222} See supra Figure D and related discussion at text accompanying note 117.
\item \textsuperscript{223} See supra text accompanying note 113.
\item \textsuperscript{224} For example, MODEL RULES, Rule 3.8(a) limits prosecutors' charging decisions and MODEL RULES, Rule 3.8(c) contains a specific prohibition on rights prosecutors may seek to nullify. MODEL RULES, Rules 3.8(b) and (d) contain somewhat more general priorities for prosecutorial behavior in affirmatively assuring defendants' rights.
\item \textsuperscript{225} See supra text accompanying note 113.
\item \textsuperscript{226} See supra text accompanying notes 138, 170-71.
\item \textsuperscript{227} See e.g., Genego, supra note 186 (study by leading defense attorney surveying other defense attorneys that supports call for reforms, quoted as ABA's main support for proposing MODEL RULES, Rule 3.8(f) in 1986 REPORT TO THE HOUSE OF DELEGATES, supra note 218, at 7 and 1990 REPORT TO THE HOUSE OF DELEGATES, supra note 218, at 4 n.4, 8); Glanzer & Taskier, supra note 187 (proposals by defense attorneys); Ellen R. Peirce &
\end{itemize}
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3.8(f) as the defense bar's attempt to control prosecutors for their own gain.\footnote{228} As a result, prosecutors not only have challenged the validity of the rule,\footnote{229} but also have transferred their perception that the code drafters are self-serving to other provisions.\footnote{230}

Even before Model Rule 3.8(f)'s adoption, drafters should have been able to predict that a Point IV approach to attorney subpoenas would undermine prosecutors' willingness to embrace the lessons of the code as a whole.

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\footnote{228}See Cramton & Udell, *supra* note 6, at 361 (discussing defense bar's use of forum in which it has "special privileges and political influence" to further its own objectives); Paul R. Friedman, *Subpoenas to Defense Lawyers in Criminal Cases: A Part of the "Assault on the Citadel"* 23 (Oct. 16, 1990) (unpublished manuscript, *quoted in Moore, supra* note 134, at 537) (characterizing anti-subpoena rule as "an attempt to elevate lawyers to an exclusive status"); Moore, *supra* note 134, at 531, 537 (discussing prosecutors' claims that anti-subpoena rules further defense bar's personal interests).

\footnote{229}See authorities cited *supra* note 216.

\footnote{230}Other than the anti-subpoena rules, the ethics rules which have incurred the greatest degree of prosecutorial resistance are those pertaining to contact with persons represented by counsel and the forfeiture of criminal defendants' assets used to pay legal fees. See, e.g., DOJ Memo, *supra* note 100, at 1, 2, 7 (purporting to exempt Justice Department litigators from compliance with anti-contact rules and asserting that defense counsel have misinterpreted anti-contact rules in an effort to forge a nonconstitutional, pre-indictment right to counsel that threatens the law enforcement process); 8 ABA/BNA MANUAL, *supra* note 45, at 396-98 (Dec. 16, 1992) (reporting proposed new DOJ anti-contact rules based on the principles expressed in the Thornburgh memo); William Glaberson, *Thornburgh Policy Leads to a Sharp Ethics Battle*, N.Y. TIMES, Mar. 1, 1991, at B4 (reporting DOJ's belief that "there may be situations in which literal compliance" with ethics standards could be "inconsistent with a Government attorney's ability to carry out his or her responsibilities under the law"); Rooney, *supra* note 100, at 1 (reporting DOJ's contention that defense lawyers promote and invoke anti-subpoena, anti-forfeiture, and anti-contact rules in an effort to "cripple" federal investigations). See also Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (4th Cir. 1989) (federal prosecutor claiming exemption from West Virginia ethics rules). Cf. 6 ABA/BNA MANUAL, *supra* note 45, at 27 (noting ABA delegate's view that DOJ position represents "sheer arrogance"); *Compare Norton, supra* note 134, at 205 (criticizing the legal authority for the DOJ Memo) with Thornburgh, *supra* note 208, at 291 (accusing Norton of misreading the DOJ Memo).

Some commentators have inferred from the legal authority upon which the DOJ Memo is grounded that the Department of Justice might claim a categorical exemption from ethics rules. See, e.g., Norton, *supra* note 134, at 207 (arguing that the DOJ Memo's reliance on the Supremacy Clause implies that the Attorney General claims the power to choose which ethics rules, if any, would apply to his office). Department of Justice officials have attempted to defuse the controversy engendered by this possibility. See Glaberson, *supra*, at B4 (reporting DOJ's public position that the DOJ Memo applies only to the limited area it addresses and that DOJ expects its lawyers to abide by most ethics rules); Thornburgh, *supra* note 208, at 291 (denying that the DOJ Memo is an open-ended authorization for government litigators to ignore all ethics rules).
In considering how a Point IV regulation governing attorney subpoenas meshes with the role-defining function of a code, one must assess the effect of extra-regulatory constraints on prosecutors' conduct. Reform proponents have disavowed any intent to establish new substantive law. If one is to believe that disavowal and providing role guidance is indeed the overriding goal of reform, the key issue becomes what guidance prosecutors lack.

