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MOONLIGHT: ABRAHAM LINCOLN AND THE ALMANAC TRIAL, BY JOHN EVANGELIST WALSH

Reviewed by Richard H. Underwood

I. INTRODUCTION

Every trial lawyer probably thinks that he or she knows what happened during Lincoln's defense of "Duff" Armstrong in the "Almanac Trial" in Beardstown, Cass County, Illinois, May 7, 1858. As usual, much of what we think we know is wrong. Historian John Evangelist Walsh has gone to the original (limited) court records, the contemporary accounts of bystanders, and the correspondence of the principal players, to document the truth and to correct at least one lie - the legend that Lincoln used a forged almanac during his cross-examination of a key eyewitness. Walsh also raises some interesting questions about Lincoln's trial tactics, and his ethics. In my opinion, this is a wonderful book for lawyers and Lincoln fans, although Mr. Walsh makes a bit much of his standing as a "professional historian." Even an amateur like me can find a few things to add to his account of the trial. And one wonders if he might have benefited from the input of a lawyer or legal historian. But I do not mean to be critical. On to the fun stuff!

II. VERSIONS OF THE ALMANAC TRIAL - POST 1858

We've all heard the standard, "corny" trial lawyer stories. Some of these stories may be grounded in fact - some, probably not. We've all probably told these stories, and we may have even pretended that the events recounted our own exploits. It has been this way down through the generations. See if you've heard these, or used them.

1Spears-Gilbert Professor of Law, College of Law, University of Kentucky; co-author of WILLIAM FORTUNE, RICHARD UNDERWOOD & EDWARD IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK, (2nd ed. 2001); Former Chairman, Kentucky Bar Association Ethics Committee 1984-1998.

2Author of 16 or so works, including THE SHADOWS RISE: ABRAHAM LINCOLN AND THE ANN RUTLEDGE LEGEND (1993). Walsh does justice to Ann Rutledge, whose relationship with Lincoln was discounted first by Mary Todd Lincoln supporters and later by modern historians.


4One of the denizens of our local bar, a trial lawyer of considerable cunning, but perhaps with somewhat frontier sensibilities, gives the book his highest rating as "agoodsom'bitch'nbook."

5It is reported that in The Highwayman's Case, Everett v. Williams, Court of Exchequer (1725), a highwayman sued another highwayman for a share of the loot the two had separated from rightful owners - no doubt the point was to vindicate sound principles of partnership. Supposedly the solicitors for the plaintiff were fined, and counsel was taxed costs - an early variation on the theme of Rule 11 sanctions. According to Professor Costigan's account, "[t]he plaintiff was executed at
During jury **voir dire**, the judge, famous for his bullying, asked me to name every lawyer in my firm for the benefit of the jurors, to insure that none of them had any forbidden relationship with them. My firm had over 300 lawyers, and his honor reveled in the opportunity to embarrass another young lawyer. Fortunately, I had been warned, and I read off the names from a copy of the firm's letterhead I had brought along for the occasion. The judge never picked on me again.

During jury voir dire all of the jurors swore under oath that they did not know me, and I recognized none of them. But half-way through the trial, an attractive young juror raised her hand, and was called to side bar. "I'm sorry, your honor, but I remember now that I know this lawyer - I just didn't recognize him with his clothes on." ... Only after suffering extreme embarrassment were we able to explain that we had apparently met once at a swimming party.

During the trial of a sex offender, a document was introduced into evidence, and passed from juror to juror. It was a letter from the accused to his victim detailing all of the disgusting acts he wished to perform with her. A young woman on the jury nudged the elderly gent next to her, who had been dozing, and passed the exhibit to him. He read it with interest, and then turned to her nodding his head "yes" enthusiastically.

A woman sued a cosmetics company claiming that she had used their tanning lotion under a sun lamp as directed, and that she had been severely burned when the lotion exploded in flame. The defense lawyer experimented with the lotion and lamp at his firm, to no effect. The confident lawyer repeated the process as a demonstration for the jury. His arm burst into flame. He settled the case on the way to the hospital.

Defense counsel appealed his client's conviction on the ground that the prosecuting attorney had "farted about 100 times" during counsel's closing argument. When asked for a citation of authority, counsel responded with a straight face by alluding to a famous line in *Berger v. United States*, 295 U.S. 78, 88 (1935): "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones."

The almanac trial has been favorite tale of trial lawyers for some time, and they have done considerable violence to accuracy in history over the years. Here are some versions of the almanac trial that are *not* mentioned by Walsh, for good reason.

**A. Version 1 - Judge Donovan**

Tyburn in 1730, the defendant at Maidstone in 1735, and "Wreatcock, one of the solicitors, was convicted of robbery in 1735, but was reprieved and transported" (internal footnote omitted).GEORGE COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 399-400 (1917) [more from COSTIGAN later]. Whenever a story begins with "there was this highwayman," I begin to suspect "jive." My guess is that this is a "made up case."

OK, I've gone over the top with this one. But it is not *entirely* made up. See DAVID PANNICK, ADVOCATES 52 (1992).
Francis Wellman's classic text on cross-examination contains some interesting commentary on the Almanac Trial. Included in the material is a version of the trial recited by a Judge Donovan [not the presiding judge in the trial by the way], who apparently included it in a tract he authored styled "Tact in Court." This is a wonderfully crazy version of the trial, and I will correct it as I quote it. It was almost certainly part of the inspiration for the equally wacky film "Young Mr. Lincoln" (1939) starring (aw shucks, and a couple of hecks, too) Henry Fonda. 

Grayson was charged - Norris and Armstrong were charged, and Norris had already been convicted by the time Armstrong was tried, a fact which cut both ways - with shooting - there were one or more beatings with blunt objects or fists - see infra - Lockwood [the victim was Metzger] at a camp meeting ... and with running away from the scene of the killing, which was witnessed by Sovine [the star prosecution witness was Allen, and not Sovine]. ... Grayson came very near being lynched on two occasions soon after his indictment for murder [this is made up, as far as I can tell].

The mother of the accused, after failing to secure older counsel, finally engaged young Abraham Lincoln - it was one of Lincoln's last cases and not one of his first ... and the trial came on to an early hearing [Armstrong's case was transferred to Cass County and postponed at least once; it came on for trial on May 7, 1858]. No objection was made to the jury [jury selection was slow, taking two days], and no cross-examination of witnesses [actually Lincoln questioned the witnesses, and later called his own witnesses, including an expert medical witness], save the last and only important one [hardly the only important one, as we shall see], who swore that he knew the parties, saw the shot fired by Grayson, saw him run away, and picked up the deceased, who died instantly [wrong - the attack was on August 29, 1857 and Metzger went home to his wife after the attack, lingered in pain, and died September 1, 1857].

Here is what Judge Donovan said happened during the cross-examination of the critical eyewitness:

Lincoln: 'And you were with Lockwood just before and you saw the shooting?'
Witness: 'Yes.'
Lincoln: 'And you stood very near to them?'
Witness: 'No, about twenty feet away.'
Lincoln: 'May it not have been ten feet?'
Witness: 'No, it was twenty feet or more.'
Lincoln: 'In the open field?'
Witness: 'No, in the timber.'
Lincoln: 'What kind of timber?'

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8 As I recall, in the film the Armstrong brothers were charged with the murder.
9 One of Walsh's themes is that Norris got the short end of the stick in all of this. The conviction was bad in the sense that a jury was willing to convict, and the prosecutor had already practiced the case once; but the conviction was good if Lincoln could argue successfully that there had been two attacks, and that Norris's, the first, had caused the death. Enter the expert witness.
Witness: 'Beech timber.'
Lincoln: 'Leaves on it rather thick in August?'
Witness: 'Rather.'
Lincoln: 'And you think this pistol was the one used?'
Witness: 'It looks like it.'
Lincoln: 'You could see the defendant shoot - see how the barrel hung, and all about it?'
Witness: 'Yes.'
Lincoln: 'How near was this to the meeting place?'
Witness: 'Three-quarters of a mile away.'
Lincoln: 'Where were the lights?'
Witness: 'Up by the minister's stand.'
Lincoln: 'Three-quarters of a mile away?'
Witness: 'Yes, - I answered ye twiste.' [This must have been a gratuitous, nineteenth century insult?]
Lincoln: 'Did you not see a candle there, with Lockwood or Grayson?'
Witness: 'No! what would we want a candle for?'
Lincoln: 'How, then, did you see the shooting!'
Witness: 'By moonlight!' (defiantly).
Lincoln: 'You saw this shooting at ten at night - in beech timber, three-quarters of a mile from the light - saw the pistol barrel- saw the man fire - saw it twenty feet away - saw it all by moonlight? Saw it nearly a mile from the camp lights?'
Witness: 'Yes, I told you so before.'

Then the lawyer drew out a blue covered almanac from his side coat pocket - opened it slowly - offered it in evidence - showed it to the jury and the court - read from a page with careful deliberation that the moon on that night was unseen [wrong - this is not what the almanac actually showed in the real case] and only arose at one the next morning.

Following this climax Mr. Lincoln moved the arrest of the perjured witness as the real murderer "..." [wrong - the real witness in the real case, Allen, had nothing to do with the killing].

Wellman is highly critical of this inaccurate version of the trial, and makes the point that Judge Donovan's storytelling, as if he were an infallible witness to the truth, was illustrative of the "fallibilities of testimony."  

10 See WELLMAN, supra note 7, at 59. Lawyers are accustomed to thinking that jurors believe that if it's in writing, it must be true. Compare the view of the long-suffering French infantry in World War I - "anything might be true, except what [i]s printed." PAUL FUSSELL, THE GREAT WAR AND MODERN MEMORY 115 (1975). Perhaps laymen are similarly shell-shocked when it comes to the
goes on to give a fairly accurate account based on the recollections of one of Walsh's sources, Frederick Trevor Hill, mentions that there was a legend that Lincoln faked the almanac, but argues convincingly on the basis of available evidence that the legend was based on falsehood. So Walsh was hardly the first to try and lay the legend of the counterfeit almanac to rest!

B. Version 2 - Professor Irving Younger

The late Irving Younger is rightly celebrated for an entertaining lecture on "The Art of Cross-Examination," which he later published as an ABA monograph. The lecture is now used in many law schools as a "classic" on the subject of cross-examination. Younger tells the story of the cross-examination of the critical prosecution eyewitness in the Armstrong case, beginning with the statement "[w]e have Lincoln's Cross-examination in the trial transcript." We must accept this as professorial poetic license, because there was no trial transcript. If I have to guess, Younger is using the Donovan/Wellman version, and editing it to suit his purpose. One purpose was to reinforce three of his "Ten Commandments of Cross-Examination" - that the cross-examiner should not ask a witness to repeat an answer, that the cross-examiner should stop when he gets what he needs and should not ask that "one question too many," and that the cross-examiner should not ask a witness an open-ended question which might give the witness an opportunity to explain or volunteer "bad facts." But according to Younger, the "masters of cross-examination" may break the rules and achieve greatness (but don't you dare) - this seemed to be the point of the exercise. Here is the story that Younger's "transcript" provides:

Question: "Did you actually see the fight?"
Answer: "Yes."
Question: "And you stood near them?"
Answer: "No, it as a hundred and fifty feet or more."
Question: "In the open field?"
Answer: "No, in the timber."
Question: "What kind of timber?"
Answer: "Beech."

presentations of lawyers. That might explain the ready acceptance of a rumor that "Honest Abe" engaged in almanac tampering: It looks to me like the learned judge swiped his version of the trial (reported in Wellman) from a fictionalized account written by Edward Eggleson and serialized in the periodical THE CENTURY (1887-1888) styled THE GRAYSONS: A STORY OF ILLINOIS. See FREDERICK TREVOR HILL, LINCOLN THE LAWYER 229 (1906). For access to THE GRAYSONS, see Cornell Library Digital Collections (visited April 4, 2000) <http://cdl.library.cornell.edu/cgi-bin/m...-cgi%3Fnotisid%3DABP2287-0036-75&view=50>. Indeed, I refer the reader to Professor Costigan's pre-Wellman observations circa 1917: See supra note 5 and accompanying text.


13 See WELLMAN, supra note 7, at 59 ("[T]here were no court stenographers during the twenty-three years that Lincoln practiced at the bar, [and] it is impossible to secure a verbatim report of the questions and answers in Lincoln's cases ...."); Cf. WALSH, supra note 3, at 131.
Question: "Leaves on it rather thick in August?"
Answer: "Yes."

Question: "What time did all this occur?"
Answer: "Eleven O'clock at night."

Question: "Did you have a candle?"
Answer: "No, what would I want a candle for?"

Question: "How could you see from [a] distance of a hundred and fifty feet or more without a candle at eleven o'clock at night?"
Answer: "The moon was shining real bright."

Question: "A full moon?"
Answer: "Yes, a full moon."

... Lincoln drew a blue covered almanac from his back pocket. ... [He] asked the judge to take judicial notice if it and the judge said, "Yes, I will." ... Lincoln hands the almanac to the witness:

Question: "Does the almanac not say that on August twenty-ninth (the night of the murder), the moon had disappeared, the moon was barely past the first quarter instead of being full?"
Answer: [The imaginary stenographer records the answer as,] "No answer."

Question: "Does not the almanac also say that the moon had disappeared by eleven o'clock?"
Answer: [No answer.]

Question: "Is it not a fact that it was too dark to see anything from fifty feet, let alone one hundred and fifty feet?"
Answer: [No answer].

... Lincoln sat down. He had demolished the witness, and Armstrong was acquitted. ...

[T]here is a legend in Illinois that no almanac published in those years had a blue cover. According to the legend, the almanac was a counterfeit that Lincoln created for the purpose.

The off-hand reference to the legend is racy, but also somewhat gratuitous, given the fact that the story had been thoroughly debunked long before. But a good lawyer story is a good lawyer story - right?

C. Version 3 - Professor Alan Dershowitz

Professor Alan Dershowitz made use of the almanac cross-examination in a case, as he reported in his autobiographical work modestly titled The Best
Defense. Dershowitz was attempting to defend his own cross-examination in a case - it seems that the judge felt that Dershowitz had crossed some ethical line. In any event, Dershowitz cited Judge Donovan's version as it had been reported in Wellman, and then added (notwithstanding Wellman's rejection of it) the rumor that the almanac was a counterfeit. The judge was not impressed.

Walsh does a convincing job of demolishing the notion that Lincoln could, or would, have based his defense on a faked almanac. He then makes plausible arguments that the story of a faked almanac may have originated with certain jurors, as a rationalization for what they may have later felt was a mistaken verdict, or have originated with Lincoln's political opponents, who spread all kinds of slander during Lincoln's unsuccessful Senatorial campaign.

III. BUT A LAWYER'S TALE OF A FAKE ALMANAC PREDATES 1858!

Is it possible that a story of a counterfeit almanac might have predated the Armstrong trial and have inspired Lincoln's cross-examination (even if he used a genuine, unaltered almanac), the false charges against him, or both? Walsh never mentions the possibility. But given the way that "them thar" lawyer stories swell up (like a "poisoned pup"?), and spread (like a "loathsome disease"?), it could be! Are you ready?

Some years ago I was doing some research in my primary field - legal ethics. I was perusing a 1917 casebook on the subject (proof positive that I have no life) when I can across an extensive note on the Almanac Trial. The author, Professor George Costigan, Jr. of Northwestern University Law School in Chicago, Illinois, provided a generally accurate account of the case, and a strong brief for the proposition that the almanac was genuine. He also reported that a secondary authority suggested that the legend of the fake almanac may have been around for some time, and had appeared as early as 1835 in the writings of Robert Southey, a British poet and a prolific generator of alleged prose to boot. Southey wrote a tome called The Doctor. I was able to track down a copy of this book dated 1836, and there it was! Walsh makes no mention of the existence of this pre-existing lawyer lore.

This brings to my recollection a legal anecdote, that may serve in like manner to exemplify how necessary it is upon any

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15 I have noted elsewhere that Professor Dershowitz may not have needed any defending. See Richard Underwood, The Professional and the Liar, 87 Ky. L.J. 949-950 (1998-99).
16 GEORGE COSTIGAN, JR., CASES AND OTHER AUTHORIZED ON LEGAL ETHICS 352-55 (1917). Professor Costigan is a contemporary of Wigmore.
17 He cites JAMES RAM, A TREATISE ON FACTS 209 (4th Amer. ed.). I can't locate the copy in our library. Perhaps I stole the book and then misplaced it? No one else would have checked it out. I have consulted this book on more than one occasion in my research, and I know it as "Ram On Facts," which has a certain punch to it.
18 Pronounced "Suhthee" (1774-1843). Southey studied the law and was a buddy of Wordsworth and Coleridge. He was poet laureate in 1813, but he may have been more widely known for his prose works. I gather that he would have been widely read on both sides of the Atlantic. My source is THE CAMBRIDGE BIOGRAPHICAL ENCYCLOPEDIA (1994).
important occasion to scrutinize the accuracy of a statement before it is taken up on trust. A fellow was tried (at the Old Bailey if I remember rightly) for highway robbery, and the prosecution witness swore positively to him, saying he had seen his face distinctly, for it was a bright moonlight night. The counsel for the prisoner cross-questioned the man, so as to make him repeat that assertion, and insist upon it. He then affirmed that this was a most important circumstance, and a most fortunate one for the prisoner at the bar: because the night on which the alleged robbery was said to have been committed was one in which there had been no moon; it was during the last quarter! In proof of this he handed an almanac to the bench - and the prisoner was acquitted accordingly. The prosecuting witness, however, had stated everything truly; and it was known afterward that the almanac with which the counsel came provided had been prepared and printed for the occasion. 19

IV. HOW IMPORTANT WAS THE ALMANAC CROSS-EXAMINATION?

Most of the fanciful versions of the Armstrong trial have Lincoln doing nothing, even snoozing, and then awakening to cross-examine a single, critical eyewitness, "demolish" him, and win the case. In fact, Lincoln questioned all of the prosecution witnesses, presented numerous witnesses, including character witnesses, and put on a sophisticated medical case. The trial procedure of the day allowed him to sand-bag the prosecution by waiting until the last minute to subpoena his medical expert, Dr. Charles Parker, who testified that a blow to the back of the victim's head inflicted by Norris could also have caused the damage at the front of his head. 20 Lincoln also called an important witness named Nelson Watkins. Cases are seldom won on cross-examination alone, although some cases have been lost by the cross. 21

That is not to say that the cross-examination of the chief prosecution Allen was not important. Indeed, after we read Walsh's meticulous reconstruction, we can see that the cross probably had more impact on the jury than it should have had. This is so because the evidence suggests that Lincoln seized upon a discrepancy between the witness's testimony about the position of the moon and judicially noticeable fact to the contrary that was probably of little or no significance. That is, the position of the moon probably made no difference in terms of the actual amount of moonlight at the scene.

And surely of equal importance was the testimony of Nelson Watkins. Remember how Charles Bronson killed the bad guys in "Death Wish" - with the sock full of coins? Well it seems that the prosecution's theory was that

20 The expert medical witness has been an important weapon in the defense arsenal for some time. See, e.g., 17 T.B. HOWELL, STATE TRIALS 1094, 1120-24 (1816), a report of The Trial of James Annesley and Joseph Redding in the Old Bailey in 1742.
Armstrong had hit Metzger in the face with a "slung-shot," a sort of 19th century blackjack made out of a copper ball covered with lead, sewn into a leather bag and attached to a strap. One had been found at the scene, and Allen testified that he had seen Armstrong swing it and hit Metzger. Watkins would be called to undermine the prosecution's theory by testifying that the slung shot was his, and that there might be an innocent explanation as to why it was found at the scene. Specifically, Watkins testified as to the construction of the slung-shot, which Lincoln corroborated by slitting it open in a clever demonstration. He also testified as to how he had put the shot under the frame of his wagon before falling to sleep that night, and then driven off the next morning without thinking about it. The slung-shot must have fallen to the ground when he pulled away.

V. DID LINCOLN SUBORN PERJURY?

Walsh's most valuable contribution may be his detective work relating to the Watkins testimony. Lincoln only wanted Watkins to testify that he, Watkins had made the slung-shot, and that Duff Armstrong did not have it in his possession. According to Walsh, Watkins had made it and willingly said so, but was less willing to answer the second question candidly. Walsh's theory, which is supported by some ancient correspondence and a 1909 article, is that Watkins saw Duff hit Metzger with a wagon hammer, and that other witnesses (called by Lincoln) had seen the same and lied when they said Duff hit him only with his fists. Apparently Watkins and the others wanted to protect Duff to that extent. Watkins did not want to tell Lincoln certain "bad facts" that he knew, and did not want to testify fearing that the prosecutor would bring out all of the "bad facts." Walsh argues that Lincoln certainly told Watkins he did not want to know anything other than the answers to his very limited questions, thereby preventing himself from "knowing" his client's guilt; and that he may have gone further. He may have been privy to the "bad facts." Furthermore, Walsh speculates that Lincoln affirmatively coached Watkins to come up with the story about losing the slung-shot. The Walsh theory is that Lincoln may have suborned perjury by not demanding a direct answer to his second question and by supplying an answer suggesting, instead, that Duff couldn't have had the slung-shot. Of course, this is the old, old, question. What did he know and when did he know it?

Lincoln would not have been the first, and certainly was not the last lawyer who took pains to avoid knowing "bad facts." Many lawyers practice the art of "knowing while not knowing." Indeed, while we are commenting on the passing down of lawyer stories, it is worth noting that many lawyers have lectured on the technique of asking "what the prosecution is likely to say about [the client's] involvement in the crime" rather than asking the client if he did it. The idea is that you don't want to foreclose options - if the client tells you he did it, then you can't put him on the stand to perjure himself to the contrary. Lawyers

22 One gets the impression that Metzger could not hold his drink, and when he had had too much he would Bully others. He had roughed up Norris and Armstrong that evening, and both were smaller men. It may have been that folks thought that his demise was partly his own fault.
claiming that they "invented" the above technique include "Racehorse" Haynes and Roy Cohn.\textsuperscript{23} Again, the lawyer story adopted over and over for fun and profit. But the practice is probably as old as the profession.

Walsh also speculates that Lincoln coached Watkins, and perhaps other witnesses, and crossed the line between legitimate lawyering and subornation of perjury. On the other hand, I am not as sanguine as Walsh about my ability to make out a case against Lincoln, and I am familiar with the relevant case law, as it existed then, and as it exists now.\textsuperscript{24} Lawyers often coach, and it is my belief that they frequently cross the line.\textsuperscript{25} But the case against Lincoln is not nearly as compelling as Walsh suggests.

On the other hand, there is another, more subtle, charge that we might level at Lincoln, if not at defense lawyers in general, at least if he knew his client was guilty. Even if we believe that he only elicited and presented true, but extremely limited, testimony, did he then knowingly induce the jury to draw a false inference or inferences from it? Can a lawyer do that? Some of us have suggested that there may be moral and ethical problems with this,\textsuperscript{26} but judicial opinion seems to give defense counsel considerable leeway.\textsuperscript{27}

\textsuperscript{23} For a recent literary application of this lawyer lore, see Scott Turow, Presumed Innocent 162 (1987). Compare Plato, The Apology, from F.J. Church, trans., The Trial and Death of Socrates 38 (1908):

What is the calumny which my enemies have been spreading about me? I must assume that they are formally accusing me, and read their indictment. It would run somewhat in this fashion: "Socrates is an evil-doer, who meddles with inquiries into things beneath the earth, and in heaven, and who 'makes the worse appear the better reason,' and who teaches others these same things. That is what they say ...."


\textsuperscript{25} See Underwood, supra note 15, at 954-961. See also Fred Zacharias & Shaun Martin, Coaching Witnesses, 87 Ky. L.J. 1001 (1998-99). Consider the conduct of Edward Bennett Williams, who is frequently praised as the great trial lawyer of our time, as it is reported in Evan Thomas, The Man to See: Edward Bennett Williams - Ultimate Insider; Legendary Trial Lawyer 405 (1991):

As a rule, Williams didn't bother to take notes of the initial interview because he knew the client was lying. Slowly he'd probe for the truth .... The fact is, however, that Williams did not always want the truth - at least the whole truth. He would - help the client come up with a plausible theory to explain away incriminating facts. This was done subtly, through leading questions and a certain amount of winking and nodding.


\textsuperscript{27} See United States v. Latimer, 511 F.2d 498, 502-03 (10th Cir. 1975). Defense counsel knew that the bank surveillance camera was not working at the time of the robbery, a true fact, but argued during his summation that the jurors should conclude that the reason that the prosecution did not offer the camera film was that it did not show the defendants on it, a false inference; the conduct of defense counsel was approved by the court (!) and the prosecutor was criticized for responding to the questionable argument.
VI. HOW DID LINCOLN CONTAIN THE CROSS-EXAMINATION?

One thing that really mystifies Walsh is the fact that Lincoln was able to present what he wanted through Watkins without opening the door to a thorough, wide-ranging cross-examination by the experienced prosecutor.

The strange thing is that nowhere in the existing record, primary or secondary, is the least hint that Fullerton did anything at all about Watkins assertions. How Lincoln managed it remains a mystery, but his promise that Watkins wouldn't be harried or pressed by the prosecution seems to have been fulfilled.28

The rule that prevails nowadays,29 that the subject of cross-examination should be limited to the scope of the direct examination, has a curious history.30 It seems that the rule in England had been in favor of wide-open cross-examination as to any relevant subject. But in 1827 the Chief Justice of the Pennsylvania Supreme Court (without the citation of any authority) opined to the contrary - that the cross-examiner should not "prove his case by evidence extracted on cross-examination," and that the witness may not be cross-examined to facts which are "wholly foreign to what he has already testified." Wigmore suggests that the learned justice would have repudiated his own comments had he understood them. But before you know it, it seems that Mr. Justice Story of the United States Supreme Court picked up the "scope of the direct rule" "speaking obiter, and also without citing a single authority." This became the Federal Rule, which is now reflected in Federal Rule of Evidence 611(b).31 Could this rule have found its way into Illinois practice, and been accepted as the "better" rule, as early as 1858? I discussed this with my colleagues at the Law School, and all agreed that this probably would not have been the rule in Illinois at that time. We were so confident of our view that I suspected we were wrong and that I had better "look it up." Unfortunately, the earliest reported Illinois opinion on the subject I could locate in our Kentucky library was announced in the 1864 case of Stafford v. Fargo.32

28 See WALSH, supra note 3, at 49.
29 This is now the "modern" or "majority rule." See JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE MANUAL: STUDENT EDITION 2-8 (4th Ed. 1999).
30 For the definitive early treatment of the subject, see JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW VOL. III, §§ 1885-1887 (1904).
31 Hint. Evidence law is not rocket science. In my home state of Kentucky a lawyer may engage in wide-open cross-examination, with the caveat that he may not use leading questions when he departs from the scope of the direct. This is "modified wide-open" cross-examination. See RICHARD UNDERWOOD & GLEN WEISSENBERGER, KENTUCKY EVIDENCE: 2002 COURTROOM MANUAL 286 (2001).
32 35 III. 481, 486 (1864).
Whilst a large discretion is necessary to be exercised by courts, in the manner of disposing of business, still some rules of practice are inflexible. *Long experience* has demonstrated that certain rules of practice are indispensable to the *attainment of justice*, whilst others conduce largely to the attainment of that end. It seems to be the *well recognized rule*, that when a witness is called by one party, the other has *only the right to cross-examine upon the facts to which he testified in chief*. If he can give evidence beneficial to the other party, he should call him at the proper time, and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. (emphasis added).

So it is possible that in 1858 the Illinois rule might have limited the subject matter of the cross to the subject matter of the direct. Such an established rule may have been the source of Lincoln's confidence that he could elicit what he needed from Watkins and head off any prosecutorial inquiry into "bad facts." If the prosecutor wanted more he would have had to call Watkins as his own witness, and in the absence of outright hostility from Watkins, he would not have been able to use leading questions. He may have been unwilling to take on the cagey Lincoln's witness without knowing what he was going to say. Of course, given my limited legal/archeological resources I cannot be certain of what happened and why it happened, and I certainly can't be certain of the regularities of practice in Cass County, Illinois, in 1858.\(^3\) However, the possibility that I may

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\(^3\) In the South, 19th century trials could be pretty irregular - and fun. In F. Farmer, *Legal Practice and Ethics in North Carolina, 1820-60*, 30 N.C. Hist. Rev. 329, 334 (1953) the author observed
have found a plausible explanation for what Walsh views to be one of the mysteries of the case is tantalizing.

that, the courthouse being the center of activity, "the spectators not only watched the trials, but often indulged in drinking while at court." Quoting one court watcher of the day:

I noticed a good deal of drinking going on to day, and the whiskey drinkers have to day, I suppose, been carrying out this very consistent principle of that class. That [sic] to drink in damp and cold weather will warm, and that to drink in hot weather it will cool them. Ah, Consistency [sic], thou art a Jewel!

Id.
I. INTRODUCTION

Bar admission and membership as conditions for the practice of law made their appearance after World War I. At the behest of the American Bar Association, states established admissions requirements that involved a process of inclusion and exclusion, typically requiring residency, good moral character and proof of competency.

The ABA's Committee on Unauthorized Practice, founded in 1930, was successful in its campaign to convince the states to prohibit the practice of law except by duly licensed practitioners. The three primary motivations for the movement were eliminating the uneducated and the untrained from the practice, defining the fields of practice reserved to the bar and eliminating competition for this work from outsiders. One by one, the states established their admissions requirements, with little attention paid to the problem of the out-of-state lawyer. Prior to that time, multijurisdictional practice was a non-issue.

Clarence Darrow, James Webster, Alexander Hamilton and William Jennings Bryant

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3 Hereinafter referred to as ABA.
4 JEROLD S. AUERBACH, UNEQUAL JUSTICE 120-29 (1976).
5 See, e.g., Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971) (holding valid a New York rule that a bar applicant provide proof that he believes in the form of and is loyal to the United States government); Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) (allowing a state bar to ask if an applicant is a member of the communist party); Schware v. Board of Bar Exam'rs of N.Y., 353 U.S. 232 (1957) (finding that past membership in the communist party is no basis for exclusion). See also Deborah L. Rhode, Good Moral Character as a Professional Credential, 94 YALE L. J. 491, 503-06 (1985) (showing, through an empirical survey, wide disarray in application of the moral character criterion).
6 See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 856-57 (1986). While the differences in state law is cited in justification of individual bar exams, now, typically half of the bar exam is literally the same exam, the Multistate Bar Exam (MBE). In addition, a number of states require the nationally standardized Multistate Performance Test. Every state except for Maryland requires the Multistate Professional Responsibility Exam. While sixteen jurisdictions within the United States do not accept MBE scores from exams taken in other jurisdictions, only four do not accept MPRE scores from exams taken in other jurisdictions. The MBE, MPT, and MPRE exams are nationally administered examinations, and are uniform in each state. If the Full Faith and Credit Clause of the United States Constitution applied, it would require the acceptance of scores from exams taken in other jurisdictions. Id.
7 See AUERBACH, supra note 4, at 102; See generally WOLFRAM, supra note 6, at 825.
8 See AUERBACH, supra note 4, at 96-101.
9 See generally HURST, supra note 2, at 249-85.
10 Id.
traveled to states distant from their homes to advocate the causes of their unpopular clients.11

There are a number of reasons for this tradition. "The demands of business and the mobility of our society" are the reasons given by the American Bar Association in Canon 3 of the Code of Professional Responsibility. That Canon discourages "territorial limitations" on the practice of law, including trial practice. There are other reasons in addition to business reasons. A client may want a particular lawyer for a particular kind of case, and a lawyer may want to take the case because of the skill required. Often, as in the case of Andrew Hamilton, Darrow, Bryan and Thurgood Marshall, a lawyer participates in a case out of a sense of justice. He may feel a sense of duty to defend an unpopular defendant and in this way to give expression to his own moral sense. These are important values, both for lawyers and clients, and should not be denied arbitrarily.12

The enforcement of unauthorized practice rules is often the responsibility of an unauthorized practice committee appointed by and under the supervision of the state's highest court.13 For example, in Ohio, Section 19 of Rule VII of the State Bar Rules of Governance states:

11 See Leis v. Flynt, 439 U.S. 438, 450 (1979) (Stevens, J., dissenting) (citing Flynt v. Leis, 574 F.2d 874, 878-79 (6th Cir. 1978)). In his dissent, Justice Stevens quoted the trial court in stating:

Nonresident lawyers have appeared in many of our most celebrated cases. For example, Andrew Hamilton, a leader of the Philadelphia bar, defended John Peter Zenger in New York in 1735 in colonial America's most famous freedom-of-speech case. Clarence Darrow appeared in many states to plead the cause of an unpopular client, including the famous Scopes trial in Tennessee where he opposed another well-known lawyer, William Jennings Bryan. Great lawyers from Alexander Hamilton and Daniel Webster to Charles Evans Hughes and John W. Davis were specially admitted for the trial of important cases in other states. A small group of lawyers appearing pro hac vice inspired and initiated the civil rights movement in its early stages. In a series of cases brought in courts throughout the South, out-of-state lawyers Thurgood Marshall, Constance Motley and Spottswood Robinson, before their appointments to the federal bench, developed the legal principles which gave rise to the civil rights movement.

12 Id. at 450-51.

13 See WOLFRAM, supra note 6, at 845. See, e.g., OHIO RULES FOR THE GOVERNANCE OF THE BAR Rule VII, § 1 (2001). This Section provides:

(A) There shall be a Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court consisting of seven members appointed by this Court. The term of office of each member of the Board shall be three years, beginning on the first day of January next following the member's appointment

Id. Section 2, entitled Jurisdiction of Board, provides:

(A) The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio under Rule I and not
After the filing of a final report of the Board, the Supreme Court shall issue to respondent an order to show cause why the report of the Board shall not be confirmed and an appropriate order granted. Notice of the order to show cause shall be served by the Clerk of the Supreme Court on all parties and counsel of record by certified mail at the address provided in the Board's report.14

While focusing primarily on the practice of law by non-lawyers, the statutes and rules requiring a local license applied equally to the out-of-state lawyer who did not hold a local license.15 This placed the out-of-state lawyer in the same position as the non-lawyer. Essentially, out-of-state lawyers and non-lawyers were treated as non-license holders, both equally prohibited from serving the legal needs of the state's population.16

16 See WOLFRAM, supra note 6, at 847. The question of what constitutes the practice of law, setting the boundaries between what lawyers must do and what non-lawyers are prohibited from doing, arises in the enforcement of unauthorized practice prohibitions against non-lawyers. Id. While many federal agencies have their own admission criteria, which might include non-lawyers, some states have refused to allow their administrative agencies to allow such practices. See, e.g., West Virginia State Bar v. Earley, 109 S.E.2d 420 (W.V. 1959) (limiting representation before the state's worker's compensation commission to lawyers). See generally Baron v. City of Los Angeles, 469 P.2d 353 (Cal. 1970) (finding that publication of legal do-it-yourself books may be unauthorized practice); Marlene M. Remmert, Note, Representation of Clients before Administrative Agencies: Authorized or Unauthorized Practice of Law?, 15 VAL. U. L. REV. 567, 577 (1981) (examining the moral and ethical aspects of lay representation in administrative proceedings). See also Committee on Prof'l Ethics v. Gartin, 272 N.W.2d 485 (Iowa 1978) (finding that a suspended attorney who continued to hold himself out as an attorney was to have his license revoked); Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982) (finding that a statute allowing public adjusters to represent members of the public was unconstitutional as invading the court's inherent powers over the practice of law); Ralph C. Cavanagh & Deborah L. Rhode, Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 YALE L. J. 104, 111-12 (1976). This has led to some nasty battles such as when the Arizona Supreme Court issued a decision in Arizona State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), which strictly restricted the activities of real estate brokers with respect to the sale of residential real estate. Id. A referendum amended the Arizona Constitution so as to insure the right of real estate brokers to present form purchase and sale agreements to their clients. Id. See also Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 830 (1824) (stating that “a corporation ... can appear only by attorney”); Melvin Adler, Are Real Estate Agents Entitled to Practice a Little Law?, 4 ARIZ. L. REV. 188, 191 (1963); WOLFRAM, supra note 6, at 842. Indeed, all kinds of professionals practice some law out of necessity. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY E.C. 3-5 (2000) (acknowledging that lay people often have the responsibility to interpret the law). See also Joyce Palomar, The War Between Attorneys and Lay Conveyancers: Empirical Evidence says “Cease Fire!,” 31 CONN. L. REV. 423, 447 (1999) (discussing the propriety of allowing laypersons to represent others in real estate transactions); Deborah Rhode, Policing the Professional Monopoly: A Constitutional and an Empirical Analysis of the
As interstate practice expanded, a large segment of the bar, including the ABA, recognized that enforcement of these prohibitions against the out-of-state lawyer undermined the interests of clients in obtaining coherent, competent and economical representation. At the same time, the enacted prohibitions remained resistant to change and local bar associations recognized that the exclusion of outsiders meant increased demand for their own services. Hence the current schizophrenia: academics, the ABA, corporate and government counsel and big firm lawyers call for reform, while the local bar and judiciary resist.

The problem became exacerbated as unauthorized practice rules found their way into fee disputes and motions to disqualify adversary counsel. In such contexts, the party raising unauthorized practice frequently raises it to gain advantage in litigation rather than to protect the public. Thus, the rules serve to protect against competition instead of incompetence.

II. RECENT CASE LAW

A survey of recent cases illustrates the bizarre results of the courts’ interpretation of unauthorized practice rules, where protection of the innocent and unsuspecting client public seems very distant to the courts’ deliberations.

In Birbrower, Montalbano, Condon & Frank v. Superior Court, the California Supreme Court denied a New York law firm’s claim for one million dollars in legal fees against its client, ESQ Business Services, Inc., a software developing and marketing company, for representation provided to the client in a dispute with Tandem Computers Incorporated, a Delaware corporation with its principal place of business in California. The retainer agreement was declared void, unenforceable and illegal as a violation of a California unauthorized practice statute. The Birbrower attorneys settled the dispute between ESQ and Tandem in August of 1993 after they invoked the arbitration clause of the contract, which was to be governed by California law. Afterwards, ESQ sued Birbrower for malpractice and Birbrower counterclaimed for its fees under a

17 See Needham, supra note 15, at 478-79.
18 Id. at 468-69.
20 See Kenneth L. Penegar, The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts, 8 GEO. J. LEGAL ETHICS 831, 832-33 (1995) (discussing the fact that one may legitimately ask whether the adverse party in a civil proceeding has standing to raise the unauthorized practice of the adverse party’s lawyer, or alternatively, whether unauthorized practice statutes vest individual rights not to be the opponent of an out-of-state practitioner).
22 Id.
23 Id. at 13.
24 Id. at 3.
retainer agreement and in quantum meruit. ESQ claimed unauthorized practice as an affirmative defense because the Birbrower lawyers who handled most of the work on the case originated out of a New York law firm and were not licensed to practice law in California. The background of the relationship was that ESQ originated in New York ("ESQ-NY"), as did its principal in the early eighties. As its California business expanded, the principal and his brother formed a second corporation in California ("ESQ-CA").

The California Court of Appeals affirmed the trial court's award of summary judgment in favor of ESQ. The California Supreme Court affirmed in part and remanded in part, dismissing Birbrower's counterclaim for legal fees because the retainer agreement was illegal. The quantum meruit claim survived and was remanded.

The court cited its precedent for the definition of the practice of law: "the doing and performing services in a court of justice," but added, "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." Under this definition, and over a vigorous dissent, representation during the negotiation, the invocation of arbitration and the settlement with Tandem was held to constitute the practice of law. Strangely, however, the court ruled that any work for ESQ-CA, performed by the Birbrower lawyers while they were physically present in New York (and assumedly en route to California), was severable from the illegal California-based work. Thus, the case was remanded for trial on the question of quantity of work performed in what locus. The court further muddied the locus of the work-performed standard in stating, "Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state." The court further held that "advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means" might constitute unauthorized practice as well.

25 Id. at 4.
26 Id.
27 See Birbrower, 949 P.2d at 4.
28 Id.
29 Id. at 9-10.
30 Id.
31 Id. at 2 (relying upon the California statute making unauthorized practice a misdemeanor). See also CAL. BUS. & PROF. CODE § 6125 (West 1994) (providing that "[n]o person shall practice law in California unless the person is an active member of the State Bar.").
32 Birbrower, 949 P.2d at 5 (citing People v. Merchants Protective Corp., 209 P. 363, 365 (Cal. 1922)).
33 Id. at 5.
34 Id. at 13.
35 See id. at 12-13. Quantum meruit is an equitable claim where the defense of unclean hands is available, such as when the court has labeled the lawyer's representation a crime. See Vista Designs, Inc. v Melvin K. Silverman, P.C., 774 So. 2d 884 (Fla. Dist. Ct. App. 2001) (disallowing the payment of an earned fee and rejecting a claim for quantum meruit, on behalf of a registered patent lawyer whose advice strayed from the strict confines of patent law).
36 Birbrower, 949 P.2d at 5.
37 See id. See also Estate of Condon, 76 Cal. Rptr. 2d 922 (1998). This locus of the lawyer theory of Birbrower was followed by a decision of the California Court of Appeal in Condon, which involved a dispute over attorneys' fees under the California Probate Code. The court held that § 6125 was not violated by the activities of a Colorado attorney who advised his client, a co-executor of a California-originated estate who resided in Colorado, on matters concerning the estate.
The dissent defined the practice of law as "representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind." It argued that the activities of the New York firm, on behalf of ESQ-CA, were not includable because the representation involved preparation for an arbitration, which is "not ordinarily constrained to decision according to the rule of law." Representation by non-lawyers is allowed, indeed, encouraged in arbitration proceedings.

The dissenting opinion was certainly vindicated by the legislature, which overruled the court's holding with respect to arbitration. However, the case endures as a statement by the California Supreme Court about how it views out-of-state lawyers practicing in the nation's most populous, richest and most diverse state. Further, the court's ruling makes no sense. Why should the locus of the lawyer make a difference when he or she is working for a California client and interpreting California law? But, if locus is important, why should phone or fax messages be different from letters or other kinds of work rendered for the client?

In In re Jackman, Jackman was an applicant to the bar of New Jersey. He was a member of the Massachusetts bar who had practiced in a large Boston firm for six years before taking a job with a large New Jersey firm. He worked under senior partners in a large transactional practice. The court delayed Jackman's admission because he waited six years before taking the New Jersey exam and applying for admission. The court criticized Jackman for his "improper practice and his failure to be responsible in discerning his personal obligation to satisfy [its] admission and practice requirements." The court struck a familiar, but irrelevant tone stating:

Lawyering is a profession of great traditions and high standards. Consistently this Court has referred to bar admission as a "privilege burdened with conditions." The core conditions...

Court found that the Colorado attorneys gave advice on California law while they were physically located in Colorado and the communications between the firm and its client took place entirely within Colorado. Id. at 16 (citing Baron v. City of Los Angeles, 469 P.2d 353, 358 (Cal. 1970)).

See, e.g., CAL. CIV. PRO. CODE § 1282.4 (West 1999).

Almost immediately after Birbrower the California Code of Civil Procedure was amended. Id. Section 1282.4 of the 1998 amendment states:

(b) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, timely files the certificate described in subdivision (c) and the attorney's appearance is approved by the arbitrator, the arbitrators, or the arbitral forum.

Id. at 1110.
resonate as soundly in the Twenty-First Century as they did when uttered: "good moral character, a capacity for fidelity to the interests of clients, and for fairness and candor in dealings with the courts." Today those concepts are joined together in the overall "fitness to practice" standard set forth in R. 1:25.

[T]he fitness requirement is rooted in the State's fundamental interests in regulation of the legal profession: first, the protection of prospective clients, and second, the assurance of the proper, orderly and efficient administration of justice.

These exigencies arise because the technical nature of law provides the unscrupulous attorney with a frequent vehicle to defraud a client. Further, the lawyer can obstruct the judicial process in numerous ways, e.g., by recommending perjury, misrepresenting case holdings, or attempting to bribe judges or jurors.

[A] bar applicant must possess a certain set of traits--honesty and truthfulness, trustworthiness and reliability, and a professional commitment to the judicial process and the administration of justice. These personal characteristics are required to ensure that lawyers will serve both their clients and the administration of justice honorably and responsibly.

Of course all of this overblown rhetoric sounds great, but has nothing to do with the applicant. No one denied that Jackman continued to have the good moral character Massachusetts found he had when he applied there twelve years earlier.

None of his corporate clients voiced any complaint that he was anything but an honest and competent corporate practitioner.

Why is the court talking about "trustworthiness" and "commitment" to the judicial process?

In In re Ferrey, the Rhode Island Supreme Court found that an out-of-state lawyer, who applied for and received permission from the Energy Facility Siting Board to appear before it on behalf of the developer of an electrical generation facility, was probably guilty of misdemeanor or felony unauthorized practice.

The court held that only the state supreme court could henceforth grant the motion to appear pro hac vice before any court or agency, whether state or municipal, and thus the board's earlier grant of permission was void.

Ferrey's motion for nunc pro tunc approval of what he had already quite innocently done was denied as "tantamount to affixing an ex post facto imprimatur of approval on what might be construed as the unauthorized practice..."

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48 Jackman, 761 A.2d at 1105 (citations omitted).
49 See id.
50 Id.
51 Id.
53 Id. at 65. See also R.I. GEN. LAWS § 11-27- 5 (2001) (providing that: "No person, except a member of the bar of this state, whose authority as a member to practice law is in full force and effect, shall practice law in this state.").
54 Ferrey, 774 A.2d at 65.
of law." In denying the *nunc pro tunc* portion of Ferrey’s motion, the court implied that all of the fees Ferrey had earned were illegal and the acceptance of monies would only compound his crime.\(^5\)

We learn from the dissent that the *nunc pro tunc* motion was about the attempts by municipal opponents to have all hearings and testimony offered in the presence of the out-of-state attorney voided, thus forcing the applicant for the construction permits to start over and re-offer all of the expensive expert testimony.\(^6\) Indeed, Rhode Island has an unusual statutory provision exempting the “visiting attorney,” which the dissent felt covered Ferrey.\(^7\) This strange and poorly written opinion causes the reader to ask, “What is the story behind the story?” As is so often true in the unauthorized practice field, there is such a story.\(^8\)

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\(^5\) See Ferrey, 774 A.2d at 63.

\(^6\) Id.

\(^7\) Id.

\(^8\) Id.

\(^9\) R.I. GEN. LAWS § 11-27-13 (2001). This section provides:

> [T]he provisions of §§ 11-27-1, 11-27-2, and 11-27-5 -- 11-27-14 shall not apply to visiting attorneys at law, authorized to practice law before the courts of record in another state, while temporarily in this state on legal business, or while permitted to conduct or argue any case in this state according to the rules of practice of the supreme court. No visiting attorney shall issue or indorse, as attorney, any writ of any court of this state.

\(^{10}\) See Ferrey, 774 A.2d at 63.

