OHIO STATE JOURNAL ON DISPUTE RESOLUTION

A SYMPOSIUM IN HONOR OF DEAN CHRIS FAIRMAN

PHILOSOPHY TECHNOLOGY AND ADR

EXAMINING DEVELOPMENT IN DISPUTE RESOLUTION SYSTEMS

FRIDAY, NOVEMBER 4, 2016

SPECIAL THANKS TO OUR SPONSORS

THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW DEAN'S OFFICE
THE CENTER FOR INTERDISCIPLINARY STUDIES
THE TRUANCY MEDIATION PROGRAM AT THE MORITZ COLLEGE OF LAW
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Symposium Editors’ Welcome

We would like to thank you for attending the 2016 Ohio State University Journal on Dispute Resolution Symposium. The title and purpose of the symposium focuses the life and works of the late Associate Dean Chris Fairman. We are honored to host this event as a memorial to Dean Fairman.

Dean Fairman was a valued member of the Program on Dispute Resolution and focused on the intersection between attorney ethics and alternative dispute resolution. He wrote and taught extensively on dispute resolution and ethics and was active in calling for new ethical rules to govern collaborative law. Dean Fairman’s work was controversial at times, but his work actively sought answers to questions others were unwilling to seek. Dean Fairman not only made an impact to the Moritz community, but on the legal community at-large.

To honor of Dean Fairman’s academic work, we have organized three panel discussions all speaking about issues that interested Dean Fairman. Although we cannot cover everything that he studied and discussed throughout his career, we hope that the discussions today help you to better understand these topics and give you some insight into Dean Fairman’s academic interests.

Included later in this booklet are selected works of Dean Fairman, discussing the topics covered in the panel discussions featured in today’s symposium. If you like what you have learned and read here today, we encourage you to read more of his works.

We would like to thank the 2015-2016 Symposium Editor, Cory Martinson for all of his work on the planning of this symposium, Professors Sarah Cole and Joesph Stulberg for their guidance, Editor-in-Chief Brooks Boron, and the staff of the Journal of Dispute Resolution for their help in executing the Symposium.

Once again, thank you for joining us today as we honor the career of Dean Christopher Fairman. We hope that you enjoy today’s discussions.

Jedidiah Irving Bressman
Robert Bonds Scuthers
Panel Descriptions

Panel 1: Technology & Dispute Resolution
As technology continues to become an increasingly important aspect of our daily lives, new disputes arise as well as new methods of resolving disputes. This panel provides an overview of some of the ways in which Technology & Dispute Resolution has shaped different methods of alternative dispute resolution.

Panel 2: An Examination of the Ethics and Application of Collaborative Law
Collaborative law, also known as collaborative practice, is a legal process often used in divorce cases and other family law scenarios. In this voluntary process, the couple signs a contract binding themselves to the process and stating that the lawyers participating in this process are disqualified from representing either party in future family-related litigation. This practice enables couples who have decided to separate or end their marriage to work with their lawyers and, on occasion, other family professionals in order to meet their specific needs without the threat of litigation. This panel studies the ethical duties of attorneys when participating in collaborative law processes.

Panel 3: How the Ethical Issues of Differing Systems of Dispute Resolution Effect Representation
Different ethical obligations arise in different legal processes. The professionals in this panel will speak to the challenge of managing these ethical responsibilities throughout various legal processes as a case progresses and how best to represent a client while navigating the various dispute resolution processes that a case may go through before a resolution is reached.
ABA and Ohio Rules of Professional Ethics and Their Application to the Panels

Panel 2: An Examination of the Ethics and Application of Collaborative Law

1. Under the Model Rules of Professional Conduct, lawyers have a duty to screen potential Collaborative Law (CL) cases for appropriateness and communicate any limitations to representation to the client. The duty to screen cases is based on the “reasonableness” requirement of Rule 1.2(c) and the requirement to avoid conflicts of interest that might interfere with competent and diligent representation under Rule 1.7.

2. Under Rule 1.16(d) of the Ohio Rules of Professional Conduct, when terminating a representation, lawyers must take reasonable steps to protect clients' interests such as giving reasonable notice, allowing time to hire new lawyers, and providing papers that the clients are entitled to. Before terminating a CL case, lawyers may explore alternatives to termination, and recommend resources and professionals to help clients deal with the termination.

Panel 3: How the Ethical Issues of Differing Systems of Dispute Resolution Effect Representation

1. The Ohio Supreme Court recommends that lawyers follow the Model Standards of Conduct for Mediators when acting as a third-party neutral. Specifically, Standards I, II, VI, and IX the principles of self-determination, impartiality, quality of the process, and advancement of mediation practice, are especially important for third-party neutrals in all systems of dispute resolution.

2. Under Rule 5.5, the lawyer must obtain informed consent to retain or contract with another lawyer outside the lawyer’s own firm. Such a situation may arise when a lawyer is representing a client in a System of Dispute Resolution to which he/she may not be as familiar.

3. Under Rule 1.4(2), the lawyer must reasonably consult with the client about the means by which the client’s objectives are to be accomplished. As a lawyer’s representation goes through various systems of dispute resolution, the lawyer has a responsibility to reasonably consult with his/her client about the steps that can be taken next.
4. **Rule 2.1** of the Ohio Rules of Professional Responsibility outlines the lawyer’s responsibility as an advisor to his/her client. Differing Systems of Dispute Resolution may require various sets of knowledge in order to provide the candid advice necessary to effectively represent a client.

5. Although the Ohio Supreme Court does not provide ethical guidelines for settlement negotiation, the **ABA Ethical Guidelines for Settlement Negotiation** provides standards for lawyers in representing clients through settlement negotiations. Many of these guidelines can be found throughout the Ohio Rules of Professional Responsibility such as providing honest advice to a client and representing a client’s interests throughout all parts of representation.

6. The **ABA Code of Ethics for Arbitrators** provides standards by which neutral third-party neutral decision makers should act when working in various systems of dispute resolution.

7. **Rule 1.14** outlines when the assumption that a client, when properly advised and assisted, can make decisions about important matters should not be followed. Under this rule, a lawyer must maintain a normal client-lawyer relationship with the client as far as is reasonably possible. However, a lawyer is allowed to take reasonably necessary protective action on behalf of a client with diminished capacity. The need to take protective action may be especially important in systems of dispute resolution where clients are working together directly with opposing parties.
Symposium Agenda
Friday, November 4, 2016

8:15-8:45 a.m.  Registration

8:45-9:00 a.m.  Welcome by Symposium Editor Robert Southers and Editor-In-Chief Brooks Boron

9:00-9:15 a.m.  Introduction by Roberto Corrada

9:15-10:45 a.m.  Technology & Dispute Resolution
Moderator: Professor Katrina Lee
Panelists: Professor David Larson, Professor Colin Rule, Professor Ethan Katsh, Professor Susan Nauss Exon.

10:45-11:00 a.m  BREAK

11:00-12:30 p.m.  An Examination of the Ethics and Application of Collaborative Law
Moderator: Professor Ellen Deason
Panelists: David Hoffman, Professor Kristen Blankley, Ronald R. Petroff.

12:30-1:30 p.m  LUNCH

1:30-3:00 p.m  How the Ethical Issues of Differing Systems of Dispute Resolution Effect Representation.
Moderator: Roberto Corrada
Panelists: Professor Maureen Weston, Professor Harold I. Abramson, Professor Richard Fullerton, Professor Lisa Kloppenberg.

3:00-3:15 p.m.  Closing Remarks: Symposium Editor Jedidiah Bressman and Dean Alan Michaels
Panel One:

Technology & Dispute Resolution

Moderator:
Professor Katrina Lee

Panelists:

Prof. David Larson          Colin Rule          Prof. Ethan Katsh          Prof. Susan Nauss Exon

![Panelists Images](images)
Professor Katrina Lee

Education
B.A., University of California Berkeley
J.D., University of California Berkeley

Biography

Professor Katrina Lee joined the faculty at The Ohio State University Moritz College of Law in 2011 after an accomplished career in complex litigation spanning more than 12 years. Based in San Francisco, she litigated in California state and federal district courts and in the areas of antitrust, real estate, construction defect, health care, and insurance coverage. She has represented Fortune 100 companies in all litigation phases, including discovery, trial, appeal, and alternative dispute resolution proceedings. At the national law firm Nossaman LLP, she was elevated to equity partner in her seventh year of practice, making her one of the youngest ever in that firm’s history to achieve that distinction.

Professor Lee has taken on leadership roles in the law firm context and in the greater legal community. She chaired her law firm’s recruiting committee, served on the diversity committee, and ran her office’s summer associate program. She has served on the Board of Directors of the Bar Association of San Francisco, as the National Asian Pacific American Bar Association’s (NAPABA) liaison to the American Bar Association’s Commission On Youth At Risk, and as a mentor and advisory board member for the School-To-College diversity pipeline program. She is a board member of the Asian Pacific American Bar Association of Central Ohio and Chair of its Mentorship Committee. Professor Lee also serves on the Board of Directors of the Association of Legal Writing Directors (ALWD). She is Chair of the Legal Writing Institute’s (LWI) Scholarship Development & Outreach Committee and the Board Liaison on ALWD’s Leadership & Development Committee.

Professor Lee teaches the Business of Law seminar, Legal Analysis and Writing 1 and 2, Legal Negotiations and Settlements, and LL.M. Legal Writing. Professor Lee is the Director of the LL.M. Legal Writing program. Professor Lee triple-majored at the University of California at Berkeley, graduating in 1994, and received her J.D. from the Boalt Hall School of Law at the University of California at Berkeley in 1997. Professor Lee is a recipient of the Bar Association of San Francisco’s Award of Merit. She is a member of the California State Bar.