Courts have defined the scope of attorney-client privilege, provided mechanisms for protecting privileged information, and recognized motions to quash when prosecutors have abused the subpoena power. On the other hand, courts have defined clients' right to keep their chosen counsel as not encompassing the right to retain a lawyer whose possession of unprivileged information creates a conflict of interest. Substantive law thus tells prosecutors fairly clearly how far client rights extend and provides enforceable sanctions for prosecutors' failure to honor those rights.

231 The codes, in general, and Model Rules, Rule 3.8(f), in particular, purport to accept the validity of the judicial definition of the attorney-client privilege.

232 In re Horn, 976 F.2d 1314 (9th Cir. 1992) (quashing attorney subpoena as overly broad); In re Grand Jury Subpoena, 831 F.2d 225, 227 (11th Cir. 1987) (discussing motion to quash procedure for raising attorney-client privilege with respect to grand jury document subpoena); In re Grand Jury Subpoenas Served Upon Field, 408 F. Supp. 1169, 1174 (S.D.N.Y. 1976) (quashing attorney subpoena on privilege grounds); In re Stolar, 397 F. Supp. 520, 528-29 (S.D.N.Y. 1975) (same).


234 See United States v. Klubock, 832 F.2d 649, 654 (1st Cir. 1986) (noting that attorney subpoena often will require attorney to withdraw), vacated, op. withdrawn, on reh'g, 832 F.2d 664 (1st Cir. 1987) (en banc) (upholding application of local rule); In re Doe, 759 F.2d 968, 975 (2d Cir.) (noting that attorney subpoena sets stage for disqualification of attorney), cert. denied, 475 U.S. 1108 (1986); In re Sturgis, 412 F. Supp. 943, 945-46 (E.D. Pa. 1976) (discussing ramifications of attorney subpoenas on potential disqualification of lawyer).
The only area in which ethics codes usefully might provide guidance is in telling prosecutors how to take into account client concerns that do not rise to the level of a legal right. This is an issue upon which substantial disagreement exists and which, accordingly, requires a case by case assessment of the relative importance of client interests and society's separate interest in successful prosecution of crime. A Point IV approach, however, is not suited to situations that call for balancing; it works best where the prescribed outcome is obvious, where a consensus exists on the outcome to a recurring problem but the relevant discretionary factors do not lead to that outcome, or where society cannot trust the lawyers in question to exercise discretion in a respectable manner.

All of this leads to the question: if professional code reform is to guide the issuance of legitimate attorney subpoenas, what regulation is appropriate? The kind of guidance prosecutors need depends at least in part on how they would exercise their discretion in the absence of an ethics rule. The federal government has promulgated specific administrative guidelines to regulate the issuance of attorney subpoenas. These provide standards which, although not judicially enforceable, track Model Rule 3.8(f)'s in many respects and include the additional proviso that individual prosecutors must seek approval from high level superiors before issuing attorney subpoenas. For the federal arena—the realm in which reform proponents have criticized prosecutorial conduct most vociferously—the guidelines provide a relatively clear standard for prosecutorial conduct. They assure some prosecutorial

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235 In other words, telling prosecutors to what extent they should, as ethical professionals, avoid attorney subpoenas because of their potential chill on the attorney-client relationship, their effect on confidential but unprivileged communications, and their interference with clients' desire to retain chosen counsel.

236 See Zacharias, A Critical Look, supra note 23, at 952-53 (discussing extent of prosecutors' obligations to defendants' interests) and authorities cited at 953 n.128.

237 Department of Justice, Policy with Regard to the Issuance of Grand Jury or Trial Subpoenas to Attorneys for Information Relating to the Representation of Clients, in UNITED STATES ATTORNEYS MANUAL § 9-2.161(a), at 35-37 (Oct. 1, 1990) [hereinafter DOJ Guidelines].

238 Id. § 9-2.161(a)(D) (requiring approval of attorney subpoenas by Assistant Attorney General of the Criminal Division).

introspection, consideration of the relevant criteria, and uniformity of conduct. In jurisdictions in which local district attorneys adopt similar rules, professional code drafters might therefore be justified in resting on a Point I "justice" regulation that defers to extra-regulatory constraints.

In jurisdictions in which no administrative guidelines exist, drafters would want prosecutors to weigh law enforcement interests against the degree to which an attorney's testimony negatively affects the attorney-client relationship, the potential loss of confidences, and the danger that a client will unnecessarily lose his counsel of choice. As illustrated in the margin, a Point II approach to balancing, the goal of which is to identify criteria for consideration, might start with a statement of principle and provide assurances that prosecutors heed substantive law constraints. A Point II rule would identify the key decision-making

240 In essence, the guidelines require prosecutors to try to seek alternative sources of information, DOJ Guidelines, supra note 237, § 9-2.161(a)(C), to limit the use of attorney subpoenas where possible, id. § 9-2.161(a)(E), and to consider the effects on the defendant's attorney-client relationship. Id. § 9-2.161(a). See also Michael F. Orman, Note, A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys, 1986 DUKE L.J. 145 (analyzing the guidelines and concluding that it represents an appropriate balance between fairness to defendants and needed prosecutorial discretion).