\(^{11}\) See Katherine Gregg, *New Furor Arising Over Ethics Dispute*, PROVIDENCE J., March 8, 2001, at A1. When the Rhode Island Ethics Commission voted to withdraw its rule prohibiting the acceptance by legislators of any gifts from lobbyists and replace it with a limit of $450 per year and per lobbyist, Common Cause of Rhode Island and Operation Clean Government filed a complaint with the Commission. *Id.* They complained that the vote of the Commission violated Rhode Island conflict of interest laws because a member, Thomas Goldberg, cast one of the votes in its 5-4 decision. *Id.* Mr. Goldberg shared his law office with his bother, Robert Goldberg, who received lobbying contributions of more than $120,000 in the year 2000. *Id.* The Commission could not find a Rhode Island attorney to investigate the complaint, and thus turned to one Daniel Small, a lawyer admitted only in Massachusetts to do the investigation. *Id.* See Jonathan D. Rockoff, *Ethics Board Clears Main*, PROVIDENCE J., April 13, 2001, at B1. The Commission’s Executive Director stated that he asked the Rhode Island Supreme Court’s Chief Justice Williams whether a *pro hac vice* application should be filed by Small. *Id.* The Chief told him no. *Id.* After the investigation had begun, Robert Goldberg complained about Small being guilty of unauthorized practice leading Small and the Commission to move his admission *pro hac vice* before the supreme court. *Id.* The court, in a one-sentence order, refused the application, in effect barring Small from continuing with the investigation. Recusing herself from the deliberations on the motion, along with the Chief Justice, was Associate Justice Maureen McKenna Goldberg, wife of Thomas Goldberg. *Id.* Subsequently, the Chief Justice fired the executive director. *Id.* Several justices sought to justify the denial of Small’s application by writing op-ed pieces or letters to the editor in the local newspaper. See also Bob Kerr, *The Ethics of This Move are a Mystery*, PROVIDENCE J., March 18, 2001, at C1; Bob Kerr, *Selectman Fined by State Ethics Panel*, PROVIDENCE J., March 20, 2001, at C1; Jonathan Rockoff, *Ethics Panel Lawyer Practiced Illegally*, Justice Contends, PROVIDENCE J., March 23, 2001, at A1; Jonathan Rockoff, *Pick for Ethics Counsel in Dispute*, PROVIDENCE J., March 27, 2001, at B1; Jonathan Rockoff, *Governor, Legislature Torpedoed Ethics Unit*, PROVIDENCE J., April 14, 2001, at B7; Jonathan Rockoff, *Sacking Was Outrage*, PROVIDENCE J., April 16, 2001, at A9; Jonathan Rockoff, *Correcting the Slur on My Objectivity*, PROVIDENCE J., May 10, 2001, at B7.
On September 19, 2001, the court amended its rule for admission of out-of-state lawyers and laid out procedures requiring an affidavit from the applying lawyer and the payment of a 150-dollar fee.\(^2\) Again, there was no claim by the client that Ferrey gave anything but exemplary service.\(^3\) It was only the lawyers for his municipal opponents who sought tactical advantage out of their opposition to his representation.\(^4\)

In *Cleveland Bar Association v. Misch*,\(^5\) the defendant, an attorney admitted in Illinois and by the federal court in Ohio, attempted to characterize his work on behalf of clients as federal work involving mostly bankruptcy and federal tax advice.\(^6\) However, the court found examples where his advice required reliance on Ohio state law.\(^7\) At other times the respondent was acting as chief executive officer and general counsel for a corporation; but the court noted that he never took advantage of an Ohio rule\(^8\) that allows attorneys employed full time by non-governmental entities to be admitted for the limited purposes of advising the employer.\(^9\)

In *Office of Disciplinary Counsel v. Pavlik*,\(^70\) a companion case to *Misch*, a partner from Misch's firm was also found guilty of facilitating unauthorized practice by introducing Misch to the firm's clients and allowing him to use the firm's stationery without informing the client that he was not admitted in Ohio.\(^71\) Although it appears that Misch rendered quality legal advice to all clients, the court imposed sanctions because of the principle that it is important "to protect Ohio citizens from the dangers of faulty legal representation rendered by persons not trained in, examined on, or licensed to practice by the laws of our state."\(^72\)

In *Cincinnati Insurance Company v. Wills*,\(^73\) an insurance company defended its insured against personal injury claims using one of its in-house

\(^{63}\) See Ferrey, 774 A.2d at 62.
\(^{64}\) Id.
\(^{65}\) 695 N.E.2d 244 (Ohio 1998).
\(^{66}\) Id. at 245.
\(^{67}\) Id.
\(^{69}\) See Misch, 695 N.E.2d at 245 (citing OHIO RULES FOR THE GOVERNANCE OF THE BAR Rule VI, § 4 (2001)).
\(^{71}\) Pavlik, 732 N.E.2d at 985.
\(^{72}\) See id. at 988.
\(^{73}\) 717 N.E.2d 151 (Ind. 1999).
attorneys. The plaintiffs moved to disqualify the attorney, asserting that the insurance company was engaged in the unauthorized practice of law. The Indiana Supreme Court held that insurance companies may represent insureds under circumstances and to the extent permitted by their ethical obligations but that the use of a captive law firm name was not permissible.

A variant on this theme was adopted by the Kentucky Supreme Court in *American Insurance Association v. Kentucky Bar Association*, where it reasoned (using the term loosely) that "a corporation cannot lawfully engage in the practice of law . . . . Moreover, a corporation cannot obtain license to practice law, since it is wholly incapable of acquiring the educational qualifications necessary to obtain such license, nor can it possess in its corporate name the necessary moral character required therefore." The ruling invalidated flat fee arrangements between insurance companies and the lawyers they retain for their insureds. Again, there was no claim of bad lawyering, only the enforcement of the details and peculiarities of Indiana professional regulations.

In *Attorney Grievance Commission v. Harris-Smith*, an attorney attempted to defend herself against an unauthorized practice charge by maintaining that she was admitted to the Maryland federal court and that her practice in Maryland was exclusively in the field of bankruptcy. The Maryland Court of Appeals found unauthorized practice stating:

(a) an unadmitted attorney may not maintain a principal office for the practice of law in Maryland; (b) interviewing, analyzing, and explaining legal issues to clients on a regular basis amounts to the practice of law in this state, even if the lawyer's court appearances are limited to those federal fora in which he is duly admitted; (c) it is virtually impossible to maintain a law office in Maryland limited only to federal cases and (d) the right to practice in a specific court does not amount to the right to practice law generally within that jurisdiction.

Admission to the highest court of a state and admission to that state's federal district are separate events. Thus, federal admission arguably authorizes

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74 Id.
75 Id.
76 See N.C. Gen. Stat. § 84-4 (1962) (stating that "[i]t shall be unlawful for any person or association of persons except members of the Bar, for or without a fee or consideration, to . . . prepare for another person, firm or corporation, any . . . legal document."). But see State v. Pledger, 127 S.E.2d 337, 340 (N.C. 1962) (holding that a corporation did not engage in the unauthorized practice of law when it appeared, through its employees, as an attorney for the insured).
77 917 S.W.2d 568 (Ky. 1996).
78 Id. at 571 (citations omitted).
79 See id.
80 Id.
81 737 A.2d 567 (Md. 1999).
82 Id.
84 See WOLFRAM, supra note 6, at 853.
the practice of federal law within the borders of the district. In Sperry v. State ex rel. Florida Bar, the United States Supreme Court held that the state of Florida could not enjoin a non-lawyer, registered to practice before the United States Patent Office, from preparing and prosecuting patent applications in Florida. The Court decided this case notwithstanding that such activity constituted the practice of law in Florida, in view of a federal statute and Patent Office regulations authorizing practice before the Patent Office by non-lawyers. The Administrative Procedure Act authorizes covered federal agencies to allow lay representation. Many federal agencies have followed suit including the Patent Office, the Internal Revenue Service and the Interstate Commerce Commission. By analogy, practitioners in federal fields like immigration, bankruptcy, admiralty, civil rights, and federal criminal defense would seem to be protected. However, case law does not support the analogy.

In Illinois v. Dunson, the Illinois Court of Appeals awarded post conviction relief to the defendant when the prosecuting attorney, a staff member of the state prosecutor’s office, was not a member of the Illinois bar. The court’s formalistic approach seems characteristic of opinions in this area. The court stated:

In a criminal prosecution, are the People of the State of Illinois less worthy of protection from incompetent legal representation and charlatans than private persons engaged in civil litigation? We think not. The State appears to ignore the clear import of Munson and grossly misapprehends the common law of this State in attempting to minimize the deception practiced upon the court and upon the public. The criminal prosecution of an accused by the State through a representative who is unauthorized to practice law can be neither ignored nor

85 Id.
87 Id.
88 See id.
90 37 C.F.R. § 1.31 (2001).
91 31 C.F.R. § 10.3-.8 (2001).
92 49 C.F.R. § 1103.3 (2000).
94 See Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560 (N.D.N.Y. 1995) (denying compensation to a federally admitted lawyer for work done in conducting actual proceedings in the federal courts because the lawyer maintained an office in New York and was not admitted by the state). See also Kennedy v. Bar Ass’n of Montgomery County, 561 A.2d 200, 210 (Md. 1989) (suggesting that a federal license may not authorize activities prefatory to a federal filing such as “the very acts of interview, analysis and explanation of legal rights”); Attorney Grievance Comm’n v. Bridges, 759 A.2d 233 (Md. 2000) (entering a judgment against an attorney and issuing a reprimand where it was shown by clear and convincing evidence that he violated two provisions of the state’s rules of professional conduct). See generally William T. Barker, Extrajurisdictional Practice By Lawyers, 56 BUS. LAW. 1501, 1530-58 (2001) (attempting to provide guidance to the multijurisdictional practitioner in navigating around the difficulties presented by this problem).
96 Id. at 700.
condoned. As we will explain, the unlawful participation of Salafsky tainted the original trial so that it must be declared a nullity and the resulting judgment void.97

The absurdity continues. Salafsky won a conviction and there is no evidence that he is a charlatan.

In summary, case law appears to be going in the wrong direction. State supreme courts are becoming more restrictive. In addition, out-of-state lawyers face greater obstacles to serving their clients.

III. PALLIATIVES

Having reviewed the strictness with which many courts interpret local licensing requirements, are there alternatives for the multi-jurisdictional practitioner? Of course, an admitted lawyer can always apply for admission in the new state where she desires to practice. This would involve taking the bar exam, which requires time and preparation beyond the time constraints of the busy practitioner. Further, failure would be embarrassing and might imply incompetence after such competence has already been established. Some states grant admission to out-of-state lawyers on a motion and without an exam, usually after five years of practice.98 However, many states, including California, do not.99 Motion admittees often face restrictions not placed on “regular admittees.”100 In addition, the admission process for these candidates can be rigorous.101 Bar membership may include other burdens such as fees, client security fund payments, continuing legal education requirements, IOLTA requirements, and reporting requirements involving pro bono102 and malpractice insurance.103 Lawyers from foreign countries face a different set of requirements that vary from state to state.104

Lawyers involved in litigation across state lines can apply for admission for the limited purpose of litigating a particular case by motion pro hac vice.105 However, the motion requires sponsorship by a local lawyer and may be

97 Id. at 702.
98 See Charles W. Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 S. Tex. L. Rev. 665, 681 (1995) (noting that twenty-six states, often in the sun belt (e.g., Florida) and bordering large cities (e.g., New Jersey), do not allow admission on motion).
99 Id.
100 Id. at 683 (noting that, for instance, Indiana imposes a “predominant practice” requirement that inquires where the bulk of the admittee’s practice is, at the risk of withdrawal of the membership).
102 See Schwarz v. Kogan, 132 F.3d 1387 (11th Cir. 1998) (rejecting a challenge to the Florida requirement of reporting pro bono activity).
104 See, e.g., In re Griffiths, 413 U.S. 717 (1973) (finding that states may not exclude non-citizens from bar membership). See also N.Y. COMP. CODES R. & REGS. tit. 22, § 520.6 (2001).
105 See, e.g., In re Ferrey, 774 A.2d 62 (R.I. 2001).
arbitrarily denied. Also uncertain is how pro hac vice applies to trial preparation and to the work of transactional lawyers.

Another often-cited solution to the problem is association with local counsel. This solution takes time and multiplies client costs. Further, case law does not clearly sanction this useless and empty legal formality. An uncertain number of states allow in-house counsel of a multi-state corporation to give advice to the corporation, but often not to its employees, and prohibits activities involving litigation. Some states have additional random exceptions to unauthorized practice.

IV. IMPLICATIONS FOR THE MODERN PRACTICE

Changes in technology and communications as well as structural changes in the profession make the enforcement of unauthorized practice rules anachronistic and parochial at best or cynical and monopolistic at worst. Although constitutional prohibitions against interfering with interstate commerce and with the privileges and immunities of citizenship have served to invalidate

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106 See, e.g., Leis v. Flynt, 439 U.S. 438 (1979). In Leis, two lawyers sought admission pro hac vice in order to represent Larry Flynt of Hustler Magazine in a prosecution for dissemination of harmful materials to minors. Id. The trial judge summarily rejected the request for reasons that, as Justice Stevens suggested in his dissent, may be related to the judge's distaste for the defendant and what he was charged with. Id. at 446-47 n.3 (Stevens, J., dissenting). The lawyers succeeded in gaining an injunction against the state criminal proceeding until the lawyers' pro hac vice motions were given a hearing that met the standards of the Due Process Clause of the Fourteenth Amendment. Id. at 438. The injunctive order was affirmed by the United States Court of Appeals for the Sixth Circuit. Id. The Supreme Court reversed 5-4 finding that there is no protected property interest in pro hac vice admissions. Id. at 433. In the absence of a property interest, no due process was required. Id. In his dissent, Justice Stevens found a consistent and regular practice of granting pro hac vice applications in the absence of some articulable argument to the contrary and that the practice had created an expectation of such admissions requiring procedural fairness. Id. at 453 (Stevens, J., dissenting). He also relied on cases holding that admission to the bar cannot be denied because of the political beliefs of the applicants. Id. at 454-55. He also cited Judge Friendly's suggestions that out-of-state lawyers have some measure of protection against arbitrary exclusion. Id. at 451. See also Spanos v. Skouras Theaters Corp., 364 F.2d 161, 167 (2d Cir. 1966) (en banc) (Friendly, J., dissenting) (stating that "history attests to the importance of pro hac vice appearances").


109 R.I. GEN. LAWS § 11-27-13 (2001) (providing that unauthorized practice prohibitions "shall not apply to visiting attorneys at law, authorized to practice law before the courts of record in another state, while temporarily in this state on legal business").

local barriers to out-of-state competition in most of the American economy, localism in the regulation of the practice of law prevails.\textsuperscript{113}

Myths about the 19th century practitioner are used to justify the need for licensing in every state of practice.\textsuperscript{114} The individual practitioner supposedly handles static disputes between immobile and unsophisticated neighbors, for which knowledge of a single state’s law is sufficient.\textsuperscript{115}

The reality is that a majority of the one million practicing lawyers in the United States represent businesses, not individuals;\textsuperscript{116} that business crosses borders, state and national, with impunity; that the demand for transactional work is higher than for litigation; and that finding a finite locus for a transaction between a number of multi-nationals\textsuperscript{117} is increasingly out of touch.\textsuperscript{118} In-house counsel to these organizations face impossible problems.\textsuperscript{119} Large law firms are growing at unprecedented rates and opening offices in major cities of the country and of the world.\textsuperscript{120} Lawyers employed by federal agencies in Washington often travel to the agency’s regional or area offices to advise and counsel agency personnel.\textsuperscript{121} Everyone seems to agree with all of this, but enforcement persists and lawyers have to sneak around local prohibitions.\textsuperscript{122} When the holdings discussed above are aggregated and rationalized, these rules would criminalize much of the routine legal work of firms representing the largest institutions of the country. With such a radical disjunction between a large segment of the bar and the state of the law, one thrashes about to find a solution to the problem.

V. THE MONOPOLY PROBLEM

\textsuperscript{113} Id.

\textsuperscript{114} See WOLFRAM, supra note 6, at 865.

\textsuperscript{115} See Wolfram, supra note 98, at 670.

\textsuperscript{116} See Clark, supra note 112, at 314.

\textsuperscript{117} See Wayne J. Carroll, Innocents Abroad: Opportunities and Challenges for the International Legal Adviser, 34 VAND. J. TRANSNAT’L L. 1097 (2001). The Europeans seem to have an easier time with all of this than we do. Id. at 1105-06. As early as 1977 a Legal Services Directive authorized the temporary practice of law in another state that is a member of the European Union. Id. at 1117. In 1989, the EU Commission passed the Diplomas Directive, which required member states to recognize the academic degrees from the schools of member states. Id. The 1997 Establishment Directive established the permanent right to provide legal services, including local law, in another EU state. Id. Admission could be achieved through an exam or demonstration of three years working experience in the legal system of another member state. Id.

\textsuperscript{118} See generally William T. Barker, Extrajurisdictional Practice by Lawyers, 56 BUS. LAW. 1501 (2001) (attempting to provide guidance to the multijurisdictional practitioner in navigating around the difficulties presented by this problem).

\textsuperscript{119} Carol A. Needham, The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice, 36 S. TEX. L. REV. 1075, 1085 (1995) (noting that at least nine states have adopted a special admissions category for in-house counsel, which permits out-of-state lawyers to give legal advice as long as their only client is their corporate employer).

\textsuperscript{120} See Clark, supra note 112, at 302 (noting that Baker and Mackenzie, the nation’s largest law firm, now exceeds 3000 lawyers). See also Michael J. Maloney & Allison Taylor Blizzard, Ethical Issues in the Context of International Litigation: “Where Angels Fear to Tread,” 36 S. TEX. L. REV. 933, 941-45 (1995) (examining the ethical problems that occur when American law offices open their doors to foreign clients).

\textsuperscript{121} See Maloney, supra note 120, at 941-45.

\textsuperscript{122} See Wolfram, supra note 98, at 670-71.
It seems incontrovertible that unauthorized practice prohibitions, both as-applied to non-lawyer competitors and to out-of-state lawyers, are anti-competitive. They have the effect of reducing the supply of providers of legal services in any particular state, thereby assuring an increased supply of potential clients to the in-state license holders. The rule of reason, established by Justice Brandeis in the Chicago Board of Trade case, calls for a full inquiry into the “facts peculiar to the business to which the restraint is applied,” as well as the history, the purpose and the effect of the restraint.

First, a historical analysis would look not only to the ABA campaign in favor of these prohibitions, but also to the history of the enactments in individual states. The purpose would be to test the sincerity of the oft-quoted solicitude for the client public against the more cynical aggressiveness for capturing the market. Second, the effect would involve economic analysis. Relevant to that analysis would be the restrictive effect on interstate providers as well as the effectiveness of enforcement in protecting the public against out-of-state providers who seek to peddle an inferior product.

It has been further alleged that ABA law school accreditation requirements are anti-trust violations. The principal obstacle to an anti-trust challenge would be the state action defense. In Parker v. Brown, the Supreme Court held that the Sherman Act was not meant to proscribe state legislative judgments that regulation is superior to competition. Since

123 See Palomar, supra note 16, at 473-74.
125 See Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).
126 See id. at 238.
127 See Auerbach, supra note 4, at 107.
128 Id.
129 Id.
130 Id.
131 See Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 886 (D. Kan. 1997) (finding that lawyers authoring pleadings for pro se litigants is unethical). See generally Daniel R. Fischel, Multidisciplinary Practice, 55 BUS. LAW. 951, 955-59 (2000) (examining the economical effect of multidisciplinary practice and specific issues for consideration such as an attorney’s pursuit for a higher profit, the effect on public interests, and quality of services rendered); Lawrence J. Fox, Dan’s World: A Free Enterprise Dream; An Ethics Nightmare, 55 BUS. LAW. 1533, 1540-55 (2000) (discussing issues that arise with multidisciplinary practice such as client loyalty, pro bono aid, self-regulation and the success of such a practice).
132 See Massachusetts Sch. of Law at Andover, Inc v. ABA, 846 F. Supp 374 (E.D. Pa. 1994) (holding that the district court did not have personal jurisdiction over a non-resident where a law school sued non-resident accredited organizations). See generally Clark, supra note 112, at 311 n.90 (citing Gerard J. Clark, A Challenge to Law School Accreditation: Massachusetts School of Law v. the A.B.A., 24 ADVOC. 62 (1994) (discussing the requirements for permission to take the bar exam)).
134 317 U.S. 341 (1943) (finding that a state program to restrict the supply of raisins, while anti-competitive, was immune form Sherman Act scrutiny).
135 Id. See also Stephen F. Ross, Principles of Anti-Trust Law 497 (1993) (analyzing the history, principles and purposes of the Sherman Act).
Unauthorized practice is usually a criminal violation, enforceable by an instrumentality of the state's highest court, it is assumedly beyond anti-trust.\textsuperscript{136}

However, in \textit{Goldfarb v. Virginia State Bar},\textsuperscript{137} the United States Supreme Court ruled that an attack on a Virginia State Bar attorney fee schedule, which dictated minimum fees to be charged for a wide variety of legal services, was not barred by the state action doctrine.\textsuperscript{138} The Court found that the fixed attorney fee schedule was "enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms; the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding."\textsuperscript{139}

The Court recognized that states have a "compelling interest" in the regulation of professions "to protect the public health, safety, and other valid interests."\textsuperscript{140} This includes the "power to establish standards for licensing practitioners and regulating the practice of professions."\textsuperscript{141} The Court also recognized that some "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."\textsuperscript{142}

However, the Court found that legal services affected interstate commerce and were thus subject to federal regulation.\textsuperscript{143} The practice of law did not create a sanctuary from the Sherman Act.\textsuperscript{144} "Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes."\textsuperscript{145}

The Court further stated, "Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anti-competitive practices with impunity [if learned professions are not trade or commerce]."\textsuperscript{146} The Court found no "support for the proposition that Congress intended any such sweeping exclusion."\textsuperscript{147}

The legal profession is clearly subject to anti-trust prohibitions.\textsuperscript{148} Just as clear, however, is the fact that when a state legislature or supreme court embeds a prohibition in state law, it escapes the scrutiny of anti-trust regardless of the degree to which it undermines competition.\textsuperscript{149}

\begin{thebibliography}{99}
\bibitem{136} Id.
\bibitem{137} 421 U.S. 773 (1975).
\bibitem{138} Id.
\bibitem{139} Id. at 781. \textit{See also} National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (finding that the trade association for the engineering profession is similarly subject to anti-trust regulation); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (finding that the national electrical code is subject to anti-trust scrutiny).
\bibitem{140} \textit{See Goldfarb}, 421 U.S. at 792.
\bibitem{141} Id.
\bibitem{142} Id.
\bibitem{143} Id. \textit{See also} FTC v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411 (1990) (applying anti-trust principles to a boycott by poverty lawyers in support of increased pay).
\bibitem{144} 15 U.S.C. § 1 (1976). This Statute provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." \textit{Id.}
\bibitem{145} \textit{See Goldfarb}, 421 U.S. at 785.
\bibitem{146} Id. at 787.
\bibitem{147} Id.
\bibitem{148} \textit{See} Makar, \textit{supra} note 133, at 159.
\bibitem{149} Id.
\end{thebibliography}
prohibitions, while clearly anti-competitive, are exempt from scrutiny under the state action doctrine. 150

VI. CONSTITUTIONAL ARGUMENTS

Claims that unauthorized practice prohibitions are unconstitutional have been unsuccessful. 151 However, the arguments are far from frivolous. The following sections examine the constitutionality of unauthorized practice prohibitions against the Privileges and Immunities Clause, 152 the Commerce Clause, 153 and the First Amendment. 154 Each is discussed in turn.

1. The Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV provides that the "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." 155 The framers hoped to bind the states together into a single economic unit with this clause along with the Commerce Clause. 156 In theory, all could do business on equal terms in each of the states. 157 The Supreme Court has used the clause to invalidate residency requirements as a precondition for admission to the bar. 158 These admission cases make clear that the clause applies to restrictions on lawyering. Case law mandates that the state imposing the requirement be able to justify it quite precisely, 159 much like strict scrutiny equal protection.

2. The Commerce Clause

151 See, e.g., Lawline v. ABA, 956 F.2d 1378 (7th Cir. 1992) (holding that an Illinois unauthorized practice statute did not violate the rights of freedom of expression, due process, or equal protection); Oregon State Bar v. Smith, 942 P.2d 793 (Or. Ct. App. 1997) (holding that an Oregon unauthorized practice statute did not violate rights to free speech, association, or due process); Board of Comm’rs of Utah State Bar v. Petersen, 937 P.2d 1263 (Utah 1997) (holding that a Utah unauthorized practice statute did not violate separation of powers provision or the right to obtain employment).
152 U.S. CONST. art IV, § 2, cl. 1.
153 U.S. CONST. art. I, § 8, cl. 3.
154 U.S. CONST. amend. I.
155 U.S. CONST. art IV, § 2, cl. 1.
156 U.S. CONST. art. I, § 8, cl. 3.
158 See, e.g., Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (finding residency as a condition for admission unconstitutional); Supreme Court of Va. v. Friedman, 487 U.S. 59 (1988) (holding that residency, as a condition for admission on a motion, burdened the Privileges and Immunities Clause); Barnard v. Thorstenn, 489 U.S. 546 (1989) (holding that the requirements of residency and a declaration of intent to remain, as conditions for admission, are unconstitutional); Frazier v. Heebe, 482 U.S. 641 (1987) (finding that residency as a condition of admission into a district court was unnecessary).
159 See generally LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1270 (3d ed. 2000) (discussing the modern interpretation of the Privileges and Immunities Clause).
The Commerce Clause of Article I, section 8, protects the free movement of goods and services across state lines. For instance, in *H.P. Hood & Sons v. DuMond*, the Supreme Court invalidated a New York statute prohibiting out-of-state milk producers from locating plants in New York. Such blatant protection of local industry against out-of-state competition was prohibited. Like the Privileges and Immunities Clause, the Commerce Clause also protects workers against local favoritism. The Supreme Court, in *C & A Carbone, Inc. v. Town of Clarkstown*, invalidated a municipal law, which required solid waste haulers to deposit the waste in a particular transfer station. In *Baldwin v. G.A.F.*, the Court stated that "[n]either the power to tax nor the police power may be used by the state of destination with the aim and the effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." When a state engages in de jure discrimination against out-of-staters, such as by employing unauthorized practice statutes, the state's justifications for the discrimination will be strictly scrutinized.

3. The First Amendment

The work of the lawyer, at its core, involves speech. The lawyer advises clients in the privacy of his or her office, negotiates with adversaries and advocates on behalf of clients in a host of public and non-public fora. Unauthorized practice prohibitions criminalize this speech. In *Legal Services Corp. v. Velazquez*, the United States Supreme Court invalidated a prohibition on legal services attorneys from initiating legal representation or participat[ing] in any other way, in litigation, lobbying, or rule making, involving an effort to reform a Federal or State welfare system, except representing an individual eligible client who is seeking specific

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160 U.S. CONST. art I, § 8, cl. 3.
161 Id.
162 336 U.S. 525 (1949).
163 Id.
164 Id.
165 Id. See also *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983) (approving residency preference on city funded construction because of the market participant exception to the Commerce Clause).
167 Id.
169 Id. at 527.
171 See *Spevak v. Klein*, 385 U.S. 511 (1967) (holding that a lawyer can invoke the Fifth Amendment privilege in a disciplinary proceeding). See also *In re Ruffalo*, 390 U.S. 544 (1968) (holding that due process gives a lawyer the right to notice about charges pending before a disciplinary body); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (finding that a lawyer has the right to have a press conference about a case).
172 See WOLFRAM, *supra* note 6, at 840-50.
relief from a welfare agency if such relief does not involve an
effort to amend or otherwise challenge existing law . . . . \(^{174}\)

The restriction prevented an attorney from arguing before a court that a state
statute conflicts with a federal statute or the United States Constitution. \(^{175}\) When
the LSC lawyer speaks on behalf of his or her private, indigent client, LSC's
regulation of private expression seeks to use an "existing medium of expression
and to control it, in a class of cases, in ways which distort its usual
functioning." \(^{176}\)

In \textit{NAACP v. Button}, \(^{177}\) the Supreme Court reversed a finding by Virginia
bar authorities, that lawyers employed by the NAACP were guilty of unlawful
solicitation of clients in school integration cases because the First Amendment
protected the lawyers' activities. \(^{178}\) The Court characterized the bar's anti-
solicitation rules as "broadly curtailing group activity leading to litigation [which
could] become a weapon of oppression, however even-handed its terms appear.
Its mere existence could well freeze out of existence all such activity on behalf of
the civil rights of Negro citizens." \(^{179}\)

In \textit{Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State
Bar}, \(^{180}\) the Supreme Court reversed a solicitation conviction against a union-
sponsored legal services program designed to assist members in vindicating their
rights under federal safety laws. \(^{181}\) The Court stated:

\begin{quote}
It cannot be seriously doubted that the First Amendment's
guarantees of free speech, petition and assembly give railroad
workers the right to gather together for the lawful purpose of
helping and advising one another in asserting the rights
Congress gave them in the Safety Appliance Act and the
Federal Employers' Liability Act, statutory rights which would
be vain and futile if the workers could not talk together freely as
to the best course to follow. The right of members to consult
with each other in a fraternal organization necessarily includes
the right to select a spokesman from their number who could be
expected to give the wisest counsel. That is the role played by
the members who carry out the legal aid program. And the
\end{quote}

\(^{174}\) \textit{Id.} at 538.

\(^{175}\) \textit{Id.}

\(^{176}\) \textit{Id.} at 543 (citing \textit{Polk County v. Dodson}, 454 U.S. 312, 321-22 (1981), which held that a public
defender does not act "under color of state law" because he "works under canons of professional
responsibility that mandate his exercise of independent judgment on behalf of the client" and
because there is an "assumption that counsel will be free of state control").


\(^{178}\) \textit{Id.}

\(^{179}\) \textit{Id.} at 436. The Court relied on \textit{Thomas v. Collins}, 323 U.S. 516, 537 (1945), where Thomas
was convicted for delivering a speech in connection with an impending union election under
National Labor Relations Board auspices, without having first registered as a "labor organizer."
\textit{See id.} He urged workers to exercise their rights under the National Labor Relations Act and join
the union he represented. \textit{Id.} The court noted that: "'Free trade in ideas' means free trade in the
opportunity to persuade to action, not merely to describe facts." \textit{Id.}

\(^{180}\) 377 U.S. 1 (1964).

\(^{181}\) \textit{Id.}
right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance -- and, most importantly, what lawyer a member could confidently rely on -- is an inseparable part of this constitutionally guaranteed right to assist and advise each other.\footnote{182}

The Court continued,

A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. Gideon v. Wainwright, 372 U.S. 335, and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics ... We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers ... And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge.\footnote{183}

In In re Primus,\footnote{184} the Supreme Court reversed sanctions imposed by the state of South Carolina against the defendant who, on behalf of the ACLU, solicited a prospective litigant by mail.\footnote{185} The client was among a class of welfare recipients who were allegedly sterilized against their will as a condition for the continuation of welfare benefits.\footnote{186} The Court approached the question in classic fashion, asking whether the anti-solicitation rule could withstand the "exacting scrutiny applicable to limitations on core First Amendment rights ... ."\footnote{187} Finally, the Court held that a state must demonstrate "a subordinating interest which is compelling," and that the means employed in furtherance of that

\footnotesize{\begin{itemize}
  \item \footnote{182}{Id. at 5-6.}
  \item \footnote{183}{See id. at 7. See also United Mine Workers of America, District 12 v. Illinois State Bar Ass'n., 389 U.S. 217 (1967) (applying First Amendment protection to the United Mine Workers program of assisting members with workers' compensation claims through the use of a salaried union-employed lawyer); United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971) (stating that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right ... .")}.
  \item \footnote{184}{436 U.S. 412 (1978).}
  \item \footnote{185}{Id. at 432.}
  \item \footnote{186}{Id. at 415.}
  \item \footnote{187}{Id. at 432 (citing Buckley v. Valeo, 424 U.S. 1, 44-45 (1976)).}
\end{itemize}}
interest must be "closely drawn to avoid unnecessary abridgment of associational freedoms."\(^{188}\) The Court rejected the state's interest in regulating "overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman."\(^{189}\) The less stringent standards applied to commercial speech were found inapplicable.\(^{190}\)

 Ultimately, the three suggested constitutional arguments can be reduced to an examination and balancing of two elements. The state's interest in the prevention of unauthorized practice is balanced against the following constitutional interests: free speech protected by the First Amendment; the free flow of commerce protected by the Commerce Clause; and the rights of persons to be free from discrimination by the states in which they travel protected by the Privileges and Immunities Clause.\(^{192}\)

 The state's interests in preventing unauthorized practice by out-of-state lawyers must be articulated and evaluated.\(^{193}\) Those interests include client protection, protection of the local legal system, disciplinary authority over practitioners and protection of the bar against competition.\(^{194}\) The evaluation may vary with the facts of each particular case.\(^{195}\) Constitutional attacks on statutes may be on their face or as-applied.\(^{196}\) A client group, such as a consumers union or chamber of commerce, might attack unauthorized practice prohibitions by bringing a class action under the Civil Rights Act of 1871\(^{197}\) against a state supreme court or an enforcement committee or by alleging a violation of the Constitution.

 A facial attack is more difficult than an as-applied attack because the opponent of the law must essentially rebut the state interest in the generality of cases.\(^{198}\) Here, the plaintiff class might introduce evidence that most

\(^{188}\) Id.
\(^{189}\) Id. at 437.
\(^{190}\) The origin of the commercial speech doctrine is found in Virginia State Bd. of Pharmacy v. Virginia Citizen Consumer Council, Inc., 425 U.S. 748 (1976) (invalidating a ban on advertising prescription drug prices). The first application of the doctrine to a lawyer was in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding that commercial speech, which serves individual and societal interests in assuring informed and reliable decision-making, is entitled to First Amendment protection). Bates was then broadened in In re R.M.J., 455 U.S. 191 (1982) (allowing states to put limitations, with care and in a manner no more extensive than reasonably necessary, on the content of legal advertisement). See also Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (finding an Ohio rule banning illustrations in attorney ads unconstitutional); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (discussing the protection of certain attorney direct mail ads); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990) (holding that an attorney has the right to declare a specialization on letterhead); Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) (approving a 30-day cooling-off period in wrongful death actions); Ohralik v. Ohio State Bar Ass'n, 466 U.S. 447 (1978) (finding that traditional ambulance-chasing can still be prohibited).

\(^{192}\) Id.
\(^{193}\) See Palomar, supra note 16, at 474-75.
\(^{194}\) See WOLFRAM, supra note 6, at 828-34.
\(^{195}\) Id.
\(^{196}\) Id.
\(^{198}\) See WOLFRAM, supra note 6, at 828-34.
unauthorized practice actions against out-of-state lawyers are not for the purpose of protecting clients or the state’s judicial system, but at the behest of a disgruntled opposing client or his lawyers.\(^{199}\) They might also argue that a state or federal court has almost as much disciplinary power over an out-of-stater as a local attorney.\(^{200}\) Plaintiffs might also demonstrate that out-of-state lawyers, by practicing in the state, subject themselves to the long-arm jurisdiction of the local courts and can be reached with civil process should they be guilty of malpractice.\(^{201}\) Finally, plaintiffs might show that licensing states treat out-of-state disciplinary violations every bit as seriously as in-state violations.\(^{202}\)

The goal of all of this evidence would be to convince the trier of fact to engage in a balancing that compares to the constitutional value at issue; whether it be the speech interest of the out-of-state lawyer or of the in-state client who seeks his advice, the elimination of obstructions to free flow of legal services across state lines, or the right of lawyer to make a living throughout the unitary economy of the United States. When these interests are balanced against the needs of the states in protecting their residents or their courts from such practitioners, the balance falls in favor of the constitutional principle over the state interest.

The as-applied attack is narrower. It simply argues that, regardless of the general validity of unauthorized practice prohibitions or of their application in other cases, the defendant has a defense to the charge of unauthorized practice because the Constitution protects his or her activity.\(^{203}\) For instance, in \textit{Birbrower},\(^{204}\) the defendant law firm would prove the circumstances of the prior relationship between the law firm and the principals of ESQ-CA and the history of the relationship between ESQ-CA and ESQ-NY.\(^{205}\) Given that relationship, the law firm would claim that the First Amendment protects free communication between the law firm and the client and for California to prohibit that communication would require a compelling interest.\(^{206}\) Since the complaint in \textit{Birbrower} sounds in malpractice and the unauthorized practice claim arises only as a defense to the counterclaim for unpaid legal fees, the client is clearly well equipped to protect its interest.\(^{207}\) Thus, the state’s interest is not compelling.\(^{208}\)

The as-applied attack under the Commerce Clause would again recite the history of the relationship between attorney and client. It would demonstrate that

\(^{199}\) See \textit{Birbrower, Montalbano, Condon \& Frank v. Superior Court}, 949 P.2d 1 (Cal 1998).
\(^{200}\) See \textit{In re Snyder}, 479 U.S. 634 (1985) (finding inherent powers of a court to discipline lawyers); \textit{Ex Parte Burr}, 22 U.S. (9 Wheat.) 529 (1824) (refusing, absent “flagrantly improper” proceedings, to disturb the decision of a state court).
\(^{202}\) See \textit{MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5} (2001) (subjecting lawyers to discipline in the state of his or her admission, “regardless of where the lawyer’s conduct occurs,” establishing the relationship between admission and discipline). See also Mary C. Daly, \textit{Resolving Ethical Conflicts in Multijurisdictional Practice- Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?}, 36 S. Tex. L. Rev. 715, 786-98 (1995) (claiming Rule 8.5 is ill-advised as it conflicts with other law, ignores clients, and ignores the realities of large firm practice).
\(^{203}\) See \textit{Birbrower}, 949 P.2d at 1.
\(^{204}\) Id.
\(^{205}\) Id.
\(^{206}\) Id.
\(^{207}\) Id.
\(^{208}\) Id.
the creation of ESQ-CA arose directly out of the business of ESQ-NY and that the use of the same lawyer to represent these two similar corporations made economic sense. The as-applied attack would then show that California unauthorized practice prohibitions obstruct the free flow of commerce and cannot survive strict scrutiny.\(^{209}\)

Finally, the as-applied attack under the Privileges and Immunities Clause would focus upon the lawyers who are in the business of providing legal advice.\(^{210}\) Since client needs call for work in California, a prohibition against the lawyers from performing that work because of a registration barrier requires the state to justify the barrier under strict scrutiny.\(^{211}\)

The difficulty with an as-applied attack is that it requires lawyers to recognize the issue early in order to plead and preserve such questions for appeal.\(^{212}\) It also requires them to litigate the case on two independent grounds, each requiring very different offers of proof.\(^{213}\) For instance, in *Birbrower*, the law firm defended a malpractice action and prosecuted its claim for attorney's fees.\(^{214}\) Both claims required proof including a review of the history of the representation, the time and efforts expended by the lawyers, the results achieved and how all of this compares to the standards of reasonable lawyering.\(^{215}\) The constitutional attack is very different. It requires proof, usually through expert testimony, of the level of unauthorized practice in California, how much it hurts the client-public, how much it interferes with the administration of justice and how successful the enforcement effort actually is.\(^{216}\) Indeed, the brief in opposition to the *Birbrower* petition for certiorari to the United States Supreme Court argues that the Constitutional questions were not raised below.\(^{217}\)

However, even if a strong factual case like *Birbrower* or *Ferrey* were to reach the Supreme Court in a perfect procedural posture, it seems unlikely that the present Court would rule against state control of unauthorized practice.\(^{218}\) Such a ruling would violate the majority's view of federalism.\(^{219}\) Further, some justices may object that there is little evidence that the framers intended to displace state control of lawyering.\(^{220}\)

VIII. PROPOSAL

\(^{209}\) See *Birbrower*, 949 P.2d at 1.

\(^{210}\) Id.

\(^{211}\) Id.


\(^{213}\) See *Birbrower*, 949 P.2d at 1.

\(^{214}\) Id.

\(^{215}\) Id.

\(^{216}\) Id.


\(^{218}\) See CLARE CUSHMAN, THE SUPREME COURT JUSTICES 496-540 (1995) (examining the backgrounds and beliefs of each Supreme Court justice).

\(^{219}\) Id.

\(^{220}\) Id.
The goal for efforts at reform should be the elimination of every possible restriction to unbridled interstate practice by a license holder originating from any state. Every lawyer in good standing with the highest court of his or her state should have full practice rights in any of the fifty states. Stated differently, states should give full faith and credit to the bar memberships of every other state. Concomitantly, each state should have disciplinary authority over lawyers practicing therein, with their judgments given nationwide full faith and credit.

The effectuation of the goal is easier said than done. The ABA is the source of these difficulties through its campaign of the early 20th century to tighten the standards for admission and through its advocacy of unauthorized practice prohibitions. More recently, however, the ABA has moderated its stance. As early as 1969, the ABA declared in the ethical considerations to the Code that states should not be overly restrictive in their enforcement.

Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

Indeed, the Ethics 2000 Commission proposals are certainly a step in the right direction and will be presented to the House of Delegates at the February 2002 Meeting. The proposed rule is as follows:

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:

221 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (2001).
223 Id.
224 Id.
(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or
(2) other than engaging in conduct governed by paragraph (1):
(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;
(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or
(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.\textsuperscript{226}

The proposal thus resolves the four problem situations: (1) trial preparation for a proceeding where the lawyer expects to appear pro hac vice, or where the particular tribunal allows the lawyer to appear;\textsuperscript{227} (2) most of the work of an unadmitted house counsel;\textsuperscript{228} (3) the local practitioner whose representation of a client requires out-of-state legal work;\textsuperscript{229} and (4) the lawyer who associates out-of-state with local counsel.\textsuperscript{230}

However, unresolved by the proposal are numerous other situations including: (1) transactional work where the locus of the client or of the transaction is difficult to establish;\textsuperscript{231} (2) the federal law and federal tribunal practitioner-expert who services a nationwide clientele;\textsuperscript{232} (3) the attorney who practices in a large firm in which there are local bar members but the attorney in question is not a member;\textsuperscript{233} (4) the in-house counsel's relationship with the employer falls short of being an employee;\textsuperscript{234} and (5) the federal agency lawyer who travels throughout the country.\textsuperscript{235}

Other useful proposals include thirty days of visitation as of right or a simple registration requirement that may be further linked with additional requirements such as submission to jurisdiction of the state's courts and disciplinary bodies.\textsuperscript{236} Alternatively, a simpler proposal would apply unauthorized practice only to the lawyer, unadmitted by the state, who has

\textsuperscript{226} Id.
\textsuperscript{227} Restatement of the Law Governing Lawyers § 24 (2000).
\textsuperscript{228} See Hensen, supra note 225, at 80.
\textsuperscript{229} Id.
\textsuperscript{230} See Wolfram, supra note 6, at 865-74 (discussing the problems faced by interstate lawyers).
\textsuperscript{231} See Fischel, supra note 131, at 959-73 (discussing the difficulties of multijurisdictional practice).
\textsuperscript{232} See Wolfram, supra note 6, at 865-74.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} See Geoffrey C. Hazard, Jr., New Shape of Lawyering, NAT'L L. J., July 23, 2001, at A21 (proposing a new rule regarding interstate law practice that provides a number of different circumstances when interstate law practice is not unauthorized practice).
established an office in the state and engages in a continuing course of business in the state. 237

Ultimately, ABA proposals are just that: the stated opinions of a commission of a national lawyer trade association. They do not have the force of law. 238 Their chances of being adopted at the local level present fifty distinctive political problems. 239 One can expect opposition to change from the unauthorized practice committees appointed by the highest courts in many states. 240 Sun-belt states and those located near large cities have shown little inclination to embrace out-of-state lawyers. 241 Change would be complicated in some states by virtue of the existence of statutory law that would require a legislative response. 242

A federal response to the problem is in line with a long tradition of federal intervention in situations where individual state regulation is counterproductive. 243 Congress’ power over interstate commerce is extensive indeed. 244 Goldfarb 245 made clear that the practice of law is commerce and that it is subject to federal legislation. 246 Making use of this undoubted federal legislative power, 247 Congress should enact the following statute:

(a) Any lawyer duly admitted to practice in any of the fifty states shall have the right to practice law in any of the fifty states,
(1) In any matter affecting interstate commerce.
(2) In any matter where the gravamen of the legal issues are federal.
(b) The rulings of the lawyer disciplinary bodies in the individual states shall be subject to the Full Faith and Credit Clause. 248

237 Carol A. Needham, The Licensing of Foreign Legal Consultants in the United States, 21 FORDHAM Int’L L.J. 1126, 1136 (1998) (suggesting that the benefits of such a rule are obvious).
238 See WOLFRAM, supra note 6, at 56.
240 Id.
241 See WOLFRAM, supra note 6, at 869.
242 See Zacharias, supra note 239, at 1049-52.
243 See Fred C. Zacharias, Federalizing Legal Ethics, 73 TEX. L. REV. 335, 365-70 (1994) (going much farther than the proposals made here and suggesting that the whole field of lawyer regulation should be federalized).
246 Id.
248 U.S. CONST. art. IV, § 4.
The federal courts have extensive experience defining the phrase “affecting interstate commerce.” While local residential real estate closings, will preparation and criminal defense may remain outside of the reach of the statute, most business and transactional work would be covered. In addition, Congress has additional power under the Necessary and Proper Clause to preempt state regulation of lawyers with respect to any matter arising under federal law. Congress could also address the question of the right of foreign lawyers to practice in the United States under its power over international commerce. In the alternative, Congress may decline to act unilaterally and await negotiations with our trading partners to have reciprocal rights in each country.

IX. CONCLUSION

A mere recitation of the cases cited earlier herein makes clear that the bar has a problem, which appears to be getting worse. The ABA has created a Commission on Multijurisdictional Practice. The Commission is inviting statements and testimony from the bar in preparation for a report at the 2002

249 See cases cited supra note 244.
250 Id.
251 U.S. CONST. art. I, § 8, cl.3.
253 See Kelly Charles Crabb, Providing Legal Services in Foreign Countries: Making Room for the American Attorney, 83 COLUM. L. REV. 1767, 1817 (1983) (acknowledging Congress' power to regulate commerce with foreign nations).
Annual Meeting in August.\textsuperscript{255} The testimony, available at the Commission website,\textsuperscript{256} overwhelmingly favors change. For instance, the American Corporate Counsel Association favors a "drivers' license" model where

an inferred license would be recognized by all states for all United States lawyers whose practices take them occasionally or temporarily into a non-Home-State jurisdiction under the following terms: no separate admission, fee, exam, or other non-Home-State registration would be required (full faith and credit would be accorded to other States' lawyers) . . . \textsuperscript{257}

However, another commission report is insufficient; federal pre-emption of local control through congressional action is the only solution and the ABA should get behind it and make it happen.

\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
RELATED REPRESENTATIONS IN CIVIL AND CRIMINAL MATTERS: THE NIGHT THE D.A. DITCHED HIS DATE FOR THE PROM

by Randy Lee

“A lady doesn’t leave her escort. It isn’t fair! It isn’t nice!
A lady doesn’t wander all over the room and
blow on some other guy’s dice.”

Sky Masterson

I. INTRODUCTION

My high school social scene was marked by a plethora of conflicting values and rules. Different groups drew different lines through the shifting sands of every life decision from cigarettes to sexuality. Yet, for all the diversity of vision, one rule was embraced by all: one did not, for any reason, dump one’s date because a better date came along. Yet, the wisdom so clear to my high school classmates has for the most part escaped local district attorney’s offices throughout the country. These offices and the courts that regulate them consistently fail to see a problem in district attorneys abandoning criminal prosecutions to which they have been assigned so they, or their law firms, can represent the crime victims in more lucrative, related civil matters.

In an ideal world, we could resolve this problem by requiring all government prosecutors to work exclusively for the state. In such a world, each political subdivision could be counted on to “allocate its resources in such a manner to insure that all criminal defendants receive a fair trial,” and all district attorney’s offices could employ only full-time prosecutors and, thus, eliminate the need for prosecutors to maintain a practice on the side. This would end our reliance on a system that injects “a personal interest, financial or otherwise, into the enforcement process” and, thus, “may bring irrelevant or impermissible

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factors into the prosecutorial decision and in some contexts raise serious constitutional questions. As Professor Richard Underwood, Chairman of the Kentucky Bar Association Ethics Committee from 1984-98, pointed out, however, "the economic realities are such that many state and local governments will continue to rely upon part-time prosecutors." Furthermore, even full-time prosecutors succumb to the temptation to abandon their obligations to the State to represent civil clients. Thus, we may have to settle for a solution that tolerates part-time prosecutors but prevents any prosecutor, or his firm, from representing a civil client in a matter that the prosecutor’s office is pursuing. Such a solution would recognize that “a public servant’s obligation is to the public interest, which must take precedence over any private interest that may be at stake.” It would not, however, financially overburden prosecutors as they have shown themselves able to adapt to even more stringent restrictions on outside practice.

