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The Ethics of Copyrighting Ethics Rules

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ARTICLES

THE ETHICS OF COPYRIGHTING ETHICS RULES

*Michael Ariens**

I. INTRODUCTION

A couple of years ago, I decided to use advances in technology to enhance learning and reduce student expenses in my Professional Responsibility course. I concluded that my students might learn more about divergent views on the ethical practice of law, as well as more about the nature and content of ethical rules, if they were able to compare more easily the provisions of the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules)¹ with the Texas Disciplinary Rules of Professional Conduct,² part of the law of lawyer

* Professor, St. Mary's University School of Law, San Antonio, Texas. Thanks to Susan Night for her excellent research assistance, and to Trina Lozoya for her assistance in locating a number of documents that were difficult to find. Thanks also to my colleague Geary Reamey for his incisive comments.

1. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT (2003) [hereinafter MODEL RULES]. The Model Rules were adopted by the ABA in 1983. See *Proceedings of the House of Delegates*, 108 A.B.A. REP. 763, 778 (1983) [hereinafter 1983 *Proceedings*]. In 1997, the ABA organized an "Ethics 2000" committee to assess and, if necessary, modify the Model Code. See E. Norman Veasey, *Commission on Evaluation of the Rules of Professional Conduct*, at http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html (last visited July 15, 2004); Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441 (2002). Changes suggested by the Ethics 2000 Committee were debated and approved by the ABA at its annual meeting in 2001 and midyear meeting in 2002. See *Summary of House of Delegates Action on Ethics 2000 Commission Report*, at http://www.abanet.org/cpr/e2k-summary_2002.html (last visited July 15, 2004) [hereinafter *Ethics 2000 Report*]. At its annual meeting in 2002, several additional changes to the Model Rules were adopted by the ABA. See *Report 201B: American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates*, at <http://www.abanet.org/cpr/mjp/201b.doc> (amended Rule 5.5, adopted by the ABA's House of Delegates); *Report 201C: American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates*, at <http://www.abanet.org/cpr/mjp/201c.doc> (amended Rule 8.5, adopted by the ABA's House of Delegates). See generally John A. Holtaway, *Commission on Multijurisdictional Practice*, at <http://www.abanet.org/cpr/mjp-home.html> (last visited July 15, 2004) (noting approval of Model Rules changes proposed by Committee on Multijurisdictional Practice). In 2003, the House of Delegates amended Model Rules 1.6 and 1.13, concerning confidentiality and representing organizations, respectively. See *Daily Journal: American Bar Association House of Delegates—2003 Annual Meeting*, at <http://www.abanet.org/leadership/2003/2003journal.pdf> (last visited July 15, 2004) (reporting that amended Rules 1.6 & 1.13 were adopted by the ABA's House of Delegates).

2. The Texas Disciplinary Rules of Professional Conduct were adopted by the Supreme Court of Texas by order on October 17, 1989, effective January 1, 1990. See generally Robert P. Schuwert & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS.

discipline in Texas. I decided to add the Model Rules to my website and to offer a “frames” page allowing students to compare both sets of rules side by side.³ For historical and comparative purposes, I also decided to include the 1969 Code of Professional Responsibility (Code).⁴ My pedagogical goals dovetailed with my desire to reduce the cost of materials to students, as the various textbooks containing the Model Rules often provided little “value added”⁵ other than offering a collection of the various sets of rules and codes adopted by the ABA.⁶

A student helping to build my website found both the Model Rules and Model Code on the Internet.⁷ Before I added them to my website, I wrote the ABA, the copyright holder, requesting permission to do so. In a faxed response, Richard J. Vittenson, Director of Copyrights & Contracts for the ABA, denied my request: “These publications [the Model Rules and Model Code] are valuable sources of revenue for the ongoing services of the Center [for Professional Responsibility] in promoting professional standards in fields of legal practice.”⁸

The fact that the Model Rules constitute a substantial revenue stream for the ABA is due less to lawyers’ desire to brush up on *model* rules of professional conduct,⁹ which are not law, than to the ABA’s direct role in approving law schools

L. REV. 1, 6 (1990). They have been amended only slightly since their adoption in 1990.

3. The address is <http://www.michaelariens.com>.

4. The Code of Professional Responsibility was adopted by the American Bar Association in 1969. See *Report of Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 728, 728 (1969) [hereinafter *1969 Report on Ethical Standards*]. Its effective date was January 1, 1970. *Id.* The Code was later re-named the Model Code of Professional Responsibility between 1979 and 1980, at a time when the ABA was amending its ethics standards, which would become the Model Rules of Professional Conduct. See *infra* text accompanying notes 43-45. One reason for adding “Model” before Code was an antitrust threat from the Department of Justice. See *Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538, 1540-41 (1978). The Model Code was superseded by the Model Rules in 1983. See *1983 Proceedings*, *supra* note 1, at 778.

5. For example, the 2003 edition of the American Bar Association’s Compendium of Professional Responsibility Rules and Standards is sold to students for \$19.95. See Memorandum of Jeanne P. Gray, Director, Center for Professional Responsibility (January 2003) (on file with author). This Compendium was useful until August 2003, when the ABA amended Model Rules 1.6 and 1.13, concerning confidentiality and representing organizations, respectively. See *Rule 1.6: Confidentiality of Information*, at <http://www.abanet.org/leadership/2003/journal/119a.pdf> (last visited July 15, 2004) (report on amended Rule 1.6, adopted by the ABA’s House of Delegates). See *Rule 1.13: Organization as Client*, at <http://www.abanet.org/leadership/2003/journal/119b.pdf> (last visited July 15, 2004) (report of amended Rule 1.13, adopted by the ABA’s House of Delegates).

6. Several of these compilations also offered some state variations from the ABA’s Model Rules, most of which were unimportant for my pedagogical purposes.

7. The American Bar Association reprints the Model Code on its website, although it’s not easy to find its location. See *Model Rules of Professional Conduct*, at http://www.abanet.org/cpr/mrpc/mrpc_home.html (last visited July 15, 2004). The site is also very cumbersome to navigate. For example, the site is designed so that the user can view only one rule at a given time. That is, one cannot scroll through the Model Rules to note cross-references or for other reasons. Instead, the researcher must move from a rule back to the homepage before selecting another rule. Thus, the site appears intentionally designed to require one to go purchase a bound book containing the Model Rules.

8. Letter from Richard J. Vittenson to Michael Ariens (Jan. 23, 2002) (on file with author).

9. The ABA publishes a book titled ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT. It retails for \$98.00. The ABA sells it to those ABA members who have also joined its Center for Professional Responsibility for \$73.50 (undated brochure on file with author). The book can be purchased from amazon.com for \$68.60. See <http://www.amazon.com/exec/obidos/tg/detail/-/159031>

and its indirect role in licensing lawyers. Because most states require that every bar applicant graduate from an ABA-approved law school, law schools must maintain their status as ABA-approved schools in order to remain in business. The ABA Standards for Approval of Law Schools require that law schools make students take a course in legal ethics as a condition of graduation. Not only must law schools require their students to take a course in legal ethics, but those courses must also include instruction in the ABA's ethics rules.¹⁰ Furthermore, nearly all jurisdictions require that bar applicants pass the Multistate Professional Responsibility Examination (MPRE) in order to become a licensed lawyer.¹¹ The MPRE is a product of the National Conference of Bar Examiners (NCBE). The material tested on the MPRE is based substantially on the Model Rules. The ABA has thus used its role in the training of lawyers to create a situation which all but requires law students and bar applicants to purchase the organization's own Model Rules. The ABA's exploitation of law students ensures that the Model Rules and Model Code are "valuable sources of revenue."

The purpose of this essay is to argue that this exploitation is unethical. It explores the manner in which the ABA obtained this position of power over law students and criticizes the ABA's position of dominance in the field of legal ethics.

II. A SHORT HISTORY OF ABA CODES OF ETHICS

The American Bar Association was founded in 1878 to professionalize the practice of law by bringing together an association of "the best men of the bar."¹² Professionalization was not exclusive to lawyers;¹³ the late nineteenth century was also a time of professionalization in other occupational fields.¹⁴ The ABA's initial

2430/102-2665096-5379333?v=glance (last visited Feb. 20, 2004). Its rank on Amazon then was 1,181,823, which indicates it is not a bestseller.

10. The ABA's Section on Legal Education and Admissions to the Bar is currently revising Chapter 3 of its Standards for Approval of Law Schools. See *Proposed Comprehensive Revision of Chapter 3 of the Standards*, SYLLABUS, Feb. 2004, at 1. Standard 302, titled "Curriculum," will be revised to require "(a)(5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members." This would alter current Standard 302(b) which requires, in part, "instruction in the Model Rules of Professional Conduct of the American Bar Association." See *id.* at 17. The Section made a final decision concerning these revisions in June 2004. The ABA House of Delegates has postponed its vote on amended Standard 302 to its February 2005 midyear meeting. See *Commentary on the Changes to the Standards for the Approval of Law Schools and the Work of the Standards Review Committee 2003-2004*, SYLLABUS, Sept. 2004, at 21.

11. See *2000 Statistics*, 70:2 B. EXAMINER 22 (2001) (noting the MPRE is required in 52 jurisdictions).

12. See John A. Matzko, "The Best Men of the Bar": The Founding of the American Bar Association, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 75, 75-80 (Gerald W. Gawalt ed., 1984). See also EDSON R. SUNDERLAND, *HISTORY OF THE ABA* 17 (1953) (listing purposes of ABA, including "[t]o uphold the honor of the profession"). For a study of the creation of the modern legal profession, see Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. AM. CULTURE 25 (1992).

13. See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 4 (1994) (discussing professionalization of legal education); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 346 (1979).

14. See generally ROBERT V. BRUCE, *THE LAUNCHING OF MODERN AMERICAN SCIENCE, 1846-*

efforts included promoting substantive law reform and enhancing the prestige of the profession.¹⁵ Enhancing the prestige of the profession included efforts to regulate entry into the market. One of the first actions of the newly-formed ABA was to create a Committee on Legal Education and Admissions to the Bar, which was ordered to report at the next annual meeting on “some plan for assimilating throughout the Union, the requirements of candidates for admission to the bar.”¹⁶ The Committee’s report urged that the practice of law be limited to persons who had graduated from law school, for this was a superior education to reading law, the then-dominant path to the practice of law.¹⁷

Another action taken to enhance the prestige of the legal profession was the adoption of a code of ethical conduct. In its early years, the ABA did little concerning the issue of legal ethics. It created a Committee on Grievances in its Constitution,¹⁸ but that committee “scarcely functioned at all during the Saratoga Era [1878–1902].”¹⁹ In 1887, the Alabama State Bar Association adopted a code of ethics, much of it borrowed from lectures given in the 1850s by a Pennsylvania Judge, George Sharswood.²⁰ Although there was little initial response by the ABA to Alabama’s code, by the mid-1890s the ABA’s Committee on Legal Education had twice recommended that law schools provide training in the ethics of lawyering.²¹ Additionally, the bar associations of ten states adopted an ethics code similar to, and based on, the Alabama Code.²² In 1905, after President Theodore

1876 (1987) (natural science); THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977) (social science); PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988) (history); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991) (social science); PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982) (medicine).