241 As the ABA has noted, the guidelines provide no external enforcement mechanism. 1986 REPORT TO THE HOUSE OF DELEGATES, supra note 218, at 7. See also Moore, supra note 134, at 538 (noting that "the real disagreement between prosecutors and defense lawyers seems to be how to get prosecutors to follow their own internal guidelines"). However, once code drafters determine that professional regulation must take a more flexible form than MODEL RULES, Rule 3.8(f), enforcement with respect to particular subpoena decisions immediately becomes less likely even under relatively strict code provisions. Enforcement bodies would inevitably recognize that the discretion accorded by the (sub-Point IV) rules stems from the absence of a consensus on how the countervailing considerations should be accommodated in any given case. Only a Point IV rule, like MODEL RULES, Rule 3.8(f), is potentially enforceable because it removes prosecutorial discretion—for example, in deciding whether to pursue alternative sources of information. But in removing discretion, the Point IV rule also would undermine the law enforcement interests; that is, it would have to assume a single correct way to balance the competing considerations.

The Justice Department guidelines illustrate, by way of contrast, the danger of Point IV reform. By requiring trial level prosecutors to submit subpoena decisions for supervisory approval, the guidelines encourage the prosecutors to give the decision careful thought, and thereby to reach an appropriate accommodation of the competing interests. A specific rule, like MODEL RULES, Rule 3.8, is likely to have the opposite effect on introspection. This, in turn, may have adverse consequences for the way prosecutors perceive and give weight to defendants' interests in the attorney-client relationship in non-subpoena contexts.
criteria and require prosecutors to exercise reasoned discretion in implementing them.\textsuperscript{243}

\textbf{242} A Point II rule thus might state:

(A) In deciding whether to issue a subpoena to a lawyer to testify on matters relating to a client, a prosecutor must consider whether the law enforcement purposes to be served by the issuance of the subpoena outweigh the client's interests in preventing the testimony. In enforcing a lawyer subpoena, a prosecutor must protect the relationship between the subpoenaed lawyer and his or her client by taking all steps consistent with law enforcement interests and feasible as a matter of law enforcement resources.

(B) The prosecutor shall not issue a lawyer subpoena for the purpose of interfering with the relationship between the subpoenaed lawyer and client, causing the lawyer to withdraw or be disqualified from the representation, or harassing the lawyer or client.

(C) The prosecutor shall ensure the client's ability to employ legal measures to protect the attorney-client privilege. Notwithstanding any other provision of this code, the prosecutor may advise the client of the time, place, and nature of the subpoenaed testimony and describe the procedures by which the client or the lawyer-witness may assert any applicable privilege.

The rough proposals in this Article's footnotes are offered only for illustrative purposes. Many other formats are possible. Even these would probably be accompanied by explanatory commentary that would spell out such matters as the nature of the client interests and the way secrecy affects them.

\textbf{243} For example:

(D) A prosecutor who subpoenas a lawyer to appear before the grand jury must recognize that the lawyer-witness's secret testimony may interfere with the client's willingness to trust the lawyer.

(1) When consistent with law enforcement interests, the prosecutor should allow the client to be present at the lawyer's testimony or to review a transcript of any portion of the testimony that relates to the client.

(2) When a prosecutor recognizes the existence of an issue of attorney-client privilege in the course of grand jury testimony, the prosecutor should notify the client in accordance with § (C) and permit the lawyer-witness to file a motion to quash.

(E) A prosecutor who issues a lawyer subpoena shall consider whether the lawyer's testimony is likely to result in the lawyer's withdrawal or disqualification from the representation and should attempt to accommodate the client's legitimate interest in keeping counsel.

(1) If the prosecutor concludes that the lawyer-witness should withdraw or be disqualified under the provisions of this code even in the absence of a subpoena, the prosecutor may proceed with the subpoena.

(2) If the prosecutor concludes that withdrawal or disqualification might result as a consequence of the subpoena, the prosecutor should consider whether the law enforcement purpose to be served by the subpoena can be achieved without issuance of the subpoena.

(3) If the prosecutor concludes that law enforcement interests require the subpoena but that its issuance may result in the lawyer-witness's withdrawal or disqualification, the prosecutor should take all steps to mitigate the need for withdrawal or disqualification that are consistent
Alternatively, appropriate reform might adopt a Point III approach that sets priorities more clearly. Such a rule could determine specifically how prosecutors should balance law enforcement and client interests. Code drafters might require prosecutors to raise potential issues of attorney-client privilege, forego grand jury secrecy, or avoid subpoenas resulting in disqualification unless specified circumstances exist. Or, the rule might strike the balance in the opposite way, by authorizing prosecutors to issue subpoenas unless defense counsel can demonstrate that the attorney-client relationship will be chilled and that law enforcement can be accomplished another way.