To their credit, most States have banned district attorneys simultaneously handling criminal prosecutions and related civil suits, the equivalent of taking two dates to the prom. Frequently States even do so in any setting that “raises an appearance of impropriety.” But States have been unable or unwilling to end the practice of prosecutors abandoning their criminal responsibilities to the State so they or their firm can pursue related civil matters for private clients. Thus, while the Bar has been able to see the impropriety in Barbi going to the prom with both Ken and Poindexter, it has been unable to recognize the impropriety in Barbi leaving Poindexter on the curb just because she suddenly receives an invitation from Ken. The purpose of this article is to illuminate that impropriety.

The issue of prosecutors handling prosecutions and related civil suits has traditionally been treated under conflict of interest rules. Thus, in its first section, this article will demonstrate how current rules of professional responsibility regulating conflicts of interest for government lawyers could be sufficient to prevent prosecutors from abandoning their public prosecutions for private professional opportunities arising out of those prosecutions. It will note, however, that such rules can be circumvented by district attorney’s offices who

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6 Underwood, supra note 5, at 9. This is not to say part-time prosecutors are necessarily inexpensive. Such prosecutors in New Jersey draw a salary of as much as $38,000 per year plus pension and medical benefits. Tom Hester & Lawrence Ragonese, Many Local Prosecutors Calling it a Career-Dual Practice Mandate Forcing Them to Choose, THE STAR-LEDGER, DEC. 26, 2000, available in 2000 WL 30751635.
7 See, e.g., Commonwealth v. Eskridge, 604 A.2d 700 (Pa. 1992). County district attorney’s law firm represented the victims of a civil suit against a criminal defendant in the county. Id. at 702 (Cappy, J., concurring).
8 Id. at 702 (Cappy, J., concurring).
10 See Breighner, 684 A.2d at 148.
11 See infra text accompanying notes 104-10.
12 See Underwood, supra note 5, at 76-77.
13 See, e.g., Id. at 69-97.
14 See infra text accompanying notes 29-58.
consent to such abandonment by focusing more on the self-interests of office lawyers than on the public’s interests. It will note further that part-time prosecutors may also try to escape the limits of these rules by directing private clients to the prosecutors’ private firms rather than assuming the private representations themselves. The article will show that such vicarious conflicts are as potentially misleading to private clients and as threatening to public confidence as would be the prohibited personal representation of the private clients by the prosecutors themselves.

In its second section, this article will consider the issue under rules regulating client solicitation, including Model Rule 1.11(c)(2), which prohibits government lawyers from even negotiating “for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.” Although the Bar has, until now, not considered as solicitation the situation of a government lawyer suddenly finding himself representing a private party in a suit related to a case the prosecutor has been handling, the appearance of solicitation and related improprieties to the general public seems inevitable. The article will, in fact, argue that the conduct should be prohibited under solicitation rules, and then show that such a prohibition would not violate First Amendment concerns.

This introduction has analogized ethical dilemmas encountered in teen dating to those that arise when district attorneys juggle representations in related civil and criminal matters. It does not do so to trivialize the prosecutor’s dilemmas. These questions of professional integrity for prosecutors implicate both the Fifth Amendment of the United States Constitution and the responsibilities of those “minister[s] of justice” entrusted with bringing the full force of the State’s prosecutorial power against other members of their communities. Only the most irresponsible of commentators could take such a situation lightly. Instead, I analogize the two situations to show that the legal system, entrusted with the responsibility of justice and the authority to self-regulate, has missed an aspect of decency that has not escaped the wisdom even of adolescents. Here, then, we are confronted with a situation where the Bar will be better able to walk the halls of justice when its most esteemed members can accept the example of children.

15 See infra text accompanying notes 59-135.
16 See infra text accompanying notes 136-70.
17 See infra text accompanying notes 157-63.
18 See infra text accompanying notes 171-228.
20 See infra text accompanying notes 171-78.
21 See infra text accompanying notes 179-228.
22 See, e.g., Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967). In this case, a prosecutor prosecuted a husband for assaulting the wife while representing the wife in the divorce proceeding. Id.
24 Id. at Preamble [11] (“The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”).
26 Compare Luke 18:17 (“Whoever does not accept the kingdom of God as a child will not enter into it”) with id. at 11:46 (“Woe to you lawyers also! You lay impossible burdens on men but will not lift a finger to lighten them.”) (New American).
II. CONFLICT OF INTEREST

A. Survey of Current Standards

Although courts have sometimes struggled with what to do when a criminal defendant's lawyer suddenly turns up as a prosecutor, no one can doubt that the public would be outraged if a prosecutor suddenly abandoned the prosecution of a defendant so the prosecutor could become that defendant's paid attorney. Yet, if we accept that the prosecutor has no more loyalty to the victim than he has to the defendant, a premise that follows necessarily from the prosecutor's exclusive duty to do justice for the State, that situation is indistinguishable from this one. In both cases, the prosecutor abandons his solemn oath and public responsibility so he can seek profit from an interested party to the litigation. If we would not allow the prosecutor to so embrace the interests of the defendant, then we cannot allow him to so embrace those of the victim.

The Model Rules of Professional Conduct could be read not only to forbid the practice of a prosecutor abandoning his public criminal responsibilities to pursue a related civil matter for a private client but also the practice of the prosecutor simultaneously pursuing both the criminal and civil matters. Rule 1.11(a) prevents a lawyer from representing "a private client in connection with a

27 State ex rel Edgell v. Painter, 522 S.E.2d 636, 644 (W.Va. 1999) (holding district attorney's office is not disqualified from prosecution after the defendant's former defense attorney is hired by the district attorney as long as the court has determined the conflicted lawyer is being effectively screened); State v. Clampitt, 956 S.W.2d 403, 403-04 (Mo. 1997) (holding prosecuting attorney could not prosecute a defendant she represented "in earlier proceedings involving the case at bar" even though that prosecutor claimed she had never spoken to the defendant when she had represented him as a public defender); State v. Smith, 32 S.W.3d 532 (Mo. 2000) Prosecutor had previously represented the defendant in an earlier criminal matter and entered that conviction into evidence. Id.

28 In Berger v. United States, 295 U.S. 78, 88 (1935), overruled on other grounds by Stirone v. United States, 361 U.S. 212 (1960), the Supreme Court articulated the role of the prosecutor particularly clearly:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. See also Robert J. DeSousa, Opening Remarks: Legal Ethics for Government Lawyers: 'Straight Talk for Tough Times, 9 Widener J. Pub. L. 207, 209 (2000) ("A government attorney does his job with pride when he aggressively, but fairly, litigates, and justice results when that litigation is decided, however it is decided.") (Mr. DeSousa is the Inspector General of the Commonwealth of Pennsylvania); Green, supra note 25, at 612.
matter in which the lawyer participated personally and substantially as a public officer or employee.\textsuperscript{29} Thus, the rule explicitly would prevent a prosecutor from engaging in the former practice.\textsuperscript{30} A literal reading of Rule 1.11(a) would not, however, prohibit a prosecutor from simultaneously pursuing both claims because the rule addresses only subsequent, rather than concurrent representations. Courts generally, though, have read Rule 1.11 as a whole to prohibit such concurrent representations.\textsuperscript{31}

This follows from the recognition that not only does Rule 1.11(a) prohibit a lawyer from abandoning a matter for the government so he can pursue it for a private client, but Rule 1.11(c)(1) prevents a government lawyer from pursuing a “matter in which the lawyer [has already] participated personally and substantially while in private practice or nongovernmental employment.”\textsuperscript{32} Given that the Model Rules typically view concurrent conflicts with greater hostility than subsequent conflicts,\textsuperscript{33} it seems highly unlikely that those rules would foreclose all forms of subsequent conflict but leave permissible concurrent conflicts.

Although one might try to circumvent the restrictions of Rule 1.11 by arguing that, for example, a civil tort liability suit and a criminal prosecution arising out of the same facts are not the same matter, both the courts and the ABA Center for Professional Responsibility have indicated such arguments are meritless. Courts, for example, have found the same matter not only in criminal and tort actions arising out of a common set of facts,\textsuperscript{34} but also in divorce actions and related criminal assault prosecutions.\textsuperscript{35} Meanwhile, the Center for Professional Responsibility has described the broad definition of “matter” in Rule 1.11(d)\textsuperscript{36} as a codification of “the discussion of the term in ABA Formal Opinion 342.”\textsuperscript{37} There the ABA Committee on Ethics and Professional Responsibility said that a “matter” can be understood as “a discrete and isolatable transaction or set of transactions between identifiable parties,” or “[t]he same issue of fact

\textsuperscript{29} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (2001).

\textsuperscript{30} For a discussion of prosecutors completing criminal prosecutions and then attempting to represent clients in related civil cases, see Underwood, supra note 5, at 82-86.


\textsuperscript{32} MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.11(c)(1) (2001). See also In re Williams, 50 P.2d 729, 732 (Oka. 1935) (where court disciplined prosecutors who brought criminal action to further civil action they were already handling and where court stated, “the powers of the office of county attorney were thrown into the scale of a civil lawsuit in favor of the defense when the county attorney’s office by law and by all ethics was required to be and remain neutral”); Underwood, supra note 5, at 77-79.

\textsuperscript{33} For example, Rules 1.9(b) & (c) & Rule 1.10(b) draw the vicariousness of conflict disqualification less stringently for subsequent conflicts than 1.10(a) draws it for concurrent conflicts. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9(b), (c) & 1.10(b) (2001) with Rule 1.10(a).

\textsuperscript{34} See, e.g., Commonwealth v. Breighner, 684 A.2d 143 (Pa. Super. 1996); Kentucky Bar Ass’n v. Lovelace, 778 S.W.2d 651 (Ky. 1989).


\textsuperscript{36} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(d) (2001).

\textsuperscript{37} ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 185 (4th ed. 1999) [hereinafter CENTER FOR PROFESSIONAL RESPONSIBILITY].
involving the same parties and the same situation or conduct." Thus, the term matter refers not to a single legal action but to a factual event out of which multiple legal actions may arise.

Two other conflict rules reinforce the notion that under the Model Rules, it would be impermissible for a prosecutor to represent either successively or concurrently public and private interests in the same matter. First Rule 1.11(c)(2) prohibits a government lawyer from negotiating "for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially." A lawyer participates personally and substantially "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." Thus, under this rule, once a prosecutor had supervised a prosecution, made decisions concerning a prosecution, consulted with an attorney handling a prosecution, or received information about or attempted to investigate a matter in anticipation of a prosecution, that prosecutor would not only be prohibited from becoming employed in a private action arising out of the same matter, but he would even be prohibited from listening to overtures for employment in such an action.

Rule 1.8(b) would also severely limit a prosecutor's representation of a private party in any matter of which he learned while representing the State. Specifically, Rule 1.8(b) prohibits any lawyer from using "information relating to representation of a client to the disadvantage of the client." The rule is implicated here because a prosecutor necessarily disadvantages the State when he abandons a criminal prosecution in which he is involved so that he can pursue a related civil action. First, in doing so the prosecutor necessarily increases his local government's cost of prosecution. Even part-time prosecutors are normally paid a salary, which they continue to receive when they withdraw from a particular case. However, once a prosecutor picks up the related civil matter, he may well conflict out his whole district attorney's office, therefore, requiring his locality to retain outside counsel for the prosecution, normally either a neighboring county's district attorney's office or the state attorney general's
Either option, of course, will have to be paid by the locality to its detriment.

Furthermore, one can argue that this outside prosecutor will function at least less efficiently and perhaps even less effectively than the local prosecutor would have. This is so because an outside prosecutor will not know the local police, lawyers, and judges to the extent the local prosecutor would have. The outside prosecutor will also lack the local prosecutor's insights into the community itself. This level of unfamiliarity is even compounded because the local prosecutor's office, having been conflicted out of the case, will be prohibited from providing any guidance to the outside prosecutor. On top of all this, the outside prosecutor will incur travel costs, which a local prosecutor would not have. Thus, the prosecutor's employing political subdivision, and client, appears indeed disadvantaged when the prosecutor abandons a criminal prosecution to accept a related private representation.

One could also argue a strong potential for the prosecutor's public client to be disadvantaged by the employment even if the prosecutor continued to represent the public as well as the private interest. Here again one must recognize that the prosecutor's public income would necessarily be a fixed amount while his income for the private representation would have the potential to vary in response to hourly wages or, more ominously in this context, a contingent fee. Given the fixed versus variable financial incentives, a lawyer simultaneously representing public and private clients would be under pressure to overemphasize the private representation to the detriment of his public one.

In Young v. United States ex rel. Vuitton et Fils S.A., Justice Brennan, while writing for a majority of the Court, endorsed the view expressed here that ABA ethical provisions prohibit prosecutors from approaching a matter with divided loyalties to public and private interests. There the Court held that a district court could not appoint counsel for an interested party to prosecute a criminal contempt action. Furthermore in Nix v. Whiteside, the Supreme Court held that a criminal defendant has no right to expect her lawyer to help her testify falsely. If the defendant has no right to expect her lawyer to abuse his office on

44 Id.
45 Commonwealth v. Eskridge, 604 A.2d 700, 702 (1992) (Cappy, J., concurring) (observing that the substitution by the county prosecutor's office of outside counsel is "extremely costly in terms of public dollars").
46 Breighner, 684 A.2d at 147 ("We hold that once a conflict arises, it is improper for the conflicted district attorney to engage in any decision-making in the case, including choosing who will handle the prosecution.").
48 For a discussion of the government practice of using "private prosecutors" to pursue or aid in government prosecutions, see John D. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 ARK. L. REV. 511 (1994). The Supreme Court considered the issue of private parties pursuing the monetary interests of the federal government in civil suits in Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765 (2000) and determined private citizens had standing under qui tam statutes to litigate interests on behalf of the federal government. This was done, however, without consideration of separation of powers concerns. Instead the Court looked only to history and an assignment theory of standing. Vermont Agency of Natural Resources, at 773-78.
49 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is
her behalf, then the prosecutor should have no right to abuse his office on his own behalf.

Although the ABA's Ethics 2000 initiative may well change Rule 1.11, none of those changes will alter anything presented here. As the text of Rule 1.11 as amended was accepted by the Ethics 2000 Commission on August 4, 2001, the relevant portion of current Rule 1.11(a) would be found at amended Rule 1.11(a)(3). The relevant portions of current Rules 1.11(c)(1) and 1.11(c)(2) would be found at amended Rules 1.11(d)(2)(i) and 1.11(d)(2)(ii) respectively. Finally, the relevant portion of current Rule 1.11(d) would be found at amended Rule 1.11(e).

Other professional legal codes echo the position of the Model Rules. DR 9-101(B) of the Model Code, for example, prohibits a lawyer from accepting “private employment in a matter in which he had substantial responsibility while he was a public employee.” Section 133(1) of the Restatement (Third) would prevent a prosecutor from dropping his criminal case and then picking up the related civil case while section 129(2) would prevent him from handling the two cases simultaneously. Finally, the ABA Standards relating to the Administration of Criminal Justice encourages a prosecutor to “avoid a conflict of interest with respect to his or her official duties,” and discourages a prosecutor from negotiating “for private employment with any person who is involved as an accused or as an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.”

Yet, for all the clarity of the rules, prosecutors persist in the practices of dual representation or of retaining the civil matter and withdrawing from the criminal matter. As Professor Underwood has described the experience in Kentucky, both court cases and Kentucky Bar Ethics opinions restricting these practices “go unheeded.” The Pennsylvania experience is similar. Pennsylvania courts have been willing to label such behavior “improper” and “too ripe . . . with potential abuse,” and also have indicated that public confidence in our system of justice demands that “[t]he rules which allow elected officials to hold public office while simultaneously engaging in related private legal practice cannot operate at the expense of the criminal defendant who is entitled to a fair trial.” However, these courts have stopped short of banning a prosecutor from abandoning a criminal prosecution so he may profit from a
related civil action. Instead, they have held only that “a defendant need not prove actual prejudice in order to require that [a prosecutor’s] conflict be removed,” and that in curing such conflicts, “all decision-making duties of the conflicted district attorney must cease and the matter must be referred to the Attorney General” rather than designating the matter to another county’s district attorney.

Such state approaches do not reflect a cavalier disregard for the letter of the law because two additional dynamics captured in the Rules of Professional Conduct permit the perpetuation of the practices discussed here. These are first, the ability of a prosecutor’s office to waive the public’s conflict interests and second, the degree to which the conflict of a prosecutor may be imputed to his fellow prosecutors or to his law firm colleagues.

B. Effect of Consent by a District Attorney’s Office

1. Interests Implicated in the Waiver Decision

Rule of Professional Conduct 1.11(a) would allow a prosecutor to represent a private client in a matter related to a case he had prosecuted as long as “the appropriate government agency consents after consultation.” This consent would not extend to Rule 1.11(c)(2)’s prohibition of a prosecutor negotiating for private employment with a party to a matter he was prosecuting, nor could it remove restrictions under Rule 1.11(b) that the prosecutor not represent anyone in a civil matter if during a prosecution, he has obtained “confidential government information about a person” and that “information could be used to the material disadvantage of that person” in the civil matter. Although the nonconsentable portions of Rule 1.11 would appear to continue to place substantial obstacles in the path of a prosecutor seeking to abandon a prosecution to embrace a related civil action, courts have read the consent provision of Rule 1.11(a) to pave the way for such abandonment. If we accept this reading, one still is left to ask whether a district attorney’s office should ever be able to consent to this practice. The answer appears to be no.

First, the consent of the district attorney’s office appears to be incapable of protecting all the conflicted interests implicated in the situation. For example, though Rule 1.11(b) protects only against a government lawyer’s abuse of

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63 See id. at 147 (indicating sympathy for position that withdrawal from the civil matter “should” be the appropriate step).
64 Eskridge, 604 A.2d at 702.
65 Breighner, 684 A.2d at 148.
66 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (2001). The proposed amendment to this rule would preserve this but require the consent be “informed” and “in writing.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a)(3) (as amended and accepted by the Ethics 2000 Commission August 4, 2001).
67 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(c)(2) (2001).
68 Id. at Rule 1.11(b); see also Pa. Bar Ass’n Comm. on Legal Ethics and Professional Responsibility, Op. 94-132 (1994).
69 See, e.g., State v. Romero, 578 N.E.2d 673 (Ind. 1991) (former prosecutor needed consent from prosecutor’s office before representing defendant).
confidential information, a government lawyer engaged in a prosecution might well derive other advantages from his role as prosecutor that could subsequently be turned against either party in a civil matter. These might well include legal research or legal theories that would be equally relevant to the civil and criminal matters, agendas for discovery or proposed mechanisms for additional factual investigation, or even the aura of a public awareness that the lawyer was previously engaged in the prosecution of the criminal matter. In that case, the opposed party has at least as much interest as the district attorney’s office in deciding whether the government lawyer should be free to unleash the resources of the district attorney’s office against that opposed party in a civil matter.

Furthermore, the criminal defendant suddenly faced with a prosecutor from a foreign part of the state may have procedural due process concerns implicated. The United States Constitution guarantees, and courts go to great lengths to provide, a jury of one’s peers. In that light, one might well ask whether the defendant can be denied a prosecutor from among his peers merely because a local prosecutor wants the opportunity to profit from the case. ABA Standard for Criminal Justice 3-2.2(a) states that “[l]ocal authority and responsibility for prosecution is properly vested in a district, county, or city attorney.” Such local control over a prosecution serves the interest of a defendant, and of justice, in particular because a local attorney can bring to a prosecution familiarity with local people, places, practices, and perspectives. This, in turn, can affect each decision in an investigation from whether to charge, through what penalty to seek, and up to whether it would be worth retrying a defendant in case of mistrial. Given how profoundly each of these decisions can affect a criminal defendant, that defendant should have input into whether she is to be denied a local prosecutor.

Finally, the public at large has interests in these matters that the district attorney’s office may not be the party best suited to waive. Others, in fact, have argued more generally that government offices should never be able to waive conflicts for the public at large. The ABA early on held this position and issued an ethics opinion in 1929 in which it refused to allow the government to waive conflicts in a criminal case where different members of the same firm appeared as prosecutor and defense attorney. The opinion noted that “[n]o question of consent can be involved as the public is concerned and it cannot consent.”

70 See supra text accompanying note 68.
71 U.S. CONST. amend. VI.
72 See, e.g., Flonnory v. State, 778 A.2d 1044, 1051-52 (Del. 2001) (“The right to a fair trial before an impartial jury of one’s peers is fundamental to the American criminal justice system. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.”); Barrett v. State, 329 So.2d 67, 70 (Miss. 1976) (“This resolution, however, is the basis of our criminal court system and is justified by the compelling theory that a jury of one’s peers, knowledgeable on everyday facts of life and most aware of community prejudices or lack thereof, is best able to determine the truth from conflicting testimony.”).
75 ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, FORMAL OPINIONS, No. 16 (1929).
Several state bar associations have taken similar stands.\textsuperscript{76} The Kansas Bar Association, for example, issued an ethics advisory opinion that indicated that government entities are representative and, thus, incapable of consenting for each member of their constituency.\textsuperscript{77} Others have argued that government waiver is unrealistic for two reasons. First, it assumes that what is good for a government office and what is necessary for good government will always be the same, an assumption which will not always be valid.\textsuperscript{78} Further, government waiver also is unrealistic because "[t]he agency employees making the waiver decision would inevitably be influenced by its precedential effect on their own future opportunities for private employment, [and] a regulatory mechanism that itself involves conflicts of interest only compounds the problem."\textsuperscript{79}

2. Desirability of Waiver of Conflicts

a. Shifting the Focus to Attorney Self-Interest

Even if the district attorney's office could represent and waive all the implicated interests, it would remain difficult to understand why it would ever want to given its role as public servant. One would expect this waiver decision would be guided by the policies underlying the conflict limitations that have been placed on government lawyers. Comment [3] to Rule 1.11 identifies four such policies:

1) the need to prevent "power or discretion vested in public authority" from being used "for the special benefit of a private client;"

2) the need to keep government lawyers from "a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority;"

3) the need to avoid any "unfair advantage [that] could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service;" and

4) the "need to attract qualified lawyers."\textsuperscript{80}

The Center for Professional Responsibility traces these policies to an ABA Committee on Ethics and Professional Responsibility advisory opinion.\textsuperscript{81} That articulation of the policies there is enlightening here: (1) the treachery of

\textsuperscript{76} Conflicts of Interest and Government Attorneys, 94 HARV. L. REV. 1413, 1441-42 (1981) [hereinafter Conflicts].
\textsuperscript{78} See Conflicts, supra note 76, at 1415.
\textsuperscript{79} Id. at 1441.
\textsuperscript{81} CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 37, at 178.
switching sides; (2) the safeguarding of confidential government information from future use against the government; (3) the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and (4) the professional benefit from avoiding the appearance of evil. 82

If one compares the policies articulated in comment [3] to those in the advisory opinion, three parallels can be drawn fairly easily. First, the first policy in both comment [3] and the advisory opinion seek to limit a government lawyer from using the power entrusted to him to further the interests of another party. Second, both the second policy in comment [3] and the third policy in the advisory opinion seek to avoid placing a government lawyer in a situation where his performance of his governmental role might be distracted by private interests. Finally, both the third policy in comment [3] and the second policy in the advisory opinion seek to prevent the abuse of confidential government information. Thus nothing in the first three policies of either comment [3] or the advisory opinion suggests a reason that a district attorney's office would ever want to consent to one of its lawyers accepting private retention in a matter to which the lawyer had previously been exposed. To the contrary, consenting to such representation could only invite the evils that the policies seek to prevent. In fact, no other context involving a government lawyer appears to pose as much danger for abuse of power, divided loyalties, and misuse of information as does the situation of the prosecutor with his hands in both civil and criminal actions arising from the same matter.

It is only, then, when one compares the fourth policies that one gains an insight into why a district attorney's office would ever consent in this situation. The fourth policy from the advisory opinion, issued at a time when the law sought to discourage the Bar's mercenary tendencies, 83 seeks to protect the government office from the "appearance of doing evil." 84 Since the fourth policy

82 Id. (quoting ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Op. 342 (1975)).
83 Some associate the beginning of the commercialization of legal practice with the Supreme Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) or with the ABA's abandonment of aspirational goals for the profession when it replaced the Model Code of Professional Responsibility with the Model Rules in 1983. Professor William Braithwaite, for example, said:

Under the Canons, professionalism meant honorable character. Today it means obeying the law — that is, complying with the Rules. Law-abidingness has supplanted the aspiration to moral excellence. Obedience, not honor, is now the lawyer's primary trait. . . [The profession is] moving away from its traditional self-conception as a noble and learned profession toward, on one hand, the model of commerce, and on the other, the model of partisan politics.

84 CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 37, at 178.
seeks to discourage not only unethical behavior but also behavior from which one might even infer evil, the policy counsels against consent even more vigorously than do the first three common policies. The Model Rules, however, did not retain this policy in comment [3]. Instead, it replaced it with a policy that invites a government office to weigh the desires of its lawyers against the interests of the public. In fact, the comment’s articulation of this fourth policy indicates that the drafters intended this policy to temper the ethical demands of the comment’s first three factors: “However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards.”

The erosion in the ethical demands from the earlier set of policies to the later reflects a conscious decision rather than an oversight. In fact, the Center for Professional Responsibility has even acknowledged a longstanding effort, reflected in both the Model Rules and Model Code, to end the judiciary’s use of an “appearance of impropriety” test. The Center laments, however, that “the test apparently refuses to die.”

The shift in the Rules, away from a desire to instill public confidence and toward a desire to provide professional incentives to lawyers, raises three questions in the context of public and private representations by prosecutors:

1) Whether this shift is permissible in a self-regulating profession;
2) Whether this shift can lead to appropriate decisions in the context of a prosecutor’s office; and
3) Whether the shift can even deliver the economic benefits it promises.

b. Focusing on Attorney Self-Interest in a Self-Regulating Bar

First, the shift cannot be permissible in a self-regulating profession because it replaces the public’s interest with that of the self-regulating lawyers. As the Preamble to the Model Rules points out, “[t]he legal profession is largely self-governing” because “[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.” The Preamble points out, however, that “[t]he legal

86 One might fairly ask if this erosion is not further evidence of the Bar’s struggle to keep its heart pure in the business of self-regulation. See supra note 83.
87 CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 37, at 176-77.
88 CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 37, at 177. See also Underwood, supra note 5, at 19-20.
89 MODEL RULES OF PROFESSIONAL CONDUCT Preamble [9], [10] (2001). For a different perspective on the state of Bar self-regulation, see Pearce, supra note 83, at 1275-76.
profession’s relative autonomy carries with it special responsibilities of self-government. 90 In particular, “[t]he profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.” 91

The legal profession breaches that responsibility when it creates its rules to guarantee greater flexibility or income for lawyers at the expense of public confidence in the profession. Thus, the shift in values we see from the advisory opinion to comment [3] is hardly consistent with the profession’s responsibility as a self-regulating profession. 92 This is particularly true when the law applicable to other citizens is defined by the very principles by which the legal profession refuses to be bound. For example, in Pennsylvania, courts have read state ethics laws applicable to public officials generally to be triggered by even the appearance of a conflict of interest, 93 even as the national Bar sought to kill that standard as applied to lawyers. 94

One might argue that the concerns of parochial rule-making are not relevant here because rules regulating government lawyers only affect a small portion of the legal profession. Therefore, the majority of lawyers can make these rules free of bias. This argument fails on two fronts. First, it ignores the reality that in this particular instance the very danger of which the Preamble warns, that lawyers will abandon the public interest in favor of their own interests, has occurred. Second, it mistakenly assumes that the only lawyers who would have an interest in the breadth of Rule 1.11 are those currently in government service when that group could also include anyone who has an associate, relative, or friend in government service or even any lawyer currently in private practice who might anticipate having an interest in government service.

91 Id.
92 For a fuller discussion of the present state of self-regulation within the legal profession, see Randy Lee, The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?, 11 WIDENER J. PUB. L. (forthcoming 2002).
93 Little v. Freeman, 484 A.2d 873, 874 (Pa. Commw. 1984) (holding mayor cannot be private investigator because he would have access to police records even if he would not use them).
94 See supra text accompanying notes 86-88. Consistent with the status of the legal profession as self-regulating, the Pennsylvania Supreme Court had held that the state employees conflict of interest laws passed by the state legislature could not be applied to lawyers. See Wajert v. State Ethics Comm’n, 420 A.2d 439, 442 (Pa. 1980). In 1999, however, the Supreme Court held that such ethic laws could be applied to government lawyers:

[I]t is ludicrous to suggest that employers be constitutionally precluded from imposing ethical and professional requirements on their employees, some or all of who may be attorneys. This is equally true where the employer is the Commonwealth or one of its subdivisions. . . . [A] lawyer who contracts his or her services to an employer is like any other employee subject to the terms and rules of that employment, provided that they are in no way inimical to the ethical standards prescribed by this Court.

a scenario the Center for Professional Responsibility describes as “frequent.”

Thus, there seem to be more than enough lawyers with an interest in government employment to think their own self-interest could influence a policy decision.

It has also been argued that when the Bar seeks to guarantee greater flexibility or income for lawyers, it actually does so in service to the public. As the argument goes, efforts to guarantee greater professional flexibility for government lawyers serves the public in three ways. First, it facilitates “the model of citizen participation in government, especially by attorneys, that is so essential to our political system” and avoids the creation of “a permanent legal bureaucracy.” Second, it protects government lawyers from political pressures in their decision-making by preserving their professional options should they need to leave government. Finally, it has been argued that “it would be extremely difficult for the government to recruit competent employees in the absence of post-employment opportunities in the private sector.”

Even the author of these arguments recognized, however, that, at least in the context of a government lawyer being involved in both public and private cases arising out of the same matter, the arguments are not persuasive. In determining the weight such arguments are to be given in the public interest, the author noted that certain negative effects of lawyer flexibility must be considered as well. For example, visions of future private employment opportunities may lead a government attorney “to abuse his position to benefit his future career in the private sector.” In addition, lawyers shifting between government and private practice may lead to former government lawyers abusing confidential information obtained in government service to benefit private clients and such lawyers receiving preferential treatment from their government colleagues who have remained behind in the public sector. Even if such dangers do not materialize, their potential to occur can seriously undermine public confidence in government. Therefore, at least in this context, the shift from consideration of the appearance of doing evil to the consideration of the promotion of lawyers' professional opportunities is not appropriate for a self-regulated Bar.

c. Attorney Self-Interest and the Distortion of Waiver Decisions

In response to the second question raised by this shift in values, the shift is actually undesirable in the context of a prosecutor’s office for three reasons. First, it underestimates the value of protecting against the appearance of evil. Second, it ignores the value that high ethical standards serve in attracting lawyers to government service. And third, it fails to factor in the resourcefulness of part-time government lawyers in adapting to the demands of conflict of interest rules.

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95 CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 37, at 175.
96 See Conflicts, supra note 76, at 1428-30.
97 Id. at 1428-29.
98 Id. at 1430.
99 Id. at 1430. But see infra text accompanying notes 111-13.
100 See Conflicts, supra note 76, at 1433.
101 Id. at 1430.
102 See id. 1431-33.
103 Id. at 1433.
Courts have resisted, for good reason, the ABA's attempt to discourage consideration of the appearance of evil in the face of prosecutorial conflicts. As the United States Supreme Court has stressed, "a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."104 State courts have noted this dynamic particularly in the criminal justice context. The Supreme Court of Tennessee has pointed out, "'[A]n appearance of impropriety on the part of a government attorney will inevitably harm not only the individual attorney, but also the entire system of government that allows such improprieties to take place.'"105 This is so, as the Supreme Courts of New Jersey and Colorado have shown, because for the criminal justice system to sustain its aura of legitimacy, "both the defendant and the complainant (victim) 'must trust the impartiality of the proceedings,'"106 and this trust must also extend to the public at large.107 At the foundation of that trust, however, is the expectation that prosecutorial discretion will be free "from conflict of interest" and faithful exclusively "to the public interest."108 While it may not always be true, as Professor Roberta Flowers' article title suggests that with respect to prosecutorial decision-making, "What You See Is What You Get,"109 it is true that what the public thinks it sees in the Bar affects public confidence in the legal system.110 Thus, even the appearance of conflict cuts to the heart of the public confidence essential to sustaining the legitimacy of the criminal justice system.

None of this is meant to suggest that drafting conflict of interest rules to avoid even the appearance of evil is done merely to pander to abstract public suspicions about the obscure and shadowy effects of government behaviors. Not only is it fair to say that where there is smoke, there frequently is fire, but it is also fair to say that most of the time it is easier to detect the smoke than to detect the fire. The public recognizes that the quid pro quo evils of conflict are difficult to detect and even harder to prove. Thus, rules seeking to deter those effects must focus on elements that actually can be proven. It could be nearly impossible to prove that a prosecutor chose to accept a plea to a lesser charge because the defendant chose to be so generous in her settlement offer to the prosecutor's civil client. Recognizing that impossibility, we, therefore, draft conflict rules to prevent such evils before they can slip beyond our view. Thus, given all the public's understandings, those whom we entrust with bringing the

106 State v. Clark, 744 A.2d 109, 112 (N.J. 2000) (holding that lawyers may not serve as public defenders and prosecutors in the same county).
107 People v. Kriho, 996 P.2d 158, 176 (Colo. App. 1999) (holding an absence of conflict where the defendant had originally designated deputy district attorney a fact witness but the court concluded the district attorney's testimony was unnecessary).
108 Culbreath, 30 S.W.3d at 316.
110 See infra text accompanying note 131.
full force and fury of state resources against private citizens must be willing to take steps to avoid the appearance of being knaves.

Professor Bruce Green has stressed that this need to avoid the appearance of impropriety sustains not only public confidence but judicial trust and prosecutorial morale as well. As Professor Green noted, the reputation for integrity that federal prosecutors enjoyed before judges in the Southern District of New York guaranteed that “new prosecutors, who were not known personally to judges and defense lawyers, nevertheless received the benefit of the office’s reputation” and “were able to work more easily and effectively as a result.”

Professor Green has also indicated that individual federal prosecutors in the Southern District understood that the office’s reputation placed special demands on their own accountability and inspired them in the performance of their duties:

The office was particularly jealous of its reputation for probity, for integrity, for judgment. It was important that its acts appear to be well motivated, that its lawyers’ word be trusted. All of this and more was captured by the concept that prosecutors in the office had a “duty to do justice.”... We felt as if we defined the term — which of course we didn’t — or at least gave it new, or special, meaning. In fulfilling this duty, we preserved the office’s great tradition (or in failing to fulfill it, we risked tarnishing the office’s reputation).

Given that avoiding improper appearances and maintaining an honorable reputation instills public confidence and professional respect, it follows that prosecutors’ offices that avoid such appearances have less need to create financial incentives to attract qualified lawyers. Certainly it was honor, rather than financial reward, that attracted lawyers to the U.S. Attorney’s Office for the Southern District of New York during Professor Green’s era. Today, Robert J. DeSousa, Inspector General of the Commonwealth of Pennsylvania, recruits lawyers to government service by offering, “that if it is a vocation, a calling, a profession that you are looking for, if it is honor, duty, pride, self-satisfaction, and justice, you will do well to consider government service.”

Not only does the ABA’s shift from avoiding the appearance of evil to creating financial incentives underestimate the power a positive professional reputation has to attract and keep lawyers; it also overestimates the economic disruption that strict adherence to conflicts rules would create. On January 19, 2000, the Supreme Court of New Jersey took an even more restrictive step than that considered here when it held that “[a] municipal prosecutor shall not represent any defendant in any other municipal court in that county or in the Superior Court located in that county” in which the prosecutor holds office. In

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111 Green, supra note 25, at 609.
112 Id. at 607-08.
113 DeSousa, supra note 28, at 210. For a discussion of a government lawyer’s duty to seek justice in all contexts, see Bruce A. Green, Must Government Lawyers “Seek Justice” in Civil Litigation?, 9 WIDENER J. PUB. L. 235 (2000).
spite of that holding, local district attorney’s office have not missed a beat. In fact, the ABA Journal reported that

[A]t the time of the ruling, many in the legal community predicted mass resignations by municipal prosecutors across the state, that seasoned prosecutors would be replaced by inexperienced newcomers and that the entire municipal court system would be thrown into chaos. But none of those dire predictions has come to pass.115

Certainly some good prosecutors did resign as a result of the decision, but other capable attorneys stepped in to fill the void.116 John Dangler, immediate-past president of the County Prosecutors Association of New Jersey noted that “[t]here doesn’t seem to be any shortage of people willing to do the job.”117 In addition, West Virginia has for years similarly survived the consequences of its Supreme Court’s holding that prosecutors cannot take on domestic relations matters related to their prosecution cases.118 These experiences in New Jersey and West Virginia should actually come as no surprise to the ABA. This willingness to embrace the public service associated with prosecuting despite the limited financial rewards simply reflects the very pro bono spirit the ABA has sought to encourage in Rule 6.1.119

d. Unfulfilled Promise of Economic Incentives

We may assume that if these measures have not inhibited district attorney’s offices in their respective states, states could ban prosecutors from abandoning their assigned prosecutions to pursue related civil matters without causing a major disruption in prosecutorial function. Having established that, we may then conclude that the State has very little to gain by concerning itself with creating financial incentives for prosecutors and much to lose by ignoring appearances of evil. In that light the balance of interests said to underlie the conflict rules for government attorneys would weigh heavily against consenting to the kind of conflicts considered here.

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115 Hansen, supra note 9, at 24.
116 See id.
117 Id. But see Hester & Ragonese, supra note 6.
118 Specifically, the Supreme Court of West Virginia held that:

[a] prosecuting attorney is required to use reasonable efforts to investigate whether conflicts of interest either are present or have the potential of arising prior to undertaking representation of private clients in domestic proceedings. . . . In the event a prosecuting attorney agrees to represent a private client in a domestic proceeding and no conflict of interest is apparent but subsequently arises, the prosecuting attorney must seek appointment of a special prosecuting attorney and remove himself from the case in all respects.

Finally, in response to the third question raised, even if the need to use economic incentives to attract qualified lawyers to government service could justify relaxing ethical standards in this context, one still would have to question whether allowing prosecutors to engage in the practice of handling private suits related to their prosecutions actually does provide such incentives. In consideration of this, we may begin by assuming that both the district attorney’s offices, who must consent to this practice of switching representations, and the prosecutors, who wish to engage in the practice, have sufficient information to evaluate accurately the economic effects such switching will yield. As part of such sufficient information, the district attorney’s office would know how much additional money the government would have to pay to other government agencies to prosecute those cases abandoned by staff prosecutors because the private matters they have assumed conflict the office out of the prosecutions.

Having identified that amount, for the local district attorney’s office to be willing to consent, the office still would have to be willing to pay that amount of additional money to its prosecutors. If it were willing to do so, the office would need to decide whether it wanted to pay that amount by refusing to consent to the practice and instead using the money for an across the board salary increase to all of its attorneys or whether it wanted to pay that amount by consenting to the practice of switching representations and, therefore, concentrating that additional money into subsidizing the decisions of particular lawyers who have decided to abandon their public responsibility so they can represent private clients.

From this vantage point, one would expect that the office would have no incentive of its own to consent. By consenting, the office embraces a policy with recognized potential for abuse, and the only purported payback for embracing such a policy is that the office gets to shift income to those

120 If such an assumption cannot be made, then no case can be made for consenting for economic reasons because ethical practices, certainly in a prosecutor’s office, can never be asked to yield to idle economic speculation and uninformed decision-making.

121 As noted earlier, the cost of shifting these prosecutions to other government agencies can be substantial and is certainly more than handling the prosecutions in-house. See supra notes 42-46 and accompanying text. Furthermore, one cannot assume these costs can be offset simply by assigning an assistant district attorney a new case for the one from which he resigns. The validity of that assumption depends on the work of an assistant district attorney being constant: assistant district attorneys would always be handling a certain number of cases and the number of assistant district attorneys, and the cost of paying them, would expand or contract with changes in the number of available cases. More likely the workload of these lawyers varies depending on the number of open cases in the office. Thus, when an assistant district attorney resigns from one case, he may be assigned another case, but that case will be one that someone currently employed in the office would have handled anyway.

122 Such an increase would not necessarily need to be across the board. It could also be targeted to the office’s most valued or meritorious prosecutors.

123 If a state allowed a local district attorney’s office to assign a case to the state’s attorney general’s office without compensating the attorney general’s office for handling the case, the local district attorney’s office would be able to externalize the cost of the practice of local prosecutors conflicting themselves out of prosecutions, effectively escaping the cost of this practice by passing that cost on to the attorney general’s office. In such a scenario, the local district attorney’s office would have great incentive to embrace this practice: that office could simultaneously cut its own costs while giving its prosecutors an opportunity for private gain. Thus, in jurisdictions where the practice of prosecutors embracing related private matters is permitted, states must, at least, require those jurisdictions to bear, or internalize, the cost of shifting the prosecutions to other governmental bodies.
prosecutors who shirk their government responsibilities for personal gain. What is more, that shift comes at the expense of those lawyers in the office most committed to their public duty, those who would benefit from an across the board salary increase but who would never abandon a prosecution to seek the financial rewards of a related private representation. Under these circumstances, we must hope that a district attorney's office would consent to such a practice only if its prosecutors insisted on a policy of consent.

Meanwhile, we would expect that an office's prosecutors would insist on such a policy only if they believed one of the following to be true. First, they might believe that the total additional income they could obtain from pursuing the private actions would be greater than the total salary increase the office would otherwise offer. Alternatively, they might, as a group, be risk-takers and believe that although the total money to be made through the policy was less than what the corresponding salary increase would be, they still would be better off individually pursuing a potential jackpot that a private action might provide rather than accepting the smaller amounts the salary increase would guarantee. Both of these beliefs, however, seem either unrealistic or unworthy of the office's deference.

The first belief is only viable if the money a prosecutor would make in pursuing the private matter is greater than what the office would have to pay to have the prosecution handled by outside lawyers. Such a situation appears highly unlikely in many if not most cases since the representation of the civil matter will often rely on both the investigation and the trial of the criminal matter. Thus, the civil matter should involve fewer hours of work for the lawyer than would the criminal matter, and the lawyer will also have to accept the burden and the risk of collecting for those hours. So long as the prosecutor anticipates being paid a "reasonable fee" for both the prosecution and the civil case, he should perceive that he has little to gain by abandoning the prosecution for the civil representation. Furthermore, handling the civil matter on a contingent fee should not change that perception because even fees from contingency agreements must be reasonable in light of what the lawyer did and, thus, such agreements should not spur the prosecutor to visions of hitting the jackpot.

Of course, lawyers in a district attorney's office might insist on receiving consent to switch representations if they did not understand that the consent policy would cost the office money and that that cost would be passed onto the lawyers in the form of lower salaries. Such insistence is best handled by both office and lawyers understanding the financial implications of consent and setting salaries accordingly. Even then, some lawyers would perceive a greater personal benefit in being able to abandon a prosecution to pursue a related civil action, and thus, insist on being able to do so. Those lawyers, however would be the


125 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (2001) ("A lawyer's fee shall be reasonable.").

ones in the office least likely to value their public responsibilities or most likely to press for excessive rewards from their civil representations, and the district attorney's office should have little interest in obliging those lawyers at the expense of more loyal public servants.

e. Other Factors in Waiver Decisions

Other values beyond that in comment [3] can also be advanced to justify consent, but none stands up any better under scrutiny than does "the need to attract qualified lawyers."\textsuperscript{127} For example one might argue that withholding consent deprives civil clients of a right to the counsel of choice.\textsuperscript{128} However, conflict rules always interfere with a right to counsel of choice so one can hardly expect to carry the day simply by asserting that right in any context. Furthermore, the public, itself, must enjoy a similar right, which they exercised when they hired the prosecutor in the first place. If the right to counsel of one's choice means anything at all, it must at least guarantee that once a client has chosen a lawyer, the lawyer will not abandon the client merely to embrace a more lucrative opportunity.\textsuperscript{129}

Alternatively, one might argue that the dangers that consent will be abused or that any real harms from conflicts will arise are overstated here because the political process will protect against such abuse. After all, would not the fear of losing re-election prevent a county district attorney from consenting irresponsibly to subsequent representations after withdrawals? Apart from the obvious answer, that reality indicates otherwise,\textsuperscript{130} one also must point out that the public's already poor perception of our legal system\textsuperscript{131} hardly needs a host of political campaigns centered around the issue of whether the central figure in a county's criminal justice system allows his subordinates excessively to cast off their public responsibilities for personal gain. One can also add fuel to that fire by suggesting that beneficiaries of consent decisions might well have an

\textsuperscript{127} See supra text accompanying note 80.
\textsuperscript{128} See Wheat v. United States, 486 U.S. 153 (1988) (recognizing in criminal context right to counsel of one's choice in Sixth Amendment).
\textsuperscript{129} The Model Rules reflect the serious responsibility associated with a lawyer's withdrawal from a representation. Model Rule 1.16(b), for example, limits permissive withdrawal to primarily situations where the "withdrawal can be accomplished without material adverse effect on the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (2001) (noting six exceptions). Also Rule 1.16(c) allows a tribunal to require a lawyer to remain in a representation even when the lawyer has "good cause for terminating the representation." Id. at Rule 1.16(c).
\textsuperscript{130} Professor Underwood has observed that "voters often don't understand what is going on or don't care." Underwood, supra note 5, at 100. See also supra notes 41-47 and accompanying text.
\textsuperscript{131} John A. Humbach, Abuse of Confidentiality and Fabricated Controversy: Two Proposals, THE PROFESSIONAL LAWYER, Summer 2000, at 1:

During the past decade the percentage of people willing to rate lawyers' honesty and ethical standards as 'high' or 'very high' has dropped from 22% to 13%, an average decline of nearly 1% per year. According to the pollsters, lawyers are ranked among the five professions and occupations considered least honest by the American public," and the legal profession is among the three that had "lost the most in the ratings over the last ten years.

\textit{Id.}
incentive to contribute to the political campaign of the person who gave the consent thus encouraging his re-election.\textsuperscript{132}

On the other hand, additional arguments opposed to consent are not so easily dismissed. Most important is the reality that courts are resistant to granting new trials because of conflict problems in the first trial.\textsuperscript{133} Thus, the best way to protect the interests of all parties in a matter from the dangers of conflict is to never let the conflict arise in the first place.

One might also argue that all the implicated interests might be best served by a rule that allowed a district attorney's office to consent but only with court approval. Such a rule could, in theory, ensure against prosecutorial abuse and protect public confidence while still allowing the office to offer its lawyers the financial incentives that related civil practice opportunities provide. Such a rule, however, is more likely to undermine public confidence in the judiciary than to assuage public concerns about an appearance of impropriety within the Bar. Furthermore, the potential for judicial approval would encourage prosecutors to attempt to take on the related civil cases in the hope that they might obtain a court's approval. The certainty associated with an absolute rule banning taking on related civil cases, meanwhile, would deter prosecutors from even attempting to take on such cases.\textsuperscript{134} Faced with the prospect of necessarily being conflicted out of both the civil case and the original prosecution, prosecutors would avoid potential conflicts from related civil cases and content themselves with their criminal assignments. Thus, as the New Jersey Supreme Court pointed out in \textit{State v. Clark}, per se rules restricting consent just work best.\textsuperscript{135}

\textbf{C. Imputation of Conflicts}

Next, we must consider whether conflicts encountered by prosecutors should be vicarious or whether a prosecutor may lessen the restrictions of

\textsuperscript{132} Professor Underwood indicates that the Kentucky experience includes legislation that allowed the practice of county attorneys serving as collection agents for local merchants, a practice the "business community, and in turn the legislature," found to be "splendid." Underwood, \textit{supra} note 5, at 69.