15. See *Proceedings of the Conference Called for the Purpose of Organizing a National Bar Association and of the First Annual Meeting of the American Bar Association*, 1 A.B.A. REP. 5, 30 (1878). See generally SUNDERLAND, *supra* note 12, at 17 (listing the ABA’s constitutional objectives).

16. See SUSAN K. BOYD, *THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR* 4 (1993).

17. See *Report of the Committee on Legal Education and Admissions to the Bar*, 2 A.B.A. REP. 209, 216 (1879). See generally BOYD, *supra* note 16, at 4-8 (exploring the ABA’s discussion of whether a law diploma be required for bar admission).

18. American Bar Association, *Constitution, Art. III*, 1 A.B.A. REP. 5, 30-31 (1878).

19. SUNDERLAND, *supra* note 12, at 22.

20. Alabama Code of Ethics, 118 Ala. xxiii (1899) (reprinting code adopted by state bar in 1887). See also Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471 (1998) (discussing the history of initial efforts to implement ethics provisions); Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAW. 483, 493 (1932) (same). On Sharswood, see generally Samuel Dickson, *George Sharswood*, in 6 GREAT AMERICAN LAWYERS 123 (William Draper Lewis ed., 1909) (explaining the life and work of Sharswood).

21. See *Report of the Committee on Legal Education*, 18 A.B.A. REP. 309, 311, 323-25 (1895); *Report of Committee on Legal Education and Admissions to the Bar*, 20 A.B.A. REP. 349, 377-82 (1897). Cf. Emlin McClain, *The Law Curriculum: Subjects to be Included and Order of Presentation*, 19 A.B.A. REP. 467, 486 (1896) (barely mentioning in passing the inclusion of a course in legal ethics as a third year course, at a time when most law schools had not yet adopted the three-year model championed by Harvard Law School).

22. See James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2437-38 (2003). Altman notes that an eleventh state, Louisiana, also adopted a code of ethics during this time, but did not acknowledge any reliance on the Alabama code. *Id.* at 2437. See also

Roosevelt gave an address at Harvard University urging lawyers and businessmen to embrace ideals loftier than the acquisition of money,²³ ABA President Henry St. George Tucker asked the ABA to consider working on a code of ethics.²⁴ Shortly thereafter, the life insurance industry scandal was publicly investigated by a New York lawyer named Charles Evans Hughes,²⁵ and the actions of lawyers who helped conceal self-dealing in the industry called into question again the ethical stature of lawyers.²⁶

An ABA committee charged with investigating the drafting of a code of ethics returned a favorable report at the 1906 annual meeting.²⁷ At its annual meeting two years later, the ABA adopted 32 Canons of Ethics.²⁸ In less than two decades, "almost all of the state and local bar associations of the country" had adopted some variation of the Canons.²⁹ Although the Canons were amended and additional Canons were added,³⁰ and although special committees recommended the overhaul of the Canons several times,³¹ the Canons of Ethics remained the unofficial standard of ethical conduct for lawyers for over sixty years.

CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.6.2, at 54 n.21 (1986) (noting after 1887, ten states borrowed heavily from Alabama).

23. See Theodore Roosevelt, *Address at Harvard University* (June 28, 1905), in 4 THEODORE ROOSEVELT, *PRESIDENTIAL ADDRESSES AND STATE PAPERS* 407 (1910). Another speech given at Harvard less than two months earlier by Louis D. Brandeis also noted the "capture" of lawyers by large corporations, and urged lawyers to resist the lure of lucre. See generally Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905) (printed text of speech given on May 4, 1905).

24. See *Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association*, 28 A.B.A. REP. 3, 132 (1905).

25. On Hughes, see Geoffrey Blodgett, *Hughes, Charles Evans*, in *DICTIONARY OF AMERICAN BIOGRAPHY* Supp. Four 403, 404 (John A. Garraty & Edward T. James eds., 1974); JAMES GRAFTON ROGERS, *AMERICAN BAR LEADERS* 226 (1932). See also MERLO J. PUSEY, *CHARLES EVANS HUGHES* (2 vols. 1951). Pusey was Hughes' official biographer, and the biography was very sympathetic to Hughes. A work focused on Hughes as Supreme Court Justice is SAMUEL HENDEL, *CHARLES EVANS HUGHES AND THE SUPREME COURT* (1951). A study of Hughes as reformer and Governor of New York is ROBERT F. WESSNER, *CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK, 1905-1910* (1967).

26. See MORTON KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885-1910: A STUDY IN THE LIMITS OF CORPORATE POWER* 245-64 (1963); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916*, at 94-95 (1963). See also *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 121-27 (Daniel J. Danelski & Joseph S. Tulchin eds., 1973) (discussing Hughes' role in the gas and insurance investigations); WESSNER, *supra* note 25, at 18-48 (discussing Hughes' work as counsel in both the gas and insurance scandals of 1905).

27. *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 600 (1906).

28. See *Transactions of the Thirty-First Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 86 (1908). For a thorough history of the Canons, see Altman, *supra* note 22, at 2395. See also JEROLD S. ADERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 40-43 (1976) (discussing the impetus and adoption of the Canons).

29. *Report of the Standing Committee on Professional Ethics and Grievances*, 49 A.B.A. REP. 466, 467 (1924). See also SUNDERLAND, *supra* note 12, at 112 (noting by the 1910 annual meeting of the ABA, 22 state and local bar associations had adopted Canons).

30. See generally *REPORT OF THE SPECIAL COMMITTEE OF THE AMERICAN BAR FOUNDATION ON CANONS OF ETHICS* (June 30, 1958) (noting amendments and additions to Canons).

31. See *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 729, 729 (1969) (noting efforts in 1928, 1933, and 1937 by special committees to recommend revisions in Canons, and efforts begun in 1954 by the American Bar Foundation to recommend changes in Canons).

In 1964, ABA President Lewis F. Powell appointed a Special Committee on the Evaluation of Ethical Standards to replace the Canons.³² The Special Committee crafted the Code of Professional Responsibility largely without outside assistance or interference, as its occasional unrevealing reports to the ABA over the next several years indicated.³³ In 1969, the Special Committee urged the adoption of the Code of Professional Responsibility to supplant the Canons of Ethics, and the House of Delegates approved the Special Committee's recommendation.³⁴ The ABA organized an effort urging states to adopt the Code as law. Within three years, most states had adopted all or part of the Code.³⁵

Less than a decade later, controversies concerning both the legal profession and the Code led the ABA to begin work on another ethics code. The Watergate Scandal, which began as an investigation into a burglary of the headquarters of the Democratic National Committee at the Watergate building in Washington, D.C., eventually reached into the White House, causing Richard Nixon to resign the presidency. A number of lawyers were implicated in the Watergate scandal, which tarnished the reputation of the profession.³⁶ In 1974, the Department of Justice filed an antitrust suit against the ABA concerning several provisions of its Code of Professional Responsibility.³⁷ In 1975, the Supreme Court held that a county bar association's minimum fee schedules for routine legal work violated the Commerce Clause;³⁸ two years later, the Court held that absolute bans on lawyer advertising, which were a part of the Code, unconstitutional on free speech grounds.³⁹ The Department of Justice again considered whether the ABA's Code violated the Sherman Antitrust Act, particularly its "anti-competitive" rules barring

32. See *Proceedings of the House of Delegates*, 89 A.B.A. REP. 365, 383 (1964).

33. A review of the annual reports of the American Bar Association between 1964 and 1969 indicates that no report was filed by the Special Committee for several of those years, and such reports that were filed consisted of little more than a paragraph indicating that the Committee was continuing its work on the Code.

34. *1969 Report on Ethical Standards*, *supra* note 4, at 728; *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. REP. 378, 389-92 (1969) [hereinafter *1969 Proceedings*].

35. See *Report of Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972) [hereinafter *1972 Report to Secure Adoption*] (noting that 43 states and the District of Columbia had adopted all or part of Code as law, with 4 other state bar associations also adopting the Code as applicable to members, though not law, leaving just 3 states, including California, which had not adopted the Code). The Special Committee also provided a summary of action of the states concerning the Code, which indicated whether such states had adopted all or part of the Code, and how such adoption became law in each state. See *id.* at 741-44.

36. For a contemporary evaluation of Watergate and its impact on the reputation of lawyers, see David R. Brink, *Who Will Regulate the Bar?*, 61 A.B.A. J. 936, 937 (1975) ("[I]f Watergate has not tarnished the image of lawyers, at least it has acutely intensified public consciousness of questions of legal ethics and professional accountability.").

37. See *Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing before the Tunney Subcommittee*, 60 A.B.A. J. 791, 792-93 (1974); *Justice Department Continues Its Contentions that the Houston Amendments Raise Serious Antitrust Problems*, 60 A.B.A. J. 1410, 1410-14 (1974); *House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments*, 61 A.B.A. J. 463, 465 (1975) (reporting retreat of ABA concerning legal services plans in the Code as a consequence of Justice Department pressure).

38. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

39. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977).

advertising.⁴⁰ Although the Department of Justice ended its investigation by dismissing its suit without prejudice, one commentator believes this was a principal factor in the ABA's decision to create a committee to look at its ethics code.⁴¹ Finally, the Code was subject to a substantial amount of criticism from scholars and lawyers.⁴²

In 1977, Robert Kutak was asked by ABA President William B. Spann, Jr., to chair a special committee to review "all facets of legal ethics."⁴³ Spann later reported, "Work has begun on redrafting the Code of Professional Responsibility to make the code of ethics more meaningful to the practicing lawyer and to resolve gray areas that have not had explicit ethical direction."⁴⁴ Six years later, the Kutak Commission's project culminated in the ABA's adoption of the Model Rules of Professional Conduct, which supplanted the ABA's Model Code.⁴⁵ The ABA again successfully organized efforts to encourage states to adopt the Model Rules, although the process was slower and not quite as successful as implementation of the Code had been a decade earlier.⁴⁶ The Model Rules have since been amended as a result of the work of the ABA's Ethics 2000 Commission.⁴⁷

III. COPYRIGHT AND CODES OF ETHICS

In 1909, Congress extensively revised the law of copyright⁴⁸ pursuant to its constitutional power to "promote the Progress of Science and useful Arts, by

40. See Lawrence Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976) (noting filing of Department of Justice antitrust case regarding the Code's provision on lawyer advertising). See also *Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538, 1538 (1978).