Select Publications

Professor David Larson

Education
B.A., DePauw University
J.D., University of Illinois College of Law
LL.M., University of Pennsylvania Law School

Biography
Professor David Allen Larson is a senior fellow at Mitchell Hamline’s Dispute Resolution Institute and a fellow of the American Bar Foundation and the National Center for Technology and Dispute Resolution. He teaches Arbitration, Cyber Skills and Dispute Resolution, Employment Discrimination Law, Employment Law, and Labor Law. He was the founder and editor-in-chief of the “Journal of Alternative Dispute Resolution in Employment” (HeinOnline), served as an arbitrator for the Omaha Tribe, was an administrative law judge for the Nebraska Equal Opportunity Commission, and currently is an independent arbitrator.

Larson has published more than 60 articles and book chapters and has made more than 150 professional presentations in Australia, Austria, Canada, China, England, Ireland, the Netherlands, Sweden, and the United States. His recent articles have focused on technology mediated dispute resolution (TMDR), a term that includes more technologies than the phrase online dispute resolution (ODR). He also has written about arbitration, cross cultural negotiation, and employment law. Larson has been a leader in the American Bar Association (ABA) and currently is co-chair of the Section of Dispute Resolution Technology Committee. His many assignments include an appointment as chairperson for the ABA Law Student Division Arbitration Competition (2010-2012), and he served as a subcommittee member until 2016. Previous appointments include serving as vice-chair for the Section of Dispute Resolution, Law School Education and Dispute Prevention Committee and vice-chair for the International Law and Practice Section, Employment Law Committee. He also was a member of the ABA E-Commerce and ADR Task Force.

From 1990-1991, Larson served as the “Professor-in-Residence” at the Equal Employment Opportunity Commission headquarters in Washington, D.C. He worked primarily in the Office of General Counsel, Appellate Division, and also worked with the Office of Legal Counsel as they drafted and revised the Regulations and Interpretive Guidance for the Americans with Disabilities Act. Professor Larson previously practiced with the Meagher Geer law firm in Minneapolis.

Select Publications
Colin Rule

**Education**
B.A., Haverford University
Conflict Resolution and Technology M.A., Harvard University
Graduate Certificate, UMass-Boston

**Biography**
Colin Rule is Co-Founder and COO of Modria.com, an ODR provider based in Silicon Valley. From 2003 to 2011 he was Director of Online Dispute Resolution for eBay and PayPal. He has worked in the dispute resolution field for more than a decade as a mediator, trainer, and consultant. He is currently Co-Chair of the Advisory Board of the National Center for Technology and Dispute Resolution at UMass-Amherst and a Non-Resident Fellow at the Gould Center for Conflict Resolution at Stanford Law School.

Colin co-founded Online Resolution, one of the first online dispute resolution (ODR) providers, in 1999 and served as its CEO (2000) and President. In 2002 Colin co-founded eDeliberation.com which applies ODR to multiparty, public disputes. Previously, Colin was General Manager of Mediate.com, the largest online resource for the dispute resolution field. Colin also worked for several years with the National Institute for Dispute Resolution (now ACR) in Washington, D.C. and the Consensus Building Institute in Cambridge, MA.

Colin has presented and trained throughout Europe and North America for organizations including the Federal Mediation and Conciliation Service, the Department of State, the International Chamber of Commerce, and the CPR Institute for Dispute Resolution. He has also lectured and taught at UMass-Amherst, Stanford, MIT, Pepperdine University, Creighton University, Southern Methodist University, the University of Ottawa, and Brandeis University.


**Select Publications**
Professor Ethan Katsh

Education
J.D., Yale Law School

Biography

Professor Katsh is widely recognized as the founder of the field of online dispute resolution (ODR). Along with Janet Rifkin, he conducted the eBay Pilot Project in 1999 that led to eBay’s current system that handles over sixty million disputes each year. With Professor Rifkin, he wrote Online Dispute Resolution: Resolving Conflicts in Cyberspace (2001), the first book about ODR. Since then, he has published numerous articles about ODR and co-edited Online Dispute Resolution: Theory and Practice, which received the International Institute for Conflict Resolution book award for 2012. He is co-author of Digital Justice: Technology and the Internet of Disputes, which will be published by Oxford University Press in March 2017.

Professor Katsh has served as principal online dispute resolution consultant for the Office of Government Information Services (OGIS), a federal agency mandated to provide mediation in Freedom of Information Act disputes. He has assisted the National Opinion Research Center (NORC) in a study of disputes involving electronic medical records. During 2010-2011, he was the Fulbright Distinguished Chair in the Humanities and Social Sciences at the University of Haifa (Israel). He has been Visiting Professor of Law and Cyberspace at Brandeis University and is on the Board of Editors of Conflict Resolution Quarterly. He was principal dispute resolution advisor to SquareTrade.com and is Chairman of the Board of Advisors of Modria.com.

Professor Katsh was 2014-2015 Affiliate Researcher, Harvard University Berkman Center for Internet and Society. Professor Katsh has chaired the International Forums on Online Dispute Resolution since 2002, the most recent ones being in The Hague in May 2016 and Beijing in September 2016. Professor Katsh received the Chancellor’s Medal and gave the University of Massachusetts Distinguished Faculty Lecture in October 2006. Recent articles include “Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment” in the International Journal of Online Dispute Resolution (2014) (with Orna Rabinovich-Einy); “Technology and the Future of Dispute Systems Design” in the Harvard Negotiation Law Review (2012) (with Orna Rabinovich-Einy) and “Is There An App For That? Electronic Health Records (EHRs) and A New Environment Of Conflict Prevention And Resolution,” 74 Law and Contemporary Problems 31 (2011).

Select Publications

Professor Susan Nauss Exon

**Education**

LL.M., Pepperdine University  
J.D., University of Wyoming  
A.S.B., Central Pennsylvania College

**Biography**

Professor Exon has offered a wealth of legal knowledge to her students, and enjoys using innovative teaching methodologies. She focuses her teaching on the areas of Civil Procedure, Mediation, and Negotiation. She began her tenure as an Assistant Professor of Law, was granted tenure and became a full professor in 2006, and served as the inaugural Associate Dean for Faculty Development from July 2013 to June 2016.

Prior to coming to the University of La Verne College of Law, she served as the Director of Law and Public Policy at the University of California, Riverside Extension. She also served for six years as a defense litigator for Best, Best & Krieger LLP, handling all aspects of general business, civil, and public law litigation.

Professor Exon has received several awards for her work in education, speaks frequently at the national, state, and local levels regarding alternative dispute resolution and ethical topics, and has numerous published papers and articles. Her book, *Advanced Guide for Mediators*, was published by LexisNexis in May 2014. She has published several articles pertaining to cyberjurisdiction and online dispute resolution, and has proposed the creation of a cybercourt with jurisdiction over online disputes. Professor Exon’s current research relates to mediation issues concerning ethics and standards of conduct as well as apology and forgiveness.

Service is important to Professor Exon. She is an active member of the American Bar Association’s Section of Dispute Resolution where she is a member of the Ethical Guidance Committee and a member of the Civil Procedure Panel for the Legal Education, ADR and Practical Problem Solving (LEAPS) Project. For four years, she served as a co-chair of the Section’s Ethics Committee, stepping down in August 2013. She is a member of several mediator panels, including California Arbitration & Mediation Services, Inc., the Riverside County Superior Court, and the Dispute Resolution Service Corporation of the Riverside County Bar Association. Professor Exon also is a member of the Legal Education Committee of the Riverside County Bar Association.

**Select Publications**

Panel Two:

An Examination of the Ethics and Application of Collaborative Law

Moderator:
Prof. Ellen Deason

Panelists:

David Hoffman Esq.  Ronald R. Petroff  Prof. Kristen Blankley  Prof. Susan Daicoff
Professor Ellen Deason

**Education**

B.A., Princeton University  
M.A. American Studies, Cornell University  
J.D., Harvard Law School

**Biography**

Ellen E. Deason is the Joanne Wharton Murphy/Classes of 1965 and 1973 Professor in Law at The Ohio State University Moritz College of Law. She served as the faculty director of the Moritz LL.M. program from 2006-2010.

Her scholarly writing is primarily on topics in alternative dispute resolution (ADR) and at the intersection of law and science. In addition, she has co-authored casebooks for civil procedure and ADR. In 2005, Deason was appointed reporter for the National Conference of Commissioners on Uniform State Laws drafting committee for a Uniform Act on Protection of Genetic Information in Employment and Insurance.

Before joining the faculty at Moritz in 2003, Deason taught at the University of Illinois College of Law. She practiced law as an associate with Morrison & Foerster in Washington, D.C. Deason served as a law clerk for Judge Harry T. Edwards on the U.S. Court of Appeals for the District of Columbia Circuit and Justice Harry A. Blackmun of the U.S. Supreme Court. She also was a legal assistant to Arbitrator Howard M. Holtzmann, Iran-United States Claims Tribunal. She was editor-in-chief of the *Michigan Law Review*. Prior to attending law school, Deason worked as a marine biologist, and she is widely published in scientific journals.


**Select Publications**

Robert R. Petroff

Education
B.A., Vanderbilt University
J.D., The Ohio State University Moritz College of Law

Biography

Ronald R. Petroff, Managing Partner of Petroff Law Offices, LLC, founded the firm in 2007 under the principles of loyalty, work ethic, sophisticated legal representation, and most of all a sense of corporate integrity. The firm remains very true to its roots and has quickly grown to be a leading domestic relations practice in the central Ohio area.

Dedicated to the field of family law, Ron is a member of numerous national and area legal associations and is an ardent supporter of the local community. He has received many awards and recognitions for his work both professionally and philanthropically, including acknowledgment by Columbus CEO Magazine as a “Top Attorney” and recognition by The National Association of Distinguished Counsel as a “Top One Percent Attorney.” Ron was also included in the Columbus Business First “20 People to Know in Law” feature in 2016. His experience and reputation in the legal field also led Ron to work closely with The Ohio State University Moritz College of Law, both as a guest speaker and mentor to law students.