It is not my function to identify precisely which policies and values code drafters should emphasize. Rules at Point II or III levels of specificity can be written to implement any orientation that, after debate, code drafters deem appropriate. Unlike Model Rule 3.8(f), however, both the Point II and III approaches would be consistent with what appears to be the Model Rules' and most codes' general goal of guiding prosecutorial behavior through a discretionary model—one that relies upon individual prosecutors’ accepting their defined role.244

2. Other Plausible Goals of Attorney-Subpoena Reform

Nothing in the above analysis suggests that rulemakers should be forbidden to use individual provisions to implement values that differ from the code's primary goal. In the attorney subpoena context, drafters justifiably may believe that prosecutors cannot be trusted to pursue justice adequately and that a specific rule controlling discretion and changing the law is warranted. It is, however, important for the drafters to recognize when this position is inconsistent with their code's general attitude toward prosecutorial

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244 Whether code drafters optimally should choose a Point II or Point III response to the attorney-subpoena issue turns on the degree to which code drafters perceive a special need to counteract special prosecutorial vindictiveness or conviction orientation in the attorney-subpoena context. Heightening specificity to the Point III level has few benefits if prosecutors are already willing to accommodate defendants' rights, but simply need guidance that the law otherwise fails to provide. Because a Point III rule would need to recognize that law enforcement interests sometimes dominate, it is unlikely to be significantly more enforceable than a Point II version. Spelling out prosecutorial responses would come at the cost of reducing prosecutors' ability to tailor responses on an individual case basis.
conduct. Such a significant divergence in approach should occur only after open and honest deliberation, including a consideration of how the proposed revision might affect the overall effectiveness of the code.  

I have already mentioned some of the objectives that Model Rule 3.8(f) might serve. Analyzing the validity of using Model Rule 3.8(f) to accomplish those objectives is beyond the scope of this Article. It may, however, be useful to identify the range of alternatives and to draw some conclusions about them from our previous discussion of regulatory specificity.

(a) Model Rule 3.8(f) and the "Legislative" Function.—Earlier, I defined the legislative function of ethics codes as prescribing or forbidding particular conduct, encouraging uniform behavior, and setting the stage for punishing lawyers who depart from the norm. Under the correct circumstances, Point IV regulation is effective as a behavioral control because of its insistence on particular behavior. Moreover, a rule like Model Rule 3.8(f) provides a good basis for discipline because its mandates are clearer than the Point II and III alternatives, the required elements of conduct are capable of objective ascertainment, and violations of the rule are self-identifying. The key question with regard to the workability of Model Rule 3.8(f) as "legislation" is whether the rule appears realistic, for our analysis has noted that a provision will lack influence when its targets doubt that it will be enforced.

Historically, disciplinary authorities have rarely sought to apply ethics codes to prosecutors. One explanation is that prosecutors are perceived as public servants whose economic interests are not affected by individual case outcomes. Discipliners may assume that even misconduct by prosecutors is ordinarily not self-serving and, as matter of priority in allocating regulatory resources, deserves less attention. However, Model Rule 3.8(f) possesses the capaci-

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245 For example, if a jurisdiction's rulemakers come to the conclusion that MODEL RULES, Rule 3.8(f) is necessary because prosecutors cannot be trusted to seek justice, that may call into question the jurisdiction's entire approach to prosecutorial ethics. Arguably, that conclusion calls for wholesale change in the professional rules governing prosecutorial conduct, including more specific, enforceable mandates.

246 See supra text accompanying note 84.

247 See supra text accompanying notes 87-96.

248 Violations identify themselves because (1) in some jurisdictions, subpoenas issue only under judicial supervision, and (2) attorney-targets are, in any event, capable of protesting and likely to raise any violations of the rules.

249 See Zacharias, supra note 37, at 105-06.
ty to be enforced, a characteristic arguably lacking in previous ethics rules governing prosecutorial behavior. Prosecutors' failure to comply with the requirements of Model Rule 3.8(f) will be so patent that discipliners may be hard put to explain a failure to invoke the disciplinary process.250 One therefore cannot assume that Model Rule 3.8(f) will simply take its place as another unenforced, self-defeating constraint on prosecutorial misconduct.251

Assuming, then, that Model Rule 3.8(f) may be workable, is its adoption an appropriate exercise of the rulemakers' power to act in a legislative mode? An important aspect of that question is whether extra-code constraints already provide guidance and enforcement; duplicative legislative rules can have a negative impact on producing the desired behavior.252 Despite proponents' disclaimers, Model Rule 3.8(f) applies its standards where the prevailing substantive law imposes no special standards for attorney subpoenas. Indeed, to the extent extra-code constraints speak to the matter, they speak inconsistently with the new rule.253

What this means is that Model Rule 3.8(f) is drafted in a way that maximizes its potential for achieving a legislative impact and, because it operates in an area where extra-code constraints are absent, that rulemakers reasonably can hope that it will have an effect. However, the rule's tension with the prevailing substantive law suggests that the rule represents more than a behavioral control that fills a void. Rulemakers are not implementing a consensus regarding appropriate prosecutorial behavior. Contrary to their public statements, the rulemakers are implementing their own vi-

250 Under the rule, prosecutors can have no valid explanation for avoiding judicial oversight. Once in court, prosecutors either will be able to establish the objective prerequisites of MODEL RULES, Rule 3.8(f) or, with few exceptions, will have violated the rule.