\textsuperscript{133} Some states do not require a defendant to show actual prejudice to gain a new trial when a prosecutorial conflict appears after the first trial. \textit{See, e.g.}, Commonwealth v. Eskridge, 604 A.2d 700, 702 (Pa. 1992) (requiring only an "actual conflict of interest affecting the prosecutor" for a new trial). However, new trials in the face of apparent prosecutorial conflicts are by no means automatic. \textit{See, e.g.}, State v. Sheika, 766 A.2d 1151, 1161 (N.J. Super. 2001) \textit{cert. denied}, 782 A.2d 427 (N.J. 2001) ("We doubt the practical efficacy of a rule requiring automatic reversals of well-supported criminal convictions without inquiry into the fairness and justness of the verdict."). and the United States Supreme Court has never held that the Sixth Amendment requires them. In fact, that Court has required a showing of actual prejudice before the discovery of a defense conflict will justify a new trial. \textit{See Cuyler v. Sullivan}, 446 U.S. 335 (1980). The Supreme Court may reconsider this standard, at least in death penalty cases, early this year. \textit{See Mickens v. Taylor}, 121 S. Ct. 1651 (2001).

\textsuperscript{134} \textit{See Underwood, \textit{supra} note 5, at 101.}

\textsuperscript{135} 744 A.2d 109 (N.J. 2000). \textit{See also Jarvis & Tellam, \textit{supra} note 74, at 172-73 ("One objective of any legal rule should be to provide clear guidance, both to those whose conduct is subject to the rule and to those responsible for its enforcement."). But see Sheika, 766 A.2d at 1161 (emphasizing "the danger of creating absolute rules that are inflexible in recognizing the subtleties of the facts of specific cases").
personal conflict rules by guiding cases to lawyers with whom the prosecutor works. Here we must consider both whether conflicts may be imputed to other lawyers within the prosecutor's office and also whether they may be imputed to other lawyers within the prosecutor's private firm.

The comments to Rule 1.11(c) indicate that that rule is not intended to "disqualify other lawyers in the agency with which the lawyer in question has become associated."136 Thus, a prosecutor's conflicts would not be imputed to the other lawyers in the district attorney's office. Rule 1.11(a), however, does impute conflicts to other members of a prosecutor's private firm137 although such vicarious disqualification can be escaped by screening the disqualified lawyer and notifying the prosecutor's office so it can ascertain compliance.138 Amendments to Rule 1.11 accepted by the Ethics 2000 Commission would preserve this approach.139

The Restatement (Third) of the Law Governing Lawyers would impute the conflict to lawyers in the prosecutor's district attorney's office under Section 123(2),140 but would allow screening of the conflicted prosecutor under Section 124(2).141 Meanwhile Section 123(1) would require imputation of the prosecutor's conflict to his private firm.142 Importantly, since the prosecutor has resigned from the original prosecution and functions in his firm as a "former government lawyer," the screening section that would apply to his colleagues in his private firm would be Section 124(3).143 The critical difference between Sections 124(2) and 124(3) is that only Section 124(2) requires that "any confidential client information communicated to the personally prohibited lawyer [be] unlikely to be significant in the subsequent matter."144 Thus, while both the lawyers in the district attorney's office and those in the private firm would have to show "adequate" screening measures and "timely and adequate notice of the screening to the 'affected clients,'"145 only lawyers in the district attorney's office would have to show that the personally prohibited prosecutor did not hold any confidential information significant to the matter within their office.

One might argue that few, if any, district attorney's offices would be disqualified under this significant confidential information requirement. Here one would argue that information given to the prohibited lawyer while he handled the matter as a prosecutor cannot be confidential as to the district attorney's office, and if the lawyer is properly screened at his private firm, he will gain no new information dealing with the matter. This argument assumes, however, that it will always be clear exactly when the prohibited lawyer ceased to act as a prosecutor and began the process of ushering the client to his private

137 Id. at Rule 1.11(a).
138 Id. at Rule 1.11(a)(1)-(2).
139 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b) (as amended and accepted by the Ethics 2000 Commission August 4, 2001).
140 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 123(2)(1998). For a discussion of the application of the term "organization" to prosecutors' offices, see Underwood, supra note 5, at 90-93.
141 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS at § 124(2)(1998).
142 Id. at §123(1).
143 Id. at § 124(3).
144 Compare id. at § 124(2)(a), with id. at §124(3).
145 Id. at § 124(2)-(3).
firm and when that lawyer obtained particular information. Furthermore, proving this timing would be particularly difficult for the defendant in the criminal prosecution, and she would normally be the party to feel most threatened by a link between civil and criminal lawyers proceeding against her.\textsuperscript{146} Thus, the Restatement approach may frequently lend itself to the situation where the prosecutor’s district attorney’s office is conflicted out but the prosecutor’s private firm can continue in the representation.

Standard 3-1.3(g) of the ABA Standards Relating to the Administration of Criminal Justice discourages “a prosecutor who has a significant personal or financial relationship with another lawyer” from participating “in the prosecution of a person who the prosecutor knows is represented by the other lawyer.”\textsuperscript{147} Those Standards, however, also suggest an interesting consideration in the context of Standards 3.1.3(g) and their other conflict standards as well. The Standards allow a prosecutor to proceed in spite of a conflict when no other lawyer “is, or by lawful delegation may be, authorized to act in the prosecutor’s stead in the matter.”\textsuperscript{148} Such an approach allows the State to use its own ineffective policies to waive the defendant’s Sixth Amendment right to a nonconflicted prosecutor.\textsuperscript{149}

State courts have been divided on these issues. Virginia and West Virginia, for example, have imputed conflicts within a district attorney’s office but have permitted the office to continue in the representation if the personally conflicted lawyer is adequately screened and notice is given.\textsuperscript{150} On the other hand, Missouri has allowed the vicariously conflicted district attorney’s office to continue in the representation only with the defendant’s consent and adequate notice and screening,\textsuperscript{151} and Pennsylvania has required that conflicts within an office be resolved by the appointment of a special prosecutor from the State Attorney General’s Office.\textsuperscript{152} Pennsylvania also imputed the conflict to members of the prosecutor’s private firm but allowed the firm to continue the representation if the prosecutor were screened.\textsuperscript{153} After the Supreme Court of New Jersey determined that conflicts of interest prevented prosecutors from handling even unrelated defense cases in the same county,\textsuperscript{154} the New Jersey

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\textsuperscript{146} See LaSalle Nat’l Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983) (acknowledging the difficulty in screening cases where “the relevant information is singularly within the ken of the party defending against the motion to disqualify”). For a discussion of the related problem of having to disclose confidences to prove the appropriateness of disqualification, see \textit{In re Stokes}, 156 B.R. 181, 186 n.3 (Bankr. E.D. Va. 1993).

\textsuperscript{147} \textit{ABA Standards Relating to the Administration of Criminal Justice} Standard 3-1.3(g) (1992).

\textsuperscript{148} \textsuperscript{Id.} at Standard 3-1.3(c) (1992); \textsuperscript{accord id.} at Standard 3-1.3(g).

\textsuperscript{149} \textit{See Wheat v. United States}, 486 U.S. 153 (1988) (recognizing right to defense attorney whose loyalties are not conflicted).


\textsuperscript{151} \textit{State v. Ross}, 829 S.W.2d 948, 952 (Mo. 1992).


\textsuperscript{153} \textit{Commonwealth v. Eskridge}, 604 A.2d 700, 702 (Pa. 1992). Professor Underwood has noted that allowing the prosecutor to retain the private work when a special prosecutor is appointed may encourage prosecutors to abdicate their public responsibility and invite the perception “that prosecutors are using the office for personal advantage.” Underwood, \textit{supra} note 5, at 101.

Supreme Court "quietly informed municipal prosecutors that their law partners could continue to handle criminal defense work in the same county until at least the end of 2002."\textsuperscript{155} Georgia, meanwhile, imputed the conflict to members of the private firm and then refused to allow members of the firm to act as lawyers in the matter.\textsuperscript{156}

Any discussion of whether to disqualify lawyers vicariously for conflicts must begin with a discussion of screening. This is so because if we are to permit lawyers with divergent loyalties and opposing confidences to work side by side in the same law office, we must have some confidence that the loyalties of each will be preserved and protected. Thus, whether we decide that we will not impute certain conflicts or that we will impute them but will require implicated lawyers to be screened, we must base that decision on a certainty that available safeguards will protect the interests of clients from harm. If such safeguards do not exist, then conflicts must not only be imputed, but all lawyers with the imputed conflict must be disqualified.

Screening is intended to prevent a lawyer with insights about a former client from sharing them with lawyers in his office who represent an opposing interest. The lawyer with these insights must remain loyal to the former client,\textsuperscript{157} but strong temptations will call him to be otherwise. For one, disclosing confidences can prove that the lawyer's first loyalty rests with his current employer. For another, the lawyer understands that disclosing what he knows to his firm can make the firm more successful and, hence, more profitable, and it is naive to think that the lawyer will not understand that being part of a more profitable firm will not profit the particular lawyer even if he may somehow be screened from the fruits of a particular case.\textsuperscript{158} Furthermore, even where a lawyer would never consciously disclose confidences, there still remains the potential for accidental or inadvertent disclosures. In the conflicted environment of his new firm, a work assignment on a secretary's desk, a letter left on a copier, or a war story by the coffee machine could become an ethical disaster.

In screening, two forces oppose these forces for disclosure. One is the commitment and loyalty of the lawyer who has left his client to work for the enemy. The other is the concept of a screen, a symbolic structure built out of the lawyer and his new firm's promise not to let the lawyer discuss, work on, or have access to files of the case.\textsuperscript{159} The public has little confidence in either of these forces, being increasingly distrustful of lawyers\textsuperscript{160} and having "little faith in the ability of the [screening] device to control substantive abuses."\textsuperscript{161} No doubt the Bar did not invite much faith in the device when it changed its name from

\begin{itemize}
\item \textsuperscript{155} Hester & Ragonese, supra note 6.
\item \textsuperscript{156} Humphrey v. State, 537 S.E.2d 95, 98-99 (Ga. App. 2000). Kentucky's Ethics Committee does not pass the taint of disqualification onto other members of the prosecutor's office although it will impute conflicts to the prosecutor's private partners and associates and disqualify them. Underwood, supra note 5, at 94-95.
\item \textsuperscript{157} See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9, 1.11(a),(c)(1) (2001).
\item \textsuperscript{158} But see id. at Rule 1.11(a)(1).
\item \textsuperscript{159} See, e.g., LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983).
\item \textsuperscript{160} See Monroe Freedman, The Ethical Illusion of Screening; Pretending that a Lawyer can switch sides on a Case and be "Screened" off from that Case Represents a Serious Ethical Breakdown, in ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION 144, 146 (1996).
\item \textsuperscript{161} Conflicts, supra note 76, at 1441.
\end{itemize}
"Chinese Wall," originally chosen to communicate a sense of enormity and impregnability, to "screen," the functional equivalent of a sieve.\textsuperscript{162} The insufficiency of screening to deal with the dangers of conflicts within an office is compounded because the day to day implementation of the screen within the firm will be observable only by the interested members of the firm itself. In addition, even if a plaintiff were convinced that screening was proving ineffective in her particular case, she would be hard-pressed to prove that in court because she would have little access to the relevant evidence, would be adverse to the loyalties of any witnesses, and might even have to disclose her own confidences to prove her case. Thus, Professor Monroe Freedman cut to the heart of the matter when he summarized the dynamic of screening as "based on a high level of temptation, a low level of visibility, and a near-impossible burden, if Plaintiff were required to prove an actual breach of its confidences."\textsuperscript{163}

In the face of this flawed alternative to disqualifying both conflicted lawyer and his office, three arguments are advanced in favor of not imputing conflicts or of allowing them to be resolved by "adequate" screening and notice even absent consent:

1) the danger of a party intentionally creating conflicts for a district attorney's office;
2) an individual's right to counsel of choice; and
3) the need to minimize the economic cost of being a part-time prosecutor as well as to maximize the employment opportunities of such lawyers.

As the latter two arguments have already been discussed in detail,\textsuperscript{164} it is sufficient here to consider only the danger of a party intentionally creating conflicts for a district attorney's office. This danger is not entirely theoretical. Professor Underwood, for example, has noted that "many a DUI repeat offender has played the game of always having some kind of legal matter entrusted to the county attorney. After all, it is not always easy to get a special prosecutor to venture into the big woods. While everyone waits, cases are consigned to limbo."\textsuperscript{165}

When confronted with a similar problem, however, the Georgia Court of Appeals pointed out that "the root of the problem" in such cases is a breakdown in the private firm's screening devices.\textsuperscript{166} The court noted that "law firms are expected to screen prospective clients for possible conflicts and decline representation where one exists," and also are "in the best position to avoid this problem."\textsuperscript{167} As the court observed, if a private firm has a part-time prosecutor working for it, the firm should be able to recognize that certain kinds of cases, for

\begin{footnotes}
\item[162] Freedman, \textit{supra} note 160, at 146. Professor Freeman points out that the shift was made to avoid what may have been perceived as an "ethnic slur." \textit{Id.}
\item[163] \textit{Id.} Professor Freedman offered a sample notice letter a screening firm could send to the former client: "Your lawyer, Attorney, now works for us. But we won't talk with him about your case. Trust us. We're lawyers." \textit{Id.} at 146-47.
\item[164] See \textit{supra} text accompanying notes 128-29 (right to counsel of choice), 85-126 (need to minimize the economic cost).
\item[165] Underwood, \textit{supra} note 5, at 100.
\item[167] \textit{Id.}
\end{footnotes}
example divorces involving physical abuse or automobile torts, are likely to have criminal implications and, therefore, refuse them. While this may impose some hardship on the firm, having a firm member act as a part-time prosecutor is consistent with the public service commitment of the Bar and with the Bar's recognition that all lawyers must accept some of the unpleasant burdens of administering a system of justice whether they be accepting an unpopular case or passing up a lucrative one.

We must also recognize that to this discussion, the most relevant context in which these vicarious conflicts arise is not the potential criminal defendant who anticipates prosecution and seeks to conflict out the district attorney's office. Instead, it is the situation in which a prosecutor begins work on a criminal case and then realizes his firm could profit from that case by being engaged in a related civil suit. In that light, the problem is not so much the defendant conflicting out the prosecutor's office but the prosecutor and his firm conflicting out their obligations as "an officer of the legal system and a public citizen having a special responsibility for the quality of justice." In that light, one can feel quite comfortable requiring the prosecutor and his firm to bear the responsibility of avoiding such conflicts and to bear the consequences when they allow those consequences to arise.

If a state were to determine that some screening could be justified, in the case of doubly imputed conflicts for example, then the State should insist on strict protections for client interests. In a doubly imputed conflict, lawyer A would be prosecuting a case, and lawyer B, who works with lawyer A in the prosecutor's office, would be imputed with A's conflicts. Then a second level of imputation would occur when B brought his imputed disqualifications back to his private firm for imputation to his colleagues there. A jurisdiction might claim this result too strict because it could have a profound impact on the degree to which a part-time prosecutor's private firm could handle not only criminal law cases but tort and family law cases, among other areas, as well. If such consequences were viewed as too severe, then at a minimum two safeguards would have to be in place before the screening of lawyer B could be permissible. First, lawyer B could have had neither any involvement in nor ever had access to confidential information from either the criminal prosecution or civil case. Second, judicial review and approval of each instance requiring this double screening would also appear to be a minimum condition. Better yet, however, might be a commitment to full-time prosecutors.

In this section, we have seen that current conflict rules rightly agree that a prosecutor may not handle civil cases related to those cases he prosecutes. In addition, States should have little interest in waiving such conflicts, and prosecutors should not be able to further undermine public confidence in the Bar by handing the related civil cases over to other members of the prosecutor's private firm. Thus, even as the Bar chooses to view these practices as exclusively conflicts of interest, the practices should be forbidden. In the next section, we shall consider the issue from a vantage point the public has been

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169 Id. at Rule 6.2 cmt. [1] ("An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.").
170 Id. at Preamble [1].
drawn to, the perception that this smacks not only of conflict of interest but also of solicitation. There again, we shall see that there is little to justify prosecutors using their public obligations to gain access to private cases.

III. SOLICITATION

A. Evils of Solicitation

One may dispel any remaining doubts the Bar may have about ending this practice, by which prosecutors abandon their obligations to the State so they may pursue the interests of a private client in a related matter, simply by seeing this practice as it appears to lay people. As part of this practice, someone who claims to be a crime-victim goes in to meet the district attorney about the prosecution and comes out the district attorney's client or the client of the district attorney's private firm. While this may be merely coincidence or the result of mutual admiration, to a public already disenchanted with lawyers and skeptical of their motives, it is more likely to suggest solicitation. The public is apt to wonder whether the district attorney stalks his office for potential clients the way the proverbial ambulance-chaser is said to prowl hospital emergency rooms. Worse yet, the scenario invites the public to wonder whether the district attorney is offering in some way to sell the use of his governmental power to private interests. In any event, as the courts continue to have an interest in government lawyers "avoiding the appearance of evil," it is hard to imagine a situation better suited to a lawyer's avoidance.

Historically the evil of solicitation has been banned by the Bar with the same degree of zeal with which a conscientious lawyer represents an honest

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171 See supra note 131 and accompanying text.
172 See, e.g., Matter of Amendment to S.J.C. Rule 3:07, 495 N.E.2d 282, 286 (Mass. 1986) ("Ohralik was a classic case of ‘ambulance chasing,’ but the language employed by the Court in its opinion, together with subsequent decisions characterizing the principle announced in that case, strongly suggests that the States may promulgate prophylactic rules banning all in-person solicitation."). For a variation on “ambulance chasing,” see Norris v. Alabama State Bar, 582 So. 2d 1034 (Ala. 1991) (sanctioning a lawyer for sending to a funeral home his firm brochure and a note to deceased’s family, along with flowers).
173 ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Op. 342 (1975). While the ABA Model Rules of Professional Conduct have abandoned the “appearance of impropriety language” as it would regulate lawyers generally, state courts have retained that language in their regulation of lawyers. See supra text accompanying notes 104-08. See also Underwood, supra note 5, at 19-20.
174 Ohrailik v. Ohio State Bar Ass'n, 436 U.S. 447, 445 (1978) (“The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession’s ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client.”). In fact, lawyer Abraham Lincoln gave us this view of solicitation:

Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.
Given Rule 1.11(c)(2)'s prohibition of not only a government lawyer soliciting private employment but even negotiating for such employment if he is approached by a party to a matter in which he has participated personally and substantially, current rules indicate that the Bar is particularly interested in deterring solicitation by government lawyers. In In re Primus, the United States Supreme Court did use the First Amendment to carve out an area of solicitation beyond the reach of regulation. The Model Rules of Professional Conduct, as well as the States that have adopted them, however, have continued to regulate solicitation to the limits of Primus, and the situation at hand is far removed from any redeeming characteristics of Primus.

B. First Amendment Limits to Regulation

As the Court characterized In re Primus, the case dealt with the situation in which a lawyer "seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated." The lawyer in Primus, Edna Smith Primus, had sought to further her ideological goals by representing a woman who had undergone sterilization after the birth of her third child, after such sterilization was presented to her as "a condition of the continued receipt of medical assistance under the Medicaid program." The potential for representation ended when the woman went to an appointment at her doctor's office about "the progress of her third child who was ill" and there "encountered" her doctor's lawyer, who requested that the unrepresented woman sign a release of liability in the doctor's favor. In protecting the actions of Ms. Primus, the Court stressed not only her ideological motive but also that the "act of solicitation took the form of a letter" rather than being "in-person solicitation" and that neither Primus nor any lawyer with whom she was associated "would have shared in any monetary recovery by the plaintiffs."
Primus, therefore, is the complete opposite of the situation we encounter here. While Ms. Primus abandoned any hope of pecuniary gain to pursue her vision of a better world, our soliciting prosecutor abandons the pursuit of a better world to seek pecuniary gain. Furthermore, while Primus’s act of solicitation was an isolated letter, the prosecutor solicits in-person in the context of encounters with the crime victim that are necessarily ongoing. Thus, nothing in Primus can be construed to endorse the situation we discuss here.

More to the point of what is faced here is Ohralik v. Ohio State Bar Ass’n, the companion case to In re Primus. There the Court held that States may restrict lawyers from “soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.” Such restrictions may seek to avert “harm before it occurs” and may even avert those “circumstances likely to result” in harm. The Court felt the facts of Ohralik, where the lawyer solicited one client “in a hospital room where she lay in traction and sought out [another] on the day she came home from the hospital,” presented a “striking example” of such potentially harmful circumstances. That conclusion is not surprising given that Ohralik actually featured the classic ambulance chaser. Here we are not confronted with an ambulance chaser, but we are confronted with what appears to be a lawyer, who bears the official endorsement of the State, waiting in the district attorney’s office for distressed crime victims to be guided his way so he can enlist them as clients for his own pecuniary gain. This image of the lawyer running down prospective clients in the DA’s office seems no less “striking” than the images the Court confronted in Ohralik.

This conclusion is only strengthened by considering the Court’s rationale in Ohralik. There, the Court considered the many dangers historically associated with solicitation by lawyers: “stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation and misrepresentation.” Some of these dangers, like stirring up litigation or assertion of fraudulent claims, arguably pose no special danger when the solicitation occurs in the prosecutor’s office. After all, a victim pressing criminal charges may well be expected to seek civil remedies as well even without being stirred up, and the danger of someone trying to assert a fraudulent claim seems greatly reduced when the police are investigating the incident. Other of these dangers, however, particularly those that the Ohralik Court considered most important, are greatly enhanced when the solicitation occurs in the prosecutor’s office.

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claim she volunteered to represent and had her client prevailed in the litigation, Ms. Primus could have been awarded attorney’s fees. *Id.* at 429-30 n.22.

186 *Ohralik*, 436 U.S. at 449.
187 *Id.* at 464.
188 *Id.* at 467.
189 *Id.* at 468.
190 See supra note 172 and accompanying text.
In *Ohralik*, for example, the Court was particularly sensitive to the State's "special responsibility" for preserving the ethical standards for lawyers and noted that in-person solicitation "has long been viewed as inconsistent" with the ideals of the legal profession and, thus, likely to debase it. The Court stressed that before lawyers may concern themselves with the earning of fees, they first must be "officers of the courts" and "assistants to the court in search of a just solution to disputes." After all, "lawyers are essential to the primary governmental function of administering justice." While one may hope that this is, in fact, true for all lawyers generally, no one can question that it must be true for those lawyers called upon to be the wielder of the sovereign's power and voice of the sovereign's conscience. Thus, when the public recognizes that prosecutors use their public role to gain private clients and then abrogate that public role in favor of pursuing the private profits those clients offer, that recognition strikes at the heart of public confidence in the legal profession.

The Court also emphasized the danger of overreaching, the potential for which, the Court explained, "is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." The Court noted that the victimization of an individual not only makes the person "more vulnerable to influence but also may make advice all the more intrusive." Given these views, one must conclude that the potential for overreaching and the injuries that come with it would be particularly acute when the solicitation occurred during a meeting between a crime victim and a district attorney. There, not only do we have the "injured or distressed lay person" and the lawyer "trained in the art of persuasion," but we also have more. We have a lawyer bearing the State's seal of approval. The prosecutor does not even need to sell himself in this context because he can use his government position to do the selling. As the Court pointed out, in such circumstances some victims will fall prey to such influence. Others, however, will view any such commercial overtures as being violated yet again and particularly so because the individual the state has placed before them to bring justice to their injury has sought instead to profit from it and from them.

In this context, the *Ohralik* Court did acknowledge that not all information that passes between victims and lawyers creates harm. In fact, the Court indicated that lawyers perform a service when they provide uninformed people "with adequate information about the availability of legal services" and their "legal rights and remedies." This is particularly true when others may be simultaneously seeking releases of liability from those people. District

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192 Id. at 454.
193 Id. at 460 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)).
194 Id. at 460 (quoting Cohen v. Hurley, 366 U.S. 117, 124 (1961)).
195 Id.
197 Green, supra note 25, at 625-37.
199 Id.
200 Id. at 458, n.15.
201 Id. at 459, n.16. As noted earlier, this was the case in *Primus* when the sterilization victim was confronted in her doctor's office by the doctor's lawyers. See supra text accompanying note 181; *In re Primus*, 463 U.S. 412, 417 (1978).
attorneys, like other lawyers, should feel free to provide such information, but as the Court stressed in *Ohralik*, they should content themselves with providing the service rather than using such "information as bait with which to obtain an agreement to represent [people] for a fee."

Significantly, when a prosecutor does seek to use such information as bait for a potential client, the danger of over-reaching is not merely hypothetical. In fact, when a prosecutor offers to represent a crime victim in a related civil matter, such an offer necessarily places the victim in a Catch-22: If the victim has enough confidence in the prosecutor to want him for her own lawyer, she cannot accept his offer and preserve him as the prosecutor; but if she would ever want the prosecutor to handle a matter for her personally, she is stuck with him prosecuting the criminal case around her.

In addition the concerns the *Ohralik* Court expressed regarding misrepresentation are exacerbated by the State's apparent endorsement of its prosecutors. For the *Ohralik* Court misrepresentation of information by an attorney to a potential client becomes a problem when the situation demands of the prospective client "an immediate response, without providing an opportunity for comparison or reflection." This is so because:

> [t]he aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for any remedy at all.

When the one-sided presentation is delivered by a prosecutor, the prospective client may not only lack the opportunity for counter-education but probably never even imagines the need to seek good counsel to remedy the evil. After all, the prospective client and crime victim is being advised by someone whose judgment and integrity have proven worthy of the State's confidence. The victim, therefore, has no incentive, let alone opportunity, to seek good counsel. Thus, with the State's endorsement, the district attorney becomes a particularly dangerous source of manipulative or misleading information.

Although the Court in *Ohralik* did not elaborate on the dangers of overcharging or under representation, solicitation in a district attorney's office poses special problems in this area that no doubt would merit the Court's attention. A crime victim is unlikely to understand or believe that the prosecutor's job is not to convict a defendant. Furthermore the crime victim may not comprehend that by retaining the prosecutor for the victim's related civil

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202 *Ohralik*, 436 U.S. at 458.
204 *Ohralick*, 436 U.S. at 457.
205 Id.
matter, she will conflict the prosecutor out of the prosecution. Thus, when retaining the prosecutor, the victim may believe she is getting a lawyer who will be particularly zealous in pursuing the defendant in the civil matter and who will have access to resources and connections that purely private lawyers would not. If, on the other hand, the victim does understand the impartiality with which the prosecutor must approach the criminal, the victim may feel that retaining the prosecutor in the civil matter is a way to buy prosecutorial loyalty to an extent to which the victim would not normally be entitled. In either scenario, the client will be paying for something the prosecutor cannot ethically sell her. Thus, both scenarios are likely to create disappointed private clients and necessarily will undermine public confidence in our criminal justice system.

One might argue that while the Court in *Ohralik* did allow States to restrict solicitation by private attorneys in ways that prevent harm before it occurs, the Court still allowed only the regulation of solicitation and not the appearance of solicitation. Two factors presented uniquely by prosecutors, however, justify broader restrictions in the public arena. First, the lawyer's role as prosecutor makes it unlikely that solicitation can be detected or proven even when prosecutors have initiated discussions with crime victims about the prosecutor's private retention. As the Court pointed out in *Ohralik*, under even normal circumstances, proving a lawyer's act of solicitation is difficult both because "[often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place," and because the lay person is frequently "so distressed at the time of the solicitation that he [can] not recall specific details at a later date."

These problems are further complicated in the context of solicitation by a prosecutor because the prosecutor has a reason, as the prosecutor, to be discussing with the victim the situation that would give rise to the victim's civil action. Thus a crafty prosecutor, trained in artful questioning, would have the opportunity to guide the victim into initiating a discussion of the retention of the prosecutor in any related civil matter. Many solicited clients, therefore, might well leave the prosecutor's office unable to articulate exactly how they had been solicited.

The second factor justifying broader restrictions is that crime victims are unlikely to report prosecutors for solicitation. Even crime victims who understood that they had been solicited might well refrain from reporting such incidents for fear that their complaining about a prosecutor might sour the entire

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206 In *In re Truder*, a part-time prosecutor and his assistant, who were prosecuting "a civil action upon the same facts constituting a criminal action" which the lawyer was then prosecuting, apparently went so far as to suggest a settlement in the civil claim would impact the vigor of the criminal prosecution. *In re Truder*, 17 P.2d 951, 951-52 (N.M. 1932). The court there observed:

The incompatibility of public duty and private interest and employment is too plainly illustrated in this case to require discussion. It scarcely aggravates the case to show that one of the respondents actually uttered the suggestion which is implied in the situation itself, that a payment of damages would moderate the vigor or good faith, if not entirely end, the prosecution.

*Id.* at 952.

207 See *Ohralik*, 436 U.S. at 464.

208 *Id.* at 466.
district attorney’s office to zealously pursuing the victim’s criminal matter. Such fears might even cause these victims to retain the prosecutor for their civil matter if only to guarantee continued interest in the criminal prosecution. Thus, a rule that allowed prosecutors to enjoy the fruits of their solicitation unless the solicitation itself could be proven would do little to address the problem presented by dual private and public interests. The problem can only be addressed by a rule that prevents prosecutors from being retained by private clients in matters related to their office’s criminal prosecutions. Only such a rule can remove the prosecutor’s financial incentive to solicit business and, consequently, end that practice.

None of this is undermined by the Supreme Court’s more recent decision in *Edenfield v. Fane.* In *Fane,* the Court did hold that States could not restrict in-person solicitation by certified public accountants (CPA’s) to the same degree that the Court in *Ohralik* had said that States could restrict in-person solicitation by lawyers. In so doing, however, the Court distinguished constitutionally protected solicitation by CPA’s from unprotected solicitation by lawyers, and to distinguish the two, the Court used the very points from *Ohralik* that most clearly work to prohibit district attorneys from engaging in practices resembling solicitation. Thus, the Court’s decision in *Fane* reinforces, rather than undermines, the conclusion that solicitation by district attorneys is not constitutionally protected.

While the Court did appear more sensitive to commercial speech interests in *Fane* than it had appeared in *Ohralik,* the *Fane* Court still acknowledged that a State has the same “substantial interest” in “maintaining CPA independence and ensuring against conflicts of interest” that it has with lawyers. Thus, the Court ultimately justified the different outcomes in the two cases.

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210 *Id.* at 774. One could argue that in *Fane,* the Court did not prohibit regulation of in-person solicitation by CPA’s but only found that in that case the State had not developed a sufficient record to justify restrictions on commercial speech. *Id.* at 771 (noting record lacked even “anecdotal evidence” that “personal solicitation of prospective business clients by CPA’s creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear”). One also might argue that after *Fane,* the Supreme Court might allow different regulations of in-person solicitation by CPA’s so long as those regulations were sufficiently narrowly tailored to restrict solicitations only “under circumstances likely to pose dangers that the State has a right to prevent.” *Id.* at 774 (quoting *Ohralik v. Ohio State Bar Ass’n,* 436 U.S. 447, 449 (1978)).
211 *Id.* at 774-76.
212 See supra text accompanying notes 191-206.
213 In *Fane,* the Court acknowledged that “[a] seller has a strong financial incentive to educate the market and stimulate demand for his product or service,” and that in-person communication can provide a buyer “an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market.” *Fane,* 507 U.S. at 766. Such opportunity for market education and exploration, however, is much less likely to be presented by in-person solicitation by lawyers in the district attorney’s office. This is true for two reasons noted earlier. First, prospective clients are unlikely to believe they need to compare services offered by a lawyer bearing the state’s seal of approval to those of other lawyers who lack that endorsement. Second, even if a prospective client felt inclined to shop around, the control the lawyer holds over the prospective client’s interest in the related criminal matter makes it unlikely the prospective client would want to disappoint the lawyer’s expectation of private retention. See supra text accompanying notes 199-209.
cases by the more immediate threat to professionalism interests that solicitation poses when engaged in by lawyers as opposed to accountants.215

Six factors in the professional work of CPA’s convinced the Fane Court that in-person solicitation by CPA’s did not normally present “‘circumstances conducive to uninformed acquiescence.’”216 First, the Court noted that unlike the lawyer “trained in the art of persuasion,” the accountant is trained in “independence and objectivity.”217 While one could certainly argue that prosecutors are similarly independent and objective seekers of justice,218 a prosecutor necessarily departs from that role when he discusses the potential for his private retention with a prospective client. At that point he is particularly his own advocate.

Second, the “sophisticated and experienced business executives who understand well the services that a CPA offers” are able to resist manipulation in the marketplace.219 One would hope, however, that the average crime victim has little experience or insight in the role of victim. Furthermore, as noted earlier, the victim may well not understand the legal obligations that prevent the prosecutor from being the victim’s lawyer in a criminal trial, particularly when the lawyer is offering to be just that in a related civil case.220 Thus, the crime victim, unlike the sophisticated and experienced business executive, may well become confused about what she would actually get for her money. This may cause her to believe that retaining the prosecutor for her civil matter may also benefit her in the criminal matter.

Third, the CPA’s initial overture is normally over the telephone, and unreceptive individuals “need only terminate the call” to end the solicitation.221 On the other hand, overtures by a prosecutor to a crime victim arise out of the relationships both have to a common ongoing criminal prosecution. Thus, that prosecution will continue to bind them even if the victim chooses to rebuff the lawyer’s commercial overture. In fact, as noted earlier, once the prosecutor makes such an overture, the client has no choice but to be bound to the prosecutor. If the client rejects the lawyer as her civil attorney, he will continue to prosecute the criminal matter, and if she accepts the lawyer for her civil case, she will be bound to him in that role even if he will no longer continue to prosecute her criminal case.222

Fourth, a CPA will probably meet prospective clients “in their own offices at a time of their choosing,” rather than in a setting “of high stress and vulnerability.”223 When a prosecutor meets a crime victim, however, they meet to talk about a painful topic, at a stressful time, and probably at the district attorney’s office, an intimidating and unfamiliar location. All of this increases

215 Id. at 774-76.
216 Id. at 775 (quoting Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 465 (1978)).
217 Id.
218 See generally Green, supra note 25.
220 See supra text accompanying notes 205-06.
221 Fane, 507 U.S. at 776.
222 See supra text accompanying notes 203-04 (noting the unfortunate situation that a victim who is unimpressed by the prosecutor’s offer to represent her civil claims must then choose between accepting that offer or having the unimpressive attorney continue to prosecute the criminal matter).
223 Fane, 507 U.S. at 775-76.
the likelihood of the client making an uninformed decision about retaining the prosecutor.

Fifth, the *Fane* Court noted that “[t]he importance of repeat business and referrals gives the CPA a strong incentive to act in a responsible and decorous manner when soliciting business.” 224 One would expect that anyone who assumed the role of a prosecutor would also behave in a similarly “responsible and decorous” manner, but if a prosecutor chose not to, there is a particularly great danger of nonreporting here. A crime victim might well choose not to complain about high pressure sales tactics for the two reasons just discussed. 225 First, the victim might well believe that no one would take her word over that of a government prosecutor, and second she might think that if she did complain about a prosecutor, the criminal prosecution might be pursued less than zealously. In light of this unlikelihood of reporting, a prosecutor willing to use his government office to generate civil clients might also be willing to do so using high pressure tactics, which might well inhibit the victim’s decision-making.

Finally, the business executive who meets the CPA soliciting business feels “no expectation or pressure to retain [the CPA] on the spot,” but instead “exercises caution, checking references and deliberating before deciding to hire a new CPA.” 226 The crime victim on the other hand would feel no such need to exercise caution or deliberate because the lawyer before her in the district attorney’s office comes as noted earlier, with the best possible reference: the State has entrusted him with the protection of his community. 227 Thus, while each of these six factors in *Fane* indicated that business solicitation by CPA’s would not present a serious problem, all six here indicate that such solicitation by prosecutors would create problems even more serious that those presented by solicitation by private attorneys. Thus, although the *Fane* Court did say that *Ohralik* in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem, 228 this cannot be understood to undermine the application of *Ohralik* to lawyers employed as prosecutors.

IV. CONCLUSION

In the same song in which Sky Masterson stresses that “[a] lady doesn’t leave her escort,” he also admonishes, “so let’s keep the party polite.” 229 Politeness seems the least of what we should expect from “pursuers of justice” 230 and

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224 Id. at 776.
225 See supra text accompanying notes 208-09.
226 *Fane*, 507 U.S. at 776.
227 See supra text accompanying notes 199-206.
228 *Fane*, 507 U.S. at 776.
229 Loesser, supra note 2.
230 DeSousa, supra note 28, at 207.
In the context of prosecutors handling both criminal and civil cases arising from the same matter, however, that politeness that demands that a prosecutor "stick" with the date she came in with would be a welcomed starting point on the road to public trust and ethical behavior.

This article has shown that the rules governing prosecutorial behavior, the policies underlying those rules, and the expectations of our communities all demand that neither a prosecutor nor his private firm should handle any case related to a prosecution in which the prosecutor has played a role. Not only does the handling of such a private case raise the spectre of conflicted interests, but it also suggests solicitation and a public servant's efforts to profit from the power her fellow citizens have entrusted to her.

Inspector General Robert DeSousa has pointed out that when Shakespeare had Dick the Butcher say "The first thing we do is kill all the lawyers," Dick said it not because he believed lawyers to be knaves but because he understood that lawyers were all that protected the people from the imposition of tyranny. In that light, the legal profession has been described as the "keepers of society's faith that 'in truth, there is a judge and there is justice.'" If we truly can be that, why would we seek to be anything else, in particular why would we seek to be something less?

Professor Green has reported that the United States Attorney's Office for the Southern District of New York did not have to shut down because its prosecutors were not allowed to be knaves; instead it flourished because its prosecutors aspired to be heroes. "Integrity, humility, a sense of duty, and compassion — the light of our nature — are no less present in lawyers than are man's shadowy traits," and it is the former which must form our behavior.

When I decided to become a lawyer the only lawyers I knew were the electronic images I saw on television, and I knew no more about their worlds than I knew of Superman's Metropolis or Batman's Gotham City. But in my heart I knew that was all I needed to know. When the world was blind, Perry Mason could still see; when the world was cowardly, Judd for the Defense was still brave; when the world was mad, the Bold Ones were still wise; and when the world was cruel, the Storefront Lawyers were still merciful. I wanted to be to the world what they were. I wanted to go to Washington to be like Frank Capra's Mr. Smith and fight for lost causes because, those, after all, were "the only causes worth fighting for." I wanted to be a lawyer because I wanted to be heroic.

\[231\] MODEL RULES OF PROFESSIONAL CONDUCT Preamble I (2001).
\[232\] Loesser, supra note 2 ("Stick with me, baby; I'm the fellow you came in with.").
\[233\] See supra text accompanying notes 27-170.
\[234\] See supra text accompanying notes 171-228.
\[235\] DeSousa, supra note 28, at 207 (quoting WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2).
\[238\] Green, supra note 25, at 607-09.
\[239\] Randy Lee, When Giants Walked the Earth, 30 TEX. TECH L. REV. 1409, 1418 (1999) (reviewing KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997)).
I do not know that there ever were "good old days" to which the Bar should long to return, days in which all lawyers were good and all the outcomes were just, days in which the "unseemly" concept of business never crept into any lawyer's imagination. I suspect that there were not. But I do aspire to a day when lawyers will become all that our profession has promised we can be. And I trust that when we reach that day, no lawyer will suggest that any lawyer, any minister of justice, may dump one date because a better date came along.

240 But see generally Pearce, supra note 83.
DEVELOPMENT OF THE LAW GOVERNING REINSTATEMENT TO LEGAL PRACTICE IN KENTUCKY

by Jane H. Herrick

I. INTRODUCTION

Reinstatement\(^2\) to the practice of law in Kentucky after a disciplinary suspension is an exacting examination process that scrutinizes an applicant for readmission. The process is meant to assure the public, the bar and the Supreme Court\(^3\) that an applicant is worthy of readmission after a disciplinary related suspension.\(^4\)

Today, Kentucky Supreme Court Rules (SCR) 2.300 and 3.510 govern the reinstatement process, but these rules incorporate many of the holdings of older cases, decisions which go back over sixty years. Therefore, the rules cannot be examined in a vacuum; to understand and correctly apply the law of reinstatement in Kentucky, the case law must be carefully examined.

Although some cases provide detailed analysis of the requirements of reinstatement, other decisions tend to focus generally on an applicant’s good character and are not as instructive or informative as to how that good character has been attained by the applicant.

This article is meant to provide an overview of the development of the law as well as the current procedures of the reinstatement process in Kentucky. The article will conclude with suggestions as to how the Supreme Court should analytically approach reinstatement cases and what information should be contained in the Court’s reinstatement orders.

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2 "Reinstatement" differs from "restoration" under the current Supreme Court Rules. Reinstatement refers to the return of one’s privilege to practice law after a disciplinary suspension. See Ky. Sup. Ct. R. 3.510. Restoration means the return of the same privilege after a non-disciplinary suspension, such as a voluntary (non-disciplinary) withdrawal from the association or suspension for failure to pay dues. See Ky. Sup. Ct. R. 3.500. This article addresses the law of reinstatement, even though some of the cases analyzed herein refer to a "restoration" to practice.
3 Throughout this article, “Court” will refer to the Kentucky Court of Appeals prior to 1976 or the current Kentucky Supreme Court. Before 1976, and the addition of Section 116 of the Kentucky Constitution creating a new, expanded court system, the Court of Appeals was the highest appellate court in Kentucky. Today, pursuant to Section 116, the Supreme Court has that role.
4 See generally In re Weak, 407 S.W.2d 409 (Ky. 1966) ("It is the duty of this Court to protect the interests of the public and the profession, as well as those of the petitioner.").
II. In re Stump

In re Stump is the seminal case in the law of reinstatement in Kentucky. Stump, the former Commonwealth Attorney of Pike County, had been disbarred in 1933 for "discontinu[ing] a criminal prosecution of a woman for stealing $7,000, and...stif[l]ing the prosecution of her accuser in a federal court for the commission of a felony." For his work, Stump received $1,000.00.

On July 27, 1936, Stump filed his petition for reinstatement with the Court of Appeals. As the Court noted, Stump was disbarred prior to the Integrated Bar Act of 1934. This act of the legislature established a state bar association as an agency of the Court of Appeals and invested the Court with the power to discipline attorneys. With this authority, the Court declared the following rule:

All applications for reinstatement to the practice of law shall be made to the Court of Appeals and shall be filed in the office of the clerk of the court. Thereupon such applications will be referred to the board [of bar commissioners] for hearing. After hearing the board shall make its recommendations, which shall be filed with the Court of Appeals for the entry of such orders thereon as the court may deem advisable. It matters not by what tribunal the applicant was disbarred, the method of reinstatement herein provided shall be exclusive.

The Court briefly recited additional procedural history of Stump's application for reinstatement. Two bar commissioners were appointed as a "trial committee" to hear evidence on the application and to report to the board. The Court additionally observed that an Alex Blackburn filed a "protest" to Stump's reinstatement, although Blackburn later unsuccessfully tried to withdraw his protest.

In expressing some of the fundamental ideas of reinstatement to practice, the Court first stated that disbarment "is not res judicata or necessarily permanent" and that "though the door to re-entrance into the profession is not
forever closed, its opening is not a matter of grace or pardon for past offenses."17 Reinstatement is not governed by sympathy.

The Court emphasized its power18 and duty19 to examine the applicant, stating that the only limitation on its power was a statutory prohibition against allowing felons to practice law.20 There were two bases for this ban. First, the Court declared that a felon "cannot be restored to his former professional status."21 Second, "relief from the penal consequences of [the felon's] act does not reinvest in the man those qualities of good character so essential for an attorney at law to possess."22 The Court expressed a healthy skepticism for any argument that just because a former attorney has "served his time" literally (being incarcerated) and figuratively (suffering the embarrassment of his criminal disgrace), it does not follow that the attorney is entitled to be reinstated.23 Reinstatement to practice must be earned.24

The Court had three options as to how it would examine the application for reinstatement: "a lax rule, a strict rule, and...a reasonable middle rule, which [the Board of Bar Commissioners] rightly declare to be the preferable one."25 The "lax" rule was to treat an application for reinstatement the same as an original application for admission to the bar.26 All that is necessary for readmission under this view are statements of good character, "without regard to any other record or circumstance."27

Stump asked that this "original applicant" rule be applied to his application.28 The Court refused.29 The "strict" rule was to "all but deny[ing] restoration," but this position was not argued by the Board or Attorney General.30 The Court rejected this approach.31

the context of permanent disbarment. For recent cases on permanent disbarment, see Broadway v. Kentucky Bar Ass'n, 8 S.W.3d 572 (Ky. 2000); Kentucky Bar Ass'n v. Thomas, 999 S.W.3d 712 (Ky. 1999); Kentucky Bar Ass'n v. Belker, 997 S.W.2d 470 (Ky. 1999).

17 In re Stump, 114 S.W.2d at 1096.
18 "As [a] general proposition, we may say that unless restrained by statute...the courts have plenary power in these matters of restoration the same as they have of disbarment." In re Stump, 114 S.W.2d at 1096 (citations omitted).
19 The courts have the duty "to protect themselves from readmitting as an officer one who cannot command trust and confidence." In re Stump, 114 S.W.2d at 1096 (citations omitted).
20 Chapter 8, § 97 CARROLL'S KENTUCKY STATUTES ANNOTATED (Baldwin's 1936 Revision); KY. REV. STAT. 30.100 (1946; repealed 1948). This prohibition can be traced in Kentucky law to an act passed in 1796. 1 Littell, Ch. CCXLV, § 3 (adopted 1796). See also In re McCoy, 239 S.W.2d 86 (Ky. 1951) (disbarment proceeding against attorney felon not necessary; disbarred by operation of statute). This prohibition is no longer applicable. The Supreme Court has constitutional authority, pursuant to KY. CONST. § 116, to govern the practice of law. There is no absolute prohibition of the reinstatement of a felon or pardoned felon. KY. SUP. CT. R. 3.166, however, does provide for the automatic temporary suspension of an attorney who is found guilty of a felony offense (either by jury verdict or by plea).
21 In re Stump, 114 S.W.2d at 1096.
22 Id. (citations omitted).
23 See In re Stump, 114 S.W.2d at 1096.
24 Id.
25 In re Stump, 114 S.W.2d at 1096.
26 See id.
27 In re Stump, 114 S.W.2d at 1096.
28 See id. at 1097.
29 Id.
30 In re Stump, 114 S.W.2d at 1097.
31 "We are not willing to say that no matter what a disbarred attorney's subsequent conduct may be;
Although the Court claimed it was adopting the "reasonable middle rule," it really announced at least four examining criteria, all fittingly high for an applicant for reinstatement. First, "[t]he fundamental consideration is the nature and degree of misconduct for which the attorney was disbarred and circumstances attending the offense."\textsuperscript{32} Therefore, the underlying conduct that led to the disbarment must be examined.