Ron’s reach truly extends outside of his profession. A generous supporter of many local foundations, schools, and organizations, Ron is a believer in providing access to education, healthcare, and other highly sought-after services.
David Hoffman

**Education**
B.A., Princeton University  
M.A. American Studies, Cornell University  
J.D., Harvard Law School

**Biography**

David A. Hoffman is the founding member of Boston Law Collaborative, LLC, and teaches courses on Mediation and Legal Profession: Collaborative Law at Harvard Law School, where he is the John H. Watson, Jr. Lecturer on Law. David was named Boston's "Lawyer of the Year" for 2016 in the field of Mediation by the book *Best Lawyers in America* and U.S. News & World Report and one of its Best Lawyers in ADR, Family Collaborative Law, Family Law Mediation, and Civil Collaborative Law. 2016 marks the tenth year that David has been named a Best Lawyer in at least one field. In 2014, the American College of Civil Trial Mediators gave David its Lifetime Achievement Award, and in 2015, the American Bar Association Section of Dispute Resolution gave David its highest honor, the D'Alermberte-Raven award.

David's practice is focused on resolving conflict in business, family, and employment cases. He has served as mediator and/or arbitrator in more than two thousand commercial, family, employment, construction, personal injury, insurance, and other business cases. David is a past chair of the ABA Section of Dispute Resolution and a founding member of the Massachusetts Collaborative Law Council. In November 2004, David was chosen as one of the "Top 100 Lawyers" in Massachusetts in Boston Magazine's SuperLawyers Directory and has been consistently named a Massachusetts SuperLawyer since the listing began.

Before founding BLC, David was a litigation partner at Hill & Barlow where he practiced for seventeen years. Before that (in reverse chronological order), David clerked for then-Judge Stephen G. Breyer on the U.S. Court of Appeals for the First Circuit, graduated from Harvard Law School (while serving as a teaching assistant for Professor Larry Tribe and an editor on the Harvard Law Review), worked as a consultant for the U.S. Small Business Administration, established a woodworking business in upstate New York, and pursued American Studies as a graduate student at Cornell. David lives in a co-housing community in Acton, Massachusetts, and has three adult children and an adolescent cat.

**Select Publications**

Professor Kristen Blankley

**Education**
B.A., Hiram College
J.D., The Ohio State University Moritz College of Law

**Biography**
Professor Blankley joined Nebraska College of Law in 2010. After law school, Professor Blankley clerked for the Honorable Eugene E. Siler on the Sixth Circuit Court of Appeals and the Honorable Kermit E. Bye on the Eighth Circuit Court of Appeals. Following her two appellate clerkships, Professor Blankley practiced at the Columbus, Ohio office of Squire, Sanders & Dempsey, LLP. Her practice involved a wide variety of civil litigation matters, including cases involving the First Amendment, trade secrets, contract issues, and product liability.

Professor Blankley teaches Alternative Dispute Resolution, Advocacy in Mediation, Mediation, and Arbitration. She first became interested in the field while in law school, where she earned a Certificate in Dispute Resolution. Her research has largely focused on how parties can customize alternative processes to suit their dispute-resolution needs. Her research also deals with the crossroads of alternative dispute resolution and legal ethics. Professor Blankley is an active member of the American Bar Association Section of Dispute Resolution, regularly speaking at their annual meeting. Additionally, she serves on the American Bar Association Law School Division Arbitration Competitions Committee, which oversees the annual law school Arbitration Competition. Professor Blankley is also a practicing mediator in Nebraska.

Professor Blankley also instituted and coaches the Nebraska Law College Representation in Mediation Competition for students. This competition teaches students how to be effective advocates for their clients in mediation. Professor Blankley runs an intra-school competition and then travels with the winning students to compete against students from other schools.

Professor Blankley sits on the Board of Directors of both The Mediation Center and the Nebraska Mediation Association. She is also on the Parenting Act Evaluation Advisory Counsel, a group that is assessing the success of mediation of parenting time disputes in Nebraska. Professor Blankley currently sits as a co-chair of the American Bar Association Section of Dispute Resolution Subcommittee on Ethics.

**Select Publications**
Professor Susan Daicoff

**Education**

LL.M. in Taxation, New York University School of Law  
J. D. With Honors, University of Florida College of Law  
M.S. in Clinical Psychology, University of Central Florida  
B.A. in Mathematics, University of Florida

**Biography**

SUSAN DAICOFF, J.D., LL.M., M.S. is a Professor of Law and the Director of Clinical Programs at Arizona Summit Law School. She has been a law professor since 1995, serving as Professor of Law at Florida Coastal School of Law, Associate Professor of Law at Capital University Law School, and visiting professor at the University of Florida Levin College of Law. She teaches restorative clinics such as mediation and unbundled general practice clinics, entrepreneurs’ clinic, federal income taxation, contracts, professional responsibility, comprehensive law practice (law as a healing profession), and mental health law. In the past, she has taught corporate taxation, partnership taxation, the taxation of mergers and acquisitions, tax policy, commercial paper, law and psychology, leadership for lawyers, and jurisprudence. She received her J.D. with honors from the University of Florida, her LL.M. in taxation from New York University where she was a Wallace Scholar (Tax Law Review editor), and her M.S. in clinical psychology from the University of Central Florida. She was a corporate, securities, and tax transactional lawyer in Orlando and Tampa and practiced psychotherapy in Orlando, before becoming a professor.

Since 1991, she has been researching and writing about the psychology of lawyers, lawyer personality, lawyer wellbeing and effectiveness, the legal profession, professionalism, and ethical decisionmaking by lawyers. These efforts culminated in her 2004 book, “Lawyer, Know Thyself,” which synthesized forty years of empirical research on lawyers’ personality traits and then related the findings to professionalism and lawyer wellbeing. She regularly lectures at national, state, and local conferences on topics such as lawyer personality, lawyer wellbeing, lawyering skills, the future of the profession, and professionalism.

Since 1999, she has also written about the “comprehensive law movement,” or law as a healing profession. This movement seeks to integrate law and social science in order to resolve legal matters with optimal outcomes. It encompasses disciplines such as therapeutic jurisprudence, preventive law, restorative justice, collaborative law, creative problem solving, holistic justice, procedural justice, transformative mediation, drug treatment courts and other problem solving courts. Her second book, “Comprehensive Law Practice,” was published in 2011 as a textbook for learning the foundations of these approaches.

Her current research interests focus on developing improved methods for addressing the access to justice gap, the “soft skills” of the law, what competencies make lawyers effective, the future of the legal profession, and innovations in the delivery of legal services.

In addition to several psychology articles and tax publications, she has 23 publications (two books, 14 law review articles, seven book chapters, and one speech) and given over 120 lectures.
Panel Three:

_How the Ethical Issues of Differing Systems of Dispute Resolution Effect Representation_

Moderator:
Professor Roberto Corrada

Panelists:

Prof. Maureen Weston  Prof. Harold Abramson  Richard Fullerton  Dean Lisa Kloppenberg
Professor Roberto Corrada

Education
B.A., George Washington University
J.D., Catholic University School of Law

Biography

Roberto Corrada has devoted his scholarly attention to three primary areas: the rights of ethnic and sexual minorities; the public/private distinction in labor and employment law; and the scholarship of teaching and learning. He has published articles on these subjects in the Wake Forest Law Review, the Cincinnati Law Review, the Houston Law Review, the Miami Law Review, the Catholic University Law Review, the Berkley Journal of Labor & Employment Law; and the Journal of Legal Education, among others. In addition, Corrada has published casebooks in administrative law and employment discrimination law.

A distinguished teacher, Corrada has been recognized for his innovative work in the classroom. In 2000, he was selected as national Carnegie scholar for his active and collaborative learning efforts in his labor law classroom. In 2002, he was named University of Denver College of Law Donald & Susan Sturm Professor for Excellence in Teaching and Learning. He has won the University of Denver Distinguished Teaching Award and has been recognized as a DU Law Star.

For 20+ years, Corrada has been extensively involved in service work with local and national institutions. In 1998, he was chairman of the board of the ACLU of Colorado. In 2002, he served as chair of the Association of American Law Schools Labor & Employment Relations Section. From 2000 – 2010, he served as secretary of the Latino/a Critical Legal Theory Association. In 2007, he helped form the Denver Urban Debate League, which he currently co-chairs.

Select Publications

Professor Maureen Weston

**Education**
B.A., University of Denver  
J.D, University of Denver

**Biography**
Maureen Weston is Professor of Law at Pepperdine University School of Law and Director of the Entertainment, Media & Sports Dispute Resolution Project. She received her JD from the University of Colorado, and BA in Economics/Political Science at the University of Denver.

Professor Weston teaches courses on arbitration, mediation, negotiation, international dispute resolution, legal ethics, and U.S. and international sports law. She serves as Faculty Advisor to the Sports & Entertainment Law Society and *Dispute Resolution Journal*, and as coach for ICC Mediation Advocacy and Sports & Entertainment Law Negotiation competitions.

Weston has taught law at the University of Oklahoma, University of Colorado, University of Las Vegas Nevada, Hamline, and in Oxford, England. Prior to teaching, Weston practiced law with Holme Roberts & Owen and Faegre & Benson in Colorado. She is actively involved in programs furthering opportunities for students to gain experience in negotiation, mediation and arbitration.

Her committee service includes the ABA, Law School Division, Arbitration Competition, AALS Sports Law Executive Committee, and former chair of the ABA Dispute Resolution Education Committee and Representation in Mediation Competition. She is a member on the Boards of Directors at the University of Colorado School of Law Alumni Board, the National Sports Law Institute at Marquette School of Law, Malibu Little League, and Editorial Board of LawInSport. A frequent speaker at conferences, Weston is co-author of casebooks on sports law and arbitration and has written numerous articles in the area of Olympic and International Sports Arbitration, disability law, sports law, and dispute resolution.

**Select Publications**
Professor Harold Abramson

**Education**
B.B.A., University of Michigan  
M.P.A., Harvard University  
J.D., Syracuse University  
L.L.M., Harvard University

**Biography**

Professor Abramson is a full-time faculty member at Touro Law Center in New York where he served for nine years as Vice Dean responsible for academic programs, faculty development, and international programs during the formative years of the law school. He teaches or has taught courses on administrative law, anti-trust law, business organizations, dispute resolution methods including mediation representation and international mediation, government regulation of business, remedies, domestic and international sales, and international business and trade. He has been teaching dispute resolution courses at Cardozo Law School since 2000. He also has visited as a full-time professor at Cardozo and UNLV. He publishes extensively in the areas of mediation representation and international mediation.