41. See WOLFRAM, *supra* note 22, § 2.6.4, at 60-61; Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 95, 100-03 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992). Professors Wolfram and Schneyer both note that the criticisms of the ABA's Code (and later Model Rules) were often contradictory.

42. See WOLFRAM, *supra* note 22, § 2.6.4, at 60-61.

43. See Ted Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, 14 *LAW & SOC. INQUIRY* 677, 677 (1989) (quoting William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, *BAR LEADER*, Nov.-Dec. 1977, at 2, 3). A shorter version of Professor Schneyer's article is Schneyer, *supra* note 41.

44. William B. Spann, Jr., *President's Page*, 64 A.B.A. J. 639, 639 (1978).

45. See *1983 Proceedings*, *supra* note 1, at 778.

46. See *Informational Report of the Special Committee on Implementation of the Model Rules of Professional Conduct*, 111:2 A.B.A. REP. 343, 343 (1986) (noting the adoption of the Model Rules by thirteen states and consideration in twenty-four more); *Informational Report of the Adjunct Committee on Implementation of the Model Rules of Professional Conduct*, 112:2 A.B.A. REP. 79, 79 (1987) (noting that all but eight jurisdictions had adopted or considered adoption of Model Rules); *Informational Report of the Adjunct Committee on Implementation of the Model Rules of Professional Conduct*, 113:1 A.B.A. REP. 64, 64 (1988) (noting adoption of Model Rules by twenty-five states, with another nine considering adoption).

47. In 1997, the ABA organized an "Ethics 2000" committee to assess and, if necessary, modify the Model Code. See Veasey, *supra* note 1; Love, *supra* note 1, at 444. Amendments to the Model Rules suggested by the Ethics 2000 Committee were debated and approved by the ABA at its annual meeting in 2001 and at its midyear meeting in 2002. See *Ethics 2000 Report*, *supra* note 1.

48. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁹ One provision of the Copyright Act of 1909 announced the “work for hire” doctrine, by which corporations were permitted to hold a copyright on published works created by employees.⁵⁰ The act ratified an emerging legal assent to the “ultimate legal fiction underlying modern copyright law,”⁵¹ “the fiction of corporate authorship.”⁵²

The ABA never attempted to copyright its 1908 Canons of Ethics.⁵³ Those Canons borrowed heavily from the noncopyrighted Alabama State Bar Association’s 1887 Code of Legal Ethics,⁵⁴ which borrowed substantially from Sharswood’s 1854 *Essay on Professional Ethics*.⁵⁵ The copyright held in 1854 by Sharswood’s publisher T. & J.W. Johnson & Co. had expired.⁵⁶ Had any ABA officers thought about attempting to copyright its Canons, they would have quickly concluded such a quest was quixotic and likely impermissible, as well as improper. Indeed, the evidence suggests that the ABA viewed the Canons as a service to the profession, something to be shared freely with all lawyers.⁵⁷

When the ABA readied the adoption of its Code of Professional Responsibility in the late 1960s, it took care to send thousands of copies of drafts of the Code to lawyers and other interested parties. The Special Committee indicated that “[o]n January 15, 1969, approximately 20,000 copies of the Preliminary Draft of the

49. U.S. CONST. art. I., § 8, cl. 8.

50. Act of Mar. 4, 1909, ch. 320, §§ 3, 23, 35 Stat. 1075.

51. Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 55 (2003); 17 U.S.C. § 26 (1909 Act) (repealed 1976).

52. Fisk, *supra* note 51, at 55. See also SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 101-05 (2001) (discussing creation of “corporate copyright” in 1909 Act).

53. See, e.g., AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS (1968 ed.) [hereinafter ABA CANONS] (ABA publication of the Canons of Professional Ethics without any copyright notice).

54. However, the Canons were not exclusively taken from the Alabama Code. The Alabama Code was responsible for just twenty-eight of the thirty-two Canons. See Altman, *supra* note 22, at 2432.

55. The ABA reprinted Sharswood’s *Essay on Professional Ethics* in its 1907 annual report. See George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. REP. 9 (1907) (the entire seventh volume is solely dedicated to Sharswood’s piece).

56. Under the 1790 Copyright Act, an author was given copyright protection for fourteen years, with one fourteen-year renewal available. David Rabinowitz, *Everything You Ever Wanted to Know about the Copyright Act Before 1909, but Couldn’t Be Bothered to Look up*, 49 J. COPYRIGHT SOC’Y USA 649, 649 (2001). Congressional action in 1831 extended the initial copyright term to twenty-eight years, with one fourteen year renewal available. *Id.* at 651. The copyright page to a later edition of Sharswood’s *Essay on Professional Ethics* indicates that the publisher, T. & J.W. Johnson & Company, last copyrighted the book in 1884. See Sharswood, *supra* note 55, inside front cover. Therefore, the copyright to Sharswood’s published 1854 lectures expired no later than 1896, and any copyright to his revised version of 1860 expired no later than 1902.

57. See SUNDERLAND, *supra* note 12, at 112 (noting that after adoption of the Canons, the ABA membership agreed to inform each bar association in the United States that it would send to them “as many copies as it may desire for distribution to its members.”). See generally ABA CANONS, *supra* note 53 (a free pamphlet of the Canons published by the Law Student Division ostensibly for law students).

proposed Code of Professional Responsibility were distributed⁵⁸ Copies of the Final Draft were sent to all of the members of the House of Delegates, as well as to those who received the preliminary draft.⁵⁹ On page fifty-five of the 1970 Appendix to the Annual Report of the American Bar Association, the ABA noted that copies of its newly-adopted Code of Professional Responsibility were "available in pamphlet form from the Headquarters Office upon request."⁶⁰ This notation was printed in the Appendices to the Reports of the American Bar Association through its 1985 Annual Report. In 1975, the ABA's Standing Committee on Ethics and Professional Responsibility reported at the ABA's annual meeting that it had distributed, at no cost, 80,000 copies of both the Code of Professional Responsibility and the Code of Judicial Conduct during the first four months of 1975.⁶¹ The Standing Committee also reported that it had arranged the printing of an additional 60,000 copies of both Codes, which would be available for distribution in August 1975. The Standing Committee concluded: "Due to the large volume of requests for both Codes, it appears increasingly likely that a charge for copies of the Codes may be necessary in the near future."⁶² Given the publication and distribution costs for 140,000 copies, this suggestion by the Standing Committee was more than reasonable. However, there are no indications in subsequent annual ABA Reports that the Standing Committee formally recommended this course of action to the House of Delegates, or that the House ever proposed its adoption. Instead, through 1985, the Code of Professional Responsibility and, beginning in 1983, the Model Rules of Professional Conduct were available upon request to the Chicago office of the ABA. Then, beginning with the 1986 Annual Report, the offer to provide complimentary copies was omitted.

As the ABA considered adopting the Model Rules, thousands of preliminary drafts were sent to interested parties for comment and evaluation. As noted by Professor Schneyer, the creation of the Model Rules "amounted to the most sustained and democratic debate about professional ethics in the history of the American bar."⁶³ The list of groups commenting on the proposed Model Rules numbered over 100,⁶⁴ and the cost of the Model Rules project to the ABA was nearly \$700,000.⁶⁵

After the ABA adopted its Model Rules, its generosity in providing free copies of the Model Rules largely ended. In order to urge the adoption of the Model Rules by states and voluntary bar organizations, the ABA created a Special Committee on the Implementation of the Model Rules of Professional Conduct. In its initial report

58. See *1969 Proceedings*, *supra* note 34, at 728.

59. See *id.*

60. See *Code of Professional Responsibility and Code of Judicial Ethics*, 95 A.B.A. REP. app. at 55 (1970).

61. See *Report of the Standing Committee on Ethics and Professional Responsibility*, 100 A.B.A. REP. 780, 780 (1975).

62. See *id.*

63. Schneyer, *supra* note 41, at 95.

64. *Id.*

65. *Id.* Based on the consumer price index for inflation, a conservative estimate of that amount in today's dollars is over \$1.5 million.

to the ABA in 1984, the Special Committee noted that it had given "reprint permission" to every legal periodical in the United States.⁶⁶ That is, the Special Committee allowed every legal periodical to reprint the Model Rules once without paying a copyright fee. In addition, the Special Committee reported that it had sent ten free copies of the Model Rules to each state bar association.⁶⁷ This focus on the economic value of the Model Rules of the ABA was a far cry from its previous efforts in distributing its Canons and Code.

As noted above, the Canons were never copyrighted. Pamphlet copies of the Model Code indicate that the ABA copyrighted the Model Code, but it appears that the ABA never charged those who requested a copy during the Code's fourteen-year existence.⁶⁸ Part of the reason for the ABA's reluctance to enforce the copyright may have been the weakness of the availability of the "work for hire" doctrine as it applied to creative works such as the Code. The Code was created by a special commission of ABA members who were not employees of the ABA. It was not until the adoption of an expanded definition of "work made for hire" in 1976 that nonprofit organizations like the ABA were permitted to copyright "a work specially ordered or commissioned for use as a contribution to a collective work, ... as a compilation ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."⁶⁹ A more powerful reason, based on reading official ABA publications, is that the ABA believed the Code was meant to be shared freely with the public as part of the ABA's service to the public interest.

Like the Model Code, the Model Rules were copyrighted. Unlike the case of the Model Code, the ABA was intent on enforcing its copyright monopoly. After 1985, the ABA revoked its published offer to send a free copy of the Model Rules to anyone requesting one. The Special Committee charged with persuading states and state and local bar associations to adopt the Model Rules clearly understood that the

66. See *Report of the Special Committee on Implementation of the Model Rules of Professional Conduct*, 109 A.B.A. REP. 432, 432 (1984) [hereinafter *1984 Report on Model Rules*].

67. See *id.* Ten seems less than generous for an entire state bar. After all, shortly after the Canons of Ethics were adopted in 1908, the ABA voted to send ten copies of the Canons to each bar association. See SUNDERLAND, *supra* note 12, at 112.