Second, the court considered the applicant's "conception of the serious nature of his act and his previous...conduct[.]"\textsuperscript{33} An applicant "should at least manifest a sense of wrongdoing" but need not actually "confess guilt of what may be a criminal offense."\textsuperscript{34}

Third, the Court stated it would examine the applicant's conduct since disbarment: "This involves the element of time since disbarment as constituting his testing period, for character is not developed or reconstructed in a day."\textsuperscript{35} An applicant "must have demonstrated his reformation[.]"\textsuperscript{36}

Last, the Court announced a broad but important test, "whether the applicant is now of good moral character and is a fit and proper person to be reintrusted with the confidences and privileges of an attorney at law."\textsuperscript{37} The Court went to lengths to explain why good moral character was necessary for the applicant:

This question has a broader significance than its purely personal aspect. From time immemorial lawyers have in a peculiar sense been regarded as officers of the court. It is a lawyer's obligation to participate in upholding the integrity, dignity, and purity of the courts. He owes a definite responsibility to the public in the proper administration of justice. It is of utmost importance that the honor and integrity of the legal profession should be preserved and that the lives of its members be without reproach. The malpractice of one reflects dishonor not only upon his brethren, but upon the courts themselves, and creates among the people a distrust of the courts and the bar. Therefore, one proven to have violated those conditions of good behavior and professional integrity annexed to the granting of the privilege of practicing law, in applying for restoration, has

\textsuperscript{32} \textit{In re Stump}, 114 S.W.2d at 1097.

\textsuperscript{33} \textit{id.}

\textsuperscript{34} \textit{id.} "[W]hile it has been said that the recreant brother must show regret or repentance, we are not willing to say that a man must humble himself or be required to confess guilt of what may be a criminal offense." \textit{id}. The Court's statements are contradictory. One cannot express \textit{genuine} remorse or regret for one's actions without an underlying admission of wrongful conduct. To say otherwise borders on a denial of the underlying wrongful conduct.

\textsuperscript{35} \textit{id.}

\textsuperscript{36} \textit{id.}

\textsuperscript{37} \textit{id.}
the burden of overcoming by persuasive evidence the former adverse judgment on his qualification. 38

In applying these factors to Stump, the Court found that Stump was not the ideal candidate for reinstatement. 39 The Court was disturbed by Stump’s post-disbarment conduct. 40

Stump produced a number of favorable recommendations and statements urging his reinstatement to practice. 41 Some of these statements, however, were obtained under suspicious circumstances. 42 For example, after his disbarment, Stump filed a petition for rehearing bearing the signatures of “practically the entire membership of the Pike county bar, some of whom had been active in the prosecution of the disbarment proceedings.” 43 Stump had apparently obtained the signatures under false pretenses, and several attorneys moved to have their names stricken from the petition for rehearing. 44 Although Stump argued the attorneys signed their own names, and that the names were not forgeries, the Court was skeptical of the circumstances. 45

Stump also embarked on a vendetta against W.K. Steele, the president of the Pike County Bar Association “who had been active in the cleansing of the bar” regarding the prosecution of Stump. 46 Stump schemed 47 to inflict the same punishment upon Steele that had been visited upon himself: disbarment. The charge against Steele was the procurement of the false testimony of his client, one Conley, for $1,500. 48 Conley was to testify falsely on behalf of Woodie Stumbo, his codefendant, thus exonerating Stumbo of a murder charge. 49 Stump

38 In re Stump, 114 S.W.2d at 1097.
39 See id. at 1100.
40 Id.
41 Id. at 1098.
42 Id.
43 In re Stump, 114 S.W.2d at 1098.
44 See id.
45 Id. “[W]e are by no means convinced.” Id.
46 In re Stump, 114 S.W.2d at 1098.
47 The record in this case satisfactorily discloses, and indeed Stump, who testified, does not deny it, that after Stump had been disbarred he made several visits to Frankfort to see one Conley who was serving a sentence in the penitentiary there under a conviction for the cutting of one Burnett, and procured Conley to make the affidavit upon which the information herein against the appellee was filed, and that thereafter Stump had at his expense gone to Frankfort and brought Conley to Pikeville for the purpose of testifying in this case. It further discloses that Stump had, after the institution of these proceedings, sent word to Steele that he would undertake to have [the charges] dismissed if Steele would get the bar association to reinstate Stump as a practicing lawyer. Of course, this was a matter that lay within the exclusive jurisdiction of the Court of Appeals.

Commonwealth ex rel. Wilson v. Steele, 67 S.W.2d 508 (Ky. 1934).
48 See Steele, 67 S.W.2d at 508.
49 Id.
had been the Commonwealth Attorney at the time. Steele was acquitted of the allegations of misconduct.

Even though disbarred, Stump was elected county judge in Pike County in November 1935. While the Court acknowledged that Stump’s election “does in large measure reflect the esteem in which the petitioner was held by his fellow citizens,” the Court did not deem the election “conclusive on a question of reinstatement to the bar.” Indeed: “Political popularity does not purge professional delinquency.”

Stump produced thirty-one residents of Pike County to testify on his behalf. The Court did not give much weight to this testimony, however, because the witnesses did not exhibit an understanding of the conduct that led to Stump’s disbarment.

In examining Stump’s underlying offense, the Court found no mitigating factors that would explain or ameliorate the seriousness of Stump’s misconduct. The Court viewed Stump more harshly because his misconduct was intentional and unmitigated. Stump also failed to display any sense of regret about his wrongdoing, or “an appreciation...of the seriousness nature of his misconduct, or any acknowledgment of error.” Stump failed to meet any of the Court’s four stated criteria for reinstatement: his original offense was intentional and unmitigated; he did not display any remorse for his conduct; his conduct after disbarment was questionable, at best; and he failed to present sufficient evidence of good moral character.

Stump was eventually reinstated to practice nine years later in 1947.

The Court’s opinion is only about one page, cursory and not enlightening. There is no indication as to how Stump came to reform himself sufficiently to be reinstated. There is no application of any of the criteria from the previous Stump opinion. This order is typical of many of the Court’s subsequent reinstatement cases.

50 Id.
51 See In re Stump, 114 S.W.2d at 1098.
52 Id. at 1099. Stump’s election was followed by allegations of “arbitrary, improper, and illegal acts in the performance of his judicial duties.” The bar commissioners did not find sufficient evidence regarding these allegations, but the Court appeared influenced, and said that “some of these things are not so devoid of doubt as to be without related influence. They rather tend to negative the positive claims of a continuing and present exemplary character. Judicial action should not give cause for suspicion and official tyranny cannot ever be justified.” Id.
53 In re Stump, 114 S.W.2d at 1098.
54 Id.
55 See id. at 1100.
56 Id. Cf. White v. Kentucky Bar Ass’n, 989 S.W.2d 573 (Ky. 1999).
57 The Court found no “temptation of necessity, or influence of association, or sudden stress of circumstances, or excessive zeal for victory for his clients, or even a very serious offense importing criminality, but accompanied by mitigating circumstances. If there were only such delinquencies, a belief of reformation and confidence of future good behavior would be more easily inspired and a restoration more readily justified. But the petitioner does not stand in that position.” In re Stump, 114 S.W.2d at 1100.
58 See id.
59 In re Stump, 114 S.W.2d at 1100.
60 See id.
61 See In re Stump, 205 S.W.2d 999 (Ky. 1947).
62 The Court barely makes reference to good character:
III. THE FOCUS ON GOOD CHARACTER AND DEVELOPMENT OF THE STUMP STANDARDS

In some of the cases that followed In re Stump, the Court attempted to apply the Stump criteria, although the discussions and analysis were usually not as thorough. These cases focus more on an applicant's good moral character, not how that character has been restored.

In re Rosenberg presented an applicant who had been disbarred fifteen years earlier for forging a signature on a note and selling the note, as well as taking over $200 from a client and falsely assuring the client his criminal matter "had been straightened out." Prior to his disbarment, Rosenberg had been indicted for fraud and embezzlement. After the disbarment, the "indictments were filed away with the consent of the Commonwealth's Attorney." Rosenberg filed a petition for reinstatement only a year after his disbarment, but he was not successful. Within two years of his first failed reinstatement, Rosenberg pled guilty to bankruptcy fraud. The Court did note, however, that Rosenberg had served honorably in the military during World War II. Lastly, Rosenberg had launched on a moral crusade against gambling, but admitted that he participated in gambling.

Although not specifically citing Stump criteria, the Court denied Rosenberg's reinstatement, observing that: 1) "[s]hortly after he entered the practice of law, [Rosenberg] became involved in fraudulent transactions"; 2) shortly after his 1935 application for reinstatement was rejected, "he became involved in admittedly fraudulent transactions in the Federal Court"; and 3) after his disbarment, he was identified with an anti-gambling effort, but "frequented gambling places and sometimes engaged in gambling."

During the interval [since the failed attempt at reinstatement] Mr. Stump has conducted himself with due propriety as a business man in Pikeville, and according to testimony and affidavits of a number of business and professional men of Pike County, including the president and other members of the local bar, he has proved himself worthy of restoration of public confidence. There is nothing to the contrary, although all parties who may have been particularly concerned had notice of the hearing which was conducted by the Bar Commissioners.

Id. at 999-1000.

63 114 S.W.2d 1094 (Ky. 1938).
64 230 S.W.2d 434 (Ky. 1950).
65 Rosenberg v. Commonwealth ex rel. Otte, 74 S.W.2d 478, 479 (Ky. 1934).
66 See In re Rosenberg, 230 S.W.2d at 435.
67 In re Rosenberg, 230 S.W.2d at 435.
68 See id.
69 Id.
70 Id.
71 Id. at 435-36.
72 In re Stump, 114 S.W.2d 1094 (Ky. 1938).
73 In re Rosenberg, 230 S.W.2d at 436.
In this analysis, the Rosenberg Court appeared to apply at least two of the Stump criteria: the examination of the nature of the underlying offense\textsuperscript{74} and the applicant's conduct since disbarment.\textsuperscript{75} There was no discussion of a requirement of expressions of regret or remorse.\textsuperscript{76}

Rosenberg petitioned successfully for reinstatement three years later.\textsuperscript{77} Again, the Court did not specifically apply the Stump criteria when considering Rosenberg's application, although it did include a quote from \textit{In re Stump}\textsuperscript{78} containing a brief recitation of the standards.\textsuperscript{79} Most of the Court's discussion focused on Rosenberg's good character, not the evidentiary components of that character.\textsuperscript{80}

The Court approached the reinstatement of Andrew J. May in a similar manner.\textsuperscript{81} May was convicted of a federal felony in 1947, but did not resign his membership in the bar association until January 1951.\textsuperscript{82} May was convicted at a time when KRS 30.100 was in effect, which prohibited a felon from practicing law, but was subsequently repealed in 1948.\textsuperscript{83} In the original disbarment order, the Court held that "May's disability to practice law attached as of the date of his conviction, and that his resignation...constituted an offer to surrender 'any rights, whatever they may be, he could claim by virtue of the repeal of KRS 30.100 and his restoration to citizenship.'"\textsuperscript{84}

May filed his application for reinstatement only eleven months later, in December 1951.\textsuperscript{85} His application revealed that he had been imprisoned for two years, released in 1950, and pardoned by the governor.\textsuperscript{86} The application contained affidavits attesting to his good character since his release from prison.\textsuperscript{87} The Board of Bar Commissioners, however, recommended against May's reinstatement.\textsuperscript{88} The Board reasoned that May's restoration to citizenship did not "restore his good character and make him fit to practice law."\textsuperscript{89}

\textsuperscript{74} See \textit{In re Rosenberg}, 230 S.W.2d at 436. See supra note 32 and accompanying text.
\textsuperscript{75} See \textit{In re Rosenberg}, 230 S.W.2d at 436. See supra notes 35-36 and accompanying text.
\textsuperscript{76} See \textit{In re Rosenberg}, 230 S.W.2d at 436. See supra notes 33-34 and accompanying text.
\textsuperscript{77} See \textit{In re Rosenberg}, 285 S.W.2d 167 (Ky. 1955).
\textsuperscript{78} 114 S.W.2d 1094 (Ky. 1938).
\textsuperscript{79} See \textit{In re Rosenberg}, 285 S.W.2d at 167-68.
\textsuperscript{80} "Seven witnesses, most of whom had been in close contact with the applicant for twenty-five years, testified that Rosenberg is now a man of good moral character and that in their opinion he had completely rehabilitated himself." \textit{Id.} at 167. Even the Commonwealth Attorney who had prosecuted Rosenberg "stated Rosenberg had become so reformed as to be worthy of public trust and confidence." \textit{Id.}
\textsuperscript{81} See \textit{In re May}, 249 S.W.2d 798 (Ky. 1952).
\textsuperscript{82} See \textit{In re May}, 239 S.W.2d 95 (Ky. 1952).
\textsuperscript{83} See 1948 Ky. Acts 55.
\textsuperscript{84} \textit{In re May}, 249 S.W.2d at 798 (citing \textit{In re May}, 239 S.W.2d at 96).
\textsuperscript{85} See \textit{In re May}, 249 S.W.2d at 798.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{In re May}, 249 S.W.2d at 798. The Board relied on \textit{In re Rudd}, 221 S.W.2d 688, 689 (Ky. 1949) ("[I]ndependently of any statute on the subject, courts have inherent power to disbar....[A] pardon does not deprive the court of the right to exercise its undoubted inherent power to say...that an attorney is not befitted to engage in the practice of law.").
The Court rejected the Board’s recommendation and reinstated May, but did not specifically apply the *Stump* criteria. In fact, the Court declared it was “not necessary to again discuss” the law as announced in *Stump*. Only the general criterion of good moral character was examined by the Court:

The sole question before the Bar Commissioners was whether or not Mr. May’s conduct since his conviction practically five years ago, and since his release from prison almost two years ago, has been such as to prove he is now a man of good moral character and entitled to confidence. The commissioners admitted all this, yet refused to reinstate Mr. May without holding out hope to him that he could ever be reinstated.

*In re Eckerle* does not cite *In re Stump* at all, although it applies each of the *Stump* standards. Eckerle was “permanently” disbarred in 1942 but applied for reinstatement in 1953. According to the Bar’s investigation, Eckerle had taken money from a client with directions to make payments on the client’s taxes. Eckerle retained the money, but eventually repaid it. According to Eckerle’s testimony “he was in financial straits at the time and succumbed to the temptation of keeping the money.” At the evidentiary hearing, Eckerle also “admitted his wrongdoing and was contrite and repentant.” The evidence showed that since disbarment, Eckerle had become a successful and reliable businessman with a large company. Lastly, Eckerle introduced testimony supporting his good moral character and was reinstated.

Each *Stump* factor is clearly considered. The Court scrutinized the conduct that led to disbarment; the applicant’s admission of wrongdoing; the applicant’s post-disbarment conduct; and applicant’s current character.

The Court did not cite *In re Stump* in *In re Nisbet* and did not do as thorough a job in analyzing the applicant as in *In re Eckerle*. Nisbet was

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90 *In re Stump*, 114 S.W.2d 1094 (Ky. 1938).
91 See *In re May*, 249 S.W.2d at 799.
92 *In re May*, 249 S.W.2d at 799.
93 Id. at 798-99. The Court also quoted *In re Stump*, 114 S.W.2d 1094 (Ky. 1938), noting that it “would not follow a rule so strict and would not close forever the door of opportunity in the face of one convicted of crime.” Id. at 799. See *supra* note 31 and accompanying text.
94 265 S.W.2d 804 (Ky. 1954).
95 114 S.W.2d 1094 (Ky. 1938).
96 See *In re Eckerle*, 265 S.W.2d at 804.
97 Id.
98 Id.
99 *In re Eckerle*, 265 S.W.2d at 804. *Cf. In re Stump*, 114 S.W.2d 1094 (Ky. 1938); see *supra* notes 57-58 and accompanying text.
100 *In re Eckerle*, 265 S.W.2d at 804.
101 See id.
102 Id.
103 *In re Stump*, 114 S.W.2d 1094 (Ky. 1938).
104 See *In re Eckerle*, 265 S.W.2d at 804.
105 Id.; see *supra* notes 32-38 and accompanying text.
106 114 S.W.2d 1094 (Ky. 1938).
107 296 S.W.2d 465 (Ky. 1956).
108 265 S.W.2d 804 (Ky. 1954).
convicted of an unspecified felony in federal court in 1932 and disbarred by order of the Hopkins Circuit Court in 1933.\footnote{See In re Nisbet, 296 S.W.2d at 465. Prior to the Integrated Bar Act of 1934, circuit courts had the power to disbar attorneys. The Commonwealth Attorney could proceed against an attorney on the basis of an information or a judge could issue a rule against an attorney to have him show cause why he should not be disbarred. See, e.g., Chreste v. Commonwealth, 186 S.W. 919 (Ky. 1916); Lenihan v. Commonwealth, 176 S.W. 948 (Ky. 1915); Commonwealth v. Roe, 112 S.W. 683 (Ky. 1908).} As in May, Nisbet had been convicted at the time when the rule forbidding felons from practicing law was in effect, although the law was repealed in 1948.\footnote{See In re Nisbet, 296 S.W.2d at 465; see supra note 20 and accompanying text.} As in May, the Court only reviewed Nisbet's character, found it to be good, and reinstated him.\footnote{See In re Nisbet, 296 S.W.2d at 466.}

The Court in \textit{In re Walker}\footnote{300 S.W.2d 795 (Ky. 1957).} was disturbed by the applicant's failure to ameliorate the results of his professional misconduct, and by his attitude. Walker was "forever disbarred" in 1944 for charging clients for divorces but then failing to obtain any decree.\footnote{Louisville Bar Ass'n v. Walker, 183 S.W.2d 26 (Ky. 1944).} Although Walker presented affidavits attesting to his good character, the Court was not convinced.\footnote{See In re Walker, 300 S.W.2d at 795.} Walker did not contact any of his victims after his disbarment to inform them they were not divorced, nor did Walker return fees to these victims.\footnote{Id.} The Court, disgusted by Walker's original misconduct,\footnote{It is difficult to imagine more reprehensible conduct than that practiced by Walker...a gross fraud was perpetrated upon the court as well as upon his clients...the judgments of divorce obtained in many of the cases had no efficacy because the court had no jurisdiction. It is most disturbing to contemplate what may happen to Walker's clients if they remarry after he obtained for them what he termed, and what they believed was, a divorce. They could be guilty of bigamy, their children could be illegitimate and their property rights could be thrown into the greatest confusion.} held that Walker "ha[d] no idea of the gravity of the offense he has committed and what trouble, grief and sorrow his acts have caused, or may cause, his innocent victims."\footnote{In re Walker, 300 S.W.2d at 795-96.} The Court denied Walker's reinstatement.\footnote{Id. at 795-96.}

The Court in \textit{Walker} did not cite any cases, except Walker's original disbarment proceeding.\footnote{See id.} However, the Court did consider at least three of the
Stump factors: the original misconduct, Walker’s remorse (or lack thereof), and Walker’s post-disbarment conduct.

In re Taylor continued the Court’s pattern of focusing generally on an applicant’s good character. Taylor, like May and Nisbet, had been convicted of an unspecified felony. He had also been party to a fraudulent divorce, the grounds upon which the Bar recommended his disbarment. The evidence adduced, as described by the Court, portrays a man of general good moral character, as many people in Taylor’s community testified on his behalf. There was a passing reference to Taylor’s sense of remorse, although the witnesses apparently expressed this observation, not the applicant. At the end of the opinion, the Court did cite Stump, and used a quote from that case which summarized the reinstatement criteria, but again did not specifically apply the criteria to Taylor in reinstating him.

In re Applewhite offered a new area of examination, although somewhat related to a previously stated Stump principle. Applewhite was

There appeared on behalf of applicant the circuit judge and the Commonwealth’s attorney of the judicial district in which he resides; the county judge, county attorney, jailer and superintendent of schools of Bell county; the state representative from Bell County; the United States Commissioner of Middlesboro; and two ministers of different religious congregations from that county. The sheriff of Bell County, although not appearing at the hearing, submitted a letter which is filed in the record. No witness appeared in opposition to the application[.]. All of the witnesses...testified positively that applicant had repented of his prior wrongs and misdeeds, had changed his way of life and was living discreetly. The evidence showed that applicant had quit drinking, which was an old vice, that he took his children to Sunday School and that he himself taught a Bible class and was attending church regularly.

Therefore, one proven to have violated those conditions of good behavior and professional integrity annexed to the granting of the privilege of practicing law, in applying for restoration, has the burden of overcoming by persuasive evidence the former adverse judgment on his qualification. In short, if the disbarred attorney can prove after the expiration of a reasonable length of time that he appreciates the significance of his derelictions; has lived a consistent life of probity and integrity, and shows that he possesses that good character necessary to guarantee uprightness and honor in his professional dealings and the faithful discharge of his duties as a lawyer, and therefore is worthy to be restored, the court will so order.

401 S.W.2d 757 (Ky. 1965).
disbarred in 1957 for a myriad of offenses, including multiple misrepresentations, issuance of bad checks, and subornation of perjury. The Court, however, did not discuss these original offenses.

After taking "extensive proof," a trial committee and the Board of Governors recommended against Applewhite's reinstatement. At an evidentiary hearing, proof was offered as to Applewhite's dealings prior to his disbarment, conduct for which he was not disbarred, and Applewhite objected. Applewhite argued that "the only question involved [was] whether his conduct since [disbarment] has shown him to be of good moral character and a fit and proper person to be entitled to public confidence." While this point obviously reflects the Stump standard of examining conduct since disbarment, the Court held that it was not so rigidly bound. The Court acknowledged Applewhite's point, yet said that where a pattern of conduct formed the basis of the original discipline, it was appropriate to examine such conduct. Thus, by examining similar conduct, the Court was examining the professional misconduct itself, one of the Stump factors.

Applewhite presented several good character witnesses on his behalf, but this proof was insufficient for the Court. The Court was concerned about Applewhite's post-disbarment conduct, including, but not described, "indifference toward financial and other obligations." Most fatal to Applewhite's application was his attitude: he had no expression of regret or remorse for his misdeeds, and actually denied that he was guilty of any professional misconduct in the original disbarment proceedings. The

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130 In re Stump, 114 S.W.2d 1094 (Ky. 1938).
131 See In re Applewhite, 297 S.W.2d 910 (Ky. 1957). The Court found that the evidence "show[ed] a scheme and pattern of conduct upon the part of respondent both professional and private."
132 In re Applewhite, 401 S.W.2d at 757.
133 See id.
134 In re Applewhite, 401 S.W.2d at 757 (emphasis in original).
135 In re Stump, 114 S.W.2d 1094 (Ky. 1938).
136 See supra notes 35-36 and accompanying text.
137 See In re Applewhite, 401 S.W.2d at 758.
138 We know of no rule or reason for restricting a thorough examination of the applicant's prior conduct if it materially contributes to a perspective appraisal of his subsequent conduct. This is particularly true when an attorney has been disbarred for 'a scheme and pattern of conduct,' both professional and private, which was the basis of applicant's disbarment.

In re Applewhite, 401 S.W.2d at 757-58 (citing In re Rosenberg, 230 S.W.2d 434 (Ky. 1950), and In re Taylor, 330 S.W.2d 393 (Ky. 1959)).

139 See In re Applewhite, 401 S.W.2d at 758.
140 In re Applewhite, 401 S.W.2d at 758.
141 Id.

Also significant is applicant's attitude. He took the position that none of the original charges which resulted in his disbarment were true, that he had never been guilty of misconduct, and that therefore his subsequent conduct should be appraised as though there had been no previous adverse finding against him. This attitude is rather convincing evidence the applicant does not appreciate
concentration on "attitude" is the first lengthy consideration by the Court of this Stump criterion.

Applewhite was reinstated to practice in 1972. He applied for reinstatement in 1970, four years after the previous opinion denying his application. Although the opinion states that there was an "extensive evidentiary hearing in July 1971," the evidence produced at that hearing is not summarized in the Court's opinion. In the Board's recommendation for reinstatement, it found that "Applewhite had rehabilitated himself satisfactorily to enable him to engage in the practice of law in this Commonwealth." The only cases cited in the opinion are Applewhite's original disbarment order and the previous order denying reinstatement. There is no Stump analysis, nor are any Stump factors expressed or considered. The Court's opinion does not inform the reader, which would have been preferable, considering Applewhite's disciplinary and reinstatement history.

In re Cohen does not go through a formal Stump analysis, although Stump is cited for the idea that the Court is to look at the applicant's post-suspension conduct. Ollie Cohen was disbarred in 1955 for convictions of uttering a forged will and giving false testimony. Cohen filed an application for reinstatement in 1964, accompanied by affidavits attesting to his good character. Again, however, as in Walker, the Court was concerned with the applicant's post-suspension conduct. The Court observed that Cohen had been adjudged civilly liable for fraud in a 1954 judgment and had not made any attempt to pay the judgment. Although Cohen argued that he was unable to pay, "it should be noted that Cohen failed to contact the wronged parties or to make any provision for future payment." The Court held that such failure was the most glaring example of Cohen's failure of rehabilitation. Regarding the affidavits Cohen produced, the Court all but dismissed their importance, stating that they did not present "any substantial facts that tended to

that a higher character of conduct is required of a disbarred attorney than of an original applicant. It indicates he fails to accept the fact of his conviction of dereliction. It also indicates he recognizes no reason to change the 'pattern of conduct' for which he was once condemned upon overwhelming proof.

Id.

142 In re Stump, 114 S.W.2d 1094 (Ky. 1938).
143 See Applewhite v. Kentucky State Bar Ass'n, 503 S.W.2d 498, 499 (Ky. 1972).
144 Id. at 498.
145 Applewhite, 503 S.W.2d at 498.
146 Id.
147 See id. at 498-99.
148 In re Stump, 114 S.W.2d 1094 (Ky. 1938).
149 See Applewhite, 503 S.W.2d at 498-99.
150 401 S.W.2d 54 (Ky. 1966).
151 In re Stump, 114 S.W.2d 1094 (Ky. 1938).
152 See In re Cohen, 401 S.W.2d at 55.
153 See In re Cohen, 276 S.W.2d 34 (Ky. 1955).
154 See In re Cohen, 401 S.W.2d at 55.
155 In re Walker, 300 S.W.2d 796 (Ky. 1957).
156 See In re Cohen, 401 S.W.2d at 55.
157 Id.
158 In re Cohen, 401 S.W.2d at 55.
159 Id.
show any significant rehabilitation."160 The Court did not specify how the affidavits were insufficient, however.161 Cohen’s reinstatement was denied.162

In In re Weaks,163 the Court reiterated that an applicant for reinstatement must show a higher degree of good character than an applicant for initial admission. George Weaks was suspended in 1958 for theft and conversion.164 Although Weaks introduced evidence as to his good character, the Court found that his “conduct since his disbarment has not been exemplary,” in that Weaks “ha[d] defaulted on some of his financial obligations, ha[d] shown a lack of stability in holding [a job], and admittedly ha[d] a problem in the use of alcohol.”165 Weaks also had been convicted of unspecified misdemeanors “similar to those with which he was charged in the original disbarment proceedings, and also others.”166

The Board of Governors, apparently acting on sympathy,167 and contrary to Applewhite,168 applied a clearly incorrect standard in judging Weaks’ application for readmission. The Board was concerned with “whether the petitioner ‘has shown the minimum stability, integrity and responsibility to pursue the legal profession as a source of livelihood.’”169 The Court firmly rejected this standard: “Surely the qualifications for reinstatement must be on a higher plane than this. We seriously doubt that a person meeting only minimum standards would qualify for admission to the Bar in the first instance.”170 Citing In re Stump171 and In re Applewhite,172 for the holding that an applicant must overcome the burden of his prior adjudged professional misconduct, the Court kept the bar high: “We must also take care that our certificate of approval in a particular case contributes in no way to the lowering of professional standards.”173

In re Smith174 provides no substantive information as to why Emmett Smith should have been reinstated to the practice of law. The opinion is less than

160 Id.
161 The Court alluded to additional adverse character information which was contained in the record: “The Bar Association has pointed out several instances in the behavior of Cohen which are inconsistent with the ‘good character necessary to guarantee uprightness and honor in his professional dealings and the faithful discharge of his duties as a lawyer.’ We will not examine each of these incidents[.]” Id.
162 See In re Cohen, 401 S.W.2d at 56.
163 407 S.W.2d 408 (Ky. 1966).
164 See In re Weaks, 318 S.W.2d 850, 851 (Ky. 1958).
165 In re Weaks, 407 S.W.2d at 409. For an overview on reinstatement and an attorney’s alcoholism, see Caroll J. Miller, Annotation, Bar Admission or Reinstatement of Attorney as Affected by Alcoholism or Alcohol Abuse, 39 A.L.R.4th 567 (1985).
166 In re Weaks, 407 S.W.2d at 409.
167 The Court stated it “appreciate[d] the sympathetic approach taken by [the trial committee of] the Board,” but “believe[d] the standards applied are inadequate.” Id. Also: “While sympathetic considerations do play a part, we must take cognizance of the responsible position every lawyer occupies in his community.” Id.
168 In re Applewhite, 401 S.W.2d 757 (Ky. 1965).
169 In re Weaks, 407 S.W.2d at 409 (emphasis in original).
170 Id. (emphasis in original).
171 114 S.W.2d 1094 (Ky. 1938).
172 401 S.W.2d 757 (Ky. 1965).
173 In re Weaks, 407 S.W.2d at 409.
174 471 S.W.2d 705 (Ky. 1971).
one page. Smith had been suspended for one year for multiple acts of misconduct, several involving the mishandling of money.\textsuperscript{175} The Board recommended reinstatement and the Court said there was "[n]othing of record...which would warrant rejecting the recommendation."\textsuperscript{176}

The Smith case is particularly troubling not only for the absolute dearth of information in the opinion, as in the 1972 Applewhite\textsuperscript{177} reinstatement, but because Emmett Smith was subsequently suspended from practice for sixty days in 1973.\textsuperscript{178} In his second disciplinary matter, Smith had appeared for a criminal "client" at the behest of a bail bondsman.\textsuperscript{179} When the "client" failed to appear, Smith pled her guilty, thus not forfeiting the bail.\textsuperscript{180} The court imposed a ten-day sentence.\textsuperscript{181} Upon arrest, the "client" said she had never hired Smith.\textsuperscript{182} Smith argued that the practice was "customary," but the Court was not persuaded: "[E]ven the greenest lawyer must know that it is unethical."\textsuperscript{183}

Smith's second petition for reinstatement was denied, but details were not provided.\textsuperscript{184} The Board recommended against reinstatement, with no reason given other than Smith had failed to meet his burden of proof "of present professional competency and good moral character."\textsuperscript{185} The Court agreed with little elaboration: "A meticulous examination of the record discloses that the evidence lacked the persuasive quality required to induce belief in Smith's present professional competency and good moral character. Indeed, the evidence would support completely negative findings on these issues."\textsuperscript{186}

\textsuperscript{175} See Kentucky State Bar Ass'n v. Smith, 439 S.W.2d 56 (Ky. 1969). Smith's unethical behavior was a pattern of serious professional misconduct:

Smith was charged with four different instances of unprofessional and unethical conduct involving his failure to properly keep and pay over money deposited with him by a client to be paid over to a trustee in bankruptcy; failure to properly apply moneys received on behalf of another client incident to the settlement of litigation; failure to institute a divorce action within a reasonable time after acceptance of employment and receipt of a retainer fee from another client accompanied by his refusal to refund the fee until the same was demanded by an attorney later employed in the matter; and acceptance of employment and fee to represent a client in filing a bankruptcy petition at a time when he knew that the referee in bankruptcy...had instructed the clerk...not to accept any pleadings or papers from respondent which referred to cases in bankruptcy as a result of his failure to properly account to the trustee in bankruptcy in the first instance mentioned herein.

\textsuperscript{176} In re Smith, 471 S.W.2d at 705.
\textsuperscript{177} In re Applewhite, 471 S.W.2d 757 (Ky. 1972).
\textsuperscript{178} See Kentucky State Bar Ass'n v. Smith, 503 S.W.2d 482, 482 (Ky. 1973).
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Smith, 503 S.W.2d at 482.
\textsuperscript{184} See Kentucky State Bar Ass'n v. Smith, 528 S.W.2d 672 (Ky. 1975).
\textsuperscript{185} Smith, 528 S.W.2d at 672 (citing former KY. RUL. CT. APP. 3.330 and 3.510).
\textsuperscript{186} Smith, 528 S.W.2d at 672.
IV. EXPANSION AND APPLICATION OF ADDITIONAL REINSTATEMENT CRITERIA

A. Compliance and Candor

*Lester v. Kentucky Bar Ass'n*\(^{187}\) was the first case to focus on whether the applicant had complied with the order of disbarment. *Lester* also introduced another factor: candor.\(^{188}\)

Lester was disbarred in 1968 for conspiracy to deprive a man of his constitutional rights.\(^{189}\) He applied for reinstatement in 1974 and an evidentiary hearing was held before a trial committee.\(^{190}\) The trial committee recommended reinstatement, but the Board of Governors did not.\(^{191}\)

The Court stated all of the reinstatement criteria, citing *In re Weaks*\(^{192}\) and *In re Stump*,\(^{193}\) as well as *Nisbet,*\(^{194}\) for the requirement that the applicant must comply with the terms of the disbarment order.\(^{195}\) This new factor developed from some passing language in *Nisbet* that there was proof in that case that the applicant had not practiced since his disbarment, obviously complying with the disbarment order.\(^{196}\)

In turning first to the compliance issue, the Court found Lester had not complied with the disbarment order.\(^{197}\) Since disbarment, Lester had been working as a "law clerk" in his old law office.\(^{198}\) Although there was no evidence Lester met with clients, he did do research, drafted memoranda and "[gave] advice and opinions on legal matters to associates."\(^{199}\) The Court cited the rule that broadly defines the practice of law\(^{200}\) but did not find much assistance from the rule when applied to Lester’s conduct.\(^{201}\) Instead, the Court scrutinized Lester’s compensation while working for his old firm.\(^{202}\) The Court found that Lester continued to receive "substantial sums as compensation for his services" after his disbarment and that such money was "more nearly commensurate with [that] received for legal services than with the token sums generally earned by law clerks. It appears that Lester has violated the spirit if not the letter of the order of disbarment."\(^{203}\)

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\(^{187}\) 532 S.W.2d 435 (Ky. 1975).

\(^{188}\) See generally *Lester v. Kentucky Bar Ass'n*, 532 S.W.2d 435 (Ky. 1975).

\(^{189}\) See *Kentucky State Bar Ass'n v. Lester*, 437 S.W.2d 958 (Ky. 1968).

\(^{190}\) See *Lester*, 532 S.W.2d at 435.

\(^{191}\) Id.

\(^{192}\) 407 S.W.2d 408 (Ky. 1966).

\(^{193}\) 114 S.W.2d 1094 (Ky. 1938).

\(^{194}\) 296 S.W.2d 465 (Ky. 1956).

\(^{195}\) See *Lester*, 532 S.W.2d at 436.

\(^{196}\) See *In re Nisbet*, 296 S.W.2d at 466. See supra note 113 and accompanying text.

\(^{197}\) See *Lester*, 532 S.W.2d at 436.

\(^{198}\) Id.

\(^{199}\) *Lester*, 532 S.W.2d at 436.

\(^{200}\) "The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services." This rule is now found at Ky. Sup. Ct. R. 3.020.

\(^{201}\) See *Lester*, 532 S.W.2d at 436.

\(^{202}\) Id.

\(^{203}\) *Lester*, 532 S.W.2d at 436.
Not only did Lester get paid like an attorney, he continued to hold himself out as one in at least one respect. It remained "Lester and Riedinger" after his disbarment, and apparently neither Lester nor his partner apparently ever took the time to change the name.

Compounding Lester's difficult predicament was his lack of candor in the reinstatement process. The reinstatement application asked if the applicant "had ever been 'Charged with unprofessional or unethical conduct[.]'" In response to this inquiry, Lester referred to a 1933 case against him, adding "upon re-trial charges dismissed." This statement was not correct. Lester received "a judgment of censure on one count and a formal censure on another[.]

Additionally, Lester stated in his application that he had not worked anywhere since his disbarment. However, Lester later admitted that he had worked as a "law clerk" for his old firm since his disbarment.

The lack of candor in reinstatement proceedings was subsequently addressed, and incorporated as an essential reinstatement requirement in In re Cohen. The Court cited all the Stump criteria for reinstatement, but only analyzed Cohen's attitude and lack of candor.

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204 See id.
205 Id.
206 Under KY. SUP. CT. R. 3.130-7.50(1), a "lawyer shall not use a firm name, letter head or other professional designation that violates Rule 7.10." KY. SUP. CT. R. 3.130-7.10(1) provides that a "lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's service. A communication is false, deceptive or misleading if it: (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."
207 See Lester, 532 S.W.2d at 436.
208 See id.
209 Under KY. SUP. CT. R. 3.130-7.50(1), a lawyer shall not use a firm name, letter head or other professional designation that violates Rule 7.10. KY. SUP. CT. R. 3.130-7.10(1) provides that a "lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's service. A communication is false, deceptive or misleading if it: (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."
210 See Lester, 532 S.W.2d at 437.
211 Lester v. Commonwealth, 62 S.W.2d 469 (Ky. 1933). This was the disbarment proceeding against Lester. The opinion does not state the specific allegations against Lester, only that there were nine charges, with Lester being found guilty of seven of them. The Court only addressed the issue of recusal of the presiding circuit judge, the matter reversed and remanded for the failure of the judge to recuse. See id.
212 Lester, 532 S.W.2d at 437.
213 Id.
214 See id.
215 Id. Lester tried to conceal his employment, even though there was evidence he had been paid $1,680 by the firm in 1971. Id. Lester explained that this was for "clerical work" at "a boat harbor." Id. He admitted the firm had paid him when presented with firm ledgers indicating the payments to him. Id.
216 706 S.W.2d 832 (Ky. 1986).
217 Kentucky Bar Ass'n v. Cohen, 625 S.W.2d 573 (Ky. 1982).
218 In re Stump, 114 S.W.2d 1094 (Ky. 1938).
219 The Court cited In re Stump for the proposition that "it is not necessary that a disbarred lawyer confess guilt, but he must at least manifest a sense of wrongdoing." In re Cohen, 706 S.W.2d at 834. This is a misquote of Stump. Stump stated that a lawyer need not admit guilt to a criminal act, not the act that formed the basis of the original discipline. See In re Stump, 114 S.W.2d at 1097. See supra note 34 and accompanying text.
220 See In re Cohen, 706 S.W.2d at 834-35.
Cohen failed to admit his prior misconduct, and testified he did not regret what he did in the bankruptcy cases. Additionally, Cohen was not candid with the Character and Fitness Committee regarding terroristic threatening and harassing communications charges filed against him by a former girlfriend after his disbarment. Cohen testified before the Character and Fitness Committee that he did not follow his former girlfriend from a Louisville restaurant. However, before a trial commissioner, Cohen testified that he did leave the restaurant in his car behind the girlfriend, and that "something unusual did occur in trying to pass and stop the car." The Court held that "[i]n a reinstatement proceeding it is important that the applicant be completely candid with the reviewing authorities at all times." Cohen was not candid, failed to appreciate the wrongfulness of his prior misconduct, and was denied reinstatement.

Cohen was reinstated to practice in 1990. Again, the Court did not provide information regarding how Cohen had rehabilitated himself since his 1986 reinstatement denial.

Although the requirement of candor appears to have been addressed as a new and separate reinstatement requirement in Cohen, candor can also be identified as a component of good moral character.

B. Financial Responsibility

The reinstatement of Glenn L. Greene, Jr. reflected fundamental differences among the Board, Court, and Character and Fitness Committee about whether an attorney was truly "rehabilitated." The case also presented the first extensive analysis by the Court of an applicant’s financial history and situation.

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219 Id. at 834.
220 See id. at 834-35.
221 Id. at 835.
222 In re Cohen, 706 S.W.2d at 835. Although the Court did not refer to it, Cohen’s admittedly criminal conduct could have been scrutinized und. the In re Stump criterion that an applicant’s post-suspension conduct should be considered in a reinstatement proceeding. See supra notes 35-36 and accompanying text.
223 Id. at 834-35.
224 See id.
226 Id. at 364-65.
227 See Greene v. Kentucky Bar Ass'n, 904 S.W.2d 233 (Ky. 1995).
Greene was disbarred in 1974 after his guilty plea to mail fraud.\textsuperscript{228} Greene bilked 26 investors of over $250,000.00 in a fraudulent investment scheme; he served one year in prison, and a condition of his probation was that he pay 25\% of his gross income to the investors during his five-year probation period.\textsuperscript{229} By the end of that time, in 1979, Greene had repaid $105,000.00, not including $10,000.00 he paid prior to indictment.\textsuperscript{230}

In 1982, Greene entered an alcohol treatment program and filed an application for reinstatement.\textsuperscript{231} At that time, Greene had not made any additional payment to the investors and had other substantial debts he could not pay.\textsuperscript{232} Greene's application was denied.\textsuperscript{233} Greene filed another application for reinstatement in 1987, along with a "Voluntary Restitution Plan" to pay the investors.\textsuperscript{234} However, Greene withdrew the application in 1988 "because of his ongoing financial problems and was forced to abandon his restitution plan after paying an additional $1,263.62 to the investors."\textsuperscript{235}

In 1990, Greene filed bankruptcy and discharged over $200,000.00 in debts.\textsuperscript{236} These debts accumulated during the time Greene was paying court-ordered restitution and reflected consumer and personal debt.\textsuperscript{237} Greene filed his third application for reinstatement in December 1992.\textsuperscript{238} At that time, Greene had not made any payments to the investors since 1988, claiming that he had been unable to pay because he paid tax liabilities and even paid some of the debts that had been discharged in bankruptcy.\textsuperscript{239} Greene subsequently proposed a repayment plan in March 1994, while his application was pending, and began to make payments on the plan to the investors.\textsuperscript{240}

The Character and Fitness Committee and a Trial Commissioner recommended Greene's reinstatement.\textsuperscript{241} The Board of Governors, however, voted ten to seven against reinstatement.\textsuperscript{242}

Presented with a record of serious original misconduct as well as substantial financial difficulties since disbarment, the Court analyzed the nature of the original misconduct, Greene's attitude, and his conduct since disbarment, as well as his character,\textsuperscript{243} thus encompassing all of the Stump\textsuperscript{244} factors. Despite Greene's extensive history of financial difficulties, the fact that his original victims were not totally compensated, and that Greene had not paid the victims

\textsuperscript{228} Id. at 234.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} See Greene, 904 S.W.2d at 234.
\textsuperscript{234} Id.
\textsuperscript{235} Greene, 904 S.W.2d at 234.
\textsuperscript{236} See id.
\textsuperscript{237} Id.
\textsuperscript{238} Id. at 235.
\textsuperscript{239} Id. Greene paid $10,000.00 to the Bank of Harlan on a discharged debt. Id.
\textsuperscript{240} Id. Greene notified the investors that he had applied for reinstatement, and none objected to his reinstatement. Id.
\textsuperscript{241} See Greene, 904 S.W.2d at 235.
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 235-36.
\textsuperscript{244} In re Stump, 114 S.W.2d 1094 (Ky. 1938).
any money until his reinstatement application was pending, the Court reinstated Greene with conditions.\textsuperscript{245}

The Court first cited \textit{In re Cohen},\textsuperscript{246} noting that the Board had concentrated on Greene's original misconduct, stating it to be "the most significant factor."\textsuperscript{247} The Court disagreed and said the Board gave this factor too much weight: "Although it is a factor, it is \textit{not} the most significant in determining whether an attorney should be reinstated."\textsuperscript{248} The Court affirmed three additional reinstatement criteria: good character, recognition of original wrongful conduct, and conduct after disbarment.\textsuperscript{249}

It was in the context of examining Greene's post-disbarment conduct that the Court undertook a detailed analysis of Greene's fiscal history.\textsuperscript{250} The Court found that Greene's problems "stemmed from his original misconduct which resulted in his felony conviction and subsequent restitution and tax problems."\textsuperscript{251} The Court specifically stated that Greene "did not make the best financial choices in providing financial assistance he could not afford" to his children for their college educations.\textsuperscript{252} Greene's only debt at the time was the debt to the original defrauded investors.\textsuperscript{253}

The Court attempted to draw a distinction between an intentional disregard of financial obligations and apparent financial incompetence. Citing \textit{In re Cohen},\textsuperscript{254} the Court noted that Ollie Cohen had disregarded a fraud judgment, never contacted the victim, and never made a plan to pay the judgment.\textsuperscript{255} Greene, in the Court's reasoning, was apparently just fiscally inept: "[T]estimony indicated that Greene's failure to make restitution payments was due to his financial condition and not due to lack of rehabilitation. He has contacted the wronged persons, has arranged a repayment plan and is currently making restitution."\textsuperscript{256}

By this line of reasoning, the Court implied that a "lack of rehabilitation" meant deliberate, perhaps deceptive, action to avoid responsibilities.\textsuperscript{257} Such a concept of "rehabilitation" is much too narrow for reinstatement purposes. This application allows an applicant to be irresponsible, as long as there was no intent by the applicant to avoid responsibility. The logical extension of this analysis is that an applicant can be financially incompetent, just not financially deceptive. Such a standard is low and not befitting the high standards of the reinstatement process.

\textsuperscript{245} See Greene, 904 S.W.2d at 236.
\textsuperscript{246} 706 S.W.2d 832 (Ky. 1986).
\textsuperscript{247} Greene, 904 S.W.2d at 235 (citing \textit{In re Cohen}, 706 S.W.2d 832 (Ky. 1986); see supra notes 216-26 and accompanying text.
\textsuperscript{248} Greene, 904 S.W.2d at 235 (citing \textit{In re May}, 249 S.W.2d 798 (Ky. 1952)) (emphasis in original) ("[The] fact that one has transgressed does not forever place him beyond the pale of respectability").
\textsuperscript{249} See \textit{id.} at 235-36.
\textsuperscript{250} \textit{id.} at 236.
\textsuperscript{251} Greene, 904 S.W.2d at 236.
\textsuperscript{252} \textit{id.}
\textsuperscript{253} See \textit{id.}
\textsuperscript{254} 401 S.W.2d 54 (Ky. 1966). See supra notes 152-64 and accompanying text.
\textsuperscript{255} See Greene, 904 S.W.2d at 236 (citing \textit{In re Cohen}, 410 S.W.2d 54 (Ky. 1966)).
\textsuperscript{256} Greene, 904 S.W.2d at 236.
\textsuperscript{257} \textit{id.}
The Court’s disregard for Greene’s failure to reimburse the victims at the time of application—or even to propose a plan at that time—did not consider that such failure was a reflection of Greene’s level of appreciation of the wrongfulness of his original misconduct. Lastly, the Court failed to consider that Greene’s financial mismanagement reflected on his general competence to practice.

Justice Wintersheimer dissented in *Greene*. He believed Greene had failed to meet his burden of proof and was wholly unimpressed with Greene’s efforts to make repayment to the defrauded investors. While the majority believed Greene’s efforts to make repayment evinced his “rehabilitation,” Justice Wintersheimer appeared to come to the opposite conclusion. In summarizing Greene’s efforts at repayment, he noted that Greene did not make payments for a period of several years, nor did he propose a repayment plan until after he filed his application for reinstatement.

Justice Wintersheimer took a broader view of “rehabilitation” and criticized Greene’s financial decisions. He noted that Greene could only propose a payment plan because of his 1990 bankruptcy, and that Greene’s decision to give his children financial assistance “was not fiscally sound.” Also: “Using the limited funds to repay discharged debts or to assume obligations of others is imprudent, particularly if the original victims remain unreimbursed.” For Justice Wintersheimer, rehabilitation contained the element of good judgment.

If any new reinstatement standard was announced in *Greene*, it was that the Court may examine an applicant’s fiscal responsibility as an element of his good character. In *Faust v. Kentucky Bar Ass’n*, *Greene* was cited for this holding.