At Touro, Hal Abramson established the law schools first summer abroad program at Russia’s premier university, Moscow State University. As an ABA CEELI Specialist in Russia, he worked on a number of law reform projects when Russia began its transition to democracy. After leaving his vice dean position, he stayed involved in legal education developments by first serving for three years on the Committee for Professional Development (CLE for law professors) of the Association of American Law Schools (AALS) and now as a member of the twenty person AALS Resource Corp that facilitates retreats at U.S. law schools.

Hal Abramson’s domestic and international neutral experiences include mediating, facilitating, and arbitrating business, organizational, and public policy disputes. He has mediated intellectual property disputes as well as disputes involving employment, partnership, service, licensing, purchase, distribution, and international business contracts. His international mediations have involved parties from Belgium, France, China, Columbia, Egypt, Guinea, India, Israel, Hong Kong, Lebanon, Russia, Slovenia, South Korea, and Venezuela.

He serves on various mediation and arbitration rosters including the rosters of the American Arbitration Association, National Academy of Distinguished Neutrals, Federal Eastern District Court of New York, CPR Institute for Dispute Resolution, International Chamber of Commerce (ICC), and CCPIT Mediation Center (Beijing). He also serves on the Law School Facilitation Panel of the Association of American Law Schools.

**Select Publications**
Richard Fullerton

Education

Master of Applied Communications, ADR concentration, University of Denver
B.A., College of William and Mary

Biography

Richard Fullerton practices mediation and arbitration and serves on Dispute Review Boards (DRBs), specializing in construction, real estate, and business cases. He is a member of the American Arbitration Association commercial arbitration and mediation panels, a member of the Dispute Review Boards for the Colorado Department of Transportation, and an employment mediator for the US Postal Service REDRESS Program.

He is adjunct faculty for the University College at the University of Denver, teaching ADR in the MA in Communication Management program, and he co-chairs the Ethics Committee for the Mediation Organization of Colorado (MAC).

Select Publications

5. Richard Fullerton, Impact of Senate Bill 06-089 on Dispute Resolution between Associations and Unit Owners, COMMUNITY ASS’N INST., July 2006.
Dean Lisa A. Kloppenberg

Education
B.A., University of Southern California
J.D., University of Southern California

Biography

Dean Kloppenberg is a well-known expert in constitutional law and Appropriate Dispute Resolution. She is the co-author of a popular text teaching law students to be effective advocates in negotiation and mediation. Previous to being appointed Dean in 2013, Kloppenberg served as Dean and Professor of Law at the University of Dayton (2001-2011) where she received national recognition for championing curricular reform and creating the first accelerated five-semester law degree in the nation. She also diversified the faculty, emphasized student services and fostered a renewed student commitment to service.

A West Coast native, Kloppenberg received her law degree from the University of Southern California Law Center where she was editor-in-chief of the law review. After graduation, Kloppenberg clerked for Judge Dorothy Wright Nelson of the 9th U.S. Circuit Court of Appeals. She then became an attorney with Kaye, Scholer, Fierman, Hays & Handler in Washington, D.C. where she was involved with litigation, arbitration, and mediation of a variety of domestic and international disputes.

Kloppenberg returned to the West Coast to teach at the University of Oregon School of Law where she served as a faculty member for nearly 10 years. She pursued her interest in constitutional issues and dispute resolution. She also co-founded and directed the school’s Appropriate Dispute Resolution Program.

Dean Kloppenberg has been active with numerous academic and professional organizations including the American Bar Association Section of Legal Education and Admission to the Bar, as a member of the Standards Review Committee and the Law School Admission Council as a member of the Finance and Legal Affairs Committee.

In 2014, Dean Kloppenberg was appointed to serve on the Association of American Law Schools (AALS) Dean’s Forum Steering Committee.

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Dean Fairman Articles
Protecting Consumers: Attorney Ethics and the Law Governing Lawyers

Christopher M Fairman
Protecting Consumers: Attorney Ethics and the Law Governing Lawyers

By Christopher M. Fairman

I. Introduction

A dialogue on the issues confronting lawyers involved with consumer financial services law and litigation is incomplete without exploring attorney ethics, the law governing lawyers, and professionalism. Lawyers specializing in consumer financial services law, both in-house and as outside counsel, face some of the same concerns that exist for the practice of law in general: What are the sources of ethical rules governing lawyers? What are the emerging issues in professional responsibility? What impact does alternative dispute resolution have in the area? In addition, lawyers specializing in consumer financial services law and litigation also confront increasing ethics regulation targeted at their practice. These issues and other recent developments in professional responsibility of importance to lawyers practicing in the financial services area are considered below.

II. Sources of Ethical Rules

A. Sources of Guidance

Lawyers are subject to multiple sources of ethical rules. The Model Rules of Professional Conduct continue to be the standard source for most jurisdictions' ethical rules. However, the older Model Code of Professional Responsibility remains applicable in key jurisdictions. These traditional sources of ethical guidance must also make room for increasing federal regulation of attorney conduct. Added to this mix are the increasing use of alternative dispute resolution and the new ethical rules that accompany them. One conclusion is clear: A lawyer must now be familiar with more than a single ethics code.

B. Model Rules of Professional Conduct

First adopted in 1983, the American Bar Association's (ABA's) Model Rules of Professional Conduct (Model Rules) remain the chief source of ethical rules for lawyers. Most states have adopted codes based on the Model Rules.

Two states, Nebraska and Iowa, recently converted to the Model Rules. Nebraska is the most recent convert, adopting new rules based on the Model Rules effective September 1, 2005.1 This brings the number of jurisdictions that pattern their lawyer rules after the Model Rules to forty-seven.2

Even in the minority of jurisdictions that follow the older Model Code, the Model Rules provide an increasingly important source of ethical rules for a number of reasons. For example, a lawyer not admitted in a jurisdiction is subject to the disciplinary authority of that jurisdiction if the lawyer provides or offers to provide legal services in the jurisdiction.3 Additionally, under the choice-of-law provisions, in a matter

2. This includes forty-six states and the District of Columbia. For a comprehensive listing and a website address for each state code, see ABA/ABA Lawyer's Manual on Prof'l Conduct § 1.3 (2004) (Model Standards/State Ethics Rules) or see the ABA's Center for Professional Responsibility, Chronological List of States Adopting Model Rules, available at http://www.abanet.org/law/pradvice/state_rates.html.

* This article is derived from materials presented at the Weil, Gotshal & Manges, LLP Second Annual High Stakes Financial Services Lending and Litigation Issues Symposium, Dallas, Texas. Reprinted with permission.
before a tribunal, the rules of the jurisdiction in which the tribunal sits typically apply. For all other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred apply, unless a particular conduct clearly has a predominant effect in another jurisdiction. Additionally, there is variety in the ethical codes adopted by the federal district courts.

Despite their general applicability, the Model Rules are just that—a model that state jurisdictions can accept, reject, or modify. After a series of significant revisions adopted in 2002 (in response to the Ethics 2000 project) and in 2003 (in response to the corporate scandals that fueled the Sarbanes-Oxley Act), the current Model Rules may not reflect a specific jurisdiction’s ethical rules, even if those purport to be “based upon the Model Rules.” Consequently, care must be taken when comparing state lawyer codes and the Model Rules.

For example, the Florida Supreme Court recently adopted a set of rules amendments incorporating some, but not all, of the 2002 and 2003 changes to the ABA Model Rules. Both Nevada and Mississippi recently took a similar approach with changes to their respective Rules of Professional Conduct.

### C. Model Code of Professional Responsibility

#### 1. Introduction

The ABA’s old Model Code of Professional Responsibility is of dwindling relevance. Only a handful of states retain professional rules based on the old Model Code. The holdouts are New York, and Ohio. California and Maine do not follow either the Model Code or the ABA’s newer Model Rules. However, both Ohio and New York are in the process of abandoning the Model Code and shifting to the Model Rules format.

#### 2. Ohio

Ohio adopted the Ohio Code of Professional Responsibility on October 6, 1970, basically enacting the ABA’s old Model Code. On March 10, 2003, the Chief Justice of the Supreme Court of Ohio announced the creation of a special Task Force on the Rules of Professional Conduct. The eighteen-member Task Force was charged with engaging in a comprehensive review of the Ohio Code of Professional Conduct, the Model Rules, and the ABA Ethics 2000 revisions. The Final Report of the Task Force was completed in October 2005. According to the Task Force, “[b]y adopting the Model Rules, Ohio will become more relevant in national discussions on the subject of legal ethics.” The public comment period on the proposed adoption of the Ohio Rules of Professional Conduct ended on Feb. 15, 2006. In the spring of 2006, the Supreme Court considered the public comments and additional recommendations of the Task Force.

#### 3. New York

On September 30, 2005, after nearly three years of study, the Committee on Standards of Attorney Conduct (COSAC) of the New York State Bar Association issued a report proposing adoption of the ABA Model Rules. Just as the multi-year process has unfolded in Ohio, the earliest the New York Rules could be ready for court consideration and adoption is November 2007. The proposed Model Rules have “a reasonable chance of being accepted,” according to COSAC chair Steven C. Crane.

### D. Federal Regulation

Federal regulation of attorney conduct is not new. The Patent and Trademark Office regulates patent lawyers. The Internal Revenue Service regulates tax lawyers to some extent. However, the Sarbanes-Oxley Act of 2002 ushered in an era of renewed interest in regulating lawyers by the federal government.