68. See *Report of the Special Committee on Implementation of Standards and Codes*, 100 A.B.A. REP. 376, 376 (1975). At its 1974 annual meeting, the ABA created a Special Committee on Implementation of Standards and Codes. *Id.* The first report of that Special Committee noted that distribution and implementation of the Code of Professional Responsibility was within its jurisdiction. *Id.* The Special Committee also noted that "estimates of the probable cost of implementation efforts which are likely to be undertaken in the near future" should be developed. *Id.* However, subsidizing such efforts by charging for the Code of Professional Responsibility was not mentioned by the report. In 1978, after the Kutak Commission began its work on the Model Rules, the Standing Committee on Ethics and Professional Responsibility indicated that it planned to work with West Publishing Company on a joint publishing program of an annotated Code of Professional Responsibility and the Code of Judicial Conduct, which would be sold. *Report of the Standing Committee on Ethics and Professional Responsibility*, 103 A.B.A. REP. 705, 707 (1978) [hereinafter *1978 Report*]. The Board of Governors permitted the Standing Committee to proceed with this project. See *Informational Report of the Board of Governors to the House of Delegates*, 103 A.B.A. REP. 640, 649 (1978) [hereinafter *1978 Board of Governors Report*].

69. See 17 U.S.C. § 101 (Copyright Act of 1976). The 1976 Act's provision on the work for hire doctrine is discussed in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737-38 (1989).

Model Rules were valuable intellectual property owned by the ABA. The ABA began to view a code of ethics not just as a public service, nor as a defense mechanism for lawyers claiming the mantle of professionalism, but as a generator of revenue. The next section suggests how and why the ABA came to view codes of ethics as a revenue generator rather than as a cost center.

IV. THE ABA AND THE ACCREDITATION OF LAW SCHOOLS

A. Accreditation and the Bar Examination

In 1913, the Carnegie Foundation commissioned Alfred Z. Reed to report on the state of legal education.⁷⁰ ABA leaders believed the report (known as the "Reed Report") would vindicate the ABA's twin goals of unifying legal education and making it more demanding. Lawyers hoped the Reed Report would benefit the legal profession in the same way the Flexner Report had benefitted the medical profession.⁷¹ In 1920, one year before the Reed Report was published, the ABA's Section on Legal Education and Admissions to the Bar created a Special Committee on Legal Education.⁷² The Special Committee, known as the Root Committee after its chairman Elihu Root, concluded that the bar should remain uniform and that legal education should become uniform.⁷³ The Root Committee's report was contrary to the Reed Report, which argued in favor of a differentiated bar, the categories for which depended on the lawyer's type of practice and his legal education.⁷⁴ The Root Committee, having been given advance copies of the Reed Report, published its conclusions shortly before the Reed Report was formally published.⁷⁵ The ABA adopted the Root Committee's report and began listing law schools which met its modest standards.

70. For a thorough study of Reed and the Reed Report, see ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 112-30 (1983). See also AUERBACH, *supra* note 28, at 110-13 (briefly discussing Reed and his work).

71. Abraham Flexner began evaluating medical schools in 1906. His report was published in 1910, and was credited with improving the standards of medical education, in part by causing a reduction in the number of medical schools in the United States. See generally ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA* (1910) (reporting on the state of medical education and proposing reforms). A recent publication by the ABA reiterates this belief. See BOYD, *supra* note 16, at 25 ("The Flexner report had resulted in reducing the number of medical schools that operated part-time, were poorly equipped, or had inferior faculty."). Historians Michael Schudson and Paul Starr reject this claim. See Michael Schudson, *The Flexner Report and the Reed Report: Notes on the History of Professional Education in the United States*, 55 SOC. SCI. Q. 347, 350 (1974) ("Medical schools were in decline from at least 1906"); STARR, *supra* note 14, at 118 ("[C]hanging economic realities, rather than the Flexner report, were what killed so many medical schools in the years after 1906.").

72. See *Proceedings of the Section of Legal Education and Admissions to the Bar*, 45 A.B.A. REP. 465, 465-66 (1920).

73. See *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 679, 681-83 (1921).

74. See ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 238 (1921).

75. See BOYD, *supra* note 16, at 26.

In 1927, when the first legal education advisor to the ABA's Section on Legal Education and Admissions to the Bar was hired, no state required its bar applicants to graduate from a law school approved by the ABA.⁷⁶ By the late 1930s, twenty states required any applicant to the bar to be a graduate of an ABA-approved law school.⁷⁷ By 1979, over forty states and the District of Columbia required bar applicants to graduate from an ABA-accredited law school.⁷⁸ Today, California is the most prominent state which does not, at least in part, require its applicants to graduate from an ABA-accredited law school.⁷⁹

B. ABA Accreditation and Requiring the Teaching of Legal Ethics

In 1973, the ABA adopted Standards for Approval of Law Schools and Interpretations, replacing the rudimentary standards created in 1921 after the adoption of the Root Committee's report.⁸⁰ The Section on Legal Education included a provision declaring, "[T]he law school shall offer . . . instruction in the duties and responsibilities of the legal profession."⁸¹ Debate in the House of Delegates at its mid-year meeting centered around this requirement, Standard 302(a)(iii). The Arizona delegate, Stanford E. Lerch, advocated amending proposed Standard 302(a)(iii) as follows: "(iii) A course for credit required for graduation on the subject of the legal profession, covering its history and traditions, its future potential, ethics, professional conduct and attorney-client relations."⁸²

76. See *id.* at 28-29.

77. See RICHARD L. ABEL, *AMERICAN LAWYERS* 55 (1989) (noting that the number of states requiring applicants to graduate from an ABA-accredited law school rose from none in 1927 to nine in 1935, to twenty-three in 1938, to forty-six in 1979, and to forty-eight in 1984). Cf. BOYD, *supra* note 16, at 40 (noting that the Territory of Hawaii was the first entity to adopt requirement, followed by New Mexico).

78. See, e.g., *Informational Report of the Section of Legal Education and Admissions to the Bar*, 103 A.B.A. REP. 953, 953 (1978) (stating that forty-three states and the District of Columbia require applicants to the bar to graduate from an ABA-approved law school); *Informational Report of the Section of Legal Education and Admissions to the Bar*, 104 A.B.A. REP. 731, 731 (1979) (same); *Informational Report of the Section of Legal Education and Admissions to the Bar*, 104 A.B.A. REP. 1149, 1149 (1979) (same). See also ABEL, *supra* note 77, at 55 (noting forty-six states and the District of Columbia required applicants to graduate from an ABA-accredited law school in 1979); Diana Fossum, *Law School Accreditation Standards and the Structure of American Legal Education*, 1978 AM. B. FOUND. RES. J. 515, 517-22 (noting the ebb and flow of states making the ABA the accrediting body for bar applicants).

79. See CAL. BUS. & PROF. CODE § 6060(e)(1) (Supp. 2004). In 1996, the California legislature first added language concerning the eligibility to take the bar examination of graduates of ABA-approved law schools. See *id.* The amended language of § 6060(e) made persons eligible for the state bar exam if they graduated from "a law school accredited by the examining committee or approved by the American Bar Association." *Id.* (emphasis added). This language allowing graduates of an ABA-approved school which is not accredited by the California authorities was continued in a 2001 amendment to § 6060. *Id.*

80. See *Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 98 A.B.A. REP. 351, 351 (1973) [hereinafter *1973 Report No. 1*]; *Proceedings of the 1973 Midyear Meeting of the House of Delegates*, 98 A.B.A. REP. 151, 154-157 (1973) [hereinafter *1973 Midyear ABA Delegate Meeting*].

81. *1973 Report No. 1*, *supra* note 80, at 354 (Proposed Section 302(a)(iii)).

82. *1973 Midyear ABA Delegate Meeting*, *supra* note 80, at 154.

Lerch's goal was for all ABA-approved law schools to require, as a condition of graduation, the completion of a course in legal ethics.⁸³ There was no evidence that law schools generally shunned legal ethics or professional responsibility courses at that time.⁸⁴ Lerch accepted a substitute: "(iii) And provide and require for all student candidates for a professional degree instruction in the duties and responsibilities of the legal profession."⁸⁵ This was the only amendment to the proposed Standards adopted by the House of Delegates.

The next year, however, Lerch proposed additional language to Standard 302(a)(iii). At the ABA's 1974 annual meeting, the Section on Legal Education and Admissions to the Bar approved the following revision of Standard 302(a)(iii):

Such required instruction need not be limited to any pedagogical [sic] method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and bar in such instruction.⁸⁶

The amendment was approved by the ABA's House of Delegates in August 1974.⁸⁷ At the ABA's mid-year meeting in February 1975, the Section on Legal Education reported that it had prepared a questionnaire for state boards of law examiners. The questionnaire inquired "about the method and extent of examining candidates for admission to the bar about ethics and professional responsibility. The questionnaire was forwarded to the National Conference of Bar Examiners at the time of preparation of [the] Report."⁸⁸ At the annual meeting six months later, the Standing Committee on Ethics and Professional Responsibility reported its

83. *Id.* at 155.

84. *See Report of the Section of Legal Education and Admissions to the Bar*, 101 A.B.A. REP. 1129, 1133-34 (1976) [hereinafter *1976 Report*] (noting that in a survey of ABA-approved schools concerning the existence of courses on legal ethics or professional responsibility, "[a]ll but one accredited law school offer courses; the one not doing so teaches legal ethics and professional responsibility as part of the various substantive law courses"). *See also* Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 248-49 (noting that surveys of law schools from the 1920s through the 1960s indicated most law schools offered courses in legal ethics, and most of those schools required students to take such courses to graduate); BOYD, *supra* note 16, at 41 (noting that majority of law schools offered some ethics instruction in 1931).

85. *1973 Midyear ABA Delegate Meeting*, *supra* note 80, at 155.

86. *Report of the Section of Legal Education and Admissions to the Bar*, 99 A.B.A. REP. 1104, 1107 (1974).

87. *See Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 100 A.B.A. REP. 516, 519 (1975) [hereinafter *1975 Report No. 1*] (reporting action of House of Delegates at 1974 annual meeting). In 1981, this Standard was re-numbered 302(a)(iv). *See Report No. 4 of the Section of Legal Education and Admissions to the Bar*, 106 A.B.A. REP. 892, 892 (1981); *House of Delegates Proceedings*, 106 A.B.A. REP. 541, 571 (1981) (approving amendments to Standards). After the ABA adopted the Model Rules, the requirement to instruct students in the Code was removed, and Standard 302(a)(iv) was renumbered Standard 302(b) in the mid-1990s. In 1988, Standard 302(a)(iv) was amended to require "instruction in the Model Rules of Professional Conduct of the American Bar Association." *See AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS Std. 302(b)* (1988) (emphasis added).