Faust had significant financial difficulties. He was suspended for fifty-nine days in 1995 for failing to return an unearned portion of a fee and failing to promptly deliver a client’s file to new counsel. A condition of his

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258 See id. at 236-39.
259 Id. (Wintersheimer, J., dissenting).
260 See *Greene*, 904 S.W.2d at 236; see supra notes 256-59 and accompanying text.
261 Id. at 236-39 (Wintersheimer, J., dissenting).
262 “No other significant restitution was undertaken until it became a factor in this reinstatement process.” *Greene*, 904 S.W.2d at 237 (Wintersheimer, J., dissenting).
263 See id. at 238 (Wintersheimer, J., dissenting).
264 *Greene*, 904 S.W.2d at 238 (Wintersheimer, J., dissenting).
265 Id. “The considerable confidence of Greene that he can handle [practicing law] is not shared. Certainly there have been significant steps toward personal rehabilitation, but these efforts are not a substitute for current fitness to reenter the practice of law. Although Greene has made considerable progress towards better management of his finances, the task is not yet complete.” Id. (Wintersheimer, J., dissenting).
266 929 S.W.2d 185 (Ky. 1996).
267 “Evidence of an attorney’s financial situation and fiscal responsibility are factors in evaluating the attorney’s present character and fitness.” *Faust*, 929 S.W.2d at 186 (citing *Greene*, 904 S.W.2d 233 (Ky. 1995)).
268 See *Faust*, 929 S.W.2d at 186.
269 See Kentucky Bar Ass’n v. *Faust*, 896 S.W.2d 613 (Ky. 1996). Faust took $5,000.00 from a client to represent the client in a criminal appeal. Id. Faust filed the Notice of Appeal and designation of the record but was then fired. Id.
reinstatement was that he return the unearned portion of the fee, although the amount was not specified in the suspension order.270

The Court found that Faust had complied with the order of suspension, possessed sufficient professional capabilities and was of good moral character.271 In making this determination, however, the Court reviewed Faust’s troubled financial history and status as an element of good character.272

Faust had been charged with felony non-support four times, although the dates of these charges were not provided.273 At least one of these charges was pending at the time of his hearing before the Character and Fitness Committee or a Trial Commissioner because Faust testified that he would pay $1,800.00 to satisfy the charge.274 He had borrowed this amount.275 Additionally, one of his ex-wives obtained a civil judgment against Faust (no amount specified), which remained unsatisfied at the time of the Court’s opinion.276

In addition to his child-support-related financial problems, a former law partner sued Faust for conversion.277 The partner alleged Faust took partnership money; Faust claimed he borrowed it with the partner’s consent.278 Faust entered into an agreed judgment to pay the partner $8,500.00 plus court costs, but there was no indication that Faust had made any payments to the partner or had proposed a payment plan.279

Additionally, Faust had been convicted of DUI four times, although the convictions were between 1980 and 1993, before his suspension.280 Faust had been attending Alcoholics Anonymous and had received counseling.281

It is astonishing that Faust was reinstated, considering his chronic financial problems and the Court’s comments. The Court stated that Faust “ha[d] recurring and significant financial problems and...exhibited a tendency to ignore difficult situations.”282 Also, although Faust’s fiscal difficulties “may [have] stem[med] from the fact that he ha[d] not been employed during his suspension because he expected the reinstatement process to be shorter, his suspension by no means explain[ed] all of his problems or how Faust ha[d] dealt with them.”283 Lastly, even though lauding Faust’s efforts to overcome his alcoholism, the Court declared that Faust “also need[ed] to confront the other problems in his life.”284

In spite of Faust’s clear financial problems, the Court granted Faust “conditional reinstatement.”285 The conditions required that Faust pay his child

270 Id. at 613.
271 See Faust, 929 S.W.2d. at 185-86.
272 Id.
273 Id. at 186.
274 Id.
275 Id.
276 Id.
277 See Faust, 929 S.W.2d at 186.
278 Id. Faust claimed he needed the money to pay a child support arrearage and then could not pay the money back. Id.
279 Id.
280 Id.
281 Id.
282 Faust, 929 S.W.2d at 186.
283 Id.
284 Id.
285 Id.
support regularly; that he create a plan to pay the arrearages and civil judgment; that he make regular payments to his former law partner on the agreed judgment; and that Faust "regularly" attend Alcoholics Anonymous or seek professional counseling. 286 Faust was to enter into a written agreement with the Character and Fitness Committee that reflected the Court’s conditions. 287 Also, the Character and Fitness Committee was to monitor Faust’s compliance. 288

Baldridge v. Kentucky Bar Ass’n 289 presented facts similar to those in Greene 290 and, to a lesser extent, Faust, 291 but produced a very different result. These three decisions are difficult to reconcile.

Baldridge was disbarred in 1989 after he misappropriated $20,000.00 in client funds he held in an estate matter. 292 Baldridge had also paid “excessive” fees to himself, but the amounts are not specified in the order. 293 One of the specific directives of the Court’s disbarment order was that Baldridge could not file an application for reinstatement “following the five year period [of disbarment] unless he presents satisfactory evidence that he has satisfied the financial obligations to his creditors identified in filed bankruptcy schedules.” 294

Baldridge filed a petition for reinstatement in March 1995. 295 The Character and Fitness Committee, after two hearings, recommended that the application be denied because Baldridge had not “satisfied” his financial obligations as ordered by the Court. 296 Baldridge had argued that the disbarment order did not require him to pay off completely his debts, only to “satisfy” them. 297

After an additional hearing before a Trial Commissioner, the Trial Commissioner found that Baldridge “had ‘satisfied’ or had been excused from paying most of his debts, but had not paid $80,000 to Pauline Davison, who was a scheduled creditor” in Baldridge’s bankruptcy. 298 Baldridge, had, however, “made an offer of repayment that had been accepted by Ms. Davison.” 299

The Board of Governors voted unanimously against Baldridge’s reinstatement because Baldridge had not complied with the terms of the original disbarment. 300 The Court agreed and denied the application. 301

286 Id.
287 See id.
288 See Faust, 929 S.W.2d at 186.
289 980 S.W.2d 558 (Ky. 1998).
290 Greene v. Kentucky Bar Ass’n, 904 S.W.2d 233 (Ky. 1995).
291 Faust v. Kentucky Bar Ass’n, 929 S.W.2d 185 (Ky. 1996).
292 See Baldridge v. Kentucky Bar Ass’n, 781 S.W.2d 516 (Ky. 1989).
293 Id. at 516. The order does not indicate if Baldridge admitted to the conduct, but only states he was “alleged” to have engaged in the conduct. Baldridge was subsequently convicted of failure to make required disposition of property, a felony offense. See Baldridge, 980 S.W.2d at 558.
294 Baldridge, 781 S.W.2d at 516.
295 See Baldridge, 980 S.W.2d at 559.
296 Id.
297 Id.
298 Baldridge, 980 S.W.2d at 559.
299 Id. The Trial Commissioner also found that “movant was unable to admit that he engaged in the criminal conduct that led to his conviction and disbarment.” Id. The Court did not discuss or consider important Baldridge’s apparent inability or refusal to admit his original wrongdoing.
300 See id.
301 Id. at 560.
The Court addressed only one issue: whether Baldridge had complied with the terms of the disbarment order. While this was not the salient issue in Greene or Faust, the Court’s interpretation of Baldridge’s similar facts is inconsistent with the two earlier decisions which granted reinstatement.

In addressing the debt-compliance issue, the Court stated that “[t]he simple fact remains that movant still has unpaid debts incurred by his pre-disbarment activities,” and that “[t]he compromises he has made in satisfaction of some of the other debts do not meet the terms of the disbarment order.” The Court said the record did not contain evidence that Baldridge had “achieved the level of financial stability that would inspire confidence” in his reinstatement. Lastly, the Court said that since Baldridge’s disbarment was based upon his theft of client funds to pay his own debts, “it cannot be assumed unequivocally that such misappropriation of funds would not occur in the future, given movant’s substantial debt at the current time.”

The Court could have denied Baldridge’s reinstatement on the very narrow ground that he had failed to comply with the order of disbarment, but the analysis went beyond this issue. Instead, the Court undertook a review of Baldridge’s financial situation, found it to be unsatisfactory, and denied his reinstatement. Like Glenn Greene, Jr. and John Faust, Baldridge had significant debts and his “financial stability” was questionable. Unlike them, however, Baldridge was not reinstated. The same issues that concerned the Court in Baldridge did not worry the Court in Greene or Faust, and the results appear inconsistent.

C. Recent Affirmations of In re Stump and In re Cohen Criteria

Within the past five years, the Court has continued to affirm the basic reinstatement criteria found in Stump and Cohen. These cases do not expand the “traditional” reinstatement standards, but focus heavily on an applicant’s lack of

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302 Id. at 559-60.
303 Greene v. Kentucky Bar Ass’n, 904 S.W.2d 233 (Ky. 1995).
304 Faust v. Kentucky Bar Ass’n, 929 S.W.2d 185 (Ky. 1996).
305 Baldridge, 980 S.W.2d at 559.
306 Id.
307 Id.
308 Baldridge used the $20,000.00 he took from his client to pay off the mortgage on his law office. See id. at 558.
309 Baldridge, 980 S.W.2d at 559-60.
310 See id. at 560.
311 Greene v. Kentucky Bar Ass’n, 904 S.W.2d 233 (Ky. 1995).
312 Faust v. Kentucky Bar Ass’n, 929 S.W.2d 185 (Ky. 1996).
313 “This Court has a duty to regulate admission to the legal profession in order to maintain the integrity of the bar. In order to fulfill this duty, the Court must receive unambiguous evidence that an applicant for readmission poses no risk to the public.” Baldridge, 980 S.W.2d. at 560 (emphasis added). Although Baldridge failed to present “unambiguous” evidence, it is questionable, based upon the Court’s own rendition of the facts in their opinions, whether Greene and Faust presented evidence of this quality, either.
314 114 S.W.2d 1094 (Ky. 1938).
315 706 S.W.2d 832 (Ky. 1986).
candor. Not surprisingly, a lack of candor is usually found when an applicant has engaged in less-than-exemplary post-suspension conduct.

*Skaggs v. Kentucky Bar Ass'n* was the first case in a number of years to review the reinstatement standards and deny reinstatement. Skaggs was suspended in 1996 for failing to represent his client diligently and failing to respond to the bar complaint. Skaggs represented Samuel Wilkey in an appeal of a substantial judgment entered against Wilkey. The Court of Appeals dismissed the appeal because Skaggs failed to file a brief. Two weeks after dismissal, Skaggs filed a Motion to Reconsider with tendered brief, but failed to tender a filing fee. The Court of Appeals brought this deficiency to Skaggs’ attention, but Skaggs never tendered the fee and the case was finally dismissed. Skaggs did not file a response to the bar complaint or an answer to the charge. He was suspended from practice for ninety days.

Skaggs filed an application for reinstatement on May 2, 1996. The Inquiry Tribunal did not approve his application and the case proceeded to an evidentiary hearing before a Trial Commissioner. The Court’s opinion does not reveal the recommendation of the Trial Commissioner, but does state that the Board of Governors voted unanimously to deny Skaggs’ application. The Court accepted the Board’s recommendation and denied Skaggs reinstatement.

The Court undertook a detailed review of the evidence, initially noting that Skaggs was not candid in his application because he omitted information. Skaggs’ lack of candor was a focus throughout the Court’s opinion. Skaggs did not provide places or dates of employment since his suspension, despite testifying that he had been working as a law clerk during that time. In addition, Skaggs did not reveal numerous traffic offenses and civil actions that had been filed against him. He also did not disclose that the Warren Circuit Court had ordered him to refund some money to the clerk.

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16 954 S.W.2d 311 (Ky. 1997).
17 Skaggs v. Kentucky Bar Ass'n, 915 S.W.2d 744 (Ky. 1996).
18 The judgment amount against Wilkey was $37,870.97. See id. at 744.
19 Id.
20 Id.
21 Id.
22 Id.
23 See *Skaggs*, 915 S.W.2d at 744.
24 See *Skaggs*, 954 S.W.2d at 312.
25 Id. See former Ky. Sup. Ct. R. 3.510(2), which provided:
   
   If the period of suspension has prevailed for less than one (1) year the Tribunal shall promptly cause an investigation to be made to determine whether the applicant has complied with the Court’s order of suspension, whether he presently possesses sufficient professional capabilities and qualifications properly to serve the public as an active practitioner, and whether he is of good moral character.

Id.
26 See *Skaggs*, 954 S.W.2d at 312.
27 Id. at 313.
28 Id. at 314.
29 Id. at 312.
30 Id.
31 Id. Skaggs also testified “that he drove, albeit infrequently, an unregistered vehicle from 1989-
Skaggs did not express "any appreciation or regret for the complete failure of his responsibilities to his client[.]" In fact, the Board based its recommendation upon Skaggs' unacceptable "attitude": "The Board's primary concern and basis for recommending against reinstatement [was] Skaggs' 'cavalier' attitude toward the whole disciplinary and reinstatement process." This criterion expands the requirement that an applicant must express a sense of regret or remorse about the original misconduct, but this more expansive requirement has not appeared in subsequent cases.

The Court's basis for denial rested upon Skaggs' lack of candor; Skaggs' omissions on his application were described as "troubling" and the Court stated that it was "clear that Skaggs was less than candid" in the reinstatement process.

Cowden v. Kentucky Bar Ass'n is a case similar in facts and results to Skaggs. Again, the court focused on the applicant's candor in the reinstatement process.

Cowden was suspended from practice for five years in 1987 for a series of misrepresentations and fraudulent acts. He attempted to file an application for reinstatement in 1992, but the application was rejected because Cowden had not paid the costs of the original disciplinary proceeding. In December 1995, Cowden paid the application fee and some of the costs; the KBA waived the remaining costs. Cowden did not amend or supplement his original application, although more than three years had intervened.

The Character and Fitness Committee recommended against reinstatement. The Committee found that Cowden "ha[d] been charged with numerous criminal offenses which he did not disclose on his application. Although most of these charges were dismissed, Cowden pled guilty to terroristic threatening and fourth-degree assault.

The hearing before the Trial Commissioner produced a different result. Cowden presented numerous good character witnesses and testified that he...
regretted his original misconduct. Although Cowden’s criminal history troubled the Trial Commissioner, she nonetheless pronounced him “of good moral character.”

The Board of Governors recommended against reinstatement, agreeing with the Character and Fitness Committee. The Board found that Cowden was not candid regarding his employment history, his criminal history, and his debts. This omitted information led the Board to conclude that “Cowden had failed to live an exemplary life during the period of suspension” and the Board recommended against Cowden’s reinstatement, twelve to three.

The Court accepted this recommendation and denied reinstatement. The Court held that a “lack of candor and omissions from an application justify a denial of a petition for reinstatement.” As in Skaggs, the Court was bothered by the applicant’s attitude: “The very fact that Cowden attaches so little significance to the character, number, and frequency of his brushes with the police indicates to us that he lacks the necessary respect for the law required of an applicant seeking to be reinvested with the public trust.”

White v. Kentucky Bar Ass’n concentrated on an applicant’s lack of candor, but reaffirmed that the burden in a reinstatement proceeding remains on the applicant throughout the entire proceeding. White was suspended for three years in 1991 for charging and collecting an excessive fee and falsely answering an interrogatory in a civil proceeding in which he was a defendant. White applied for reinstatement in April 1996 and the Character and Fitness Committee recommended his reinstatement after hearing testimony from “a number of witnesses,” including White.

Prior to the hearing before the Trial Commissioner, White initially stated that he would call the same witnesses as he had before the Character and Fitness Committee, Mr. White asserted, by his own testimony and [through] a number of witnesses, that he was remorseful for his prior professional misconduct, that he complied with all the terms of his suspension, that he was completely candid with the reviewing authorities, that he had rehabilitated himself, and that he is of good moral character. Mr. White contended that he had met the criteria for reinstatement required by In re Cohen.

Appearing before the Character and Fitness Committee, Mr. White asserted, by his own testimony and [through] a number of witnesses, that he was remorseful for his prior professional misconduct, that he complied with all the terms of his suspension, that he was completely candid with the reviewing authorities, that he had rehabilitated himself, and that he is of good moral character. Mr. White contended that he had met the criteria for reinstatement required by In re Cohen.

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344 Id.
345 Cowden, 997 S.W.2d at 10.
346 See id. at 10-11.
347 “The Board also found that Cowden had failed to establish the status of unpaid debts and obligations, including a federal tax lien.” Id. at 11.
348 Cowden, 997 S.W.2d at 11.
349 See id.
350 Id.
351 Cowden, 997 S.W.2d at 11. The Court cited Skaggs, 954 S.W.2d at 314, for this holding, although the case does not appear to specifically reflect this holding.
352 Skaggs v. Kentucky Bar Ass’n, 954 S.W.2d 311 (Ky. 1997).
353 Cowden, 997 S.W.2d at 11.
354 989 S.W.2d 573 (Ky. 1999).
355 See Kentucky Bar Ass’n v. White, 818 S.W.2d 263 (Ky. 1991).
356 White, 989 S.W.2d at 574.
Committee. White then changed his mind, claiming that he had no notice of
"charges, facts in issue or a question to resolve" and that he would not appear for
the Trial Commissioner's hearing, nor would he present any witnesses. White
believed he did not have any "obstacle to overcome."

After White made the objection that he did not know what the issues
were, the KBA provided White with a "notice of deficiencies" in his
application. The KBA's lengthy notice specified eleven "factual issues that
had been raised by Mr. White's testimony before the Character and Fitness
Committee." These points included: providing additional information
regarding White's post-suspension conduct; White's candor before the
Committee regarding his disciplinary record; White's attitude about a criminal
assault conviction; the status of tax liens filed against White; White's candor
regarding the status of his bankruptcy proceeding; the status of several lawsuits
filed against White; development of additional information regarding White's
employment history; examination of discrepancies between White's testimony
and statements of witnesses obtained by an investigator; White's failure to reveal
suspension of his Georgia driver's license and traffic offenses; and White's
admission that he had not complied with all terms of the suspension order.

At the Trial Commissioner's hearing, White's attorney appeared and
announced White would not appear "on advice of counsel." White's attorney
continued with this strategy, despite a warning from the Trial Commissioner.
The only witness White presented was "a law professor who was wholly
unfamiliar with the reasons for the suspension or whether there had been
compliance with the terms of the suspension." The Trial Commissioner filed a
report making no recommendation.

At oral argument, before the Board of Governors, the Board asked
White's attorney if White would appear before the Trial Commissioner if the
matter were remanded for additional proof; White's attorney replied that White
would not. The Board unanimously recommended against reinstatement
because White had failed to meet his burden. The Court agreed and denied
reinstatement.

White fundamentally misunderstood the reinstatement process. The
Court rejected White's argument that the Inquiry Tribunal had to identify the
factual issues involved in reinstatement: "There is no due process right to be
advised of 'charges' in a reinstatement proceeding." The Court also rejected

357 See White, 989 S.W.2d at 574.
358 White, 989 S.W.2d at 574.
359 Id.
360 Id.
361 Id.
362 See id. at 575.
363 White, 989 S.W.2d at 575.
364 See id.
365 White, 989 S.W.2d at 575.
366 See id.
367 Id.
368 Id.
369 Id. at 576.
370 White, 989 S.W.2d at 596. "Mr. White's approach may well be appropriate in a disciplinary
case, where the burden of proof is on the KBA and the respondent is required only to defend the
White’s argument that since former KY. SUP. CT. R. 3.510(2) referred to former KY. SUP. CT. R. 3.230, the procedure by which a Trial Commissioner was appointed in a disciplinary charge matter, the case was “converted” from a reinstatement case to a disciplinary case in which the burden is on the KBA.

Perhaps the most important holding of White was the Court’s declaration that a favorable report from the Character and Fitness Committee does not equate to automatic reinstatement: “The Character and Fitness Committee is only the first step. An applicant for reinstatement cannot convert the Committee’s favorable recommendation into a final decision and thereby abort the remainder of the process.” The Court recognized the Board’s long-established role in evaluating candidates for reinstatement, and affirmed its own power as the final arbiter over the proceedings.

D. Recent Reinstatements

Not all recent reinstatement cases have resulted in denials. The Court granted reinstatement in Smith v. Kentucky Bar Ass’n, Suggs v. Kentucky Bar Ass’n and Huffman v. Kentucky Bar Ass’n. These applicants received favorable reports from Character and Fitness and from the Board of Governors, but the Court’s opinions in these cases are cursory. The opinions are unremarkable and do not provide information on how these particular applicants became rehabilitated. The circumstances leading to these applicants’ original suspensions were quite different.

Barry Sloan Smith was suspended for a year and a half for lack of diligence, failure to return an unearned fee, and appearing at a pretrial while under a suspension for failure to obtain sufficient Continuing Legal Education credits. In the disciplinary proceeding, Smith filed a responsive pleading charges against him. But this is not so in a reinstatement proceeding where the applicant has the burden of proof and the ‘issues of fact’ are identified by the law governing the applicant’s right to seek reinstatement.” Id. (citing In re Cohen, 706 S.W.2d 832, 834-35 (Ky. 1986)).

371 See supra note 327 and accompanying text.

372 KY. SUP. CT. R. 3.230 states:

If the answer raises any issue of fact, the Inquiry Tribunal shall notify the Chairman of the House in order that he may appoint an attorney to represent the Association, and appoint a member of the House to act as Trial Commissioner who will be so commissioned by the Chief Justice. The Trial Commissioner shall have been admitted to the practice of law for a minimum of five (5) years and shall reside in a different Supreme Court District from that of the respondent. The Director shall immediately notify the Trial Commissioner of his appointment and provide him with a copy of the pleadings.

Id.

373 White, 989 S.W.2d at 576.

374 Id. (emphasis added).

375 979 S.W.2d 111 (Ky. 1998).

376 988 S.W.2d 35 (Ky. 1999).

377 14 S.W.3d 555 (Ky. 2000).

378 See Kentucky Bar Ass’n v. Smith, 913 S.W.2d 317 (Ky. 1996). At the pretrial conference, the judge questioned Smith’s membership status. Smith told the judge that “the appropriate documents had been mailed to the Bar Association which would entitle him to reinstatement.” This statement
admitting some of the allegations, stating he was "not cut out to be an attorney." In observing Smith's comment on his own professional competence, the Court said: "[W]e suggest that respondent well consider whether he desires to resume his legal career. If he so desires, it should be with resolve to diligently perform his duties and, in general, to mend his ways."

In assessing the record before it upon Smith's application for reinstatement, the Court acknowledged that Smith "ha[d] taken several steps in the right direction," but did not detail Smith's rehabilitation. The Court did note that Smith had "made satisfactory arrangements with his creditors to pay off his debts" and that Smith agreed to "attend a management seminar to improve his business management skills." No other information is provided regarding Smith's rehabilitation.

In 1991, Stanley Suggs was suspended from the practice of law for three years for misappropriation of client funds. Suggs filed for reinstatement in August 1996 and received favorable recommendations from the Character and Fitness Committee and the Board of Governors. The Board decided Suggs had met the Cohen criteria. The Court accepted the recommendations and reinstated Suggs. The Court's opinion mentions briefly, with little analysis, several Cohen-type factors. Suggs successfully completed a drug rehabilitation treatment, had been employed in Virginia since his suspension, admitted his wrongful conduct, and had dealt satisfactorily with his debts.

Florence Huffman was suspended for four years in 1995 for her part in a kickback plan when she worked as an Assistant County Attorney for Fayette County Attorney Norrie Wake. Huffman had agreed to a raise with the condition that the money be given back to Wake to help him retire a campaign debt. Huffman received favorable recommendations from Character and Fitness and the Board of Governors. As in Smith and Suggs, the Court was false. Id.

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379 Smith, 913 S.W.2d at 319.
380 Id.
381 Although not revealed in the Court's opinion, the records of the Kentucky Bar Association indicate that the Inquiry Tribunal approved Smith's application for reinstatement pursuant to former Ky. Sup. Ct. R. 3.510(2) after a favorable recommendation from the Character and Fitness Committee.
382 Smith, 979 S.W.2d at 112.
383 Id.
384 See id. at 111-12.
385 See Suggs v. Kentucky Bar Ass'n, 819 S.W.2d 725 (Ky. 1991). The Court had temporarily suspended Suggs in 1990 for the same alleged conduct. See Kentucky Bar Ass'n v. Suggs, 799 S.W.2d 575 (Ky. 1990).
386 See Suggs, 988 S.W.2d at 35.
387 In re Cohen, 706 S.W.2d 832 (Ky. 1986).
388 See Suggs, 988 S.W.2d at 35.
389 Id.
390 Id.
391 See Kentucky Bar Ass'n v. Huffman, 908 S.W.2d 347 (Ky. 1995).
392 Id. at 347. Huffman was not criminally prosecuted, but Wake was. He was convicted of mail fraud, misappropriation of funds, and conspiracy. Wake was disbarred on his own motion to resign under terms of disbarment. See Wake v. Kentucky Bar Ass'n, 860 S.W.2d 295 (Ky. 1993).
393 See Huffman v. Kentucky Bar Ass'n, 14 S.W.3d 555, 556 (Ky. 2000).
reinstated her with no analysis of any reinstatement factors and no information on Huffman's rehabilitation. The opinion is only about one page in length.

_Bowling v. Kentucky Bar Ass'n_ 97 is the most recent reinstatement case, but the opinion does not offer clear direction on reinstatement. In Bowling's original disciplinary matter, he was suspended for nine months from the practice of law after entering an _Alford_ plea to one count of fourth-degree assault, four counts of terroristic threatening, two counts of unlawful imprisonment, and one count of second-degree wanton endangerment. Bowling's victim was his former wife, Sandra.

At issue was whether an applicant could be "conditionally" reinstated. The Character and Fitness Committee, citing SCR 2.042, which provides for conditional admission of initial applicants to the bar, recommended Bowling be conditionally readmitted. The conditions of Bowling's reinstatement were that a psychologist or psychiatrist must monitor him following reinstatement, pursuant to a plan proposed by Bowling. The monitoring period was indefinite, with the Character and Fitness Committee having the sole responsibility in determining when monitoring was "no longer necessary to protect the public interest."

Although the Court recognized SCR 2.042 was not applicable to reinstatement proceedings, it granted "conditional" reinstatement to Bowling. The Court cited Smith v. Kentucky Bar Ass'n, Kentucky Bar Ass'n v. Dunn, Faust v. Kentucky Bar Ass'n, and Kentucky Bar Ass'n v. Rankin, stating it had "granted conditional reinstatement in a number of cases."

_Smith_ cannot be called a "conditional" reinstatement case. The only suggestion of conditions, as provided by the Court's own opinion (consisting of only one page), was that Smith had "made satisfactory arrangements with his creditors to pay off his debts" and that Smith had promised to "attend a management seminar to improve his business management skills." The distinction between the nature of the Smith "conditions" and the conditions placed upon Bowling's reinstatement is enormous.

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394 Smith v. Kentucky Bar Ass'n, 979 S.W.2d 111 (Ky. 1998).
395 Suggs v. Kentucky Bar Ass'n, 988 S.W.2d 35 (Ky. 1999).
396 See Huffman, 14 S.W.3d at 556. The Court merely cited Cohen, and said that the Board had determined that "Huffman's conduct since the suspension has demonstrated the appropriate degree of rehabilitation necessary to support her application for reinstatement." Id.
397 54 S.W.3d 160 (Ky. 2001).
398 See Bowling v. Kentucky Bar Ass'n, 971 S.W.2d 294, 294 (Ky. 1998).
399 Id.
400 KY. SUP. CT. R. 2.042. This rule is best understood in context. The rule is not found in the section of Rule 2 dealing with reinstatement, but is placed with other rules dealing with initial admission to the bar.
401 See Bowling, 54 S.W.3d at 162.
402 Id.
403 Bowling, 54 S.W.3d at 162.
404 Id. at 163.
405 979 S.W.2d 111 (Ky. 1998).
406 965 S.W.2d 158 (Ky. 1998).
407 929 S.W.2d 185 (Ky. 1996).
408 999 S.W.2d 710 (Ky. 1999).
409 Bowling, 54 S.W.3d at 163.
410 Smith, 979 S.W.2d at 112.
Faust, although facially a conditional reinstatement case, appeared to be an anomaly in reinstatement jurisprudence rather than a policy shift. It is unfortunate the Court chose to rely on Faust, considering how the result deviated from reinstatement standards.

The other cases cited by the Court, Dunn and Rankin, are not reinstatement cases. The Court was incorrect when it declared it had "granted" conditional reinstatement in these two matters. Dunn and Rankin are disciplinary cases involving attorneys with alcohol-related problems. Both attorneys received probated suspensions upon the condition that they abstain from alcoholic beverages, attend Alcoholics Anonymous meetings, and submit a report on their progress and status to the Executive Director of the KBA.

Important to the Court in Bowling was that the Board of Governors' report, which had unanimously recommended against Bowling's reinstatement, "expressed no grounds for denying Bowling's application for reinstatement." The Court then turned to the Character and Fitness Committee's report for information, and decided Bowling had met his burden of showing good moral character.

Yet while the opinion criticized the Board of Governors for not providing enough information, the Court itself did not share any of its own analysis of how Bowling proved his good moral character. The Court did not cite any factual information contained in the Character and Fitness Committee's report regarding Bowling's proof of good character. Again, a reinstatement opinion provided a final result, but very little explanation of the analytical steps taken in reaching that result.

V. NEW RULES, OLD RULES

A. SCR 2.300

In 1999, the Court adopted SCR 2.300, a completely new rule that specifies the duties of the Character and Fitness Committee in reinstatement proceedings. The rule also codifies many of the reinstatement case law holdings.

411 Faust v. Kentucky Bar Ass'n, 929 S.W.2d 185 (Ky. 1996).
412 See Kentucky Bar Ass'n v. Dunn, 965 S.W.2d 158 (Ky. 1998); Kentucky Bar Ass'n v. Rankin, 999 S.W.2d 710 (Ky. 1999).
413 See Dunn, 965 S.W.2d at 160; Kentucky Bar Ass'n v. Rankin, 862 S.W.2d 894, 895-96 (Ky. 1993).
414 Bowling, 54 S.W.3d at 163.
415 See id. at 164.
416 Adopted by order 99-1, effective February 1, 2000.
417 The preamble to the KY. SUP. CT. R. 2.300 provides:

The guidelines set forth in KY. SUP. CT. R. 2.300 apply to applications for reinstatement filed by any person who has been suspended from the practice of law, who seeks reinstatement under the provisions of KY. SUP. CT. R. 3.510, and whose application is referred by the Kentucky Bar Association to the Office of Bar Admissions Character and Fitness Committee. These guidelines have been formulated to govern the manner in which Reinstatement Applications are processed so that all parties, including the public at
The first five subsections of the rule explain the “Initial Reinstatement Application Process,” the “Investigative Process,” “Informal Hearings,” “Formal Hearings,” and the Committee’s “Formal Recommendation.” The technical specificity found in the first four subsections did not exist in the prior version of the Supreme Court Rules. These subsections provide the rules of procedure before the Character and Fitness Committee in reinstatement cases and do not appear to impact the substantive law of reinstatement.

Respectively titled “Burden of Proof” and “Presumption and Weight of Evidence,” SCR 2.300(6) and (7) attempt to codify the key reinstatement cases. Subsection (6) reiterates that the burden is on the applicant in a reinstatement case to “prove by clear and convincing evidence that he/she possesses the requisite character, fitness and moral qualification for re-admission to the practice of law.” The subsection then provides a non-exclusive list of “issues” that the Committee will consider, including whether the applicant “has complied with every term of the order of suspension or disbarment”; whether the applicant’s “conduct while under suspension shows that he/she is worthy of the trust and confidence of the public”; whether the applicant “possesses sufficient professional capabilities to serve the public as a lawyer”; whether the applicant “presently exhibits good moral character”; and whether the applicant “appreciates the wrongfulness of his/her prior misconduct, that he/she has manifest contrition for his/her prior professional misconduct, and has [been] rehabilitated from past derelictions.” The applicant must present clear and convincing evidence on these points and “failure to meet any of these criteria may constitute a sufficient basis for denial” of the application.

The criteria in Subsection 7, as those in Subsection 6, clearly are derived from the case law, and they substantially overlap with the points elucidated in Subsection 6. The first paragraph of the rule affirms the Stump standard that an applicant for reinstatement “will be held to a substantially more rigorous standard than a first time applicant” for admission. The subsection reiterates that the “prior determination that [the applicant] engaged in professional large, are insured that a systematic and thorough character and fitness investigation is conducted and applicants are assured that their applications are addressed in a timely and procedurally consistent manner.

Id. 418 KY. SUP. CT. R. 2.300(1-4). 419 KY. SUP. CT. R. 2.300(6); White v. Kentucky Bar Ass'n, 989 S.W.2d 573 (Ky. 1999). 420 KY. SUP. CT. R. 2.300(6)(a); Baldridge v. Kentucky Bar Ass'n, 980 S.W.2d 558 (Ky. 1998); Lester v. Kentucky Bar Ass'n, 532 S.W.2d 435 (Ky. 1975). 421 KY. SUP. CT. R. 2.300(6)(b); Cowden v. Kentucky Bar Ass'n, 997 S.W.2d 558 (Ky. 1999); In re Cohen, 401 S.W.2d 54 (Ky. 1966); In re Eckerle, 265 S.W.2d 804 (Ky. 1954); In re Rosenberg, 230 S.W.2d 434 (Ky. 1950); In re Stump, 114 S.W.2d 1094 (Ky. 1938). 422 KY. SUP. CT. R. 2.300(6)(d); In re Eckerle, 265 S.W.2d 804 (Ky. 1954); In re May, 249 S.W.2d 708 (Ky. 1952); In re Stump, 114 S.W.2d 1094 (Ky. 1938). 423 KY. SUP. CT. R. 2.300(6)(e); In re Cohen, 706 S.W.2d 832 (Ky. 1986); In re Applewhite, 401 S.W.2d 757 (Ky. 1965); In re Eckerle, 265 S.W.2d 804 (Ky. 1954); In re Stump, 114 S.W.2d 1094 (Ky. 1938). 424 KY. SUP. CT. R. 2.300(7); In re Weaks, 407 S.W.2d 408 (Ky. 1966).
misconduct continues to be evidence against [the applicant] and the proof presented must be sufficient to overcome that prior adverse judgment.\(^{427}\)

Subsection 7 also lists several “considerations to be weighed” by the Committee, including the “nature of the misconduct for which the applicant was suspended or disbarred”\(^{428}\), the “applicant’s conception of the serious nature” of the prior misconduct\(^{429}\), the “applicant’s sense of wrongdoing”\(^{430}\), the “applicant’s previous and subsequent conduct and attitude toward the courts and the practice”\(^{431}\), including the element of time elapsed since disbarment\(^{432}\), the “applicant’s candor in dealing with the Character and Fitness Committee”\(^{433}\), and the “relevant knowledge of the witnesses called by the applicant.”\(^{434}\)

**B. Other Reinstatement Rules and New Problems**

SCR 2.300 does not provide an all-inclusive guide to reinstatement. One must refer to several rules to determine the complete procedural path of a reinstatement case. For example, all four subsections of SCR 3.510, the rule regarding reinstatement after a disciplinary suspension, refer to “proceedings” held by the Character and Fitness Committee conducted “under Rule 2.040.”\(^{435}\) However, that rule only outlines the Committee’s general powers relating to applicants for initial admission to the bar. The Court’s 1998 amendments to the rules created SCR 3.505,\(^{436}\) which enumerates the Committee’s powers in reinstatement proceedings.\(^{437}\) It would therefore appear that any reference to Character and Fitness “proceedings under” SCR 2.040 found in SCR 3.510 should be changed to SCR 3.505 and SCR 2.300.

The Court substantially changed SCR 3.510 in its 1998 amendments. For example, prior to the amendments, there was no automatic reinstatement after a disciplinary suspension.\(^{438}\) The “new” SCR 3.510 provides for “automatic” reinstatement of an attorney who was suspended for one hundred eighty days or less.\(^{439}\) The attorney, however, must provide an “affidavit of compliance with the terms of the suspension.”\(^{440}\) The rule does not specify the

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\(^{427}\) KY. Sup. Ct. R. 2.300(7).

\(^{428}\) KY. Sup. Ct. R. 2.300(7); In re Stump, 114 S.W.2d 1094 (Ky. 1938).

\(^{429}\) KY. Sup. Ct. R. 2.300(7); In re Cohen, 706 S.W.2d 832 (Ky. 1986); In re Stump, 114 S.W.2d 1094 (Ky. 1938).

\(^{430}\) KY. Sup. Ct. R. 2.300(7).

\(^{431}\) KY. Sup. Ct. R. 2.300(7); Skaggs v. Kentucky Bar Ass'n, 954 S.W.2d 311 (Ky. 1998).

\(^{432}\) In re Stump, 114 S.W.2d 1094 (Ky. 1938).

\(^{433}\) KY. Sup. Ct. R. 2.300(7); Cowden v. Kentucky Bar Ass'n, 997 S.W.2d 9 (Ky. 1999); White v. Kentucky Bar Ass'n, 989 S.W.2d 573 (Ky. 1999); Skaggs v. Kentucky Bar Ass'n, 954 S.W.2d 311 (Ky. 1998); In re Cohen, 706 S.W.2d 832 (Ky. 1986); Lester v. Kentucky Bar Ass'n, 532 S.W.2d 435 (Ky. 1975).

\(^{434}\) KY. Sup. Ct. R. 2.300(7); Cf. White v. Kentucky Bar Ass'n, 989 S.W.2d 573 (Ky. 1999).

\(^{435}\) KY. Sup. Ct. R. 3.510.

\(^{436}\) Adopted by Order 98-1, effective October 1, 1998.

\(^{437}\) The title of the rule is “Character and Fitness Committee; Reinstatements.”

\(^{438}\) Former KY. Sup. Ct. R. 3.510.

\(^{439}\) KY. Sup. Ct. R. 3.510

\(^{440}\) Id.
necessary elements of the affidavit. The rule gives Bar Counsel the opportunity to object to automatic reinstatement. The 1998 amendments completely deleted former SCR 3.520, Reinstatement in Case of Disbarment. The new rules do not provide an explicit procedure for reinstatement after disbarment. Although now disbarment is "permanent" pursuant to SCR 3.380, there are many disbarred attorneys who were disbarred under the "old" rules. Former SCR 3.520(1) provided that "[a]ny former member who has been disbarred may apply for reinstatement after a period of five (5) years." Disbarment orders under the old rules usually contained language that a disbarred attorney could apply for reinstatement after five years under former SCR 3.520 or any successor amendment to that rule. However, now there does not appear to be any "successor" to former SCR 3.520; the current version of SCR 3.510 is derived from former SCR 3.510. It remains to be seen how the Court will address this gap in the rules.

VI. CONCLUSION

The fundamental ideals of reinstatement—good moral character, rehabilitation through post-suspension good conduct, and contrition—are found in a steady line of cases from In re Stump through White v. Kentucky Bar Ass'n, and are now specified in SCR 2.300. The standards are clear and easily found.

However, the Court's opinions do not always methodically explore each reinstatement criterion as applied to a particular candidate for reinstatement. Frequently, when an applicant has received favorable recommendations from the Character and Fitness Committee and the Board of Governors, the Court will enter a reinstatement order with scant factual information as to why that applicant should be reinstated. Although there may be cites to relevant cases, there are few details about the applicant. Only when an applicant has serious obstacles in the reinstatement process or there is a split of opinion between the Character and Fitness Committee and the Board of Governors is there an opinion containing a detailed factual and legal analysis.

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41 KY. SUP. CT. R. 3.510(2).
42 Id.
43 Former KY. SUP. CT. R. 3.520(1).
44 See, e.g., Wagers v. Kentucky Bar Ass'n, 973 S.W.2d 845 (Ky. 1998).
45 KY. SUP. CT. R. 3.510(4) does address a situation where "the period of suspension has prevailed for more than five (5) years," but this language appears to be the almost verbatim version of former KY. SUP. CT. R. 3.510(3), which only dealt with reinstatement after a disciplinary suspension, not reinstatement after disbarment.
46 114 S.W.2d 1094 (Ky. 1938).
47 989 S.W.2d 573 (Ky. 1999).
48 See, e.g., Huffman v. Kentucky Bar Ass'n, 14 S.W.3d 555 (Ky. 2000); Suggs v. Kentucky Bar Ass'n, 988 S.W.2d 35 (Ky. 1999); Smith v. Kentucky Bar Ass'n, 979 S.W.2d 111 (Ky. 1998); Applewhite v. Kentucky State Bar Ass'n, 503 S.W.2d 498 (Ky. 1972); In re Nisbet, 296 S.W.2d 465 (Ky. 1956).
49 See, e.g., Cowden v. Kentucky Bar Ass'n, 997 S.W.2d 9 (Ky. 1999); Skaggs v. Kentucky Bar Ass'n, 954 S.W.2d 311 (Ky. 1997).
50 See, e.g., White v. Kentucky Bar Ass'n, 989 S.W.2d 573 (Ky. 1999); Greene v. Kentucky Bar Ass'n, 904 S.W.2d 233 (Ky. 1995).
Once an attorney has been suspended for disciplinary reasons and the Court undertakes to reinstate that attorney, more information should be provided than that the applicant has met the standards announced in *In re Stump*\(^{451}\) or *In re Cohen*.\(^{452}\) The Court needs to explain how the attorney has overcome the "prior adverse judgment"\(^{453}\) of professional misconduct, with specific references to the standards and the facts in the case. While the entire record may actually support the applicant's reinstatement, those reading the opinion are not familiar with the record. The Court needs to provide enough information to convince a public increasingly wary of lawyers and the legal system that the applicant has earned reinstatement.

New SCR 2.300 provides an easy checklist for the Board and the Court to use when drafting reports and opinions. By providing more detailed information about an applicant's rehabilitation, the Court can engender more confidence in Kentucky's lawyer regulatory system.

\(^{451}\) 114 S.W.2d 1094 (Ky. 1938).
\(^{452}\) 401 S.W.2d 54 (Ky. 1966).
\(^{453}\) KY. SUP. CT. R. 2.300(7).
ADMINISTRATIVE ADJUDICATION IN KENTUCKY:
ETHICS AND UNAUTHORIZED PRACTICE CONSIDERATIONS

by Richard H. Underwood

I. INTRODUCTION

This article is an extended version of a presentation I made at a training course for hearing officers sponsored by the Office of the Attorney General, Division of Administrative Hearings. In my original presentation, I was asked to focus on the ethics of the administrative adjudicator. I was asked to answer some specific questions, which I will include here for the reader's benefit. In this more complete treatment, I would also like to discuss the ethics of lawyers and other representatives appearing before administrative agencies.

The Kentucky Courts had begun to "judicialize" the administrative hearing process in the early 1970's, but it was not until 1996 that Kentucky put into effect a general administrative hearing procedures act outlining "standardized minimum procedural protections." This important development

1 J.D., The Ohio State University; Spears-Gilbert Professor of Law, University of Kentucky College of Law; Former Chairman, Kentucky Bar Association Ethics Committee (1984-1998); Former Chairman, Kentucky Bar Association Unauthorized Practice Committee (1984-1996); Former Chairman, Kentucky Bar Association Model Rules Committee. The author would like to thank Professor John Rogers for commenting on an early draft of this article, and to thank Dean Vestal for providing the author with a Summer research grant.


4 See, e.g., Kaelin v. City of Louisville, 643 S.W.2d 590 (Ky. 1971) (parties in an administrative proceeding must have an opportunity to examine and present evidence, and cross-examine witnesses); Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298 (Ky. 1972) (an administrative decision must be based on "substantial evidence"); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973) (an agency decision must be based on legally competent evidence). The notion that hearing officers and agency lawyers perform judicial or adjudicatory functions that entitle them to absolute immunity was recognized in Butz v. Economou, 438 U.S. 478 (1978). See also Watts v. Burkhart, 978 F.2d 269, 273 (6th Cir. 1992) ("state officials subject to restraints comparable to those imposed by the Administrative Procedure Act and performing adjudicatory functions in resolving potentially heated controversies are entitled to absolute immunity from damages liability for their judicial acts").


II. THE ETHICS OF THE ADJUDICATOR

A. Institutional Bias

Claims of conflict of interest or unethical conduct on the part of the adjudicator or hearing officer are usually couched in terms of bias.8 Before addressing the subjects of personal bias and disqualification of the individual hearing officer, some mention should be made of institutional or structural bias.9

Administrative officials work for the executive branch of government, and their administrative work may involve legislation, rule-making, prosecution, or quasi-judicial adjudication.10 Needless to say, the degree of "fairness" required may vary according to the type of decision being made by or within the agency.11 When the proceeding is quasi-judicial, there will be a natural tendency to draw an analogy between the administrative decision-maker and a judge.12 However, the analogy is not exact.13 We cloister our judges. Judges are supposed to be apolitical and detached. Can the same be said of administrative adjudicators?14

Some administrative adjudicators are elected officials whose positions also involve lawmaking, rule-making and executive functions. Investigatory, prosecutorial and quasi-judicial functions are often combined in the same agency.15 In the majority of states, the traditional model for adjudication has been the agency staff system in which the adjudicator is an employee of the agency. The adjudicator's rulings are recommendations subject to review and modification by the agency.16 Proceedings may be more inquisitorial than might

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7 Presentations made during the Attorney General's training course for hearing officers included discussions of professionalism, discipline and order in the hearing, and ethics, as well as updates in the law of evidence. See supra note 2 and accompanying text.
8 See generally ALFRED AMAN, JR. & WILLIAM MAYTON, ADMINISTRATIVE LAW § 8.5.6 (1993) (discussing personal bias and prejudgment) [hereinafter AMAN].
9 The terms "institutional bias" and "structural bias" are used by Alfred Aman, Jr. & William Mayton. See AMAN, supra note 8, § 8.5.5. See also RICHARD FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, § 30.8.1 (1996) [hereinafter FLAMM].
10 See generally AMAN, supra note 8, § 15.1 (Administrative Agencies and the Executive Branch - Introduction).
11 Compare AMAN, supra note 8, § 8.1 (Overview of Formal Agency Adjudication) with AMAN, supra note 8, § 9.1 (Overview of Informal Agency Adjudication). See also AMAN, supra note 8, § 7.6.4 (Post-Goldberg: The Emergence of Alternatives to Trial-Type Procedures) (considering due process requirements of various agency actions).
12 See, e.g., AMAN, supra note 8, § 8.5.2 (The Administrative Law Judge). See also AMAN, supra note 8, § 8.5.5 (citing Withrow v. Larkin, 421 U.S. 35 (1975), wherein Justice White compared administrative processes [presided over by agency decision-makers] to criminal processes [presided over by judges]).
13 See, e.g., AMAN, supra note 8, § 8.1.
14 See generally AMAN, supra note 8, §§ 8.1 and 8.5.5.
15 See AMAN, supra note 8, § 8.5.4.
16 See AMAN, supra note 8, § 8.1.
be the case in judicial proceedings. Agencies have statutory mandates and goals, and the adjudicator or hearing officer will presumably be expected to develop the record in such a way as will carry out the statutory mandate.\textsuperscript{17} Finally, "both of the traditional justifications for administrative adjudications - administrative expertise and the avoidance of the cumbersome machinery of a court trial - necessarily imply that administrative adjudicators will possess a certain degree of prior knowledge and consequent prejudgment of matters of law and policy."\textsuperscript{18}

"[T]he case law generally rejects the proposition that a combination of functions in one agency necessarily creates an unconstitutional risk of bias, or that such a combination automatically constitutes a denial of due process such as to warrant disqualification of the involved administrative adjudicator."\textsuperscript{19} On the other hand, when functions are combined in a single individual, the case for disqualification for "unfairness" or bias is stronger.\textsuperscript{20} How can an administrative adjudicator deal fairly with a party or parties if he or she has performed other functions - investigatory or prosecutorial - in the same matter?\textsuperscript{21} As we shall see, the federal APA and Kentucky APA recognize and deal with this problem by requiring a separation of functions within the agency.\textsuperscript{22}

To deal with the perception of institutional or structural bias (when functions are combined within the same agency), some states have moved away from an agency staff model to a central panel model, in which an independent managing agency is created to handle administrative hearings.\textsuperscript{23} Separating the adjudicator (administrative law judge or hearing officer) from the agency makes the process appear fairer and more objective.\textsuperscript{24} However, there are costs, which

\textsuperscript{18} FLAMM, supra note 9, § 30.5.5, at 945-46 (citing Wagner v. Jackson Cty. Bd. of Zoning Adj., 857 S.W.2d 285, 289 (Mo. App. 1993) and Bougham v. Bd. of Engineering Examiners, 611 P.2d 670 (Or. Ct. App. 1980)).
\textsuperscript{20} See, e.g., Grolier, Inc. v. F.T.C., 615 F.2d 1215 (9th Cir. 1980), appealed after remand, 699 F.2d 983 (9th Cir. 1983), cert. denied, 464 U.S. 891 (1983) (precluding ALJs from hearing a case if they had actually performed investigatory and prosecutorial functions in the same or factually related cases).
\textsuperscript{21} See id.
\textsuperscript{22} See generally FLAMM, supra note 9, § 30.8.3.
\textsuperscript{24} See AMAN, supra note 8, § 8.5.2.
may include a loss of the "expertise" previously alluded to. Again, this is all part of the movement to further "judicialize" the administrative process.