251 One consequence of imposing any ethical obligations on prosecutors is that failure to enforce the imposed obligations leads to disrespect for the codes and the administration of justice. See Zacharias, supra note 37, at 109-114.

252 See supra text accompanying notes 98-100.

253 Prior to the adoption of MODEL RULES, Rule 3.8(f), courts had reached the conclusion as a matter of constitutional law and the law of attorney-client privilege that government investigations and prosecutions should not be hampered by an inflexible attorney subpoena rule. See authorities cited in Zacharias, A Critical Look, supra note 23, at 929-30. Similarly, legislatures had declined to limit grand jury and prosecutorial discretion to issue subpoenas despite endless calls for reform. See, e.g., HOUSE COMM. ON GOVERNMENT OPERATIONS, FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. No. 986, 101st Cong., 2d Sess. 86 (1990) [hereinafter HOUSE REPORT] (urging further attention to but no new limits on current prosecutorial behavior). One thus cannot justify MODEL RULES, Rule 3.8 on the basis of a societal consensus favoring client concerns over law enforcement interests.
sion of the direction the law should take. That regulatory goal must be analyzed on its own merits.

(b) Model Rule 3.8(f) and the Function of Influencing Judicial Standards.—Perhaps nowhere in the Model Rules is the goal of influencing judicial standards more apparent than in Model Rule 3.8(f). The Rule purports to regulate prosecutorial conduct, but in practice requires judges to engage in a procedure and employ standards that the courts have not adopted. Courts in some jurisdictions already have declined to put local versions of Model Rule 3.8(f) into effect.

We have seen that codes are most likely to influence extra-code standards when gaps in the prevailing law are evident, traditional sources for developing standards are absent, and the standard setter (e.g., the courts) has reason to believe the bar is acting objectively. Yet the issues upon which proponents of Model Rule 3.8(f) attempt to influence courts are traditional questions of privilege and prosecutorial subpoena power, both of which courts always have felt competent to address. Gaps in the law exist only because courts have rejected the bar’s substantive viewpoint and preferred to accept the status quo.

254 In other words, the rule requires courts to supervise the issuance of each attorney subpoena according to substantive standards established in the rule. See Cramton & Udell, supra note 6, at 296 (characterizing MODEL RULES, Rule 3.8(f) as “an effort to vindicate the profession’s normative vision of a lawyer’s immunity from ordinary legal process”).

255 See, e.g., Baylson v. Pennsylvania Supreme Court Disciplinary Bd., 975 F.2d 102 (3d Cir. 1992) (holding state version of MODEL RULES, Rule 3.8 inapplicable to federal prosecutors); New York’s Courts Adopt Changes to Ethics Rules, 6 ABA/BNA MANUAL, supra note 45, at 172, 175 (June 6, 1990) (N.Y. courts reject rule fashioned after MODEL RULES, Rule 3.8(f)).

256 See supra text accompanying notes 154-65.

257 See Cramton & Udell, supra note 6, at 305 (“If ethics rules are to impose legal duties upon federal lawyers, these duties must harmonize with duties imposed by the Constitution, Congress, and the Attorney General.”).

258 For example, courts have declined to impose restrictions on prosecutors’ subpoena power, expand the constitutional right to effective assistance of counsel to incorporate a right to keep subpoenaed attorneys, or extend the attorney-client privilege to currently unprivileged information that prosecutors can obtain from a source other than the attorney. See Zacharias, A Critical Look, supra note 23, at 929-30. Cf. Hoover, supra note 157, at 615 (“because the Model Rules are in greater harmony with common law than the Model Code was, the chances that the Model Rules will be regarded as authoritative rather than persuasive appear to have increased”).

MODEL RULES, Rule 3.8’s specificity cannot be justified by the need to counteract institutional pressure to win cases on prosecutors’ exercise of reasoned discretion. The danger that prosecutors will exercise discretion unwisely when issuing attorney subpoenas is substantially limited by the fact that, unlike most other pretrial decisions, prosecutorial
From the moment Model Rule 3.8(f) was first proposed, there was reason to believe it represented the self-interest of a discrete segment of the bar. The attorney-subpoena area thus does not look like one in which rulemakers are likely to receive significant judicial deference.

Although a measure of specificity is essential for any code provision designed to influence the law, Model Rule 3.8(f)'s strict (i.e., Point IV) specificity may undermine its effectiveness in influencing judicial standards. In one sense, the rule maintains the flexibility of common law approach to attorney-client privilege, because it does not purport to change the law of privilege. But under the rule, judges may not authorize attorney subpoenas unless no feasible alternative exists. This irrebuttable presumption would prevent courts from adjusting their discovery rules with changing notions of reasonable conduct. Judges' fear of accepting such Point IV standards that are "frozen" in time reduces the likelihood that the courts will adopt the rulemakers' substantive vision.