88. *See 1975 Report No. 1*, *supra* note 87, at 519.

distribution of 80,000 copies of the Code during the first four months of 1975 and noted the printing and availability for distribution of an additional 60,000 copies. There is no indication that the volume of requests by lawyers had suddenly increased five years after the Code was adopted by the ABA, and several years after most states had adopted some version of the Code.⁸⁹ Instead, this extraordinary need to print 140,000 copies of the Code was a response by law schools and their students to the ABA's amendment to Standard 302(a)(iii), which linked ABA approval to the teaching of legal ethics,⁹⁰ and further linked the teaching of legal ethics to the ABA Code of Professional Responsibility. Because the amended Standard mandated that law schools require their students to complete a course in legal ethics, which had to focus in part on the Code of Professional Responsibility, the upsurge in requests for the Code suggests that the requests were made by or for law students. The number of students at ABA-approved law schools studying for a law degree during the 1974-75 academic year was 105,708, including 38,074 first-year law students.⁹¹ The number of first-year law students the previous year was 37,018.⁹² Those two classes together total just fewer than 80,000, the number of copies distributed during the first four months of 1975 by the Standing Committee on Ethics and Professional Responsibility. Requiring law schools to teach the Code as a condition of maintaining ABA approval resulted in a massive increase in the number of free copies of the Code that were distributed by the ABA.

At the same time Stanford Lerch proposed amending Standard 302(a)(iii) in August 1974, the Section on Legal Education reported that, for the first time ever, not one law school seat was empty.⁹³ The final piece of the marketing puzzle fell into place by 1980 with the implementation of the Multistate Professional Responsibility Examination (MPRE) as an additional requirement for admission to the bar.

89. Membership in the ABA in 1975 was about 200,000 lawyers. See James D. Fellers, *State of the Legal Profession*, 61 A.B.A. J. 1053, 1059 (1975). Thus, approximately 50% of all lawyers were ABA members. See ABEL, *supra* note 77, at 280 tbl. 22.

90. The Standard did not require a course in legal ethics; "pervasive" teaching of ethics was available as an option. This dated from the "Harvard" model from the 1920s. See generally MICHAEL J. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* (1980) (discussing the history of law school teaching of legal ethics). However, that vague and opaque option was taken up by very few law schools, for the easier option was simply to require students to take a course that most already included in their curricular offerings. As noted by the ABA's Section of Legal Education in its 1976 report, "all but one law school" met this Standard by requiring a course in legal ethics, rather than through the "pervasive" method. See *1976 Report*, *supra* note 84, at 1133-34.

91. See *Table, Legal Education and Bar Admission Statistics, 1963-95*, in *A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES*, FALL 1995, at 66.

92. See *id.*

93. See *Report of the Section of Legal Education and Admissions to the Bar*, 99 A.B.A. REP. 513, 514-15 (1974). Accord James P. White, *Is That Burgeoning Law School Enrollment Ending?*, 61 A.B.A. J. 202, 202 (1975) ("In 1973, for the first time, there was not a single 'unfilled seat' in the first-year class of any approved law school. In 1974 only one law school reported 'unfilled seats' in its entering class."). For a survey of the dramatic increase in law school enrollment from the late 1960s through the 1980s, see Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 312-14 (2003).

C. *Developing the MPRE*

The National Conference of Bar Examiners (NCBE) is a creature of one of the ABA's oldest sections, the Section on Legal Education and Admissions to the Bar. The idea for an organization of state bar examiners began in 1898 at a meeting of the Section on Legal Education.⁹⁴ Although the 1898 conference at the annual ABA meeting was a success, and although in 1900 the Section approved the creation of an organization of state bar examiners, such an organization was not created immediately.⁹⁵ The idea of a separate conference of bar examiners reappeared at the ABA's 1904 and 1914 annual meetings, but the successful creation of the NCBE did not occur until 1930, at the annual meeting of the Section of Legal Education.⁹⁶ The NCBE was formally created the next year. The NCBE's first secretary and treasurer was Will Shafroth, who was also the adviser to the ABA's Section on Legal Education and Admissions to the Bar. Shafroth performed his work for both organizations from his office in Denver.⁹⁷ Shafroth's work helped cement ties between the two organizations, as did the NCBE's decision "to continue to hold its annual meetings in connection with the annual meetings of the American Bar Association."⁹⁸ These ties have continued through most of the NCBE's history. The historian of the ABA's Section on Legal Education and Admissions to the Bar, in an understatement, concluded, "[t]he NCBE has had a close relationship with the Section since the NCBE was founded in 1931."⁹⁹

At the first meeting of the NCBE in 1931, Shafroth urged bar examiners to work toward a national bar examination.¹⁰⁰ By the late 1960s, the NCBE decided to offer a standardized test on the subjects of contracts, criminal law, evidence, property, and torts.¹⁰¹ The NCBE prepared a multiple-choice test consisting of 200 questions, to be answered in two three-hour testing sessions.¹⁰² The NCBE first offered the

94. See SUNDERLAND, *supra* note 12, at 55.

95. See *id.* at 56-57.

96. See *id.* at 58.

97. See BOYD, *supra* note 16, at 37. Both institutions were then headquartered in Chicago. The NCBE moved from Chicago to Madison, Wisconsin in 2001. Shafroth remained Secretary-Treasurer of the NCBE through 1939. In 1940, he became Chief of the Procedural Studies and Statistics Division of the United States Courts, where he remained for twenty-four years.

98. SUNDERLAND, *supra* note 12, at 58.

99. BOYD, *supra* note 16, at 97.

100. See generally Will Shafroth, *A National Board of Law Examiners*, 1 B. EXAMINER 160 (1931).

101. See Joe E. Covington, *The Multi-State Bar Examination Program*, 40 B. EXAMINER 90, 91 (1971) [hereinafter Covington, *Multi-State Program*]; Joe E. Covington, *Progress Report as of March 21, 1971, on the Multi-State Bar Examination*, 40 B. EXAMINER 45, 45 (1971) [hereinafter Covington, *Progress Report*]. See also John Eckler, *The Multistate Bar Examination: Its Origins and Objectives*, 50:3 B. EXAMINER 15, 17 (1981) (stating that the test be limited to five subjects); Daniel C. Blom, *The Multistate Bar Examination: A New Approach*, 44 B. EXAMINER 8, 11-12 (1975) (discussing adoption of the Multistate Bar Exam). See generally Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 378-81 (1996). The NCBE added Constitutional Law to the MBE in 1976. See Joe E. Covington, *The Multistate Bar Examination—1975*, 44 B. EXAMINER 39, 40 (1975) [hereinafter Covington, *Multistate 1975*].

102. See Covington, *Multi-State Program*, *supra* note 101, at 91. See also Eckler, *supra* note 101, at 18.

Multistate Bar Examination (MBE) in February 1972.¹⁰³ The test was a hit with bar examiners,¹⁰⁴ though not with all academics.¹⁰⁵ The success of the MBE suggested that a similar project for ethics might work.

At the ABA's annual meeting in 1976, the ABA's Section on Legal Education reported that "all but one accredited law school" offered one or more courses in legal ethics.¹⁰⁶ Its report also indicated that the NCBE would be asked to survey whether and, if so, to what extent state boards of law examiners were testing bar applicants on issues of ethics.¹⁰⁷ As was customary, the NCBE held its 1976 annual meeting at the same time and place as the ABA. The meetings that year were in Atlanta, Georgia. The NCBE met from August 7-9, 1976, and the ABA met August 9-12, 1976. The organizations worked closely together on what would become the Multistate Professional Responsibility Examination (MPRE). The NCBE created a Professional Responsibility Committee, to be headed by Francis D. Morrissey, a lawyer in the Chicago-based law firm of Baker & McKenzie who had also been a member of the Section on Legal Education's Council.¹⁰⁸ In 1977, the NCBE's Professional Responsibility Committee proposed a multiple choice professional responsibility exam similar to the MBE.¹⁰⁹ The Chairman of the NCBE, Arthur Karger, gave two reasons for proposing the examination. First, "the ABA Code of Professional Responsibility, which has been adopted in all but a few States, provides national standards of ethics and professional responsibility which can readily serve as the framework for a national or multistate test."¹¹⁰ Second, the

103. See Covington, *Multi-State Program*, *supra* note 101, at 91; Covington, *Progress Report*, *supra* note 101, at 45. See also Eckler, *supra* note 101, at 19; Blom, *supra* note 101, at 12.

104. See Joe E. Covington, *The 1972 Multistate Bar Examination*, 41 B. EXAMINER 146, 146 (1972) (listing 19 jurisdictions using the MBE in February 1972 and 26 in July 1972); Joe E. Covington, *The Multistate Bar Examination Program*, 42 B. EXAMINER 95, 95 (1973) (listing 35 jurisdictions using the MBE in 1973); Joe E. Covington, *1974 Report on the Multistate Bar Examination Program*, 43 B. EXAMINER 85, 85 (1974) (listing 42 jurisdictions using the MBE in 1974); Covington, *Multistate 1975*, *supra* note 101, at 39 (listing 43 jurisdictions using the MBE in 1975); Joe E. Covington, *The Multistate Bar Examination—1976*, 45 B. EXAMINER 70, 70 (1976) (listing 44 jurisdictions using the MBE in 1976, with possibility of additional jurisdictions adding the MBE).

105. See Max A. Pock, *The Case Against the Objective Multistate Bar Examination*, 25 J. LEGAL EDUC. 66, 66 (1973); Jarvis, *supra* note 101, at 381-82. See also Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 373-76 (2002) (criticizing the MBE); *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 447-49 (2002) (criticizing, among other aspects of the bar exam, the MBE). For recent critiques of the Multistate Professional Responsibility Examination (MPRE), see David A. Logan, *Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility*, 56 WASH. & LEE L. REV. 1023 (1999) (arguing that every state should test applicant's ethical knowledge on the essay portion of the bar exam); Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395 (1998) (stating MPRE should be state specific and that test itself may be of little usefulness).

106. See *1976 Report*, *supra* note 84, at 1134.

107. See *id.*

108. See Francis D. Morrissey, *Report of the Professional Responsibility Committee*, 46 B. EXAMINER 172, 172-73 (1977); BOYD, *supra* note 16, at 96-97 (noting Morrissey's background as of 1992).