In Kentucky, KRS Chapter 13B created a Division of Administrative Hearings to provide a limited number of separately housed and independent hearing officers who can be used by agencies. This looks very much like a small central panel. It will be interesting to see if this panel grows and replaces other agency employed hearing officers in the future. Some agencies, like the Natural Resources and Environmental Cabinet, the Cabinet for Human Resources, and the Department of Worker's Claims, have their own "cluster" of hearing officers. KRS 13B.030(2) also authorizes agencies to employ private attorneys to serve as hearing officers.

B. Individual Bias

It is probably fair to say that in the absence of statutory guidance some courts have been reluctant to disqualify administrative adjudicators or to set aside their decisions on grounds of bias (1) merely because the administrative adjudicator participated in a matter in a non-adjudicative capacity, (2) merely because the administrative adjudicator held views on particular issues of law or public policy, or (3) merely because he or she developed or expressed opinions based on experience. It will be noted later that there has also been some reluctance to apply the strict standards contained in the ABA Code of Judicial Conduct to all administrative adjudicators. The standards applied by judges in disqualifying administrative adjudicators have not been uniform, and have varied

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25 For example: "[A]gency adjudications are expected to be steeped in the complexities of their regulatory fields. They are expected to have acquired substantial experience with both the law in their area and the ranges of factual situations to which it applies." AMAN, supra note 8, § 8.1.
28 See Durant, supra note 6, at 9.
29 "States with centralized administrative law judge or hearing officer divisions are in the minority; various states simply have hearing officers associated with each agency. Kentucky has followed a middle ground in which there are clusters of hearing officers." Durant, supra note 6, at 9 [citations omitted].
30 See Durant, supra note 6, at 9.
31 Id. This suggests that there is at least a preference for lawyer hearing officers. See infra Part IV.A.
32 Part of the reluctance to disqualify may arise from the fact that administrative adjudicators may be difficult to replace because of limited staffing and the need for specific expertise. In some contexts the reluctance may be based on the fact that the adjudicator will be a part-timer who makes his living from other work in the community and who could not or would not serve if every "connection" to the agency or to outside pursuits could be deemed disqualifying. See FLAMM, supra note 9, § 30.1, at 928. See also the limits on a hearing officer's practice of law, infra note 92 and accompanying text.
33 See discussion infra Part I.D.
from a demand that the moving party prove actual bias,\textsuperscript{34} to a requirement of proof that the risk of actual bias is great, to a showing of "appearance of bias."\textsuperscript{35}

In Kentucky, in administrative proceedings not exempted from the provisions of Chapter 13B,\textsuperscript{36} one of the grounds for disqualification of a hearing officer is that the hearing officer has "a personal bias toward any party to a proceeding which would cause a prejudgment on the outcome of the proceeding."\textsuperscript{37} Fortunately, this general statement is supplemented by other statutory grounds.\textsuperscript{38}

C. Statutory Grounds for Disqualification

It was noted previously that the courts have allowed functions to be combined in an agency so long as an "internal" separation of functions is maintained.\textsuperscript{39} Along these lines, KRS 13B.040 [Qualifications of hearing officer] provides in pertinent part:

(1) A person who has served as an investigator or prosecutor in an administrative hearing or in its preadjudicative stage shall not serve as hearing officer or assist or advise a hearing officer in the same proceeding. This shall not be construed as preventing a person who has participated as a hearing officer in a determination of probable cause or other equivalent preliminary determination from serving as a hearing officer in the same proceeding.\textsuperscript{40}

It should be noted that this Kentucky law, like its federal counterpart,\textsuperscript{41} is stricter than the standard applied in the constitutional "due process" cases.\textsuperscript{42}

\textsuperscript{34} See, e.g., AMAN, supra note 8, § 8.5.6. In rulemaking proceedings, a standard of "clear and convincing showing" is required to prove bias. See id. (citing Association of National Advertisers, Inc. v. F.T.C., 627 F.2d 1151, 1168-69 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980)).
\textsuperscript{35} See, e.g., AMAN, supra note 8, § 8.5.6. (stating "This standard [Cinderella] takes both actual fairness as well as the appearance of propriety into account.") (citing Cinderella Career & Finishing Schools, Inc. v. F.T.C., 425 F.2d 853 (D.C. Cir. 1970)).
\textsuperscript{36} For exemptions, see KY. REV. STAT. ANN. § 13B.020 (Michie 1996 & Supp. 2000).
\textsuperscript{37} KY. REV. STAT. ANN. § 13B.040 (b) (4) (Michie 1996 & Supp. 2000).
\textsuperscript{39} See supra note 19 and accompanying text.
\textsuperscript{40} KY. REV. STAT. ANN. § 13B.040 (1) (Michie 1996 & Supp. 2000).
\textsuperscript{41} 5 U.S.C. §§554(d) provides in pertinent part:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review ... except as witness or counsel in public proceedings. This subsection does not apply . . . (C) to the agency or a member or members of the body comprising the agency.

\textsuperscript{42} See Withrow v. Larkin, 421 U.S. 35, 58 (1975) (holding that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation . . . "). See also CHARLES KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 6.11 (2d ed. 1997) [hereinafter KOCH].
Other grounds of disqualification, and the procedures for disqualification, are set forth in KRS 13B.040 as follows:

(2)(a) A hearing officer, agency head, or member of an agency head who is serving as a hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot afford a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing officer, agency head, or member of the agency head by filing an affidavit, upon discovery of facts establishing grounds for a disqualification, stating the particular grounds upon which he claims that a fair and impartial hearing cannot be accorded. A request for the disqualification of a hearing officer shall be answered by the agency head within sixty (60) days of its filing. The request for disqualification and the disposition of the request shall be part of the official record of the proceeding. Requests for disqualification of a hearing officer shall be determined by the agency head. Requests for disqualification of a hearing officer who is a member of the agency head shall be determined by the majority of the remaining members of the agency head.

(b) Grounds for disqualification of a hearing officer shall include, but shall not be limited, to the following:

1. Serving as an investigator or prosecutor in the proceeding or the pre-adjudicative stages of the proceeding;

2. Participating in an *ex parte* communication which would prejudice the proceedings;

3. Having a pecuniary interest in the outcome of the proceeding; or

4. Having a personal bias toward any party to a proceeding which would cause a prejudgment on the outcome of the proceeding.

By the terms of the statute, these grounds are not exclusive, but there is little supplemental Kentucky caselaw. Presumably the practitioner could turn to secondary authority including the Code of Judicial Conduct, federal caselaw, and the law of sister states. What is, or is not, personal bias? What relational interests might provide a basis for disqualification? What is the standard under §

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43 KY. REV. STAT. ANN. § 13B.040 (2) (a), (b) (Michie Supp. 2000).
44 See MODEL CODE OF JUDICIAL CONDUCT (1990). See also infra notes 86-91 and accompanying text.
2(a) and §§ (b)? It does not look like an "appearance of impropriety" standard. It will not do, or does the movant have to provide concrete evidence of bias emanating from an extrajudicial source? Are there times when disqualification will be appropriate even though legally sufficient proof of actual bias has not been presented?

As noted previously, when functions are combined in an individual (as opposed to being combined in a single agency) the case for impropriety is strong. Even in jurisdictions that do not apply the Code of Judicial Conduct to administrative adjudicators, the claim of impropriety will be particularly strong if the individual adjudicator can be shown to possess prior knowledge of the facts to be determined, or personally investigated or initiated the investigation, or has a pecuniary interest in the outcome. Still, in the absence of the Code of Judicial Conduct, generalizations are hazardous. Courts being asked to disqualify an adjudicator may require a showing of "actual participation" in the case. That is, a court may be reluctant to infer a basis for disqualification from an individual's title or from an organizational wiring diagram.

Along these lines, one question I was asked just before my talk at the training session was whether an administrative agency may employ an in-house hearing officer who is also the agency's general counsel or a regular prosecutor? Under KRS 13B.040(2)(a) or (b) does he or she have to have actually participated as an investigator or prosecutor in the particular case? Are we to assume or presume bias, or does actual bias have to be established? Who bears the burden of proof on that? There is some language in the famous case Wong Yang Sung v. McGrath, suggesting that it is unrealistic to expect a prosecutor to be able to investigate and prosecute "like cases" one day, and then put on his hearing officer cap and fairly judge "like cases" the next day, and so on. This argument has some common sense appeal. But subsequent cases do not exactly take an expansive view of the need for disqualification under the APA. For example, in Au Yi Lau v. United States Immigration and Naturalization Service, it was held that the Chairman of the Board of Immigration Appeals did not participate improperly in the decision of a deportation matter although he was formerly employed as an attorney in the office of the INS General Counsel, although the General Counsel had supervisory responsibility over both the trial attorney who "prosecuted" the proceeding and the appellate counsel who presented to the Board the opposition of the INS to the petitioners' motions to reopen. The court reasoned that under §554(d) of the APA "investigative and

47 See FLAMM, supra note 9, § 30.84, at 962-63.
48 Id. at 963.
49 Id.
50 See generally id. at 963.
52 Id. at 45.
53 555 F.2d 1036 (1977).
54 See id. at 1042-43.
prosecuting personnel are precluded only from participating in the adjudication of cases in which they have actually performed such functions, and in 'factually related' cases.\footnote{55 Id. at 1043.} Unless he had actually personally supervised the INS attorneys who argued against the petitioners in the case, or had knowledge or familiarity with this or any other case arising out of the same transaction, he was not disqualified or participating improperly.\footnote{56 Id.}

Then there are procedural questions. The party seeking disqualification must seek it in a timely manner, "upon discovery of facts establishing grounds."\footnote{57 See FLAMM, supra note 9, § 30.7, at 956 (citing 5 U.S.C. § 556 (b) (1982)).} The quoted words should be read to mean "as soon as practicable after a party has reasonable cause to believe that such [grounds] exist."\footnote{58 See FLAMM, supra note 9, § 30.7, at 956.} Failure to make a timely motion will presumably be treated as a waiver.\footnote{59 See FLAMM, supra note 9, § 30.72, at 956; cf. KY. REV. STAT. ANN. § 13B.020 (6) (Michie 1996 & Supp. 2000); Gibson v. F.T.C., 682 F.2d 554 (1982), reh'g granted, 688 F.2d 840 (5th Cir. 1982) (waiver under the federal APA).} Presumably an appeal of a decision not to disqualify will have to await a final administrative adjudication.\footnote{60 See FLAMM, supra note 9, § 30.10.2, at 965.} On appeal, one assumes that it must be shown that there was an abuse of discretion in deciding the motion.\footnote{61 See AMAN, supra note 8, § 8.5.2, at 242.}

**D. Code of Judicial Conduct**

Ever since the rise of administrative law in the 1930s there have been efforts to "judicialize the process."\footnote{62 See generally AMAN, supra note 8, § 8.5.2, at 243.} It has already been noted that dissatisfaction with the combination of adjudicatory and prosecutorial functions in many agencies led to a greater separation for federal administrative law judges (ALJs) under the federal Administrative Procedure Act (APA).\footnote{63 See 438 U.S. 478, 513 (1978).} The APA ushered in the modern administrative hearing, which incorporated the essential elements of the judicial model.\footnote{64 Once again, since investigative and adjudicative responsibilities are frequently combined in a single agency in the administrative context (though not in a judicial context, where the Code of Judicial Conduct applies), it may be permissible for one who possesses personal knowledge of disputed evidentiary facts to sit in judgment. At least, this is so as a matter of constitutional due process. See Withrow v. Larkin, 421 U.S. 35 (1975).} That federal ALJs are perceived to be comparable to trial judges was recognized by the Supreme Court in *Butz v. Economou*.\footnote{65 See Karen Lewis, *Administrative Law Judges and The Code Of Judicial Conduct: A Need For Regulated Ethics*, 94 DICK. L. REV. 929, 938, 947 (1990) [hereinafter Lewis].} To the extent that the administrative law official is performing in a judicial or quasi-judicial role, should the Code of Judicial Conduct apply?\footnote{66 See generally AMAN, supra note 8, § 8.5.2, at 243.} Originally, the answer seemed to be "no," because administrative officials are operating under the authority of the executive, and therefore they are not judicial officers.\footnote{67 See Karen Lewis, *Administrative Law Judges and The Code Of Judicial Conduct: A Need For Regulated Ethics*, 94 DICK. L. REV. 929, 938, 947 (1990) [hereinafter Lewis].} Furthermore, their decisions are recommendations which
can be overturned by agency higher ups.\textsuperscript{68} So in some jurisdictions, efforts to apply the Code of Judicial Conduct directly were rejected.\textsuperscript{69} Other states applied the Code of Judicial Conduct by analogy, at least in some contexts.\textsuperscript{70} Perhaps sensing a need to foster public credibility in the administrative process, the ABA Standing Committee on Ethics and Professional Responsibility offered a proposed (1989-90) revision of the Code of Judicial Conduct containing the following footnote:

Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges.

This footnote is consistent with the views expressed in an earlier ABA opinion\textsuperscript{71} which noted that the applicability of the Code to the state administrative law process depends on all the facts and circumstances.\textsuperscript{72} State bar ethics opinions (and judicial ethics opinions) are consistent with this to the extent that they are "all over the boards."\textsuperscript{73}

In the past the Ethics Committee of the Kentucky Judiciary\textsuperscript{74} has taken the position that a lawyer serving as a hearing officer for an administrative body would not be serving as an officer of the judicial branch of government and would not be subject to the Code of Judicial Conduct.\textsuperscript{75} Following this logic, the Ethics Committee of the Kentucky Judiciary declined to issue an ethics opinion in response to a request from a hearing examiner for a city's human rights commission and referred the lawyer/examiner's question to the Kentucky Bar Association Ethics Committee.\textsuperscript{76} Our high court could apply the Code of Judicial Conduct by analogy when reviewing agency decisions,\textsuperscript{77} or leave it to the legislature or agency decision makers to either adopt or reject the Code of Judicial Conduct\textsuperscript{78} or develop similar rules consistent with powers granted by

\textsuperscript{68} See id. at 947.
\textsuperscript{69} See generally Levinson, supra note 3, at 256. See also Lewis, supra note 66, at 954.
\textsuperscript{70} See Lewis, supra note 67, at 936.
\textsuperscript{72} ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1522 (1986) (holding that federal ALJs are "judges" and are covered by the Code of Judicial Conduct). See Levinson, supra note 3, at 255.
\textsuperscript{74} Kentucky's Supreme Court Rules authorize an Ethics Committee of the Kentucky Judiciary to render formal and informal advisory opinions. See SUP. CT. R. 4.310, KY. R. ANN. Vol. 2. (Michie Supp. 2001).
\textsuperscript{76} See Ky. Bar Ass'n Ethics Committee Op. E-398 (1997). All of the Kentucky Ethics, Judicial Ethics, and Unauthorized Practice opinions cited in this article are collected in full text in KENTUCKY LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (Todd Eberle and Richard Underwood, eds., 2d ed. 1999).
\textsuperscript{77} See Levinson, supra note 3, at 226.
\textsuperscript{78} Id. at 230.
enabling statutes.\textsuperscript{79} The chief ALJ or hearing officer in a central panel or cluster might have the authority to adopt the Code of Judicial Conduct in whole or in part.\textsuperscript{80} It seems unlikely that the Court would attempt to impose the Code of Judicial Conduct directly on any administrative body because of the concept of separation of powers or because of considerations of comity.\textsuperscript{81}

In Kentucky, some administrative adjudicators are calling for the direct application of the Code of Judicial Conduct, or a derivative of the Code, to at least some types of hearing officers. I attach a copy of a non-final draft of a "Proposed Code of Judicial Conduct for Hearing Officers" developed by the Ethics Committee of the Kentucky Association of Administrative Adjudicators.\textsuperscript{82} These rules were based in part on the Kentucky Code of Judicial Conduct,\textsuperscript{83} the ABA-NCALJ Model Canons, and the Canons of the National Association of Administrative Law Judges.\textsuperscript{84}

I think that the adoption of such a proposed Code - at least Canons 1 through 3, would be a positive development, at least in the context of Chapter 13B proceedings. Does the Code add anything that is not already present in KRS 13B.040\textsuperscript{85} [Qualifications of hearing officer]? The answer is clearly - "Yes."

Consider all of the questions I raised but did not answer, with respect to KRS 13B.040 regarding personal bias, personal knowledge of facts, relational interests, and so forth. The "Proposed Code of Judicial Conduct for Hearing Officers," would provide some answers to these questions.\textsuperscript{86} It provides for disqualification when the hearing officer's impartiality might reasonably be questioned\textsuperscript{87} in instances when: (1) the hearing officer has personal bias or prejudice or personal knowledge of disputed evidentiary facts;\textsuperscript{88} (2) the hearing officer served as a lawyer or representative in the matter in controversy;\textsuperscript{89} (3) the

\textsuperscript{79} Id.
\textsuperscript{80} Id. at 235.
\textsuperscript{81} Id. at 229 (discussing state and federal constitutional limitations on judicial and legislative powers).
\textsuperscript{82} See Appendix.
\textsuperscript{84} MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES, available at <http://www.naalj.com/my%20site/mejcalf.htm>.
\textsuperscript{86} See Appendix.
\textsuperscript{87} See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), reprinted in Appendix; cf. KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned ... .")
\textsuperscript{88} See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (a) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), reprinted in Appendix; cf. KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1) (a), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "[A judge shall disqualify himself if the] judge has ... a personal bias or prejudice ... or personal knowledge of disputed evidentiary facts concerning the proceeding."). See also MODEL CODE OF ETHICS § III (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm> (stating: "Personal knowledge of the facts in a case is an appropriate ground for disqualification of the hearing official.").
\textsuperscript{89} See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (b) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), reprinted in Appendix; cf. KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1) (b), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "[A judge
hearing officer or a close relative has an interest in the subject matter or controversy;\textsuperscript{90} or, (4) the hearing officer or a close relative is a party to the proceeding or appears as a lawyer in the proceeding.\textsuperscript{91} Given the lack of uniformity in the case law, it would be helpful if we adopted some clear rules like those contained in Canon 3, so that we could avoid litigating all of these issues on a subjective and \textit{ad hoc} basis.

Still, some amendments and deletions to the Proposed Code may be advisable. Is the definition of "hearing officer" too broad? There are hearing officers and then there are hearing officers. Some are exempt from KRS 13B.\textsuperscript{92} I do not think that it is necessary or appropriate to apply the standards of the Code of Judicial Conduct to all administrative adjudicators. However, that may not be the intent of the drafters of the Code. Perhaps this is a Code only for KRS 13B hearing officers. One also wonders how you deal with agency heads and other officials who have special and multiple roles.\textsuperscript{93} Of course, this is a voluntary code at this point. The individual agencies will presumably have something to say about its applicability.

I also wonder about the need for and practicality of Canons 4 and 5 in the administrative context.\textsuperscript{94} I note that the Model Code of Ethics of the National Association of Hearing Officials does not attempt to incorporate the elaborate

\textsuperscript{90} See \textit{Code of Judicial Conduct for Hearing Officers} § 3 E (1) (c) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), \textit{reprinted in Appendix}; cf. \textit{Kentucky Code of Judicial Conduct}, Sup. Ct. R. 4.300, Canon 3 E (1) (c), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "[A judge shall disqualify himself if the] judge . . . or the judge's [close relative] has . . . more than a de minimis interest . . . that could be substantially affected by the proceeding.").


\textsuperscript{93} Cf. Administrative Procedure Act, 5 U.S.C. §554 (d) (2) (C), \textit{supra} note 41.

provisions of the Code of Judicial Conduct relating to civic, political, and business activities.95

E. Ex Parte Communications

The question of ex parte communications seems to come up frequently. Apparently some have been so bold as to suggest that "ex parte contacts in Kentucky are, or should be, the 'bread and butter' of administrative proceedings to be tolerated with a knowing wink."96 However, this cynical proposition was rejected with considerable judicial indignation in Louisville Gas and Electric Company v. Commonwealth.97

The right to a fair hearing includes the notion that one has to have a reasonable opportunity to know the claims and contentions of the opposing party and to meet them.98 Therefore, we have the fundamental rule regarding the "exclusivity of the record."99 The administrative tribunal should take nothing into consideration that has not been introduced in the record.100 The rule that the administrative adjudicator should not communicate ex parte with any party or its representatives concerning the merits, except upon notice to all parties, is a corollary to all of this.101 Ex parte communications can lead to the disqualification of the administrative decision maker,102 and may, in some circumstances, result in a reversal of a decision rendered by an administrative tribunal.103 But administrative adjudicators are frequently exposed to unsolicited

97 See id.
98 See Flamm, supra note 9, § 30.5.7.1, at 949.
99 See Amam, supra note 8, § 8.5.3.
100 See Flamm, supra note 9, § 30.5.7.1, at 949.
101 See Ky. Bar Ass'n Ethics Committee Op. E-402 (1997), reprinted in Richard Underwood, Advisory Ethics Opinions, KY. BENCH & BAR 52, 56, 58-59 (Spring 1997). For good general references regarding the rules governing ex parte communications and the procedures followed when one must deal with violations of the rules, see Flamm, supra note 9, §30.5.7. See also Leslie Abramson, The Judicial Ethics of Ex Parte and Other Communications, 37 Hous. L. Rev. 1343 (2000); Cornelius Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 Hary. L. Rev. 233 (1962); Note, Ex Parte Contacts Under the Constitution and Administrative Procedure Act, 80 Colum. L. Rev. 379 (1980). See also National Association of Hearing Officers Model Code of Ethics:

Ex Parte Communication: 1. Hearing officials should have a strong working knowledge of their jurisdiction's definitions and restrictions on ex parte contact. Generally, "ex parte" refers to communication between a hearing official and fewer than all parties to an administrative hearing. 2. Hearing officials should not receive information from any party without sharing that information with all parties.

ex parte communications, and not every such contact should be disqualifying.\textsuperscript{104} Ordinarily, reversible error will only be found where the complaining party has been materially prejudiced.\textsuperscript{105} On the other hand, Flamm contends that it is appropriate to place the burden of demonstrating that a prohibited communication was \textit{not} prejudicial on the challenged administrator.\textsuperscript{106}  

KRS 13B.100[Prohibited communications], which prohibits \textit{ex parte} communications, provides:

(1) Unless required for the disposition of ex parte matters specifically authorized by statute, a hearing officer shall not communicate off the record with any party to the hearing or any other person who has a direct or indirect interest in the outcome of the hearing, concerning any substantive issue, while the proceeding is pending.

(2) The prohibition stated in subsection (1) shall not apply to:

(a) Communication with other agency staff, if the communication is not an ex parte communication received by staff; and

(b) Communication among members of a collegial body or panel which by law is serving as a hearing officer.

(3) If an ex parte communication occurs, the hearing officer shall note the occurrence for the record, and he shall place in the record a copy of the communication, if it was written, or a memorandum of the substance of the communication, if it was oral.\textsuperscript{107}

All of this may seem simple and familiar to the practitioner. On the other hand, it has been suggested that the definition of prohibited \textit{ex parte} contact under the Kentucky caselaw may be broader than that contained in either the federal APA or KRS 13B - the warning being "if there is any doubt, the matter should be treated as a prohibited \textit{ex parte} contact."\textsuperscript{108}  

As Chairman of the KBA Ethics Committee, and as a Professor of Law, I have encountered a problem with judges who call experts to obtain assistance without notifying all parties in the matter. This may get judges and administrative adjudicators in trouble. The Kentucky Code of Judicial Conduct

\textsuperscript{104} See Flamm, supra note 9, § 30.5.7.3, at 952.
\textsuperscript{105} See id.
\textsuperscript{106} See Flamm, supra note 9 § 30.5.7.3, at 952. On the other hand, we do not ordinarily require a person or party to prove a negative.
\textsuperscript{108} KENTUCKY ADMINISTRATIVE LAW, supra note 6, §§ 6.30-6.31 (citing Louisville Gas and Elec. Co. v. Commonwealth, 862 S.W.2d 897, 900-01 (Ky. Ct. App. 1993)).
provides that "a judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge."\(^{109}\) However, the ABA versions of the Code of Judicial Conduct require that the judge give "notice to the parties of the person consulted and the substance of the advice, and afford . . . the parties reasonable opportunity to respond."\(^{110}\) I have always declined to opine unless the ABA procedures are followed. Certainly, there should be no ex parte contacts with experts regarding factual matters or matters that are not purely questions of law.\(^{111}\)

Just prior to my presentation\(^{112}\) I was asked a question that seems to be related to the problem of ex parte communication or institutional bias or both. Specifically, I was asked whether the executive director of an administrative agency may participate, or even be present, during the "Board's" consideration of a disciplinary matter while in executive session. What are the risks here — combination of functions and bias, or ex parte communications, or both?\(^{113}\) If the person is not a member of the body or panel that is serving as the hearing officer, what is he or she doing there, and are comments that he or she might make prohibited by KRS 13B.100?\(^{114}\) Is this just a way for an "interested party" to influence the decision maker? Certainly there is an appearance of impropriety.\(^{115}\) Perhaps I am missing something, but the scenario does not pass my "smell test." When I made similar comments at the training session,\(^{116}\) I received no response from the audience, but mine may not be the last word on this practice.

F. Confidentiality


\(^{110}\) Model Code of Judicial Conduct Canon 3 B (7) (b) (1990). It is not clear why the Kentucky version does not explicitly mention these procedures. Perhaps the draftpersons were of the opinion that the judge should be able to get the "law," as opposed to other forms of expertise wherever he or she can find it, without notice to the parties. But as Professor Abramson points out, the Kentucky version of the Code of Judicial Conduct deprives the parties of any opportunity to cross-examine the expert in order to bring out the expert's biases or prejudices. See Leslie Abramson, The Judicial Ethics of Ex Parte and Other Communications, 37 Hous. L. Rev. 1343, 1372-73, n.112 (2000).

\(^{111}\) See National Association of Hearing Officers Model Code of Ethics: "If hearing officials are authorized to consult with an expert, the nature of the consultation and the substance of the expert's advice must be disclosed to all parties. Hearing officials should also give all parties an opportunity to respond." Model Code of Ethics § V (3) (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>.

\(^{112}\) See Underwood, supra note 2.

\(^{113}\) See AMAN, supra note 8, § 8.5.4, at 248.

\(^{114}\) See KY. REV. STAT. ANN. § 13B.100 (Michie 1996).

\(^{115}\) See Louisville Gas and Elec. Co. v. Commonwealth, 862 S.W.2d 897, 900 (Ky. Ct. App. 1993) (expressing at least some concern with "protecting the integrity of the administrative process, which includes the question of the appearance of impropriety . . . "); cf. National Association of Hearing Officers Model Code of Ethics: "[S]upervisors may provide consultation to hearing officials, except as prohibited by law, but may not alter the hearing officials' decisions or substitute their judgment for that of the hearing officials." Model Code of Ethics § IV (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>. See also Section V(2), Ex Parte Communication: "Hearing officials should not receive information from any party without sharing that information with all parties."

\(^{116}\) See Underwood, supra note 2.
It might be helpful if any Proposed Code for Hearing Officers also addressed the issue of confidentiality. For example, Kentucky Rule of Professional Conduct (KRPC) 1.11(b) and (c) recognize that a lawyer serving as a public officer or employee may acquire "confidential government information" - information about a person, obtained under government authority - which ought not be disclosed.117 In this regard, the National Association of Hearing Officers Model Code, Section IX contains the following useful language:

Confidentiality

1. Hearing officials should not disclose confidential or private information obtained by reason of official position or authority except as required by law.

2. Hearing officials should never seek to use such confidential information to further their personal interests....

4. Hearing officials should avoid ex parte communications with anyone (including family, friends, and agency staff and associates) unless authorized by statute or agency regulations. However, hearing officials may in confidence discuss cases with other hearing officials.118

G. The Revolving Door - Negotiating for Private Employment

Most practitioners are familiar with the problem of the "revolving door." Lawyers in Washington, and to a lesser extent in Frankfort, go in and out of government service in administrative agencies, lobbying or appearing before their former agencies. Conflicts of interest and other abuses associated with the revolving door are addressed in Kentucky Rules of Professional Conduct 1.11 [Successive government and private employment].120 To the extent that a lawyer working for an agency is also an adjudicator, the lawyer should also consider KRPC 1.12, which deals with the conflicts of former judges and arbitrators.121 Perhaps the most overlooked provision of the latter is KRPC 1.12(b), which provides that a lawyer serving as a judge or arbitrator shall not negotiate for private employment with any party or attorney for a party appearing before him in a matter. I do not know whether this scenario has presented any

117 See KY. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (b), (c), Sup. Ct. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001).
119 See generally KOCH, supra note 42, § 6.20 (2), at 340-42; § 6.22 (3) (e), at 348-49.
problems for Kentucky ALJ’s or hearing officers. However, I am reminded of a
case in Kentucky in which a confident lawyer waited a very long time for
findings of fact and conclusions of law in a case that he was sure he was going to
win. When he finally received them he was shocked at the outcome, and even
more shocked to discover that the judge had resigned the next day after issuing
them to take a job with the winning firm. I do not know if there was any fallout
from this peculiar set of "circumstances."

III. THE ETHICS OF THE REPRESENTATIVE

A. The ABA Model Code and Model Rules

The provisions of the Model Code of Professional Responsibility apply
to lawyers appearing before administrative agencies in adjudicatory
proceedings. The definitions section of the Model Code defines "tribunal" as
including "all courts and all other adjudicatory bodies." Furthermore, EC 7-15
provides that "[w]here the applicable rules of the agency impose specific
obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer
has a legitimate basis for challenging the validity thereof." Prior to the
adoption of the Kentucky Rules of Professional Conduct, Kentucky lawyers were
disciplined under the Code for misconduct in administrative proceedings.

Now Kentucky has a version of the Model Rules. The Rules apply to
lawyers appearing before administrative agencies, although it takes some effort
to find the controlling language. Unfortunately, the definitions section of the
Rules does not include a definition of "tribunal." However, Rule 3.9 provides
that a lawyer appearing as an advocate “before a legislative or administrative
tribunal in a nonadjudicative proceeding” must still follow “the provisions of
Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5." So it would seem to
follow that a lawyer appearing as an advocate in an adjudicative, trial-type,
administrative proceeding would have all of the obligations under the Rules as a
lawyer appearing before a court. EC 7-15 is restated in Model Rule 3.4(c): "A
lawyer shall not: (c) knowingly disobey an obligation under the rules of a

122 See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary
125 See, e.g., Ky. Bar Ass'n v. Nall, 599 S.W.2d 899 (Ky. 1980) (a referral to disciplinary authorities
led to discipline).
126 The Kentucky Rules of Professional conduct became effective January 1, 1990. See KENTUCKY
127 See e.g., KENTUCKY RULES OF PROFESSIONAL CONDUCT Rule 1.11 cmt. 2, SUP. CT. R. 3.130, KY.
RULES ANN. Vol. 2 (Michie 2001) ("A lawyer representing a government agency . . . is subject to
the Rules of Professional Conduct . . . .").
128 See KENTUCKY RULES OF PROFESSIONAL CONDUCT, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2
(Michie 2001).
129 KENTUCKY RULES OF PROFESSIONAL CONDUCT Rule 3.9, SUP. CT. R. 3.130, KY. RULES ANN.
130 See Levinson, supra note 3, at 226.
tribunal except for an open refusal based on an assertion that no valid obligation exist. For its part, the Restatement of Law Governing Lawyers (Third) provides in pertinent part:

A lawyer representing a client before a legislative or administrative agency . . . (2) must comply with applicable law and regulations governing such representations; and (3) except as applicable law otherwise provides: (a) in an adjudicative proceeding before a government agency or involving an agency as a participant, has the legal rights and responsibilities of an advocate in a proceeding before a judicial tribunal . . .

In summary, the Kentucky Rules of Professional Conduct apply to lawyers practicing before state administrative agencies in adjudicative proceedings, and the rules of the agency may also impose additional standards or obligations to the tribunal through Rule 3.4(c).

One controversial issue in federal administrative practice has to do with the power of a federal agency to hold a lawyer to regulatory duties that appear to conflict with the ethics rules, for example, Rule 1.6 (Confidentiality of Information). As we shall see below, the power of a Kentucky agency to impose additional obligations in conflict with the Kentucky Rules of Professional Conduct would be limited by the doctrine of separation of powers.

C. Enforcement

Before addressing the problem of enforcement of the Rules of Professional Conduct, I would like to point out some distinctions between the power to admit or "disbar" persons to practice before an agency, the power to discipline an advocate, and the power to exclude an advocate as a means of punishing misconduct or controlling the proceedings. This gets confusing because the rules are different in the state and federal systems. We also need to address the question of whether administrative adjudicators have the equivalent of the judicial contempt power.

Regarding admission of attorneys to practice, in Kentucky the license to practice law also admits the lawyer to practice before state administrative agencies. However, the rules of the agency may also impose additional standards or obligations to the tribunal through Rule 3.4(c).

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134 See Model Rules of Professional Conduct Rule 1.6 (2000). See also Nancy Combs, Understanding Kay Scholar: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer, 82 Cal. L. Rev. 663-716 (1993), cited in Charles Koch, Jr., Administrative Law and Practice § 6.22 (1) (2d ed. 1997). I am not as confident as the author of this comment that federal agencies do not have some power here. If the agency is acting pursuant to its statutory authority, then it seems to me that the federal law trumps state ethics rules, notwithstanding the curious language of Comment [20] to Model Rule 1.6: "The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." Model Rules of Professional Conduct Rule 1.6 cmt. 20 (2000).
135 See discussion infra part IV.C.
tribunals. Under federal law, the lawyer's Kentucky license also automatically admits the lawyer to practice before federal agencies, except for the Patent and Trademark Office which may impose its own standards for attorney admission. Regarding admission of non-lawyers, Kentucky agencies have no power to admit laymen. In marked contrast, federal agencies do have, and in fact exercise, the power to admit non-lawyers according to the agency's own admissions criteria.

Federal agencies may also have the statutory authority to suspend lawyers from practice before them. Technically speaking, a Kentucky administrative adjudicator has no power to suspend or "disbar" a lawyer. However, a hearing officer has the authority and duty to maintain order during the prehearing and hearing stages of the adjudication. While a hearing officer may not have the contempt power, a hearing officer may exclude counsel for disruptive behavior, may disqualify counsel for conflicts of

136 See Levinson, supra note 3, at 221.
137 See 5 U.S.C. § 500 (a) (2), (b) (1994).
139 See infra text accompanying notes 167-68.
141 See Koch, supra note 41, § 6.23 (2). See also Levinson, supra note 3, at 247 (citing Polydoroff v. Interstate Commerce Comm'n, 773 F.2d 372 (D.C. Cir. 1985) (upholding power of the Interstate Commerce Commission to suspend two practitioners for six months for violation of the canons of ethics contained in the ICC's rules)); Jaskiewicz v. Mossinghoff, 822 F.2d 1053 (Fed. Cir. 1987) (upholding the Patent and Trademark Office's suspension of an attorney for filing misleading information and other "inequitable conduct").
142 Consider Ky. Bar Ass'n Ethics Committee Op. E-32 (1967), in which the Kentucky Bar Association Ethics Committee reasoned that a judge may dispose of unethical conduct through the contempt power, but that "[d]isciplinary actions relating to a reprimand, suspension, or disbarment rest solely and exclusively in the Court of Appeals [now the Supreme Court]." Id. (citing In re Wehrman, 327 S.W.2d 743 (Ky. 1959). That much of the opinion makes sense. However, the Committee went on to opine that a judge of a "minor court" had no right to pass judgment on the ethical conduct of a member of the bar, except through contempt proceedings. That strikes me as a questionable proposition at best. Judges may take disciplinary actions against lawyers who practice before them, including reprimands, sanctions, and even exclusion, and may refer unethical conduct to the Bar Counsel. Compare Kentucky Code of Judicial Conduct, Sup. Ct. R. 4.300, Canon 3D (1) – (3), Ky. Rules Ann. Vol. 2 (Michie 2001) (providing that a judge who knows of substantial likelihood that a judge or attorney has violated applicable rules of the Kentucky Code of Judicial Conduct "should inform the appropriate authority.") with Kentucky Code of Judicial Conduct, Sup. Ct. R. 4.300, Comment to Canon 3D, Ky. Rules Ann. Vol. 2 (Michie 2001) (stating "appropriate action may include direct communication with the judge or lawyer . . . ."). The quibble factor in KBA E-32 seems to be over what we mean when we use the word "discipline."
145 The power to punish for contempt is "inherent in every court." See Underhill v. Murphy, 78 S.W. 482, 484 (Ky. 1904). However, an administrative hearing officer is not, strictly speaking, a judicial officer. Some state and federal courts have concluded that the contempt power may only be exercised by a judicial court. See Levinson, supra note 3, at 247-48, collecting the conflicting precedents; cf. Ky. Rev. Stat. Ann. § 13B.080 (3) (Michie 1996) (stating that a subpoena from a hearing officer may be enforced by an application to the Circuit Court for an order for compliance; noncompliance with such an order may then be treated as a contempt of court). See also Levinson, supra note 3, at 239.
146 See Levinson, supra note 3, at 242-44.
interest, and may also treat noncompliance with orders and disruptive behavior as grounds for a default order, resulting in a grant or denial of relief. Furthermore, the hearing officer can and should refer instances of unethical behavior to bar counsel.

It is assumed that most hearing officers would prefer to address misbehavior with warnings and referrals to the state bar. More serious and immediate action will require an adequate record. Furthermore, the Kentucky hearing officer has a limited number of options. Exclusion and default are drastic remedies. If counsel is excluded, the hearing officer may have to give the represented party a reasonable time to obtain substitute counsel.

IV. UNAUTHORIZED PRACTICE ISSUES

A. Lay ALJs and Hearing Officers

One of the questions I was asked to address at the training conference was whether hearing officers must be admitted to the bar. I assume that in most states, including Kentucky, the answer is no. Constitutional "due process" does not require ALJs or hearing officers to be admitted to the bar. That should not be surprising given the breadth of the term "hearing officer." Think of all the boards and commissions that perform quasi-judicial activities without the benefit of lawyer decision makers. Also, I refer the reader to my least favorite unauthorized practice opinion, KBA U-34 (1981). That curious opinion came out of the university setting, and held that non-lawyer students and faculty may not represent others in university grievance and disciplinary proceedings.

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147 Id. The power to disqualify counsel is thought to be inherent in every tribunal, and is implied by statutes that prohibit conflicts of interest, [e.g. Rules of Professional Conduct] and requirements of due process. Id. (citing Brown v. District of Columbia Board of Zoning Adjustment, 413 A.2d 1276 (D.C. App. 1980)).
150 See Levinson, supra note 3, at 243-44.
151 See Levinson, supra note 3, at 260 (citing, among other cases and materials, Schweiker v. McClure, 456 U.S. 188 (1982)).
152 See Code of Judicial Conduct for Hearing Officers (Ky. Ass'n of Admin. Adjudicators, Proposed 2001) (stating: "'Hearing officer' includes any person to whom the authority to conduct an administrative adjudication has been delegated by the administrative agency or by statute.") (emphasis added), reprinted in Appendix.
153 See e.g., Kentucky's state licensing boards, local planning and zoning boards, etc.
155 See id. This opinion was in direct conflict with law school honor code rules, which allowed students to represent other students in proceedings.
However, the opinion also seems to assume that a non-lawyer might be the hearing officer. Specifically, it stated that if the hearing officer is a lawyer (but presumably not otherwise), he or she must report non-lawyers who are attempting to appear and play lawyer, or risk being charged with aiding the unauthorized practice of law.

In Kentucky the unauthorized practice rule, SCR 3.020 (Practice of Law defined) is spectacularly broad: "The practice of law is any service rendered involving legal knowledge or legal advice, whether representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the service . . . ." So far the KBA Unauthorized Practice Committee has not attempted to "outlaw" non-lawyer hearing officers, but it may be a temptation.

I do think it is interesting that KRS 13B.030 (2) (b) allows an agency to contract "with private attorneys" in order to secure hearing officers if the Attorney General can't provide them. Does that mean that being an attorney is a minimum qualification? Apparently not. KRS 13B.030 (3) states: "A hearing officer shall possess and meet qualifications as the Personnel Cabinet and the employing agency, with the advice of the division, may find necessary to assure competency in the conduct of an administrative hearing." KRS 13B.030 (4) then goes on to require no more than 18 hours of initial training plus six hours of additional annual training. The Attorney General has issued regulations clarifying the nature of this training.

Professor Levinson argues that non-lawyer hearing officers or ALJ's should be required (by the employing agency or central panel chief) to follow the same standards as lawyer hearing officers or ALJs even if they are not subject to bar association discipline.

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156 Id.
157 Id. See also KY. RULES OF PROFESSIONAL CONDUCT Rule 5.5 (b), SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001) (prohibiting a lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.").
159 One interesting example suffices to illustrate the possibility of abuse under the rule. Many years ago Elvis Stahr, Jr., who was something of a Kentucky luminary, became Dean of the University of Kentucky College of Law. He was invited to join the bar, but under the terms of the admissions rules he would have had to take the bar examination (horrors!). To facilitate his admission on motion, the rules were changed to count years of prior law teaching as years of practice for "experience purposes". (My source for this background information was Professor Paul Oberst, who retired some years back.) Unfortunately, the rule as amended has led some to assume that since "law teaching is law practice," then it must follow that all law teachers in Kentucky must be admitted to the Kentucky Bar. Again, this was not the intent of the rule, and one doubts the power of the bar to enforce such an interpretation. In any event, the notion that only members of the Kentucky Bar Association may teach law in Kentucky only comes up when some unfortunate professor makes some lawyer or judge mad. Kentucky's Supreme Court Rules include instructors or professors of law in Kentucky law schools as a form of the practice of law. See SUP. CT. R. 3.022 (c), KY. RULES ANN. Vol. 2 (Michie 2001).
164 See Levinson, supra note 3, at 260.
B. Lay Representation

KBA Opinion U-27 (1980) reiterates the longstanding position of the Court and the Unauthorized Practice Committee that non-attorneys, and non-attorney employees of corporations, cannot represent other persons, including their own employer corporation, in administrative adjudication. Kentucky law on this point is different from the law of some surrounding states. I advised the hearing officer trainees to keep this opinion in their "bench books."

C. Authorizing Practice and the Separation of Powers

In Kentucky, there have been a number of fights over the power of the legislative and executive branches to "authorize" lay representation in administrative adjudication. In every case, the Unauthorized Practice Committee and the Supreme Court have stuck to their guns, opining that such efforts violate the constitutional principle of separation of powers. The most recent pronouncement of the principle came in Turner v. Kentucky Bar Association, in which the Court held that KRS 342.320(9), which authorized non-lawyers to represent injured workers, employers, and insurance carriers in proceedings before the Department of Worker's Claims, was unconstitutional.

D. Foreign Lawyers and Local Counsel

KBA U-27 also addressed the issue of representation by lawyers who are not admitted in Kentucky. The Unauthorized Practice Committee opined that

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166 See Ky. State Bar Ass'n v. Henry Vogt Machine Co., 416 S.W.2d 727 (Ky. 1967) (holding that a director of personnel who appeared for his company at a hearing before the Unemployment Insurance Commission was guilty of the unauthorized practice of law).
171 See ABA/BNA LAW. MAN. PROF. CON. 21:8010 (1999) (citing an ABA 1999 Survey Of Unauthorized Practice Of Law Committees, which reports that 11 out of 34 states responding reported that they allow nonlawyers to appear as representatives before state administrative agencies).
169 980 S.W.2d 560 (Ky. 1998). The opinion was rendered on review of an unauthorized practice opinion, Ky. Bar Ass'n Unauthorized Practice Comm. Op. U-52 (1997), reprinted in Marcus Carey, Unauthorized Practice Opinions, 54, 55 KY. BENCH & BAR (Summer 1997). The opinion in Turner made a big point of saying that "as the Supreme Court has no regulatory control over non-attorneys, [the lay worker's compensation specialists would have] provide[d] legal representation without being subject to the professional standards applied to lawyers." Id. at 562. However, the Court then said it would allow such specialists to work, in essence, as "paralegals" under the direct supervision of licensed counsel. See id.
170 See KY. REV. STAT. ANN. § 342.320 (9) (Michie 1997).
in Kentucky administrative proceedings, non-admitted lawyers must comply with SCR 3.030(2) which provides:

A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if he subjects himself to the jurisdiction and Rules of the Court covering professional conduct and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court.\footnote{\textit{Sup. Ct. R. 3.030 (2), Ky. Rules Ann. Vol. 2 (Michie 2001).}}

Does that mean that local counsel must be present during the hearing, performing a sort of "sergeant-at-arms" role? Presumably local counsel has some responsibility for the conduct of his non-admitted co-counsel.\footnote{\textit{See, e.g., Ky. Rules of Civil Procedure Rule 11, Ky. Rules Ann. Vol. 1 (Michie 2001). See also Ky. Rules of Professional Conduct Rule 5.1 (b), (c), Sup. Ct. R. 3.130, Ky. Rules Ann. Vol. 2 (Michie 2001) (stating: (b) "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct only if . . . "). See also Ky. Rules of Professional Conduct Rule 5.2 (a), (b), Sup. Ct. R. 3.130, Ky. Rules Ann. Vol. 2 (Michie 2001): (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person. (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.}} Indeed the justifications for requiring local counsel are supposedly to insure that a lawyer familiar with the nuances of Kentucky procedure, and a lawyer fully subject to bar discipline, will be present or available.\footnote{\textit{Id.}} This would call for the presence of local counsel. On the other hand, some hearing officers may share my view that the presence of local counsel throughout the proceedings may not be necessary, and may impose unnecessary expense on a party. I am inclined to think that \textit{most} foreign counsel will do a competent job, and that \textit{most} of them won't run amok. Furthermore, it has been suggested that the language of SCR 3.030(2), which refers to "all trials," might not include "hearings." These are arguments in support of giving the hearing officer some discretion in the matter.

\textbf{E. Discipline of Laymen and Foreign Lawyers}

Parties and persons appearing \textit{pro se} may be controlled by default orders and the like.\footnote{\textit{See supra text accompanying note 146.}} In states where agencies are permitted to authorize the practice by non-lawyers (again, Kentucky is not such a state) the agencies have the power to establish and enforce standards of conduct for non-lawyers.\footnote{\textit{See Koch, supra note 42, § 6.24 (3).}} These standards
should be the same as the standards for lawyers, at least insofar as the rules relate to the fair conduct of the proceeding.\textsuperscript{178} Foreign lawyers admitted \textit{pro hoc vice} can be controlled by default orders and exclusion. Their misconduct can also be referred to their own bar associations.\textsuperscript{179} By appearing before a Kentucky agency, with the assistance of local counsel, a foreign lawyer agrees to abide by the Kentucky Rules of Professional Conduct, and any disciplinary tribunal to which the matter is referred should apply the Kentucky Rules of Professional Conduct to the lawyer's conduct.\textsuperscript{180} While it is true that the Kentucky Bar Association has no ability to discipline a layman or a foreign lawyer directly, the power to exclude the representative, punish the representative's client through default orders, or refer the matter to an appropriate disciplinary authority are sufficient to curb unethical conduct.