Courts have tended to reject the influence of provisions at the Point IV end of the specificity continuum, in part because such provisions ordinarily favor one type of litigant and thus remove judges' case by case control. These provisions also run the spec-
cial risk of partisanship that can undermine judges' faith in the rulemakers. The heated, partisan prosecution versus defense rhetoric surrounding Model Rule 3.8(f)'s adoption, the legal challenges to the rule's constitutionality, and the resulting literature condemning the rulemakers' good faith are a natural outgrowth of Point IV regulation that benefits a segment of the bar. Those reactions are symptoms of a concern that judges will inevitably share and consider as a negative factor in evaluating the rulemakers' substantive view.

(c) Model Rule 3.8(f) and the Fraternal Function.—Although specific rules tend to promote communications among lawyers, it is difficult to see how Model Rule 3.8(f) serves that function. By creating an obstacle to attorney subpoenas, it provides greater assurance for defense attorneys that they will be able to continue representing clients whom they accept. But to the extent a dispute concerning potential lawyer testimony exists, the rule does not fix expectations regarding prosecutorial behavior; it merely sends the question to litigation, adding into the equation the issue of "feasible alternatives." In practice, the rule therefore complicates the issue of what attorney-client communications are discoverable, while failing to provide greater stability in counsel-prosecutor dealings.

264 See supra notes 206-09.
265 See authorities cited supra note 216.
266 See Cramton & Udell, supra note 6, at 316-17 (suggesting self-serving motivation in adoption of rules relating to prosecutorial conduct); Koniak, supra note 10, at 1401 (same). Cf. Zacharias, A Critical Look, supra note 23, at 954 (discussing possible hidden agenda underlying adoption of MODEL RULES, Rule 3.8(f)).
267 Much of the rule's supporting documentation relies on the number of attorney subpoenas that prosecutors have issued and the consequences of those subpoenas for the practices of defense lawyers. See 1990 REPORT TO THE HOUSE OF DELEGATES, supra note 218, at 5-6. Similarly, proponents justify reform with the claim that, without reform, lawyers will hesitate to represent criminal defendants because of the inconvenience attorney subpoenas cause. Id. at 8. See also Genego, supra note 186, at 815-19 (defense attorney's empirical appraisal of effects of attorney subpoenas). These justifications can be viewed benignly, on the basis that, as an institutional matter, the legal system needs to maintain the criminal bar. See Morgan Cloud, Government Intrusions Into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice, 36 EMORY L.J. 817, 818-19 (1987) (discussing maintenance of institution of defense bar). But because many reform proponents are themselves defense lawyers, it is just as easy to imagine that ethical limitations on attorney subpoenas are designed to protect their economic well-being. See Zacharias, A Critical Look, supra note 23, at 954-56.
268 See supra text accompanying notes 132-36.
This Article has already illustrated the conflicting impact that Point IV provisions can have on the bar's public image.\textsuperscript{269} The open warfare between the defense and prosecution bar that was prompted by the proposal of Model Rule 3.8(f) magnified its adverse effects.\textsuperscript{270} In terms of prosecutors' self-image, the Point IV approach is unambiguously and decidedly negative. A rule that lessens prosecutors' discretion and threatens them with oversight inevitably erodes their sense of empowerment and professionalism. Thus, just as the fraternal purposes of ethics codes do not justify the Point I justice approach, they also cannot support the highly specific Model Rule 3.8(f).

V. CONCLUSION

The example of Model Rule 3.8(f) highlights the importance of focusing the thrust of reform. Existing professional codes inevitably provide a foundation—a purpose, or set of purposes, into which any reform must fit. Only by identifying the primary purposes that the codes seek to fulfill can rulemakers determine whether new rules are needed and how consistent reform should be drafted. Alternatively, focusing the debate in this way forces proponents of rules that would embark in an entirely new direction to justify that departure and to test its effect on the bulk of the codes.\textsuperscript{271}

\textsuperscript{269} See supra text accompanying notes 139-45.

\textsuperscript{270} See generally Cramton & Udell, supra note 6, at 386 (noting increasing conflict between opposing segments of the organized bar in the context or prosecutorial ethics rules); Moore, supra note 134, at 515-18, 530-39 (discussing warfare between prosecutors and defense bar); Tom Watson, ABA Soundly Rejects Justice Dept. Advice on Rules Change, LEGAL TIMES, Feb. 19, 1990, at 7 (reporting ABA's rejection of DOJ's advice not to adopt an anti-subpoena provision); Watson, supra note 198, at 1, 15 (reporting U.S. Attorney's accusation that the ABA is mounting an ethical end run around Congress and the U.S. Supreme Court).

\textsuperscript{271} My observations concerning specificity in code-drafting apply to codes as a whole or significant portions of codes, rather than to minor individual provisions. Whatever the quality of a single provision, it is unlikely to have an impact upon lawyers globally. No one rule controls the way lawyers approach their whole practice. Even far-reaching provisions, such as confidentiality rules, do not alone determine whether lawyers are introspective on moral matters, whether they cooperate with fellow fraternity members, or whether courts will look to the codes in setting the substantive law. At most, individual provisions contribute to a package of regulation which has those effects. I have focused on the "justice" provisions because they include the whole package of ethical restrictions on prosecutorial behavior. Reforms like MODEL RULES, Rule 3.8(f), therefore, can easily be evaluated in terms of those provisions' goals.