109. See *Proposed Multistate Professional Responsibility Examinations (MPRE)*, 46 B. EXAMINER 50, 50 (1977).

110. See *Letter from the Chairman*, 46 B. EXAMINER 109, 110 (1977).

addition of Standard 302(a)(iii) in 1974, which mandated that law schools require their students to complete a course in legal ethics in order for those schools to remain in good standing with the ABA, made “that subject a required course in the curricula of all ABA-approved law schools.”¹¹¹ But the rationale for the exam was not just that legal ethics was now a required subject in all ABA-approved schools. The opening for the NCBE was that law schools were required to teach the ABA’s Code of Professional Responsibility when teaching a legal ethics or professional responsibility course. As noted then by Francis Morrissey, “The American Bar Association now requires those schools that have ABA approval to offer a course in the Code of Professional Responsibility.”¹¹² By 1979, the NCBE had decided that the MPRE would test examinees on the Code of Professional Responsibility and the ABA’s Code of Judicial Conduct.¹¹³ The MPRE was administered in March 1980 to 4,208 persons.¹¹⁴ Like the MBE, the MPRE was an astounding success. In 1981, 22,982 examinees took the MPRE, double the number who took the test in 1980.¹¹⁵ The next year, 30,902 persons took the MPRE, and 23 jurisdictions required bar applicants to take the test.¹¹⁶ After ten years, 38 jurisdictions required bar applicants to pass the MPRE.¹¹⁷ During the 1990s, the number of test takers ranged from a low of 35,444 in 1999 to a high of 68,230 in 1998, and averaged over 45,000 examinees per year.¹¹⁸ The MPRE is now required in fifty-two jurisdictions, including all but three states.¹¹⁹

At the same time that the MPRE was first offered in 1980, the Chairman of the NCBE, David Cummins, noted that the NCBE was substantially in debt.¹²⁰ The next year, Cummins was pleased to report to the members of the NCBE that its Board of Managers had eliminated the “very substantial deficit” of the organization

111. *Id.* at 109.

112. Morrissey, *supra* note 108, at 173.

113. See *Letter from the Chairman*, 48 B. EXAMINER 3, 3 (1979). For a critique of the ABA’s efforts regarding a code of judicial conduct, see Justice Scalia’s opinion for the Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

114. *Letter from the Chairman*, 49 B. EXAMINER 43, 44 (1980). During the first year of its administration, 11,920 examinees took the MPRE. See Cynthia Board Schmeiser, *A Ten-Year Profile of the Administration of the MPRE Program*, 59:2 B. EXAMINER 6, 6 (1990). For a thorough history of the origins of the MPRE, see Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299 (2003).

115. Joe E. Covington, *Statistics*, 51:4 B. EXAMINER 28, 28-29 (1982). See also Schmeiser, *supra* note 114, at 8 (noting seventeen states required bar applicants to pass MPRE in 1981).

116. Joe E. Covington, *Statistics*, 52:4 B. EXAMINER 39, 41 (1983).

117. See Schmeiser, *supra* note 114, at 6. There were 35,551 examinees in 1989. See *id.*

118. See *2000 Statistics*, *supra* note 11, at 23. From 2000-2002, the average number of MPRE test takers was over 51,000. See *Number of Applicants Taking the MPRE*, 72:2 B. EXAMINER 22 (2003).

119. See *2000 Statistics*, *supra* note 11, at 22 (noting that in 2000 only Wisconsin, Washington, and Maryland did not require bar applicants to take the MPRE, and further noting that the MPRE is required for bar applicants in the District of Columbia, Guam, Northern Mariana Islands, Palau, and the Virgin Islands, making it required in 52 jurisdictions).

120. See *Letter from the Chairman*, 50:1 B. EXAMINER 3, 3 (1981).

by approving increases in the charge for the MBE.¹²¹ These testing devices were extremely successful in generating revenue.

D. *Legal Ethics as a Profit Center*

The stage was thus set for the ABA to earn a substantial sum of money on its ethics rules. In 1978, as the NCBE worked to finalize the MPRE, the Standing Committee on Ethics and Professional Responsibility noted in its Informational Report to the ABA that it wished to begin exploring a "joint publication program with West Publishing Company" to "annotate both the Code of Professional Responsibility and the Code of Judicial Conduct."¹²² It requested approval from the ABA's Board of Governors, which then granted the Standing Committee such permission.¹²³ That year, the ABA also created its National Center for Professional Responsibility to work on substantive issues of legal ethics.¹²⁴

In the meantime, the Kutak Commission had survived the uproar over the secrecy of the Commission's work,¹²⁵ and Kutak wrote a letter urging support of the Model Rules in December 1980.¹²⁶ The Proposed Final Draft of the Model Rules was published in May 1981,¹²⁷ and discussion on the Model Rules began in the House of Delegates at the 1982 annual meeting of the ABA.¹²⁸ The Model Rules were approved at the mid-year meeting in February 1983.¹²⁹

The approval of the Model Rules, joined by several disparate but related events in the 1970s, serendipitously paved the way for the ABA to make its ethics rules a profit center. First, throughout the 1970s, law school enrollment grew at a much faster pace than growth in the general population.¹³⁰ This tremendous increase in demand not only filled all available law school seats by Fall 1973, but also led to the opening of a number of new law schools, most of which sought (and received)

121. *Id.* Chairman Cummins also noted that the NCBE had successfully fought an IRS effort to alter the organization's tax-exempt status from a 501(c)(3) organization to a 501(c)(6) organization, which would have had severely deleterious tax consequences. The organization was able to remain a 501(c)(3) organization because it showed that it was "quasi-governmental" in nature. *See id.*

122. *See 1978 Report, supra* note 68, at 707, *Informational Report of the Standing Committee on Ethics and Professional Responsibility*, 104 A.B.A. REP. 332, 332 (1978), and *Informational Report of the Standing Committee on Ethics and Professional Responsibility*, 104 A.B.A. REP. 925, 926 (1978), which all state the ABA's desire to publish jointly with West.

123. *See 1978 Board of Governors Report, supra* note 68, at 649.

124. *See* Robert A. Stein, *Ethics Pros: The Center for Professional Responsibility Provides Leadership and Resources*, 89 A.B.A. J., Apr. 2003, at 79. In the early 1980s, it was renamed the American Bar Association, Center for Professional Responsibility and, later, the ABA Center for Professional Responsibility.

125. *See* Schneyer, *supra* note 41, at 114 (discussing the uproar over disclosure of some proposed model rules after "secret deliberations" by Kutak Commission).

126. *See id.* at 116.

127. *See id.* at 118.

128. *See id.* at 124. Professor Schneyer notes that the *House of Delegates* managed to act on just one of the fifty Model Rules set for adoption. *See id.*

129. *See 1983 Proceedings, supra* note 1, at 778.

130. *See* Ariens, *supra* note 93, at 314 n.62 (noting a doubling of law student population between 1968-69 and 1980-81, from 59,498 to 119,501 students seeking a first degree in law).

ABA approval.¹³¹ Second, after a challenge from unaccredited proprietary schools in the mid-1970s, the ABA retained its status as the official accrediting agency of the Department of Health, Education and Welfare.¹³² Although HEW's (now the Departments of Education and Health and Human Services) imprimatur of approval of the ABA was irrelevant to state decisions to approve the bar applications of law school graduates, the failure of a law school to receive ABA approval meant students at that school were ineligible for federal grants and loans. This became an increasingly important issue as law school costs increased. Third, most states limited bar exam applicants to those persons who graduated from an ABA-approved law school, and the Standards for Approval of Law Schools mandated that law schools teach a course in legal ethics that incorporated the Code of Professional Responsibility. This mandate created a ready-made captive market for the Code, which the ABA surely noticed when it distributed 80,000 copies of the Code shortly after it implemented amended Standard 302(a)(iii). Fourth, when the NCBE used the adoption of Standard 302(a)(iii) to justify the creation of a multistate professional responsibility examination focusing on the Code of Professional Responsibility, particularly after the success of the MBE, the Code's value (and later, that of the Model Rules) as a product to be sold was ensured.

The result was that by mid-1983, the ABA was poised to use its position as *de facto* national accrediting agency and *de facto* national ethics agency to turn a service, a code of ethics, into a product, a commodity from which it would profit. The 1983 Report of the Standing Committee on Ethics and Professional Responsibility at the ABA annual meeting indicated that the Standing Committee was intent on devising and maintaining "a professional responsibility subscription service, the ABA Professional Responsibility Reporter."¹³³ The next year, the Standing Committee's annual Report indicated that there was an organizational meeting concerning the ABA/BNA Lawyers' Manual on Professional Conduct.¹³⁴ The NCBE did its part in 1984, indicating that it would alter the MPRE by testing in such a way that the answer was the same whether based on the Model Code or the Model Rules.¹³⁵ This understanding concerning the commodification of the

131. The number of ABA-approved law schools increased from 146 in 1970 to 176 in 1991. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999).

132. See BOYD, *supra* note 16, at 82-84.

133. Report of the Standing Committee on Ethics and Professional Responsibility, 108 A.B.A. REP. 877, 877 (1983).

134. Report of the Standing Committee on Ethics and Professional Responsibility, 109 A.B.A. REP. 658, 663 (1984). The ABA/BNA Lawyers' Manual on Professional Conduct continues to be published as a subscription service.

135. See John F. Sutton, Jr., *Testing Professional Responsibility in View of Changes in the Code*, 53:4 B. EXAMINER 26, 32 (1984). See also Schmeiser, *supra* note 114, at 55 ("Since 1983, when the ABA House of Delegates approved the Model Rules of Professional Conduct, the questions in the MPRE, other than those on judicial conduct, have been designed so that the correct answer is the same under both the ABA Code of Professional Responsibility and the Model Rules of Professional Conduct."). In 1997, the NCBE noted that it would change what was tested on the MPRE beginning in August 1999. See *New MPRE Test Specifications*, 66:4 B. EXAMINER 31, 31 (1997). The 1969 Model Code would no longer be tested. Applicants would continue to be tested on the ABA's Model Rules and the ABA's 1990 Code of Judicial Conduct. Additionally, applicants would be tested on the

Model Rules places into clearer context the unusual statement of the ABA's Special Committee on the Implementation of the Model Rules of Professional Conduct, made in 1984, that it had given "reprint permission" to legal periodicals to publish the Model Rules.¹³⁶ The ABA surely understood the importance of protecting its copyright of the Model Rules, for a legal consultant to the Kutak Commission during its entire six-year existence was Dean L. Ray Patterson, a legal scholar who specialized both in copyright law and the ethics of lawyering.¹³⁷ Although the Special Committee reported in 1985 the existence of another Department of Justice inquiry concerning antitrust implications of the Model Rules,¹³⁸ the inquiry did not affect this use of the Model Rules. By 1986, neither the Model Code nor the Model Rules were freely available from the ABA. Instead, those interested in obtaining a copy of those rules, either for their ABA-required legal ethics course or in order to prepare for the MPRE, needed to purchase them.¹³⁹

Thus, since 1974, law students have been required to take a course in professional responsibility or legal ethics in order to graduate from an ABA-accredited school. As of 1988, that course must instruct students in the Model Rules.¹⁴⁰ After 1990, most applicants to the bar were required to pass the MPRE in order to obtain their law licenses. The MPRE has focused on the ABA's codes of ethics during its entire existence.