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4. See Model Rules of Prof'l Conduct R. 8.5(b)(1).
5. See Model Rules of Prof'l Conduct R. 8.5(b)(2).
6. There is a wide array of rules adopted by the federal district courts. Forty-eight districts have adopted some rule based on the Model Rules. Twelve districts adopted some rules based on the Model Code. The districts have adopted the ABA’s Model Code or Model Rules directly or not their respective state’s amended version; ten districts have adopted simultaneously both an ABA model and their own state’s rules. Eleven districts have adopted no rules. Still others have conflicting standing orders concerning the district’s policy. See Andrew L. Kaufman, Who Should Make the Rules Governing Conduct of Lawyers in Federal Courts, 72 Tul. L. Rev. 149, 150 (2009).
7. In 1997, the American Bar Association Board of Governors appointed a thirteen-member Commission on Evaluation of the Model Rules of Professional Conduct. This commission is more commonly known as the Ethics 2000 Commission. The Ethics 2000 Commission was charged with reviewing the Model Rules and proposing revisions. After three years of work, the commissions released its 400 page report in November 2000. The Ethics 2000 Report were its proposed changes to the Model Rules was processed to the ABA House of Delegates at its August 2001 meeting. The House voted on some of the proposed rules. The House completed its deliberations at its February 2002 meeting. In the aftermath of the Sarbanes-Oxley Act, the ABA House of Delegates revisited some Ethics 2000 recommendations in 2003.
9. (Continued from previous column)

For a summary of the changes, see Amendments to Florida Rules Enforce Selected Parts of Updates to Model Rules, 22 ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT, CURRENT REPORTS 176 (Apr. 5, 2006).
11. See ABA/BNA LAWYER’S MANUAL ON PROF’L CONDUCT § 1.3 (2004).
13. Id. at 2.
1. Securities and Exchange Commission

The Sarbanes-Oxley Act mandated the Securities and Exchange Commission (SEC) to promulgate "minimum standards of professional conduct for attorneys appearing in practice before the commission." Complete treatment of the requirements and implications of the new SEC regulations promulgated in January 2003 are beyond the scope of this article. However, the intersection of SEC regulation with state ethics regulation on the disclosure of confidential information provides an interesting lens with which to view the complex landscape of the laws governing lawyers.

Section 307 of the Sarbanes-Oxley Act requires the SEC to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC including a rule: (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

SEC Rule 205, "Standards for Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer," was adopted to meet this statutory mandate and became effective on August 5, 2003. Section 205.3 of Rule 205 sets forth the duty of an attorney appearing and practicing before the SEC to report evidence of a material violation of securities law or a breach of fiduciary duty to the chief legal officer and chief executive officer of the client company and, if an appropriate response is not forthcoming, to the audit committee of the board of directors or to the board itself. This is now commonly referred to as "reporting up." Section 205.3(d)(2) contains a provision permitting, but not requiring, what is commonly referred to as "reporting out," as described below:

An attorney appearing and practicing before the SEC in the representation of an issuer may reveal to the SEC, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

- to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
- to prevent the issuer, in a SEC investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. section 1621; suborning perjury, proscribed in 18 U.S.C. section 1622; or committing any act proscribed in 18 U.S.C. section 1001 that is likely to perpetrate a fraud upon the SEC; or
- to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

Section 205.6 of SEC Rule 205 addresses sanctions and discipline. Section 205.6(c) provides:

An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

The "reporting out" rule is not a problem for lawyers practicing in most jurisdictions. Forty-two states have ethics rules allowing or requiring lawyers to report out under the circumstances described by SEC Rule 205. Eight states and the District of Columbia, however, prohibit disclosure of such confidential client information. Lawyers practicing in these jurisdictions face a dilemma. If an attorney reports out, the attorney could be subjected to disciplinary charges by the state bar. If the attorney does not report out when allowed under the SEC rule, the attorney could face a civil claim by injured investors arguing that the lawyer helped the corporate client commit a civil wrong. The claimant could rely on the SEC Rule 205 to argue that the lawyer was permitted to disclose and declined to do so.

According to the SEC, there is no dilemma because Rule 205 preempts contrary state rules. The SEC position relies on Fidelity Federal v. de la Cuesta, which held that a federal regulation preempts conflicting state law if the agency intended to preempt state law and the agency action was within the scope of its delegated authority.


20. See id.

21. Id.

Whether SEC Rule 205 effectively preempts state ethics rules limiting the ability of lawyers to disclose information about their clients is a matter of dispute. In 2003, the Washington State Bar Association, in an interim formal ethics opinion, concluded that the state rule prohibiting disclosure of a client’s confidential information was to be followed because the SEC rule permits, but does not require, reporting out. By not disclosing information, an attorney could comply with both state and federal rules.

In contrast, the North Carolina State Bar Association recently reached the opposite result. North Carolina agreed with the SEC that under *Fidelity*, a federal regulation preempts state ethics rules if it was the federal agency’s intention and was within its scope of authority. According to North Carolina State Bar Association, “[t]he [SEC’s] intention to preempt state ethics rules conflicting with Rule 205 is unambiguous.” Finding it beyond the capacity of an ethics opinion to determine whether the provision was validly promulgated, the North Carolina Formal Ethics Opinion concludes that “unless and until the Fourth Circuit Court of Appeals or the U.S. Supreme Court determines that Rule 205 was not validly promulgated, (a) there will be a presumption that Rule 205 was promulgated by the [SEC] pursuant to a valid exercise of authority and (b) a North Carolina attorney may, without violating the North Carolina Rules of Professional Conduct, disclose confidential information as permitted by Rule 205 although such disclosure would not otherwise be permitted by the [North Carolina] Rule.”

2. The Lawsuit Abuse Reduction Act of 2005

The so-called Lawsuit Abuse Reduction Act of 2004 that died in Senate Committee last year was reincarnated in this Congress as the Lawsuit Abuse Reduction Act of 2005 (LARA or H.R. 420). The stated purpose of H.R. 420 is to prevent the filing of frivolous lawsuits. According to the bill’s sponsor: “The filing of frivolous suits by attorneys across the nation has made a mockery of our legal system. Instead of concentrating on real cases that need timely rulings, our courts today are forced to wade knee-deep in a pool of false claims and unscrupulous plaintiffs. These suits have increased insurance premiums and raised health care costs.”

However, others argue that the perception of court dockets being filled with frivolous lawsuits lacks foundation. As Professor Arthur Miller recently said: “the supposed litigation crisis is the product of assumption.” Those touting the view that frivolous lawsuits are being filed often rely mainly on anecdotes of seemingly silly lawsuits.

Critics of LARA argue that when empirical research is examined a different picture emerges. For example, rising insurance and health care costs may be real, but the link to litigation is questionable. The two most recent empirical studies on the issue reach the same conclusion: The likely cause of insurance premium spikes is insurance market dynamics, not litigation.

Perhaps the most compelling evidence concerning frivolous litigation comes from the federal judiciary itself. At the request of the Judicial Conference’s Advisory Committee on the Federal Rules, the Federal Judicial Center recently surveyed a representative sample of federal judges. On the issue of the frequency of groundless litigation, eighty-five percent responded that it was a small problem (thirty-two percent), very small problem (thirty-eight percent), or no problem at all (fifteen percent). Consequently, it can be said that those who deal with these claims on a daily basis barely get their shoes wet, much less “wade knee-deep in a pool of false claims.”

Despite the evidence that there is not a real problem with meritless lawsuits, LARA directly targets Rule 11 of the Federal Rules of Civil Procedure and would reinstate a prior version of Rule 11 that was in place for a decade and subsequently was rejected because of its well-documented negative effects. It would eliminate judicial discretion and transform Rule 11’s permissive sanctions into mandatory ones. It would remove the “safe harbor” provision that currently allows parties to avoid sanctions if they withdraw the challenged filing within twenty-one days of notice. Further, LARA would transform the very nature of


33. Rule 11 currently requires that every pleading, written motion, and other paper be signed by at least one attorney of record. This signature certifies to the court that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that:

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the details of factual contentions are warranted by existing law or a non-frivolous argument for a change in existing law, or are reasonably based on a lack of information or belief.


30. See id. at 987-88.

of Rule 11 by requiring sanctions to be sufficient not only to deter future violations, but to compensate parties as well. Finally, it would expand the reach of Rule 11 to cover discovery disputes.

These “back-to-the-future” amendments to Rule 11 are probably unwise. For nearly half a century, Rule 11 laid dormant. Then in 1983, it was amended to encourage courts to use their power to sanction. In its 1983 incarnation, sanctions became mandatory following a finding of violation. Rule 11 was broadened to apply to discovery motions. Instead of going to the court, monetary sanctions were commonly paid to the other party, creating a litigation incentive. Rule 11 was dormant no more.

By 1985, just two years after amendment, Rule 11 had become a tool of abuse, rather than a tool for curbing abuse. The problems under the 1983 version are well documented. Litigation costs increased as Rule 11 motion practice took on a life of its own. Fear of mandatory sanctions created a chilling effect, causing parties to avoid raising even meritorious claims and defenses; the burden of the rule fell disproportionately on plaintiffs.

To correct these problems, Rule 11 was amended in 1993 to include many of the beneficial provisions that H.R. 420 would strip away. The 1993 amendments gave flexibility to the district courts to determine whether sanctions were appropriate and what form they should take. With deterrence as the stated purpose of the rule instead of compensation, monetary sanctions were generally to be paid to the court. Discovery motions, already subject to sanctions by Rules 26 and 37, were removed from Rule 11 altogether.

Explicit provision was made for litigants to have notice and an opportunity to respond before sanctions were imposed. The beneficial effects of these changes have been to reduce Rule 11 litigation and equalize the burden of the rule. H.R. 420 would undo these valuable provisions, with predictable results. Rule 11 litigation would increase. The mandatory nature of sanctions, an explicit provision for compensation to parties, and the lure of attorneys fees can create a financial incentive for those who can afford to litigate the applicability of sanctions. Additionally, by striking subsection (d), the inapplicability to discovery, new rounds of motion practice would ensue over whether Rule 11, discovery sanctions, or both should apply. Meanwhile, the chilling effect would return to the combination of mandatory sanctions coupled with the abolition of the safe harbor provision. These deleterious effects would, of course, fall disproportionately on plaintiffs—especially civil rights plaintiffs—as post-1983 research indicates. It is therefore unsurprising that eighty-seven percent of the federal judiciary favor the current version of Rule 11; the reforms proposed by H.R. 420 are preferred by only four percent.