There is a difference between adopting whole new codes and adopting individual reforms. In enacting a whole code, drafters may be justified in pursuing a new approach or set of goals. That is what the Kutak Commission originally planned to do in drafting...
Although space does not permit a lengthy discussion here, it is important to note that the same analysis applies to other areas in which specific reforms in prosecutorial ethics have been proposed (e.g., in seeking disqualification of defense counsel and seizure of defendants' assets) and to unrelated areas in which piecemeal changes to existing codes are debated. The principles remain the same: in considering each stage of reform—whether reform is needed, what kind of reform, and how to draft the reform—drafters must keep in mind the underlying purpose(s) of the code and gear changes toward effectuating the purpose(s) that the drafters can agree should be targeted.

Essential to these principles is the recognition that code provisions interrelate—both to each other and to extra-code constraints on the targeted lawyers' behavior. To evaluate the regulation of prosecutorial ethics, for example, one must determine what the codes hope to accomplish in demanding "justice" and determine what legal constraints and internal incentives operate to produce that end in any particular setting. Specificity in professional regulation can be counterproductive when the targeted lawyers already know how they should act. Conversely, to the extent the codes seek to establish a "role," the result of which is prosecutorial introspection and self-control, reforms must be evaluated in that light. A single rule that imposes strict external control on prosecu-

the 1983 MODEL RULES. See Gillers, supra note 31, at 275 (arguing that the MODEL RULES' "sole rationalizing principle seems to be that when the law allows a choice, competing claims should be resolved in the way that most benefits the profession"); Schneyer, supra note 11, at 701-07 (describing new brand of "legalism" underlying original proposals, which "regarded law as cause and legal ethics as effect"). However, unless one accepts as a normative base the suggestion that the codes have turned completely into legislation, drafters of individual reforms should be faithful to the overall scheme of a given code. It is in this vein that scholars such as Roger Cramton have criticized recent attempts by the bar to proscribe particular prosecutorial conduct. See, e.g., Cramton & Udell, supra note 6, at 390-01 (noting that bar has attempted to assume, under ethical rubric, broad federal issues that should be made by federal institutional decisionmakers).

272 The main areas in which reforms have been proposed involve fee forfeitures, IRS summonses to attorneys, and prosecutorial attempts to disqualify defense counsel. See generally HOUSE REPORT, supra note 253 (congressional study of need for reforms governing prosecutorial conduct); William J. Genego, supra note 186 (empirically evaluating fee forfeitures, IRS summonses, and disqualification motions and proposing reforms) and authorities cited therein; Bruce A. Green, Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest, 16 AM. J. CRIM. L. 325, 332-52 (1989) (discussing prosecutors' ethical obligations and proposing guidelines to govern disqualification motions).

273 Perhaps the area still most debated is whether mandatory or piecemeal exceptions to attorney-client confidentiality rules should be adopted. See, e.g., Zacharias, Confidentiality I, supra note 23, at 353 n.5 (detailing the approaches of various states).
torial behavior, like Model Rule 3.8(f), is unlikely to affect prosecutors' willingness to "introspect." A series of rules limiting prosecutors in this and other areas can change the whole nature and function of the ethics regulation that is now in place. Such a fundamental change may be appropriate, but should not be undertaken unthinkingly or accomplished as a by-product of a reform process that focuses on isolated issues.

By analogizing the adoption of ethics regulation to the adoption of "legislation," the academic community has encouraged a political process of rulemaking that fluctuates with the interests of influential groups. My analysis suggests that even if the analogy is apt with respect to the adoption of codes as a whole, it should be tempered when drafters consider code reforms. Ethics regulation may have evolved, but it has always followed a theoretical model or approach. Routine piecemeal reform—even reform that seems defensible in isolation—will undermine the approach if not tai-

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274 Stated another way, reform may have a positive effect in directing prosecutors' attention to their obligations in one area, but a negative effect in minimizing introspection regarding other areas in which prosecutors must do justice. Emphasizing too many narrow contexts in which prosecutors must focus upon particular rights of defendants may discourage prosecutors from heeding the more general mandates of their role (e.g., "do justice") and engaging in introspection in other contexts. MODEL RULES, Rule 3.8, which highlights a handful of constitutional rights, already risks this reaction. But by mentioning the rights only briefly and in one place, MODEL RULES, Rule 3.8 reduces the likelihood that prosecutors will consider its mandate comprehensive.

275 Consider the mandate that lawyers represent clients with zeal. CPR, Canon 7. The codes include other general principles that take precedence: lawyers may not engage in criminal conduct; lawyers have obligations to the court. Taken as a whole, the codes present a package of countervailing considerations that resemble Point II or III regulation. The package leaves development of the role to lawyer introspection and discretion.