In December 2003, the ABA's Section on Legal Education and Admissions to the Bar proposed revisions to the Standards for Approval of Law Schools.¹⁴¹ One suggested amendment is to eliminate the requirement that students be taught the Model Rules, although the requirement of "substantial instruction" in "the history, goals, structure, values, rules, and responsibilities of the legal profession and its members" remains.¹⁴² The ABA has postponed its consideration of revisions of Standard 302 to its February 2005 meeting.

Removing the particularly coercive requirement that students be instructed in the Model Rules is little more than window dressing. The requirement has existed for thirty years, during which time an entire field called the law of lawyering has developed. The ABA successfully embedded the Model Rules into the law of many states and, more importantly, ensured the continued value of the Model Rules as a product through its testing on the MPRE. To eliminate the requirement of Model Rules instruction suggests that the ABA is engaged in a preemptive strike to avoid

law of lawyering, including constitutional decisions, and lawyering issues in procedure and evidence.
Id.

136. 1984 Report on Model Rules, *supra* note 66, at 432.

137. See Patterson, Lyman Ray, in THE AALS DIRECTORY OF LAW TEACHERS, 2003-2004, at 888 (2004) (listing book publications in copyright and legal ethics fields). Patterson was the Dean at Emory University School of Law from 1973-80, after which he returned to the faculty as Professor.

138. See Report of the Special Committee on Implementation of the Model Rules of Professional Conduct, 110 A.B.A. REP. 446, 446 (1985).

139. Of course, students and MPRE examinees had the option of reviewing the Code or Model Rules published in the ABA Reports. This is an impractical option.

140. See AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Std. 302(a)(iv) (1988 ed.).

141. See Proposed Comprehensive Revision of Chapter 3 of the Standards, SYLLABUS, Feb. 2004, at 1.

142. See *id.* at 16-17.

any antitrust claim linking its authority in approving law schools with its efforts to make money from its intellectual property. But it is too late for the ABA to now recognize the problem. The learning of the ethical practice of law has already been damaged.

V. OWNING THE CODE

A. *Private Gain and Quasi-Public Power*

Writing shortly after the Watergate scandal, lawyer David Brink responded to the latest crisis¹⁴³ of lawyer professionalism by urging the ABA to continue its path away from its former existence as a trade organization: "In the last seven years [1968-75] the Association has evolved rapidly, under my eyes, from a trade organization to one that is a public interest group first and a lawyer interest group second."¹⁴⁴ As Professor Schneyer notes in his pointillist study of the drafting of the Model Rules, one of the reasons the debate over the content of the Model Rules was so fierce was that the contending parties saw the ABA as a quasi-governmental entity:

[Kutak's] brand of legalism regarded other law as cause and legal ethics as effect, but the lawyers most passionately interested in the Model Rules often saw things the other way around. Their approach to legal ethics was as legalistic as Kutak's, but they rejected his characterization of the Model Rules as codifying a preexisting "law of lawyering." For them, the law of lawyering was largely inchoate, and the Model Rules process was an opportunity to shape that law, or more often, a dangerous source for new malpractice theories, new grounds for disqualification and denial of legal fees, and new liability under the securities laws.¹⁴⁵

The ABA demonstrated its power to shape the law of lawyering in the early 1970s, when the vast majority of states rushed to adopt the Code of Professional Responsibility as law.¹⁴⁶ A mere decade later, the ABA was replacing the Code with another version of ethical duties, the Model Rules. Not only were the Model Rules substantially different in substance from the Code, they differed in form. The Code's form included both Disciplinary Rules (DR) and Ethical Considerations (EC); that is, both a ground floor and an ideal to which a lawyer might aspire. The Model Rules were intentionally designed to look like the American Law Institute's

143. A study of earlier crises in lawyer professionalism is Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).

144. Brink, *supra* note 36, at 936.

145. Schneyer, *supra* note 41, at 117.

146. See *1972 Report to Secure Adoption*, *supra* note 35, at 741 (noting that forty-three states and the District of Columbia had adopted all or part of the Code as law, with four other state bar associations also adopting the Code). The Special Committee also provided a Summary of action of the states concerning the Code, which indicated whether such states had adopted all or part of the Code, and how the Code became law in that state. See *id.* at 741-44.

(ALI) Restatements, consisting of black-letter law followed by comments.¹⁴⁷ By adopting the form used by the ALI, the ABA followed the path taken by another private law-forming organization that acted as a quasi-governmental agency, one that had not merely “restated” the law, but also affected the law’s growth and development.¹⁴⁸ The Model Rules were intended to look like law, and were intended to become law. After all, the ABA named its committee promoting the adoption of the Model Rules the Special Committee on *Implementation* of the Model Rules of Professional Conduct. As stated by Professor Schneyer, creation of the Model Rules was not merely a reaction to the Watergate Scandal, but was also an attempt by the ABA to shore up its “image as lawgiver for the practice of law.”¹⁴⁹

If the ABA is first and foremost a public interest organization and secondarily a lawyer interest group, a major aspect of the Model Rules should be to serve the interests of the public. The decision to make the Model Rules a commodity belies that ideal. More than 50,000 applicants took the MPRE in each of the years 2001 and 2002. The special price of the ABA’s Compendium of the Model Rules of Conduct is \$19.95 for law students. An inaccurate though not wholly unreasonable multiplication of these two numbers totals nearly \$1 million in gross annual revenues from the Model Rules.¹⁵⁰ Even if the ABA takes in just half the suggested retail price, it earns \$500,000 in annual revenues. As noted earlier, the numbers of applicants annually taking the MPRE rose quickly to over 30,000 and averaged over 40,000 in the 1990s. Even at lower prices than \$19.95 after 1986, the ABA was making a great deal of money on a product that required little continuing financial investment.

In 1977, the ABA financial report for the year 1976-77 indicated that actual publication revenues had exceeded budget, totaling \$1,113,212.¹⁵¹ The ABA’s consolidated assets that year were \$22,162,720.¹⁵² In 2000-01, the ABA’s consolidated assets totaled \$245,514,000, far outpacing inflation, and its revenues for 2000-01 totaled more than \$159 million.¹⁵³ The ABA is a very large nonprofit

147. See *Report of the Commission on Evaluation of Professional Standards*, 104 A.B.A. REP. 1010, 1010 (1979) (“[T]he Commission has reached agreement that the Code, to be effective, requires complete reconstruction rather than piecemeal amendment. The format under consideration would closely resemble that of the Restatements with black letter rules, followed by commentaries which will more precisely state the obligations and duties of lawyers.”); *Report of the Commission on Evaluation of Professional Standards*, 105 A.B.A. REP. 838, 838 (1980) (reporting adoption of the Restatement approach).

148. On the ALI’s impact on the development of a code of evidence, see generally Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC. INQUIRY 213 (1992). See also *id.* at 255 n.246 (noting interaction between ALI’s Restatements projects and development of law).

149. See Schneyer, *supra* note 41, at 104. A similar sentiment, written in 1975, is found in Brink, *supra* note 36, at 939 (declaring that the ABA “more and more is becoming the profession’s national spokesman”).

150. The 2003 Compendium also includes the Model Code, the noncopyrighted Canons, several other sets of Model Rules, a Professionalism Code and Creed, a few Formal Opinions of the ABA, and other miscellaneous materials, few of which I use in teaching Professional Responsibility.

151. See *A.B.A. Financial Report 1977*, 63 A.B.A. J. 1416, 1416 (1977) (noting 123% of budget).

152. See *id.* at 1419.

153. See *ABA Treasurer’s Report, 2000-01*, 88 A.B.A. J., Feb. 2002, at 69. The most recent

organization. Even if annual revenues from the Model Rules total something near \$1 million, that seems relatively slight given the ABA's size. It is painful that the ABA's appetite for revenue appears so voracious that it must squeeze money from law students, who continue to borrow more to pay for the rising cost of a legal education.

The ABA's decision to draw several hundred thousand dollars from law students is unethical. Doing so in the manner in which the ABA accomplished this goal is a deft and stunning slight-of-hand maneuver. Using its state-granted power to force law schools to meet its Standards in order to maintain ABA approval and stay in business, and including as one of those Standards a requirement to teach the Model Rules, feeds a constant revenue stream. Continued tinkering with the Model Rules ensures a quick sell-by date for any compendium of the Model Rules. And getting the NCBE to agree to a test based on the ABA's ethics codes (as opposed to another private code) was smoothly accomplished. By claiming the mantle of enhancing lawyer professionalism, and by skillfully walking the tightrope between private enterprise (Model Rules as private intellectual property) and quasi-governmental (unofficially official) institution, the ABA succeeded brilliantly. But it did so by taking advantage of law students.

What is even worse, in my view, is the cynical reaction one may have to this conduct. Students realize early on that the Model Rules are just that. They are not law, but students can become licensed as lawyers only if they learn this "not-law" well enough to achieve the appropriate scaled score on the MPRE. The teaching of legal ethics is already burdened by the skepticism bred in first-year law students.¹⁵⁴ It is joined by the manner in which the subject is taught. As stated by Professors Baron and Greenstein, "[t]he construction of professional responsibility as a field of law, characterized by the separation of law and morality typical of the law school construction of fields of law generally, is directly and clearly signaled in the primary teaching materials available on the market for professional responsibility courses."¹⁵⁵ That subject-matter marketing, together with the ABA's hawking of its Model Rules, creates the very understanding of the legal profession that the ABA professes to abhor. The "old" ABA, the one derided for its trade organization mentality, at least had it right when it freely offered its Canons and Code to anyone who asked for a copy. That ABA understood that ethics rules are not a product and that no one should profit from those who are the least secure in the legal profession, law students.

Treasurer's Report, published in the March 2004 *ABA Journal*, indicates a possible reduction of assets, based in part on investment losses. The consolidated net assets (which are different from consolidated assets) as of August 31, 2003 were \$102 million. But the ABA has \$150 million in cash and investments. See Allen J. Joseph, *ABA Treasurer's Report 2003-2004*, 90 A.B.A. J., Mar. 2004, at 66.

154. See Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37, 43-47 (2001) (noting that first-year courses reinforce the standard conception of moral nonaccountability).