All of the negative effects of LARA described above would be magnified by application of the new Federal Rule 11 to selected state cases. However, this provision, requiring state-court judges to determine if a state-court civil action “affects interstate commerce” and if so to apply Federal Rule 11 is, on its face, probably unconstitutional. While Congress has the power to regulate interstate commerce under Article I, section 8, and the power to set procedural rules for the federal courts, it has no constitutional authority to preempt state rules of civil procedure. LARA states that it applies to “any civil action in State court” and requires on motion a determination within thirty days “whether the action affects interstate commerce.” Presumably the Commerce Clause could support Rule 11 application if there is a finding of an effect on interstate commerce, but where is the constitutional authority to order the state court to hold the hearing in the first place? Most state court actions do not affect interstate commerce. Consequently, there is no constitutional basis to require the state court to hold the initial hearing required by LARA. In this regard, H.R. 420 would create a gross encroachment on our system of federalism and state control over state judicial systems.

Even if it were constitutional to impose Rule 11, the proposed application is still undesirable. It would yield even more litigation and confusion. Because of its application to “any civil action,” a party with resources could unilaterally impose a new round of motion practice with all the inherent costs and delays. Consider a typical civil action for divorce. Either party could file a motion. Given that the determination is to be “based on an assessment of the costs to the interstate economy, including a loss of jobs,” a departing spouse might come within the provision. Surely this is not desirable. However, given the lack of clarity, state court judges could be inundated with mandatory requests for such a determination.

The mechanics of the provision are equally troubling. What is the threshold effect on interstate commerce that would trigger application of Rule 11? LARA provides slim guidance. The court would be directed to assess the costs to the interstate economy—including job losses. What quantum of job loss is necessary? Presumably, the court can consider other factors besides job loss, but how are they to be weighed in the new interstate commerce equation? Is the determination to be based on the pleadings alone? Is discovery stayed or encouraged on the motion? It is easy to envision the judicial confusion—and litigant uncertainty—generated by this test alone. Given these serious concerns about LARA, it is not surprising that the fate of H.R. 420 appears to be the same as its sibling from the last congressional session. After passing the House with
a vote of 228-184 on October 27, 2005, it was referred to the Senate Judiciary Committee on October 31, 2005. At this writing no further action has been taken.\footnote{For additional analysis of H.R. 450, see Christopher M. Fairman, House Politics: A Frivolous New Bill Ignores Lessons Learned from Rule 11, Legislistes, June 13, 2003, at 76.}

3. **The Class Action Fairness Act of 2005**

On February 18, 2005, President Bush signed into law the “Class Action Fairness Act of 2005” (the Act).\footnote{See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005); Anthony Ratto and Gabriel A. Claverson, Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23, 59 Consumer Fin. L. Q. Rep. 11 (2005).} Despite its title, the Act is targeted at limiting the effectiveness of class actions by expanding federal diversity jurisdiction over multi-state class actions. The Act reflects a growing willingness of Congress to involve itself in federal civil procedure, especially in an attempt to curb what it sees as frivolous lawsuits. The legislation also targeted certain settlement practices deemed abusive. As such, the Class Action Fairness Act is an attempt to improve the ethical behavior of attorneys.

The key provision of the Act is to provide federal jurisdiction, with some exceptions, for class actions with one hundred or more members and over $5 million in controversy, provided there is diversity between at least one plaintiff and one defendant. The Act permits liberal removal of class actions filed in state court even by in-state defendants. The combination of the use of minimal diversity requirements and liberal removal provisions reflects a clear congressional intent to move large class actions into the federal forum.

The Act also targets a number of settlement practices. Coupon settlements, often a way to provide something for the plaintiff class in lieu of cash, can no longer form the basis for inflated attorney fees awards. Instead of basing attorney fees on the face value of the coupons (which are frequently unused), the Act requires counsel fees to be calculated on the value of the coupons actually redeemed. Moreover, federal courts can reject the face value altogether and examine the actual value of the coupons to the class. Additionally, the Act restricts certain practices that could cause disproportionate settlements, such as increased awards to those with closer geographic proximity to the court or provisions requiring class members to pay more to class counsel than they receive in the settlement.

The Act also attempts to increase scrutiny over proposed settlements by requiring notice to the Attorney General or the appropriate state official within ten days of filing the proposed settlement. The Act applies only to those class actions filed on or after February 18, 2005.

4. **FTC Regulation Under the Gramm-Leach-Bliley Act**

Not all attempts at federal regulation of attorney ethics succeed. The United States District Court for the District of Columbia recently struck down the Federal Trade Commission’s (FTC’s) attempted application of the privacy provisions of the Gramm-Leach-Bliley Act (GLB Act) to attorneys.\footnote{See New York State Bar Ass’n v. Federal Trade Comm’n, No. 02-CV-8135(RWJ), 2004 WL 961179 (D.D.C. Apr. 30, 2004) (upholding summary judgment in Chevron challenge to the FTC’s attempted application).} In an earlier opinion, the district court noted the “approximately two hundred years of exclusive state regulation”\footnote{See New York State Bar Ass’n v. Federal Trade Comm’n, 276 F. Supp. 2d 110 (D.D.C. 2003).} and reiterated the dominant role of states in the regulation of attorneys.\footnote{See American Bar Ass’n v. FTC, 430 F.3d 457 (D.C. Cir. 2005) (holding that attorneys engaged in practice of law are not "financial institutions" within the meaning of the statute requiring preemption of consumer financial information).}

The D.C. Circuit recently affirmed in a consolidated appeal the district court’s decision in *NYSHA*.\footnote{See Rhode Island Bar Ass’n v. Federal Trade Comm’n, 430 F.3d 457 (D.C. Cir. 2005) (holding that attorneys engaged in practice of law are not "financial institutions" within the meaning of the statute requiring preemption of consumer financial information).} After five years, the organized bar can declare victory, at least for now, over the FTC’s effort to regulate the confidentiality of law office files; the FTC allowed the deadline for filing for review in the Supreme Court pass in March 2006.\footnote{See Rhode Island Bar Ass’n, Case Closed, ABA J., at 86 (May 2006), but see Michael Fleming, "So That's the End of It. Right?" Lawyers Obligations Arising from Gramm-Leach-Bliley since ABA v. FTC, in this issue.}

D. **Supreme Court and Federal Rules**

While direct congressional and federal agency meddling with ethics rules may be problematic, another source of attorney ethical guidance is not: the United States Supreme Court. On April 12, 2006, the Supreme Court approved, *inter alia*, a new appellate rule requiring federal appeals courts to allow attorneys to cite unpublished opinions in court pleadings. Rule 32.1 of the Federal Rules of Appellate Procedure now states that a court of appeals cannot prohibit a party from citing an unpublished opinion of a federal court.

Previously, four appellate circuits (the Second, Seventh, Ninth, and Tenth Circuits) forbade citation to their unpublished opinions in unrelated cases. In six other circuits (the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits), citation to unpublished cases was discouraged. In the remaining three circuits (the Third, Fifth, and D.C. Circuits), citation to unpublished opinions was already permitted.

New Appellate Rule 32.1 will apply prospectively, affecting only unpublished opinions issued after January 1, 2007.\footnote{See Ralph Lindermeier, Supreme Court Approves Rule Change Allowing Unpublished Opinions Citations, 23 ABA/BNA Lawyer’s Manual on Practice, Conduct, Current Reports 194 (Apr. 19, 2006).} The new appellate rule was forwarded to the Supreme Court by the U.S. Judicial Conference in September 2005 and will take effect on December 1, 2006 unless Congress blocks implementation. No such Congressional blockage is expected.\footnote{See infra § III.B. (noting additional civil rule changes).}

E. **Alternative Dispute Resolution**

The recent explosion in the use of alternative or appropriate dispute resolution procedures (ADR) is well known.
While arbitration has been used in America since the eighteenth century, the use of commercial arbitration has recently increased exponentially. Undoubtedly, the United States Supreme Court’s recent and repeated support for a “liberal federal policy favoring arbitration” has fueled the expansion. Use of arbitration is likely to continue to increase, as research reflects that the majority of participants in binding arbitration proceedings see the process as faster, less expensive, and simpler than litigation in court. As ADR’s reach expands, new ethical questions emerge as traditional lawyer-as-advocate models fail to address the newer, dynamic roles of attorneys in this context. The ethical codes governing lawyers were at first slow to respond. However, today there is no dearth of ethical guidelines in the ADR context. This multiplicity—and lack of uniformity—is part of an emerging ethical problem in this field. Key new rules adopted or proposed in this area are considered infra this article at Parts IV.A.–C.

III. Emerging Issues

A. Attorneys and Consumer Protection Statutes

1. Fair Debt Collection Practices Act

A divided panel of the Fourth Circuit U.S. Court of Appeals recently held that attorneys hired as trustees to foreclose on mortgages qualify as “debt collectors” and must comply with the Fair Debt Collection Practices Act (FDCPA). In Wilson, Chase Manhattan Mortgage Corporation retained Draper & Goldberg to foreclose on Karen Wilson’s property due to her failure to make the mortgage payments. Draper & Goldberg wrote to Wilson on several occasions concerning the debt and ultimately initiated foreclosure. Wilson then sued alleging that the law firm violated the FDCPA by failing to verify the debt, by continuing collection efforts after she had contested the debt, and by communicating directly with her when they knew she was represented by counsel. The district court granted summary judgment in favor of the law firm, ruling that trustees foreclosing on property pursuant to a deed of trust are not “debt collectors” under the FDCPA and that actions taken by a trustee in foreclosing on a property pursuant to a deed of trust may not be challenged as FDCPA violations.