Commentators have highlighted tactics which the codes do not address directly and have called for specific resolutions. For example, various rules have been proposed that would limit lawyer discretion to advise third parties to assert the privilege against self-incrimination and that would force lawyers to prevent client perjury. See, e.g., MODEL RULES, Rule 3.3(b) (requiring lawyers to remedy client perjury); Green, supra note 61 (proposing alternatives for regulating lawyer advice regarding assertion of right against self-incrimination). The reform proponents have tended to consider the issues in a vacuum, focusing exclusively on whether the codes give lawyers sufficient information to know how to act. But as we have seen, providing instruction is not the codes' only function; indeed, the drafters themselves often lack agreement on particular results. What the reform proponents ignore are the costs of specific regulation. For example, the effect on introspection and the danger that lawyers will come to treat a series of specific rules as an exclusive list of their obligations. Before adopting reforms, it behooves code drafters to chart an approach for regulating the whole category of conduct in question. Only by determining the level of regulatory specificity that is appropriate for the context can drafters assess whether the codes have already adequately defined the regulated lawyers' role.
lored to the code and extra-code law. Similarly, a pattern of regulatory changes may affect both the way lawyers perceive the motivation underlying the whole package of regulation and their willingness to abide by it.  

In making tradeoffs between coverage and enforcement, guidance and leeway, appearances and strict control, code drafters act most wisely when they are clear about their goals and use professional regulation to fill gaps in the extra-regulatory standards. I have attempted to provide a framework by which code drafters and code reformers can identify the factors that should be considered as the drafting process unfolds. Recognizing these factors will focus the debates, both in the context of drafting new ethics codes and in considering revisions. Perhaps more importantly,

276 For example, in the abstract, prosecutors may welcome a rule providing guidance with respect to a particular dilemma. When the same rule becomes part of a pattern of regulation limiting prosecutorial discretion, they tend to perceive it as an attack by the criminal bar or an effort to preserve the defense bar's selfish interests. Recent history shows that piecemeal limits on prosecutorial discretion, particularly where some prosecutors have limited the exercise of discretion on their own, make all prosecutors more likely to resist the regulation on political grounds.

277 Consider the example of attorney-client confidentiality rules. The basic prohibition on revealing client secrets is a strict, Point IV regulation. However, decades of debate have led to actual and proposed exceptions to protect third party or societal interests. The proposed exceptions typically have been Point IV rules requiring specific conduct in specific situations. However, because the legal community is divided on the relative importance of loyalty to clients, little consensus has evolved. As a consequence, jurisdictions which have adopted exceptions have followed the course of political compromise. Cf. MODEL RULES, Rule 1.6 cmt. (comment to rule allowing lawyer to "disaffirm any opinion, document, affirmation" a client may use to defraud, despite text of rule's strict confidentiality mandate forbidding lawyer to disclose fact of fraud directly).

In effecting compromise, regulators have failed to analyze the appropriate level of regulatory specificity. The compromise has centered on enforcement, resulting most often in voluntary limits on strict confidentiality: attorneys may disclose in order to prevent future crimes or may disclose to prevent certain kinds of harm. See authorities cited in Zacharias, Confidentiality I, supra note 23, at 352-53 n.5. At best, such provisions identify relevant considerations for lawyers who find themselves in permissive disclosure situations, but do not prioritize the relative importance of loyalty to clients, promoting legal conduct, and preventing harm. Because the rules provide no guidance on how lawyers should exercise their discretion to balance the considerations, they provide little hope that different lawyers will address the issues in a similar way.

I do not mean to suggest that either this Point II regulation or the proposed Point IV alternatives are necessarily wrong. My point is that selecting the level of regulatory specificity has ramifications code drafters have not even considered. Whether the rules should provide guidance or prescribe uniform conduct are separate questions from what the guidance or conduct should be. Whether professional rules should define lawyers' role specifically may depend, in large measure, on the nature of what I have called extra-regulatory constraints—including lawyers' economic incentives and agency and malpractice law. Cf. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Tentative Drafts 1-5,
this framework should help participants in the debates to avoid the temptation of power, and to reject the invitation to act as legislators in just another political process that results in rules. After all, to those who really believe that lawyers have special duties, ethics has always meant something more than law.

1990-92) (ongoing project attempting to collate the entire body of law governing lawyer conduct).

In failing to decide initially how regulators should approach the confidentiality dilemma—what level of regulatory specificity is appropriate—the legal community has avoided a threshold issue that could produce more agreement than issues regarding the substance of exceptions. To the extent proponents and opponents of exceptions can decide upon the level of regulation the context requires, they will be far closer to achieving agreement on particular rules. The opposing parties may be willing to recognize that defining lawyers' roles in a meaningful fashion is the central function of the codes and that, when extra-regulatory constraints and the codes together fail to guide the exercise of discretion to results that all can agree are justifiable (if not necessarily correct), then more specificity is needed. That conclusion suggests to all that, in context, relegating disclosure decisions to individual choice may inappropriately leave lawyers with the task of defining their own roles.