155. See *id.* at 52.

B. Copyright, Ethics, and Law

It may be true that information wants to be free, but original writings are property owned by the maker of the writing.¹⁵⁶ The owner of the copyright is permitted by law to bar anything other than fair use of copyrighted materials, and free speech is no defense to a claim of copyright infringement.¹⁵⁷ In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court reaffirmed the policy rationale for the copyright monopoly: copyright law creates an incentive for authors to create more speech, acting as an “engine of free expression.”¹⁵⁸ Consequently, the monopoly given by copyright law to the ABA, the owner of the Model Rules, is consistent with the principle of free speech. This consistency remains as long as it is the expression that is protected, not the idea itself.

However unethical it may be for the ABA to sell its Model Rules, the ABA owns the Model Rules. It is legally permitted to bar anyone, including any law professor, from reprinting the Model Rules. But the ABA wants to have its cake and eat it too: it also wants states to adopt its Model Rules as law, for that reaffirms the ABA’s standing as the leading voice of the legal profession. And this, I suggest, may be the undoing of the ABA’s monopoly on the Model Rules.

C. Veeck—As in Wreck?

The worm in the copyright apple for the ABA may be the recent decision by the Fifth Circuit in *Veeck v. Southern Building Code Congress International, Inc.*¹⁵⁹ In *Veeck*, an *en banc* court held that Peter Veeck’s publication on the Internet of a building code written by the private nonprofit Southern Building Code of Congress International (SBCCI) did not constitute copyright infringement because the code had been adopted, word-for-word, by two municipalities in Texas. In the Fifth Circuit’s view, Veeck had published “the law,” which was not copyrightable. Veeck published the building code on the Internet because he could not find a copy of the city’s code. Veeck ordered a copy of the SBCCI code for \$72. He then posted that code on the Internet. The Fifth Circuit concluded that it was irrelevant that he had posted the code without permission from SBCCI. SBCCI’s code had in fact been adopted verbatim by the cities of Anna and Savoy, Texas. Consequently, even though the language posted by Veeck came from SBCCI, this language was also the language of a municipal code and, therefore, law. The Fifth Circuit framed

156. For a study of the origins of copyright in England, see generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993). A somewhat older historical study of copyright is L. RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968). A recent study of the history of intellectual property in the United States is William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, available at <http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf> (last visited July 15, 2004) (on file with author).

157. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

158. *Id.* at 558.

159. 293 F.3d 791 (5th Cir.), *cert. denied*, 537 U.S. 1043 (2002). On the implications of *Veeck*, see generally Shubha Ghosh, *Legal Code and the Need for a Broader Functionality Doctrine in Copyright*, 50 J. COPYRIGHT SOC’Y OF THE U.S.A. 71 (2003) and Nick Martini, *Veeck v. Southern Building Code Construction International, Inc.*, 18 BERK. TECH. L.J. 93 (2003).

the issue this way: “whether Peter Veeck infringed SBCCI’s copyright on its model codes when he posted them only as what they became—building codes of Anna and Savoy, Texas—on his regional website. Put otherwise, does SBCCI retain the right wholly to exclude others from copying the model codes after and only to the extent to which they are adopted as ‘the law’ of various jurisdictions?”¹⁶⁰

The answer was “no.” Since the Supreme Court’s decisions in 1834 in *Wheaton v. Peters*¹⁶¹ and in 1888 in *Banks v. Manchester*,¹⁶² it has been clear that as a matter of public policy, federal and state judicial opinions could not be copyrighted, but were, in the *Banks* Court’s language, “free for publication to all.”¹⁶³ Additionally, relying on the Copyright Act of 1976 and the Supreme Court’s decision in *Feist Publications, Inc. v. Rural Telephone Services Co.*,¹⁶⁴ the *Veeck* court held that cities’ “codes are ‘facts’ under copyright law. They are the unique, unalterable expression of the ‘idea’ that constitutes local law.”¹⁶⁵ As “facts,” the codes were “susceptible to only one form of expression,” and therefore “the merger doctrine applies and § 102(b) excludes the expression from the Copyright Act.”¹⁶⁶ Finally, the *Veeck* court distinguished two cases which arguably were contrary to its decision.

In *CCC Information Services, Inc. v. Maclean Hunter Market Reports*, the Second Circuit held that the “Red Book” valuation of automobiles did not lose its copyright when several states declared as a matter of law that the Red Book was an acceptable alternate standard for state-required valuation of automobiles.¹⁶⁷ The court declared that it was “not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright.”¹⁶⁸ Three years later, the Ninth Circuit held that a coding system created by the AMA for use in hospital forms remained copyrighted even though the federal government required use of that coding system to obtain government health care reimbursements.¹⁶⁹

The *Veeck* majority distinguished *CCC Information Services* on the ground that the states in that case had merely “referenced” the Red Book. States had not actually adopted the Red Book as positive law.¹⁷⁰ It distinguished the Ninth Circuit’s decision in *Practice Management Information Corp. v. American Medical Association* on the ground that the alleged infringer, Practice Management, was “not trying to publish its own version of the [uncopyrighted federal coding system]. Practice Management desired to sell a cheaper edition of the AMA’s code, which was also used by insurance companies and had other non-governmental uses.”¹⁷¹

160. *Veeck*, 293 F.3d at 794.

161. 33 U.S. (8 Pet.) 591, 668 (1834).

162. 128 U.S. 244, 253 (1888).

163. *Id.*

164. 499 U.S. 340 (1991).

165. *Veeck*, 293 F.3d at 801.

166. *Id.*

167. 44 F.3d 61, 74 (2d Cir. 1994).

168. *Id.*

169. *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 518-20 (9th Cir.).

170. *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 804-05 (5th Cir. 2002).

171. *Id.* at 805.

The ABA may be able to avoid *Veck*. Federal copyright law only declares federal law to be noncopyrightable, and *Veck* extended that statutory phrasing to include all law.¹⁷² The *Veck* court noted that Peter Veck posted the code on his “regional” website. It further indicated, “[o]ur decision might well be the opposite, if Veck had copied the model codes as model codes, or if he had indiscriminately mingled those portions of ‘the law’ of Anna and Savoy adopted by their town councils with other parts of the model codes not so adopted.”¹⁷³ Arguably, then, if one posts a “frames” page on the Internet consisting of two sets of state lawyer ethics codes, one of which is identical to the Model Rules, but located outside of the “region,” one may be engaged in copyright infringement. Additionally, as long as the ABA continues to modify its Model Rules, having done so at three of its last five semiannual meetings, it will be difficult for states to keep up with the changes made by the ABA, thus making the posting of a state’s code as a substitute for the Model Code less possible over time. Finally, codes need interpretation, and interpretations, whether by the ABA or some other private body, are ordinarily not part of the “law.” Thus, the ABA may be able to avoid *Veck* due to the importance of the “comments” to the black letter of the Model Rules.

But the *Veck* court also noted, “[i]n the case of a model code, ... the text of the model serves no other purpose than to become law.”¹⁷⁴ The ABA has delighted in its self-proclaimed role as “the lawgiver” for the practice of law.¹⁷⁵ It has not needed the incentive of the copyright monopoly to create its codes of ethics but claims to have been driven by its goal of public service. The ABA’s goal in fashioning codes of ethics has always been to have them implemented as law. The benefits of turning a model code into law included both protecting the public and enhancing the stature of the legal profession. But that requires giving the Model Rules away, which the ABA avoided in favor of continued, highly profitable, revenue streams.

VI. CONCLUSION

In an era in which the culture is fragmented, including the professional legal culture, the constant effort to reaffirm professional status makes nearly impossible any reconsideration of the current regime. This includes the current testing regime. The mischief lies in the view that rather than making changes to the meaning of professionalism, offering just a little more of the same will return the profession to some bettered state. One such example was found in the February 2002 issue of *The Bar Examiner*. Written after the Enron, Tyco, and WorldCom business

172. *Id.* at 796. The court understood that the 1976 Copyright Act specifically noted just federal statutes and regulations. It concluded that *Banks*, which concerned state law, extended the denial of copyright claims to state and local law. *Id.* at 795-96. See generally L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 751-58 (1989) (concluding that state law materials may not be copyrighted). Professor Patterson, the co-author of this article, was also the legal consultant to the Kutak Commission, which drafted the Model Rules.

173. *Veck*, 293 F.3d at 800 n.14.

174. *Id.* at 805.

175. Schneyer, *supra* note 41, at 105-06.

scandals became public knowledge, the Letter from the Chair suggested that “we should be sure” anyone who is given the appellation lawyer “has a more than rudimentary knowledge and understanding of the lawyer’s applicable rules of professional responsibility and conduct.”¹⁷⁶ The Letter continued: “What I am suggesting is that a relatively easy and painless way to emphasize the importance of ethical issues to aspiring lawyers is to make sure that they have not only the knowledge currently tested by the MPRE but also the ability to apply that knowledge in an essay examination.”¹⁷⁷ The Chair, Isidoro Berkman, ignores the absence of any evidence of a link between “the ability to apply that knowledge in an essay examination” and the observance of correct, ethically proper action. The MPRE itself was never sold as ensuring the licensing of ethically competent lawyers. Mr. Berkman also fails to note that “the importance of ethical issues to aspiring lawyers” has never been found in rules, but is found in that most elusive of abilities, good judgment. But rules and testing on rules sell, not only metaphorically, but economically. The ABA’s decision to make its ethics rules a commodity, now going on twenty years strong, together with the NCBE’s desire to nationalize testing of bar applicants by using the Model Rules, engenders the dangerous view that testing checks for those inclined to unethical behavior. In light of the ABA’s successful efforts to wring even more revenue from increasingly financially-burdened law students, the creation of an essay examination in ethics sounds less like a call to renewed professionalism than a pitch for another product for the NCBE to sell to state bar examiners. It is a bureaucratic culture’s last-gasp effort, one that should be rejected firmly and finally.

The Section on Legal Education is attempting to do the right thing in eliminating the requirement that law schools teach the Model Rules from Standard 302. But, though the specific tie between ABA approval and ABA economic self-interest may disappear, the continued claim of the ABA to act as the voice of the legal profession will practically necessitate the teaching of Model Rules. Whether *Veeck* affects the Internet publication of the Model Rules under the guise of publishing a particular state’s rules of professional conduct remains to be seen. But the gouging of future lawyers for the benefit of a behemoth like the ABA is not just unethical, but immoral.

176. *Letter from the Chair*, 71:1 B. EXAMINER 2, 2 (2002).

177. *Id.* at 3.