A Fourth Circuit panel held that the district court incorrectly concluded that the law firm could not be held liable under the FDCPA: “We hold that Defendants’ foreclosure action was an attempt to collect a ‘debt.’ Defendants are not excluded from the definition of ‘debt collector’ under 15 U.S.C.A. section 1692a(h)(F)(ii) merely because they were acting as trustees foreclosing on a property pursuant to a deed of trust, and Defendants can still be ‘debt collectors’ even if they were also enforcing a security interest.” As a result, the court reversed the summary judgment and remanded. The court made clear that its decision was not intended to bring every law firm engaging in foreclosure proceedings under the ambit of the FDCPA. Nevertheless, the FDCPA applies to lawyers who regularly engage in consumer-debt-collection activity, even when that activity consists of litigation. Because Congress enacted the FDCPA to eliminate abusive debt collection practices by debt collectors, lawyers who regularly engage in consumer-debt-collection activity should not be allowed to thwart this purpose merely because they proceed in the context of a foreclosure. Given that the law firm allegedly initiated over 2,300 foreclosure actions in Maryland in 2003, there was little room to argue the firm was less equipped to comply with the FDCPA than a more “traditional” debt collection agency. Moreover, the law firm was aware that the FDCPA could apply to their conduct, as their letters to Wilson contained clear references to the FDCPA, including the notice: “this is an attempt to collect a debt.”

2. Fair and Accurate Credit Transactions Act

The FTC issued a new rule effective June 1, 2005 that requires businesses and individuals, including lawyers, to take appropriate measures to dispose of sensitive information obtained from consumer reports. The so-called “Disposal Rule” implements requirements of the 2003 Fair and Accurate Credit Transactions Act (the FACT Act).

Any business or individual using a consumer report for a business purpose is subject to the requirements of the Disposal Rule. The Disposal Rule applies to consumer reports and information derived from them. Specifically, consumer reports may include: credit reports; credit scores; and reports that businesses receive concerning employment background, check writing history, insurance claims, etc.
residential or tenant history, or medical history. When it comes to the proper method of disposal, the rule is flexible, allowing the covered businesses to take into account the sensitivity of the information, the costs and benefits of the disposal methods, and changes in technology.


The Colorado Supreme Court declared on January 9, 2006 that lawyers could be liable for deceptive trade practices under Colorado’s Consumer Protection Act, provided the usual elements for establishing a claim are satisfied. The Colorado Supreme Court rejected the argument that lawyers are exempt from state consumer protection laws and refused to create a special test for lawyers. While the court predicted that lawyers would rarely be liable under the statute, it held that the plaintiff could pursue his claim against a personal injury law firm that allegedly engaged in false advertising to generate a high volume of cases.

B. E-Discovery

1. Introduction

In what has been described as “the biggest change to the Rules of Civil Procedure in a generation or two,” on April 12, 2006, the United States Supreme Court approved the entire package of proposed amendments to the Federal Rules of Civil Procedure concerning the discovery of “electronically stored information” (e-discovery). The package includes revisions and additions to Rules 16, 26, 33, 34, 37, and 45, as well as Form 35. These proposed amendments were transmitted to the Supreme Court in September 2005, after the Judicial Conference unanimously approved them. These proposed amendments will go into effect on December 1, 2006 unless Congress decides to take action. Collectively, these amendments address key areas of e-discovery: planning, privilege, scope and form of production, and preservation.

2. Planning

The Advisory Committee notes to the proposed amendments generally indicate that the goal of the amendments is to recognize the importance of electronically-stored information and to respond to the increasingly prohibitive costs of document review and protection of privileged documents. It is important for litigants to think about e-discovery early and often. According to the Advisory Committee: “In many instances, the court’s involvement early in the litigation will help avoid difficulties that might otherwise arise.”

Two rule amendments specifically address the need for advanced planning with regards to electronically stored information: Rule 16(b) and Rule 26(f). New Rule 16(b) identifies categories of topics to be discussed at the pretrial conference and now includes “provisions for disclosure or discovery of electronically stored information.” This amendment is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 16(b) also includes discussion of “any agreements that the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.”

Rule 26(f) is also amended to direct the parties to discuss discovery of electronically-stored information during their required discovery-planning conference.

When the parties anticipate disclosure of electronically-stored information, discussion at the outset may avoid later difficulties or help ease their resolution. When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties’ information systems. It may be important for the parties to discuss those systems; accordingly, counsel should become familiar with those systems before the conference. Similar to new Rules 16(b)(5) and 16(b)(6), new subsections 26(f)(3) and 26(f)(4) are made to add sure the Rule 26(f) conference includes a discussion of e-discovery issues. Rule 26(f)(3) specifically identifies “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced” as a discussion item during the discovery conference. Similarly, “any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order” are also to be discussed.

3. Privilege

The risk of privilege waiver, and the work necessary to avoid it, add to both the costs and delay of e-discovery. When electronically stored information is at issue, the waiver risk and time and effort needed to avoid it can increase substantially because of the sheer volume of information to be produced. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can
decide whether to contest any claim and the court can resolve the dispute.

Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

However, Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. Courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues.

To deal with the inadvertent production of privileged material, the e-discovery rules contain what is often called a “clawback” provision. If a party has produced information it claims is protected by attorney-client privilege or work product, upon notification the receiving party must return, sequester, or destroy the information and may not disclose it to third parties until the claim is resolved. However, the clawback provision can be superseded by an agreement between opposing parties.

Rule 26(b)(5)(B) works in tandem with Rule 26(f). Parties are specifically directed to discuss agreements on approaches to asserting claims of privilege or work-product protection after inadvertent production in discovery under Rule 26(f). This Rule, along with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under these rules may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B). 71

4. Scope and Form of Production

a. Introduction

Rule 26(a)(1)(B) is amended to substitute “electronically stored information” for “data compilations” as a category of the required initial disclosures.

New subsection 26(b)(2)(B) is added to excuse a party from providing discovery of electronically-stored information that is “not reasonably accessible because of undue burden or cost,” but the burden remains on the responding party to make the required showing. If the showing is made, “the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for discovery.” 72

Interestingly, as noted below the Advisory Committee notes for 26(b)(2) go well beyond the language of the rule amendments and sketch an entire vision of e-discovery.

b. Subdivision (b)(2)

The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (b)(2)(B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the Rule 26(b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of—and the ability to search—much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties’ discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause

for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party’s information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.

The responding party has the burden as to one aspect of the inquiry—whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party’s willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party’s burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically-stored information, including that stored on reasonably accessible electronic sources.73

According to one commentator:

[The cost allocation question has been considered in Zubulake v. UBS Warburg, LCC.74 In that case, U.S. District Judge Shira Scheindlin held that courts must consider factors such as the likelihood of discovering critical information and the costs of the document production compared to the amount in controversy and the resources available to each party. The amendment attempts to codify Zubulake by establishing a two-tier standard in which lawyers first obtain and examine information that can be provided from easily accessed sources such as computer hard drives, personal digital assistants (PDA), removable media such as USB devices, etc. and then determine whether it is necessary to search the difficult-to-access sources such as back up tapes.75

Rule 33 concerning interrogatories is amended to specify that electronically-stored information may qualify as appropriate business records from which an answer to an interrogatory may be derived or ascertained.76 Rule 34(a) concerning the scope of production requests is amended to reference electronically-stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. For example, discovery of electronic communications, such as e-mail, is often sought. The rule covers—either as documents or as electronically-stored information—information

“stored in any medium,” to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.77

Rule 34(b) is amended to supply a procedure for specifying and objection to the form in which electronic information is to be produced. Under new subsections 34(b)(ii) and 34(b)(iii), the default form for producing electronically stored information is that “in which it is ordinarily maintained [or] reasonably usable,” and “a party need not produce the same electronically stored information in more than one form.” However, the amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form.78

5. Preservation

New Rules 16(b) and 26(f) both direct the parties to discuss preservation of electronic information.

New Rule 37(f) is added. It states, in full:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.79

The Advisory Committee Note explains that the premise for this amendment is that ordinary computer use necessarily involves routine alteration and deletion of information for reasons unrelated to litigation.80

It is important to note that this “safe harbor” provision only applies to information lost due to the “routine operation of an electronic information system”–the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs.

Similarly, Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in “good faith.” Good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.81

When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold.” Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or a party agreement requiring preservation of specific electronically stored information.82

Rule 45 relating to subpoenas is also amended to make clear that it applies to electronically stored information.83 “A subpoena may specify the form or forms in which electronically stored information is to be produced.”84

6. Zubulake v. UBS Warburg L.L.C.

Spoliation of evidence, document retention, and e-discovery came to a dramatic intersection in an employment discrimination case from the Southern District of New York.85 The case produced six published opinions relating to attorney and client obligations and electronically-stored information.

On April 6, 2005, the New York jury awarded Laura Zubulake $9.1 million in compensatory damages and $20.2 million in punitive damages for discrimination against her on the basis of sex. Zubulake’s lawyer argued that UBS destroyed emails and UBS witnesses lied on the witness stand. Before the jurors began deliberating, Judge Shira Scheindlin instructed them to assume that the e-mails UBS deliberately discarded after Zubulake filed her EEOC complaint would have hurt the bank’s case.86

This negative inference instruction stemmed from UBS’s failure to preserve electronically-stored information. The district court found in Zubulake V that UBS and its counsel failed to meet these obligations and issued sanctions including that the jury empanelled to hear the case would be given an adverse inference instruction with respect to e-mails deleted and, in particular, with respect to e-mails that were irretrievably lost when UBS’s backup tapes were recycled.87

C. Emerging Issues Under the Model Rules

1. Rule 4.2 and the Pro se Lawyer

Can a lawyer acting pro se speak directly with employees and managers of an entity that the lawyer knows is regularly

77. See Proposed Fed. R. Civ. P. 34(b), advisory committee notes.
78. See Proposed Fed. R. Civ. P. 34(b), advisory committee notes.
82. See Proposed Fed. R. Civ. P. 37(f), advisory committee notes.
87. See Zubulake V, supra note 85.
represented by counsel? Apparently, the answer depends upon which jurisdiction the lawyer is in. In a pair of decisions by state regulators issued just one day apart, Alaska allows contact while Washington would subject the lawyer to discipline. The issue involves Model Rule 4.2.