V. CONCLUSIONS

In this brief survey I have summarized the Kentucky law relating to bias and disqualification of administrative adjudicators, and the prohibition of \textit{ex parte} communications. I have also reviewed the ethical rules relating to the conduct of representatives appearing before administrative adjudicators, and the rules relating to admission and unauthorized practice.

Kentucky took a big step forward when it adopted a uniform administrative hearing act\textsuperscript{181} and created what amounts to a small central panel of full-time hearing officers. Although many agencies are exempted from the act, the statute does provide a model, and the case law that develops around this model will provide much needed guidance. It is also possible that individual agencies and the Chief Hearing Officer of the Division of Administrative Hearings will adopt a version of the Code of Judicial Conduct to supplement the statutory rules relating to disqualification of, and ethical conduct of, hearing officers.

Given the vigor with which Kentucky's unauthorized practice rule is enforced and the inability of Kentucky agencies to authorize lay practice, the statutory preference for lawyer-hearing officers, and the mandatory training

\textsuperscript{178} See Levinson, \textit{supra} note 3, at 264.
\textsuperscript{179} See KY. RULES OF PROFESSIONAL CONDUCT Rule 8.4 cmt. 1, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001) ("In modern practice lawyers frequently act outside the territorial limit of the jurisdiction in which they are licensed to practice . . . . In doing so, they remain subject to governing authority of the jurisdiction in which they are licensed to practice.").
\textsuperscript{180} See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (b) (1) (2000):

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a proceeding in a court before which the lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise . . . .

\textit{Id.}

supplied by the Attorney General's office, we can expect an increase of professionalism in administrative proceedings.
APPENDIX

PROPOSED CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS
KENTUCKY ASSOCIATION OF ADMINISTRATIVE ADJUDICATORS

The Ethics Canon Committee

Canon 1: A hearing officer shall uphold the integrity and independence of the administrative judiciary.

Canon 2: A hearing officer shall avoid impropriety and the appearance of impropriety in all of the hearing officer's activities.

Canon 3: A hearing officer shall perform the duties of office impartially and diligently.

Canon 4: A hearing officer shall so conduct the hearing officer's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

Canon 5: A hearing officer shall refrain from inappropriate political activity.

PREAMBLE

Our legal system is based on the principle that an independent, fair, and competent administrative judiciary will interpret and apply the laws that govern us. The role of the administrative judiciary is central to American and Kentucky concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that hearing officers, individually and collectively, must respect and honor their office as a public trust and strive to enhance and maintain confidence in our legal system. The hearing officer is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct for Hearing Officers is intended to establish standards for ethical conduct of hearing officers. The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, administrative rules, and decisional law, and in the context of all relevant circumstances, including the varying degrees of responsibility and administrative functions of different hearing officers. The Code is to be construed so as not to impinge on the essential discretion of hearing officers in making judicial decisions.

The Code of Judicial Conduct for Hearing Officers is not intended as an exhaustive guide for the conduct of hearing officers. Hearing officers should also be governed in their judicial and personal conduct by general ethical standards.
The Code is intended, however, to state basic standards which should govern the conduct of all hearing officers and to provide guidance to assist hearing officers in establishing and maintaining high standards of judicial and personal conduct.

The Code of Judicial Conduct for Hearing Officers is based on the Kentucky Code of Judicial Conduct and should be interpreted when appropriate in accordance with the opinions and commentary for the Kentucky Code of Judicial Conduct.

TERMINOLOGY

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a hearing officer’s impartiality.

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that hold securities is not an economic interest in such securities unless the hearing officer participates in the management of the fund or a proceeding pending or impending before the hearing officer could substantially affect the value of the interest;

(ii) service by a hearing officer as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a hearing officer’s spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the hearing officer could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the hearing officer could substantially affect the value of the securities.

"Ex parte communication" means the hearing officer’s communication off the record with any party to the administrative proceeding, or with any other person who has a direct or indirect interest in the outcome of the administrative proceeding, concerning any substantive issue, while the proceeding is pending.
"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

"Invidious discrimination" includes any action by an organization that appears to regard some immutable individual trait, such as a person's race, gender, religion, or national origin, as odious or inferior, which is used to justify arbitrary exclusion of persons possessing those traits from membership or participation in the organization. On the other hand, organization dedicated to the preservation of religious, fraternal sororal, spiritual, charitable, civic, or cultural values, which do not stigmatize any excluded persons as inferior and therefore unworthy of membership, are not considered to discriminate invidiously.

"Judicial duties" include all the duties of the hearing officer's office prescribed by law.

"Hearing officer" includes any person to whom the authority to conduct an administrative adjudication has been delegated by the administrative agency or by statute.

"Knowingly," "knowledge," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law" denotes statutes, administrative rules, constitutional provisions, and decisional law.

"Member of the hearing officer's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the hearing officer maintains a close familial relationship.

"Member of the hearing officer's family residing in the hearing officer's household" denotes any relative of a hearing officer by blood or marriage, or a person treated by a hearing officer as a member of the hearing officer's family, who resides in the hearing officer's household.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

"Require." The rules prescribing that a hearing officer "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a hearing officer is to exercise reasonable direction and control over the conduct of those persons subject to the hearing officer's direction and control.

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.
CANON 1

CANON 1: A hearing officer shall uphold the integrity and independence of the administrative judiciary.

An independent and honorable administrative judiciary is indispensable to justice in our society. A hearing officer should actively participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

CANON 2: A hearing officer shall avoid impropriety and the appearance of impropriety in all of the hearing officer's activities.

1. A hearing officer shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

2. A hearing officer may properly lend the prestige of the hearing officer's office to advance the public interest in the administration of justice.

3. A hearing officer may actively support public agencies or interests or testify voluntarily on public matters concerning the law, the legal system, the provision of legal services, and the administration of justice.

4. A hearing officer shall not lend the prestige of judicial office to advance the private interest of the hearing officer or others; nor shall a hearing officer convey or permit others to convey the impression that others are in a special position to influence the hearing officer.

   (i) A hearing officer shall not allow family, social, political, or other relationships to impair the hearing officer's objectivity.
   (ii) A hearing officer shall not testify voluntarily as a character witness.

5. A hearing officer shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

CANON 3
CANON 3: A hearing officer shall perform the duties of office impartially and diligently.

6. Judicial Duties in General. The judicial duties of a hearing officer take precedence over all the hearing officer’s other activities. In the performance of these duties, the following standards apply.

7. Adjudicative Responsibilities

(1) A hearing officer shall hear and decide matters assigned to the hearing officer, except those matters in which disqualification is required.

(2) A hearing officer shall be faithful to the law and maintain professional competence in it. A hearing officer shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A hearing officer shall require order and decorum in proceedings before the hearing officer.

(4) A hearing officer shall be patient, dignified, and courteous to litigants, witnesses, lawyers, and others with whom the hearing officer deals in an official capacity, and shall require similar conduct of participants in proceedings before the hearing officer, and of staff members and others subject to the hearing officer’s direction and control.

(5) A hearing officer shall perform judicial duties without bias or prejudice. A hearing officer shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not, in proceedings before the hearing officer, permit staff members and others subject to the hearing officer’s direction and control to do so.

(6) A hearing officer shall require the participants in proceedings before the hearing officer to refrain from manifesting by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A hearing officer shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer or...
representative, the right to be heard according to law. With regard to a pending or impending proceeding, a hearing officer shall not initiate, permit, or consider \textit{ex parte} communications.

(a) If an \textit{ex parte} communication occurs, the hearing officer shall note the occurrence for the record, and the hearing officer shall place in the record a copy of the communication, if it was written, or a memorandum of the substance of the communication, if it was oral.

(b) As a part of legal research, a hearing officer may obtain the advice of a disinterested expert on the law applicable to a proceeding before the hearing officer.

(c) A hearing officer may consult with support personnel whose function is to aid the hearing officer in carrying out the hearing officer’s adjudicative responsibilities or with other hearing officers.

(d) A hearing officer may, with the consent of the parties, confer separately with the parties and their lawyers or representatives in an effort to mediate or settle matters pending before the hearing officer.

(e) A hearing officer may initiate or consider any \textit{ex parte} communications when expressly authorized by law to do so.

(8) A hearing officer shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A hearing officer shall not, while a proceeding is pending or impending in any administrative forum or court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair hearing. The hearing officer shall require similar abstention on the part of staff members subject to the hearing officer’s direction and control. This Section does not prohibit hearing officers from making public statements in the course of their official duties or from explaining for public information the procedures of the administrative body. This Section does not apply to proceedings in which the hearing officer is a litigant in a personal capacity.

(10) A hearing officer shall not commend or criticize an agency head for its decision other than in an opinion in a proceeding.

(11) A hearing officer shall not disclose or use, for any purpose
unrelated to judicial duties, information acquired in a judicial capacity that by law is not available to the general public.

(12) A hearing officer should not be subject to the authority, direction, or discretion of a person who has served as an investigator, prosecutor, or advocate in a proceeding before the hearing officer, or in any pre-adjudicative stage of the proceeding.

8. Administrative Responsibilities

(1) A hearing officer shall diligently discharge the hearing officer's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other hearing officers and staff members in the administration of the hearing officer's duties.

(2) A hearing officer shall require staff members and those subject to the hearing officer's direction and control, and should encourage other administrative officials, to observe the standards of fidelity and diligence that apply to the hearing officer and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A hearing officer with supervisory authority for the performance of other hearing officers shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

9. Disciplinary Responsibilities

(1) A hearing officer who receives information indicating a substantial likelihood that another hearing officer has committed a violation of this Code should take appropriate action. A hearing officer having knowledge that another hearing officer has committed a violation of this Code that raises a substantial question as to the other hearing officer's fitness for office should inform the appropriate authority.

(2) A hearing officer who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Kentucky Rules of Professional Conduct should take appropriate action. A hearing officer having knowledge that a lawyer has committed a violation of the Kentucky Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects should inform the appropriate authority.
10. Disqualification

(1) A hearing officer shall disqualify himself or herself in a proceeding in which the hearing officer's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the hearing officer has a personal bias or prejudice concerning a party or a party's lawyer or representative, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the hearing officer served as a lawyer or representative in the matter in controversy, or a lawyer with whom the hearing officer previously practiced law served during such association as a lawyer concerning the matter, or the hearing officer has been a material witness concerning it;

(c) the hearing officer knows that he or she, individually or as a fiduciary, or the hearing officer's spouse, parent, or minor child residing in the hearing officer's household, has any interest, more than a de minimis interest, in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the proceeding;

(d) the hearing officer or the hearing officer's spouse, or a person within the third degree of relationship to either of them or the spouse of such a person:
   (i) is a party to the proceeding, or an officer, director, or trustee of a party;
   (ii) is acting as a lawyer or representative in the proceeding;
   (ii) is known by the hearing officer to have a more than de minimis interest that could be substantially affected by the proceedings;
   (iii) is to the hearing officer's knowledge likely to be a material witness to the proceeding.

(2) A hearing officer shall keep informed about the hearing officer's personal and fiduciary economic interest, and make a reasonable effort to keep informed about the personal economic interests of the hearing officer's spouse and minor children residing in the hearing officer's household.
11. Remittal of Disqualification. A hearing officer disqualified by the terms of Canon 3E may disclose on the record the basis of the hearing officer’s disqualification and may ask the parties and their lawyers or representatives to consider, out of the presence of the hearing officer, whether to waive disqualification. If following disclosure of any basis for disqualification, other than personal bias or prejudice concerning a party, the parties and lawyers or representative, without participation by the hearing officer, all agree that the hearing officer should not be disqualified, and the hearing officer is then willing to participate, the hearing officer may participate in the proceeding. The agreement, signed by all parties and lawyers or representatives, shall be incorporated in the record of the proceeding.

CANON 4

CANON 4: A hearing officer shall so conduct the hearing officer’s extra-judicial activities as to minimize the risk of conflict with judicial obligations.

12. Extra-Judicial Activities in General. A hearing officer shall conduct all of the hearing officer’s extra-judicial activities so that they do not:

(1) cast reasonable doubt on the hearing officer’s capacity to act impartially as a hearing officer;

(2) demean the judicial office; or

(3) interfere with the performance of judicial duties.

13. Avocational Activities. A hearing officer may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code.


(1) A hearing officer may appear at a hearing before an executive or legislative body or official and may otherwise consult with an executive or legislative body or official, under the following circumstances:

(a) if the appearance or consultation is not otherwise prohibited by law or by any other provision of this Code;

(b) if the appearance or consultation casts no doubt on the hearing officer’s capacity to decide impartially any issue that may come before the hearing officer; and
(2) A hearing officer shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters that will come before the hearing officer or that will come before the administrative body for which the hearing officer serves as hearing officer. A hearing officer may accept appointment to a governmental committee or commission where an appointment of a hearing officer to the governmental committee is authorized or required by law or where the governmental committee or commission involves the improvement of the law, the legal system, or the administration of justice. A hearing officer may represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

(3) A hearing officer may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice, or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A hearing officer shall not serve as an officer, director, trustee, or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the hearing officer or the administrative body for which the hearing officer serves as hearing officer; or

(ii) by reason of its purpose, will have a substantial interest in other proceedings in the administrative body for which the hearing officer serves as hearing officer.

(b) A hearing officer as an officer, director, trustee, or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities;
(ii) may make recommendations to public and private fund granting organizations on projects and programs concerning the law, the legal system, or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Canon 4C(3)(b)(i), if the membership solicitation is essentially a fund raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund raising or membership solicitation.

15. Financial Activities

(1) A hearing officer shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the hearing officer’s position, or

(b) involve the hearing officer in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the administrative body for which the hearing officer serves as hearing officer.

(2) A hearing officer may, subject to the requirements of this Code, hold and manage investments of the hearing officer and members of the hearing officer’s family, including real estate, and engage in other remunerative activity.

(3) A hearing officer may serve as an officer, director, manager, general partner, advisor, or employee of any business entity subject to the following limitations and the other requirements of this Code:

(a) A hearing officer shall not be involved in any business entity:

(i) held in disrepute in the community; or

(ii) likely to be engaged in proceedings that would ordinarily come before the hearing officer or the administrative body for which the hearing officer services as hearing officer.
(b) A hearing officer involved with any business entity may assist such a business entity in planning fund raising and may participate in the management and investment of the entity's funds, but shall not personally participate in the solicitation of funds, the raising of capital, or the selling of stock in such a manner as to use or permit the use of the prestige of judicial office for promotion of the business entity.

(4) A hearing officer shall manage the hearing officer's investment and other financial interests to minimize the number of cases in which the hearing officer is disqualified. As soon as the hearing officer can do so without serious financial detriment, the hearing officer shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A hearing officer shall not accept, and shall urge members of the hearing officer's family residing in the hearing officer's household not to accept, a gift, bequest, favor, or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the hearing officer and the hearing officer's spouse or guest to attend a bar related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member of a hearing officer residing in the hearing officer's household, including gifts, awards, and benefits for the use of both the spouse or other family member and the hearing officer (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the hearing officer in the performance of judicial duties;

(c) ordinary social hospitality or customary expressions of sympathy;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;
(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Canon 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not hearing officers;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor, or loan, only if the donor is not party or other person who has come or is likely to come or whose interests have come or are likely to come before the hearing officer.

16. Fiduciary Activities

(1) A hearing officer may serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, only if such service will not interfere with the proper performance of the hearing officer's duties.

(2) The same restriction on financial activities that apply to a hearing officer personally also apply to the hearing officer while acting in a fiduciary capacity.

17. Service as Arbitrator or Mediator. A hearing officer may act as an arbitrator or a mediator if such activity does not affect the independent professional judgment of the hearing officer or the conduct of the hearing officer's official duties. A hearing officer shall not act as an arbitrator or a mediator in a matter over which the hearing officer may later preside.

18. Practice of Law.

(1) A hearing officer may practice law if such activity would affect neither the independent professional judgment of the hearing officer nor the conduct of the hearing officer's official duties, and if such activity would not violate any other provisions of this Code.

(2) A hearing officer shall not accept the representation of a client who is a litigant before the administrative body for which the hearing officer serves as hearing officer or if there is a likelihood that such person will appear before the hearing officer.
(3) The hearing officer shall not practice law before the administrative body for which the hearing officer serves as hearing officer.

19. Compensation and Reimbursement. A hearing officer may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the hearing officer's performance of judicial duties or otherwise give the appearance of impropriety.

(1) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a hearing officer would receive for the same activity.

(2) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the hearing officer and, where appropriate to the occasion, by the hearing officer's spouse or guest. Any payment in excess of such an amount is compensation.

I. Disclosure of a hearing officer's income, debts, investment, or other assets is required only to the extent provided in this Canon and in Canon 3E and F, or as otherwise required by law.

CANON 5

CANON 5: A hearing officer shall refrain from inappropriate political activity.

20. Political Conduct in General

(1) A hearing officer shall not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office;

(c) solicit funds for or pay an assessment to a political organization or candidate.

(2) A hearing officer may engage in political activity on behalf of measures to improve the law, the legal system, or the administration of justice, as provided in Canon 2B and C.
THE ROLE OF PROFESSIONAL RESPONSIBILITY IN THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN ROE V. FLORES-ORTEGA

by Erin N. Rieger

I. INTRODUCTION

Imagine being sentenced to life in prison. The judge tells you that you have sixty days in which to file a notice of appeal. You do not speak English and so have little understanding of the law. You assume that your attorney will take all necessary precautions to protect your rights in this matter; after all, it is your attorney that you have trusted to represent you and who has fought to put on a good defense for you so as to mitigate your sentence. You are taken into custody immediately and have no contact with your attorney until after ninety days have passed. You attempt to file a notice of appeal, but it is rejected as untimely because your attorney failed to file the notice as promised.

If you are subject to the jurisdiction of the courts in the First Circuit, you may be entitled to habeas relief since counsel's failure to file a notice of appeal without the defendant's knowledge or consent is prejudicial to the defendant. In addition, the Tenth Circuit holds that unless the defendant waives his right to counsel on appeal, an attorney is obligated to advise the defendant about the appeal. If you are in the Second Circuit, however, you are not entitled to relief because counsel has no duty to file a notice of appeal unless it is requested by the defendant. The same is true in the Seventh Circuit.

Faced with a conflict among the circuits regarding counsel's obligations under the Sixth Amendment to file a notice of appeal, the United States Supreme Court sought to resolve the issue by granting certiorari in the case of Roe v. Flores-Ortega. But did it?

This article examines the standard currently being applied to determine the obligations of an attorney to consult clients about the right to appeal. Part II provides a brief overview of ineffective assistance of counsel claims as well as the facts of Flores-Ortega. Part III explains the Court's majority holding and the concurring opinions. Part IV of the article provides an analysis of the Court's opinion and suggests that the American Bar Association Standards on

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1 The author is a graduate of Transylvania University and is expecting her J.D. from Salmon P. Chase College of Law in 2002.
2 See United States v. Tajeddini, 945 F.2d 458, 468 (1st Cir. 1991).
3 See Romero v. Tansy, 46 F.3d 1024, 1031 (10th Cir. 1995).
4 See Morales v. United States, 143 F.3d 94, 97 (2d Cir. 1998).
5 See Castellanos v. United States, 26 F.3d 717, 719 (7th Cir. 1994).
7 Id.
Professional Responsibility be incorporated as guidelines to be used in assessing the objective reasonableness of counsel's conduct.

II. BACKGROUND

A. A Brief Overview of Ineffective Assistance of Counsel Claims

1. Sixth Amendment

The Sixth Amendment of the United States Constitution, as adopted in 1791, guarantees the right to counsel in a criminal trial. The Supreme Court has qualified the right as one of effective assistance of counsel. Challenges based on ineffective assistance of counsel are frequently filed in post-conviction relief proceedings at both the state and federal levels. Many of these challenges are unsuccessful because of the rigid test used to determine whether ineffectiveness rises to a constitutionally significant level.

One can raise a claim of ineffective assistance of counsel both generally and specifically. General claims include the failure of a lawyer to prepare adequately, the lack of experience, or the neglect to file a claim or a discovery motion. Specific claims, on the other hand, include the failure to investigate an issue, to object to the admissibility or sufficiency of the evidence, to call witnesses, or to cross-examine witnesses called by the opposition.


The Supreme Court announced a standard for judging a claim of ineffective assistance of counsel. Recognizing that the convicted defendant must show that counsel's representation fell below an "objective standard of reasonableness," the Court employed a two-part test: first, the defendant must show that counsel's performance was deficient; second, the defendant must show

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8 See U.S. CONST. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.


10 Id. at 1118.

11 Id.

12 Id. at 1121.

13 Id.

14 See Voigts, supra note 9, at 1122.


16 See id. at 687.
that such deficient performance prejudiced the defendant.\textsuperscript{17} A court deciding an actual ineffectiveness claim must judge the reasonableness of the challenged conduct based on the facts of the particular case and viewed as of the time of counsel’s conduct.\textsuperscript{18}

The \textit{Strickland} Court was faced with a defendant who sought to set aside his death sentence because his defense counsel’s assistance at the trial and sentencing hearing was ineffective.\textsuperscript{19} The defendant, subject to indictment for first-degree murder, robbery, kidnapping for ransom, breaking and entering, assault, attempted murder, and conspiracy to commit robbery, rejected his counsel’s advice by waiving his right to a jury trial and pleading guilty to all charges.\textsuperscript{20} In preparing for the sentencing hearing, counsel did not follow up on his efforts to meet the defendant’s wife and mother, nor did he seek out character witnesses or look for further evidence pertaining to the defendant’s character and emotional state.\textsuperscript{21} Counsel also chose to forgo cross-examination of the medical experts who testified about the manner of death of the defendant’s victims.\textsuperscript{22}

After the defendant was sentenced to death and his conviction was upheld on direct appeal, the defendant sought collateral relief in the state court, alleging ineffective assistance of counsel.\textsuperscript{23} Confronted with a denial of relief from the state, the defendant sought federal habeas relief.\textsuperscript{24} The Supreme Court denied relief, holding that the defendant failed to satisfy the two-part test set forth by the Court since counsel’s decisions were strategic choices that were well within the range of professionally reasonable judgments.\textsuperscript{25}

\textbf{B. Facts of Roe v. Flores-Ortega\textsuperscript{26}}

Lucio Flores-Ortega, a Spanish-speaking Californian, was charged with one count of murder, two counts of assault, and a personal use of a deadly weapon enhancement allegation.\textsuperscript{27} After some plea bargaining, the defendant was sentenced to 15 years to life in state prison.\textsuperscript{28} After pronouncing the sentence, the trial judge explained to the defendant that he could file an appeal within 60 days from the date of sentencing and, that if the defendant did not have money for counsel, an attorney would be appointed to represent him on his appeal.\textsuperscript{29}

The defendant’s appointed public defender wrote “bring appeal papers” in her file, but no notice of appeal was filed within the 60 days allowed by state law.\textsuperscript{30} During the first 90 days after sentencing, the defendant was in lockup,
undergoing evaluation, and unable to communicate with counsel. 31 About four months after sentencing, the defendant attempted to file a notice of appeal which was rejected by the Superior Court as untimely. 32 The defendant unsuccessfully sought habeas relief from California’s appellate courts, challenging the validity of his plea and his conviction, and alleging that the public defender had not filed a notice of appeal as promised. 33

The respondent then filed a federal habeas petition, pursuant to 28 U.S.C. § 2255, alleging constitutionally ineffective assistance of counsel based on the failure to file a notice of appeal on his behalf. 34 The United States District Court for the Eastern District of California referred the matter to a Magistrate Judge, who ordered an evidentiary hearing to determine whether the public defender promised to file a notice of appeal on the defendant’s behalf. 35 The Magistrate Judge found that there was no consent to a failure to file a notice of appeal, but that the defendant did not carry the burden of showing that the public defender had made a promise to appeal. 36 The District Court, adopting the findings and recommendation of the Magistrate Judge, denied relief. 37 The Court of Appeals for the Ninth Circuit reversed, reasoning that a habeas petitioner need only show that his counsel’s failure to file a notice of appeal was without his consent. 38 The Supreme Court granted certiorari to resolve a circuit split regarding the obligations of counsel in the appeal process. 39

III. COURT’S REASONING

A. Holding of Roe v. Flores-Ortega40

1. Part II-A

The Court held that the Strickland test applied to claims where counsel was constitutionally ineffective for failing to file a notice of appeal. 41 The Court distinguished the present case from similar ones in the appeal context: a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a professionally unreasonable manner; a defendant who tells his attorney not to file an appeal cannot later complain that, by following his instructions, his attorney was deficient. 42 The Court then presented the question at issue in this

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31 Id.
32 See Flores-Ortega, 528 U.S. at 474.
33 Id.
34 Id. (citing Ortega v. Roe, D.C. No. CV-95-05612-GB (E.D. Cal. 1995)).
35 Id.
36 Id.
37 Id. at 475.
38 See Ortega v. Roe, 160 F.3d 534, 536 (9th Cir. 1998).
39 See Flores-Ortega, 528 U.S. at 476.
40 Id. at 477.
41 Id.
42 Id.
case as follows: "Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?" 43

Although courts in several circuits applied a bright-line rule requiring counsel to file a notice of appeal unless the defendant specifically instructed otherwise, the Court rejected the per se rule as inconsistent with Strickland. 44 Instead, the Court began its analysis by focusing on the circumstances under which counsel has an obligation to consult -- to advise the defendant of the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes -- with the defendant about an appeal. 45

Citing American Bar Association Standards for Criminal Justice, the Court addressed the dissent by agreeing that it is good practice for counsel routinely to consult with the defendant regarding the possibility of an appeal. 46 The Court, however, went on to say that the "prevailing norms of practice as reflected in American Bar Association standards and the like . . . are only guides," and imposing 'specific guidelines' on counsel is 'not appropriate.' 47 Therefore, the Court refused to imply that in every case counsel's failure to consult with the defendant about an appeal is unreasonable, and therefore deficient. 48

The Court held that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either that a rational defendant would want to appeal, or that this particular defendant reasonably demonstrated to counsel his interest in appealing. 49 The Court rejected a bright-line rule, reiterating that the purpose of the effective assistance guarantee of the Sixth Amendment is only to ensure that criminal defendants receive a fair trial, not to improve the quality of legal representation. 50 The majority then stated its expectation that in the majority of cases in which the reasonableness of the counsel's performance is evaluated using the Strickland inquiry, the courts will find that counsel had a duty to consult with the defendant about an appeal. 51

2. Part II-B

The Court noted the unusual nature of the defendant's claim that counsel's deficient performance deprived him not of a fair judicial proceeding, but of an appellate proceeding altogether, and suggested that such a serious denial warrants a presumption of prejudice to the defendant. 52 The Court, however, held that in order to show prejudice in such circumstances, the defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have

43 Flores-Ortega, 528 U.S. at 477.
44 See id. at 478.
45 Id.
46 Id. at 479.
47 Flores-Ortega, 528 U.S. at 479 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).
48 See id.
49 Id. at 480.
50 Id. at 481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).
51 See id.
52 Id. at 483.
timely appealed.\textsuperscript{53} Therefore, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal."\textsuperscript{54} This prejudice standard mirrors standards applied in previous ineffectiveness claims -- one based on counsel's allegedly deficient advice regarding the consequences of entering a guilty plea; and one based on counsel's failure to file a notice of appeal despite being instructed by the defendant to do so.\textsuperscript{55}

The question whether the defendant has made the requisite showing of prejudice under \textit{Strickland} will turn on the particular facts of a given case; however, evidence of nonfrivolous grounds for appeal or a prompt expression of a desire to appeal will be highly relevant in making the determination.\textsuperscript{56} The defendant is required to demonstrate that, but for counsel's deficient performance, he would have appealed.\textsuperscript{57}

3. \textit{Part III}

The record before the Court was insufficient to determine whether the public defender had a duty to consult with the defendant, whether she satisfied her obligations, and if she did not, whether the defendant was prejudiced as a result.\textsuperscript{58} Therefore, the judgment of the Court of Appeals was vacated and the case was remanded for further proceedings.\textsuperscript{59}

\textit{B. Concurring Opinion of Justice Breyer}

Justice Breyer wrote separately to express his agreement in the context of filing a notice of appeal following a guilty plea.\textsuperscript{60} He also joined the Court's opinion making clear that counsel ""almost always"" has a constitutional duty to consult with a defendant about an appeal after a trial.\textsuperscript{61}

\textit{C. Opinion of Justice Souter}

Justice Souter wrote separately to join Part II B of the Court's opinion, and to dissent from Part II A.\textsuperscript{62} While the majority concluded that a lawyer sometimes has the duty to consult with her client about the choice to appeal after a criminal conviction, Justice Souter concluded that a lawyer ""almost always"" has the duty.\textsuperscript{63} ""It is unreasonable for a lawyer with a client like ... Flores-

\textsuperscript{53} id. at 484.
\textsuperscript{54} Flores-Ortega, 528 U.S. at 484.
\textsuperscript{56} See Flores-Ortega, 528 U.S. at 485.
\textsuperscript{57} id. at 486.
\textsuperscript{58} Id. at 487.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 488 (Breyer, J., concurring).
\textsuperscript{61} Id.
\textsuperscript{62} See Flores-Ortega, 528 U.S. at 488 (Souter, J., concurring in part and dissenting in part).
\textsuperscript{63} Id.
Ortega to walk away from her representation after trial or after sentencing without at the very least acting affirmatively to ensure that the client understands the right to appeal."

When an appeal is available as a matter of right, a decision to seek or forgo review is for the defendant, not his lawyer. Justice Souter drew attention to the fact that, while the majority noted that a lawyer who fails to file a notice of appeal despite the defendant's request to do so is ineffective for constitutional purposes, the Court says that a "lesser infidelity" than that may fail the ineffectiveness test of Strickland. Justice Souter suggested that the ineffectiveness of counsel's performance was clearer than the Court realized.

Since the decision about whether or not to appeal is an important one, a lay defendant needs help before deciding and only in an "extraordinary case" will a defendant need no advice whatsoever. As "prevailing professional norms" are the touchstone of reasonable representation, attention is directed to the ABA Standards for Criminal Justice and the ABA Model Code of Professional Responsibility.

Justice Souter suggested that the qualification expressed in Strickland regarding the applicability of the American Bar Association standards had no application to the case before the Court since there was no concern about the "strategic choices" of counsel. "Strategic choices are made about the extent of investigation, the risks of a defense requiring defendant's testimony and exposure to cross-examination, the possibility that placing personal background information before a jury will backfire, and so on." Whether or not to give a defendant advice before he loses the chance to appeal a conviction or a sentence is not an issue of strategy.

Considering the fact that the defendant spoke no English and was not sophisticated in the ways of the legal system, the Court's position is less explicable.

In effect, today's decision erodes the principle that a decision about an appeal is validly made only by a defendant with a fair sense of what he is doing. Now the decision may be made inadvertently by a lawyer who never utters the word "appeal" in his client's hearing, so long as that client cannot later demonstrate (probably without counsel) that he unwittingly had "nonfrivolous grounds" for seeking review. This state of the law amounts to just such a breakdown of the adversary system that Strickland warned against.

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64 Flores-Ortega, 528 U.S. at 488-89 (Souter, J., concurring in part and dissenting in part).
65 Id. at 489 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).
66 See Flores-Ortega, 528 U.S. at 489.
67 Id.
68 Id.
69 Id. at 490 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).
70 See Flores-Ortega, 528 U.S. at 491.
71 Id.
72 Id. at 492.
73 Id.
74 Flores-Ortega, 528 U.S. at 493 (Souter, J., concurring in part and dissenting in part).
Justice Souter would have held that after sentencing, the defendant's lawyer was obliged to consult with her client about the availability of an appeal, and that failure to do so violated *Strickland*’s standard of objective reasonableness.  

**D. Opinion of Justice Ginsburg**

Justice Ginsburg wrote separately to point out that the Court was not deeply divided on the issue at hand: after a defendant pleads guilty or is convicted, the Sixth Amendment hardly ever permits defense counsel simply to walk away, leaving the defendant uncounseled about his appeal rights. Because the test articulated by Justice Souter, however, provided clearer guidance to courts and to counsel, and because the duty to consult in this case was not satisfied, Justice Ginsburg joined Justice Souter’s opinion.

**IV. ANALYSIS OF OPINION**

The problem that results from the Court’s holding in *Roe v. Flores-Ortega*, that the standard to be applied for ineffectiveness claims is the two-part test announced in *Strickland*, is the difficulty in determining what factors should be considered when deciding whether counsel’s behavior qualifies as deficient under the “objective standard of reasonableness” test. The Court was presented with an unusual case, one in which the defendant did not convey his wishes to appeal one way or the other and so, therefore, the defendant was not claiming deprivation of a fair proceeding, but deprivation of the proceeding altogether.  

The Court suggested that such a serious denial warranted a presumption of prejudice to the defendant, but remanded the case to determine whether, after applying relevant factors to the particular facts of the case, the defendant was prejudiced as a result of the counsel’s performance.

Implicit in the Court’s analysis was the notion of the “reasonableness” of counsel’s conduct, with high deference afforded to counsel’s performance. While the Court agreed with Justice Souter that the better practice is for counsel to routinely consult with the defendant regarding the possibility of an appeal, the majority rejected imposing specific guidelines on counsel to determine if they are

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75 See *id.*
76 *Id.* (Ginsburg, J., concurring in part and dissenting in part).
77 *Id.* at 494.
79 See *id.* at 476-77 (“A defendant claiming ineffective assistance of counsel must show (1) that counsel’s representation ‘fell below an objective standard of reasonableness,’ and (2) that counsel’s deficient performance prejudiced the defendant.”).
80 *Id.* at 483.
81 *Id.*
82 *Id.* at 487.
83 *Id.* at 477.
professionally unreasonable, despite its recognition that the American Bar Association Standards are the "prevailing norms of practice." In the case of a lawyer who disregards specific instructions from the defendant to file a notice of appeal, the Court was quick to say that such a lawyer acts in a manner that is "professionally unreasonable." What about the case where the client does not clearly convey his wishes about the appeal? The Court in Flores-Ortega refused to say, as a constitutional matter, that counsel's failure to consult with the defendant in such a case was necessarily unreasonable. What about from an ethical standpoint?

Justice Souter's opinion in Flores-Ortega addressed the flaws in the Court's analysis and provided a better solution to the problem at hand. Strickland's holding that no particular set of rules can take account of the variety of circumstances and range of decisions faced by defense counsel is a legitimate concern. Justice Souter echoed the majority's statement, however, that the decision to appeal rests with the defendant: "Where appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer." The Court failed to address whether, in the context of this case, counsel's decision to consult with the defendant about an appeal was a "strategic" decision, a detail that seems mandatory for the Strickland analysis to apply in this situation. The disclaimer that the American Bar Association Standards are only guides to be used to determine what is reasonable, therefore, had no application to the defendant in Flores-Ortega as no strategic concerns were present in the case.

In order to assess counsel's non-strategic decisions from an objective standpoint, the American Bar Association standards on professional responsibility should be incorporated as guidelines to judge the reasonableness of counsel's conduct. Consulting the ABA standards in this context imposes no real hardship on counsel as the rules are expressions of what the lawyer should do in certain circumstances. Already bound to uphold the integrity of the legal system, a lawyer's choice to act within the bounds of professional discretion will not be subject to disciplinary action. Therefore, inquiry into counsel's performance as judged by the standards will not harm the lawyer at the federal level, but will ensure that the rights of the accused are adequately protected.

84 See Flores-Ortega, 528 U.S. at 479 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).
85 Id. at 477.
86 Id. at 479.
87 Id. at 488 (Souter, J., concurring in part and dissenting in part) (suggesting that counsel "almost always" have the duty to consult with defendants about the right to appeal).
88 Id. at 491.
89 Flores-Ortega, 528 U.S. at 489 (Souter, J., concurring in part and dissenting in part).
90 See Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."); see also Lissa Griffin, The Right to Effective Assistance of Appellate Counsel, 97 W. Va. L. Rev. 1, 34 (1994) ("[N]o decision by counsel that can fairly be deemed strategic will constitute ineffectiveness.").
91 See Flores-Ortega, 528 U.S. at 491.
92 See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1999).
93 See MODEL RULES OF PROFESSIONAL CONDUCT Scope (1999).
94 Id.
The fact that the public defender’s failure to file a notice of appeal in *Flores-Ortega* was not a strategic choice is mirrored in the ABA Standards for Criminal Justice, Defense Function 4-5.2.\(^*\) In addition, the ABA Defense Function Standard 4-8.2 provides:

(a) After conviction, *defense counsel should explain to the defendant the meaning and consequences of the court’s judgment and defendant’s right of appeal.* Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. *The decision whether to appeal must be the defendant’s own choice.*

(b) *Defense counsel should take whatever steps are necessary to protect the defendant’s right of appeal.*\(^6\)

Further, Ethical Consideration 2-31 provides: “Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal . . . .”\(^7\) Based upon these guidelines, it appears that counsel’s behavior in failing to consult with the defendant about the appeal and failing to file a notice of appeal was professionally unreasonable, as the decision was not made in accordance with the professional standards.\(^8\)

Model Rule 1.3 provides that a lawyer shall act with reasonable diligence in the representation of a client.\(^9\) The commentary adds: “A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”\(^10\) The Model Code counterpart, Disciplinary Rule 6-101(A)(3) provides as follows: “A lawyer shall not: neglect a legal matter entrusted to him.”\(^11\) Ethical consideration 6-4 also obligates the lawyer to

\(^{*}\) See Standards Relating to the Administration of Criminal Justice, Defense Function § 4-5.2 (1992). The relevant portions of the Standard read as follows:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for the defense counsel. The decisions which are to be made by the accused after full consultation with counsel include: (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

\(^6\) Id.

\(^7\) Standards Relating to the Administration of Criminal Justice, Defense Function § 4-8.2 (1992) (emphasis added).


“give appropriate attention to his legal work.” Ethical Consideration 7-1 stresses that the “duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law...” Further, Disciplinary Rule 7-101(A) reads: (1) “A lawyer shall not intentionally: Fail to seek the lawful objectives of his client through reasonably available means...” and (3) “prejudice or damage his client during the course of the professional relationship...” These rules speak directly to the fact that the public defender neglected the case of Flores-Ortega by making a notation in the file regarding the appeal papers, but failing to actually file the notice in order to protect his rights.

Model Rule 1.14(a) reads as follows: “When a client’s disability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Ethical Consideration 7-12 also states: “obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.” Examples of the application of these rules include those in the case of minority or incompetency. It seems plausible, however, that defendant Flores-Ortega’s language barrier and lack of sophistication of the law might have achieved the status of a disability in this case. One view of this case resulted in an expression that the defendant was “handicapped” because he had to understand the proceedings through an interpreter. If the language barrier was in fact a disability within the meaning of this rule, then it seems that the public defender had a duty to make sure the defendant fully understood his rights, and then to do what was necessary to protect them, duties applicable to a “normal” client-lawyer relationship. Counsel’s failure to do either of these was professionally unreasonable.

The Strickland Court expressed the sentiment that the Sixth Amendment relies “on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.” “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” At first glance, it appears that the Strickland Court suggested that counsel’s conduct must

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103 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981).
110 Id.
111 See generally MODEL RULES FOR PROFESSIONAL CONDUCT (1999).
112 Id.
114 Id.
be judged by a standard of reasonableness without giving any direction as to the scale to be used to determine whether the conduct in question conforms to such a standard.\textsuperscript{115} The Court qualified this statement, however, by setting the bar as "prevailing professional norms."\textsuperscript{116} If the American Bar Association Standards are the prevailing professional norms, why is it that the Court merely paid lip service to the standards and then refused to impose them on counsel so that the attorney performance in question was not even subjected to review by application of such "professional norms?"\textsuperscript{117}

The Court even went so far as to say that filing a notice of appeal is "a purely ministerial task that imposes no great burden on counsel" as it is generally a one-sentence document stating the defendant's desire to appeal from the judgment.\textsuperscript{118} In addition, the public defender in this case was bound by the California Penal Code, which imposed on trial counsel a per se duty to consult with defendants about the possibility of an appeal.\textsuperscript{119} It does not seem just that counsel could in effect shirk her duty to consult with the defendant and escape consequences simply because the defendant was left to pursue his remedy in federal court.\textsuperscript{120} If courts combine the characterization of such an error as a strategic choice with the analysis that the counsel's performance as a whole, was competent, the result could be deadly as the defendant will likely be deprived of his rights.\textsuperscript{121}

An overview of the applicable professional standards suggests that counsel's behavior violated the ethical guidelines promulgated by the American Bar Association and, in effect, denied the defendant the constitutional guarantee of effective assistance of counsel.\textsuperscript{122} While consideration of specific guidelines may not be mandatory from a constitutional standpoint, they are certainly valuable from an ethical point-of-view as the Rules provide a framework for the ethical practice of law.\textsuperscript{123} Because the failure to adhere to professional rules and standards may implicate the violation of constitutional rights, courts should

\textsuperscript{115} Id.
\textsuperscript{116} Id. at 688-89.
\textsuperscript{117} Id.

Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant . . . Judicial scrutiny of counsel's performance must be highly deferential.

\textit{Id.}
\textsuperscript{118} Roe v. Flores-Ortega, 528 U.S. 470, 474 (2000).
\textsuperscript{119} Id. at 479 (citing Cal. Penal Code Ann. § 1240.1(a) (West Supp. 2001)).
\textsuperscript{120} Id. at 474.
\textsuperscript{121} See Richard Klein, The Constitutionalization of Ineffective Assistance of Counsel, 58 Md. L. Rev. 1433, 1462 (1999).
\textsuperscript{122} See generally MODEL RULES OF PROFESSIONAL CONDUCT (1999); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, DEFENSE FUNCTION (1992).
\textsuperscript{123} See MODEL RULES OF PROFESSIONAL CONDUCT Scope (1999).
consider such guidelines when evaluating a claim of ineffective assistance of
counsel.\textsuperscript{124}

If the Court continues to apply the \textit{Strickland} standard to claims of ineffectiveness of counsel for failure to file a notice of appeal, it appears that the decision about whether to file the notice can be made by the lawyer without even discussing the possibility with the client, a concern expressed by Justice Souter in his opinion.\textsuperscript{125} This possibility seems particularly egregious in light of the circumstances of this particular case -- Flores-Ortega did not even speak English and needed a Spanish-language interpreter in order to enter his plea.\textsuperscript{126} In addition, he had no contact with his attorney until after the time to file the notice of appeal had passed.\textsuperscript{127} It seems entirely possible that the Spanish language interpreter read the public defender’s notation, “bring appeal papers,” and conveyed this fact to Flores-Ortega, who found comfort knowing that his rights were being protected, only to later find that counsel did not fulfill her duty.\textsuperscript{128} Justice Souter said of counsel’s obligation in this case:

To condition the duty of a lawyer to such a client on whether . . . 
an effective defendant would want to appeal . . . , is not only to
substitute a harmless-error rule for a showing of reasonableprofessional conduct, but to employ a rule that simply ignores
the reality that the constitutional norm must address.\textsuperscript{129}

The \textit{Strickland} Court, in rejecting the concept of a set of detailed rules for evaluating counsel’s conduct, was concerned with the independence of defense counsel to investigate, develop, and implement the defense strategy.\textsuperscript{130} Implicit in the Court’s position was that the Court sought to avoid interfering with the defense counsel’s conducting of the defense.\textsuperscript{131} In \textit{Flores-Ortega}, however, independence of counsel during the trial was not an issue since the defense had already been presented and the ineffectiveness challenge came for reasons stemming from counsel’s performance after trial.\textsuperscript{132} Therefore, the Court’s rejection of specific guidelines and deference to counsel in the absence of the \textit{Strickland} concern, was unfortunate: “this misplaced and generous deference often excuses questionable conduct that would otherwise have been ineffective but for the capricious \textit{Strickland} standard.”\textsuperscript{133}

The Court was presented with a case in which its decision was paramount to resolving a conflict in the lower courts regarding counsel’s obligations to

\textsuperscript{125} See \textit{Flores-Ortega}, 528 U.S. at 493 (Souter, J., concurring in part and dissenting in part).
\textsuperscript{126} Id. at 473.
\textsuperscript{127} Id. at 474.
\textsuperscript{128} Id.
\textsuperscript{129} \textit{Flores-Ortega}, 528 U.S. at 492 (Souter, J., concurring in part and dissenting in part).
\textsuperscript{132} See \textit{Flores-Ortega}, 528 U.S. at 474.
\textsuperscript{133} Cirilla, \textit{supra} note 124, at 278.
consult with criminal defendants about the right to appeal.\textsuperscript{134} By incorporating the guidelines promulgated by the American Bar Association into the standard for judging claims of ineffective assistance of counsel, the Court could have set the stage for a more uniform interpretation of counsel’s performance.\textsuperscript{135} As such, application of the “objective standard of reasonableness” test to the conduct at issue would not differ vastly among the circuits and the rights of similarly-situated defendants would be given adequate weight despite the geographic location of the court in which relief is sought.\textsuperscript{136}

\section*{V. CONCLUSION}

The Constitution does not require attorneys to act in accordance with the guidelines promulgated by the American Bar Association; a system of justice, however, is dependent upon guidelines of this nature so that officers of the court are bound to act in a professional manner. Without rules setting forth the boundaries for acceptable and unacceptable behavior, the system would run afoul of its purpose, leaving thousands of defendants at the mercy of counsel’s personal standards for professional conduct. The ABA Model Rules for Professional Conduct and the Model Code for Professional Responsibility are in accord with the Sixth Amendment by providing that the lawyer act as a competent advisor to the client.\textsuperscript{137} Also reflecting the underlying premise of the Sixth Amendment, that a criminal defendant enjoy a right to assistance of counsel for his or her defense, are the ABA Standards for Criminal Justice.\textsuperscript{138} The relationship between such standards and constitutional rights has been described as a circular one: it is necessary to evaluate counsel’s performance in light of professional standards when a constitutional right is violated.\textsuperscript{139}

What would seemingly be your worst nightmare was in fact a reality for Flores-Ortega and will probably be so for many other defendants in similar circumstances. The Court had the opportunity to define the \textit{Strickland} standard so as to apply to those cases where counsel’s failure to file a notice of appeal has an adverse effect on the defendant for reasons out of the defendant’s control.\textsuperscript{140} Until the Court requires specific guidelines, such as American Bar Association standards, to be given adequate weight in the determination of the reasonableness of counsel’s performance, many defendants will continue to be deprived of their rights and, possibly, their lives.

\begin{footnotesize}
\begin{enumerate}
\item[134] See \textit{Flores-Ortega}, 528 U.S. at 476.
\item[135] See, e.g., United States v. Tajeddini, 945 F.2d 458 (1st Cir. 1991); Romero v. Tansy, 46 F.3d 1024 (10th Cir. 1995); Morales v. United States, 143 F.3d 94 (2d Cir. 1998); Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994).
\item[136] \textit{Id.}
\item[137] See \textit{Cirilla}, supra, note 124, at 289.
\item[138] \textit{Id.}
\item[139] \textit{Id.} at 317.
\item[140] See, e.g., \textit{Roe v. Flores-Ortega}, 528 U.S. 470 (2000) (suggesting that the public defender’s failure to file a notice of appeal was out of defendant’s control since he was in lockup and unable to communicate with counsel).
\end{enumerate}
\end{footnotesize}
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