Model Rule 4.2 prohibits a lawyer who is representing a client from communicating about the subject matter of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless authorized by law or the other lawyer. Does this rule apply when a lawyer represents herself such as when a lawyer-consumer has a complaint about a product or service or a lawyer-homeowner has a concern about the city government's refusal to issue a building permit?

The Alaska Bar Association Ethics Committee considered this question and concluded that a lawyer acting pro se is subject to Rule 4.2, which regulates attorney's communications with parties known to be represented by counsel. But the rule does not prevent a lawyer from contacting the entity's employees or managers directly until the lawyer is notified that the corporation is represented by counsel in the particular matter.

Just one day earlier, on January 26, 2006, a splintered Washington Supreme Court announced that lawyers acting pro se must comply with the disciplinary rule against communicating with represented persons. In this case, Haley was a shareholder, board member, and primary legal counsel for a closely-held software company. Haley sued its former CEO. After the trial, Haley represented himself and communicated directly with the former CEO to propose a settlement. CEO's counsel warned Haley that he was violating Rule 4.2 and to leave his client alone. Despite the warning, Haley left voice-mail messages for the CEO, again proposing a settlement.

The court concluded that Rule 4.2 prohibited a lawyer acting pro se from contacting a party who is represented by counsel. According to the court, other jurisdictions such as Idaho, Illinois, Nevada, Texas, West Virginia, and Wyoming “that have considered the rule's applicability to lawyers acting pro se have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se.” Nonetheless, the court found the rule impermissibly vague and determined that its decision to apply the Rule 4.2 to pro se lawyers would only have a prospective application.

2. Unauthorized Practice of Law (UPL)

The Ohio Supreme Court proved that it intends to get serious about UPL, by imposing a $1 million dollar civil penalty and permanent injunction against a so-called “trust mill.” The Cleveland Bar Association filed a UPL complaint against “The Estate Plan” (TEP), its owner, and Sharp Estate Services, which operated as “advisors” in marketing TEP products in Ohio. The Sharp advisors made the sales pitch to elderly custodiers at their homes. Once the advisor had a signed purchase agreement and obtained two checks (one for the advisor and one for a review attorney), the advisor would send the information to a review attorney who would enter the information into a software program without having any contact with the customer. Sharp’s fees ranged from $1,995 to $2,195 for modest estates. According to a partial list, at least 468 living trust and estate plans were sold in Ohio.

The court held that the use of review attorneys did not insulate the practice from UPL charges. “Because the advisor, not the attorney, sells the trust or estate plan and makes the decisions necessary to create the trust or estate document, the use of attorneys does not cure the UPL violation.”

Emphasizing the gravity of UPL violations, the court permanently enjoined TEP and Sharp from marketing living trusts in Ohio. The court then assessed a penalty of $1,027,260, effectively forcing TEP and Sharp to disgorge the amounts they received from Ohioans from the sale of the living trust packages.

3. Multijurisdictional Practice (MJP)

Out of all the U.S. jurisdictions, about half provide for some type of temporary practice by lawyers licensed elsewhere beyond pro hac vice. Most of these jurisdictions have adopted some version of Model Rule 5.5 including California, Florida, Georgia, and Pennsylvania. Others like Virginia and Michigan permit temporary practice without yet having adopted a version of the Model Rule.

However, not all jurisdictions are so welcoming. The Connecticut State Bar mixed the idea of allowing lawyers licensed in other jurisdictions to engage in temporary practice in Connecticut. The Montana Supreme Court apparently takes the same position only with less spine. After deferring adoption of Rule 5.5 and 8.5 until the comment period ran on other MJP-related proposals, the Montana Supreme Court rejected the reforms without even mentioning the two Model Rules. According to Montana State Bar counsel Betsy Brandborg: “It’s pretty clear we have a solid fence around the state.”

89. See In re Disciplinary Proceeding Against Haley, 126 P.3d 1262 (Wash. 2006).
90. Haley, 126 P.3d at 1267.
91. Id. at 1272.
93. See Sharp, 837 N.E.2d at 1185.
94. See id.
95. Id. at 1186.
96. Id. at 1187.
97. Id.
98. Id. at 1188.
99. See Fence Around Montana, 21 ABA/BNA LAWYER'S MANUAL on PRACTICE & PROCEDURE, Commentary 313 (June 15, 2009).
100. See id.
Interestingly, even if a jurisdiction adopts Rule 5.5 it can still be protectionist. Consider New Mexico. Since 2003 it has been legal for lawyers licensed elsewhere to enter into New Mexico and perform limited legal services. Approved on August 13, 2003 by the New Mexico Supreme Court, New Mexico basically follows Rule 5.5. However, few may be aware of the rule change. Following adoption of its version of Rule 5.5, the change was not published in the state's bar bulletin at the time. As of April 2005, it was not available online either.

In 2006, it is possible to access New Mexico Rule of Professional Conduct 16-505; however, it is available only through a private site.

D. Duty of Good Faith and Fair Dealing in Negotiations

Debate continues as to the appropriate duty a lawyer owes to his opponent in the course of negotiation. Traditionally, Model Rule 4.1, “Truthfulness in Statements to Others,” would control. Rule 4.1 requires that “[i]n the course of representing a client a lawyer shall not knowingly...make a false statement of material fact or law to a third person.” While the rule itself seems straightforward, the comments that follow significantly alter the burden for a lawyer in the context of negotiation:

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances.

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Consequently, in the context of a negotiation, “puffery” is permissible.

Recently, the Litigation Section of the ABA began its first formal attempt to recognize a distinction between the ethical duties of a lawyer in the courtroom versus settlement negotiations. In August 2002, the ABA Litigation Section issued Ethical Guidelines for Settlement Negotiations (Guidelines). The Guidelines include a duty of fair-dealing. “A lawyer’s conduct in negotiating a settlement should be characterized by honor and fair-dealing.” Similarly, an “attorney may not employ the settlement process in bad faith.” As to false statements of material fact, the Guidelines include section 4.1.1, False Statements of Material Fact, that states: “In the course of negotiating or concluding a settlement, a lawyer must not knowingly make a false statement of material fact (or law) to a third person.”

The comments, however, continue to embrace the Model Rules definition of materiality:

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances. Model Rule 4.1, comment 2. “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category...”

The refusal of the Guidelines to alter the materiality definition is a source of criticism.

The effect of the Guidelines on lawyer ethics remains to be seen. At least one additional limitation is the fact that the Guidelines have not been approved by the full ABA. Consequently, the Guidelines carry the following disclaimer:

The Ethical Guidelines for Settlement Negotiations have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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103. See id.


109. Id. § 2.3.

110. Commentary to section 2.3 notes the novelty of this approach:

While there is no Model Rule that expressly and specifically controls a lawyer’s conduct in the context of settlement negotiations, lawyers should aspire to be honest and fair in their conduct and in their counseling of their clients with respect to settlement. Model Rule 2.1 recognizes the propriety of considering moral factors in rendering legal advice and the preamble to the Model Rules exhorts lawyers to be guided by “personal conscience and the approbation of professional peers.” Model Rules. Preamble, [7]; cf. infra Sections 4.1.1, 4.1.2, and 4.3.1. Whether or not a lawyer may be disciplined, sanctioned, or sued for failure to act with honor and fairness based on specific legal or ethical rules, best practices dictate honor and fair dealing. Settlement negotiations are likely to be more productive and effective and the resulting settlement agreements more sustainable if the conduct of counsel can be so characterized.


111. Id. § 4.3.1.

112. See id. § 4.1.1.

113. Litigation Section, American Bar Association, Ethical Guidelines for Settlement Negotiations § 4.3.1 cmt., citing Model Rule 4.1, comment 2.

recommend the Ethical Guidelines for Settlement Negotiations as a resource designed to facilitate and promote ethical conduct in settlement negotiations. These Guidelines are not intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules of Professional Conduct, and should not serve as a basis for liability, sanctions or disciplinary action.\textsuperscript{115} 

E. Attorney Misconduct and the Duty to Report

In our largely self-regulating profession, members of the bar are required to report misconduct of other lawyers if it raises questions as to the lawyer's honesty, trustworthiness, or fitness as a lawyer.\textsuperscript{116} In ABA Formal Ethics Opinion 04-433 issued on August 25, 2004, the Standing Committee on Ethics and Professional Responsibility explored the obligation of a lawyer to report professional misconduct by a lawyer not engaged in the practice of law. Formal Opinion 04-433 concludes with a sweeping duty:

We interpret Rule 8.3 as requiring a lawyer to report professional misconduct at anytime by a licensed but non-practicing lawyer. Even misconduct arising from purely personal activity must be reported if it reflects adversely on the lawyer's fitness to practice law. A lawyer violates the Model Rules and is subject to professional discipline when she fails to report such professional misconduct, in circumstances in which Rule 8.3 requires such reports.\textsuperscript{117}

The formal opinion identifies examples of situations where such an obligation might arise. For example, a lawyer practicing in a corporation may learn of misconduct by a fellow employee who is licensed but employed by the corporation in a nonlegal capacity. Or a lawyer in private practice may discover misconduct by an employee of the firm (such as an in-house accountant) who the lawyer knows is admitted to law practice. Finally, the example that is closest to my heart: a lawyer observing the misconduct may himself not be engaged in active practice—such as faculty of a law school—and learns of misconduct by another law professor who is licensed to practice but also exclusively engaged in teaching.\textsuperscript{118} Of course, not all misconduct must be reported. Two thresholds must be reached to trigger the reporting requirement. First, the lawyer must "know" of the violation. Second, the misconduct must raise a "substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer.\textsuperscript{119}

The Committee even recognized the "awkwardness and potential discomfort" of reporting a colleague's misconduct—a situation compounded if the lawyer to be reported is the superior of the reporting lawyer. The Committee concludes:

Whether employed in a law firm, a corporate law department, on a law school faculty, or elsewhere, the lawyer may be facing the same dilemma: jeopardize her career by making the report, or jeopardize it by remaining silent in violation of the rules of ethics.\textsuperscript{120}

The reporting obligation is not, however, absolute. If reporting the misconduct would reveal confidential information in violation of Rule 1.6(a), the duty to report is subordinate to the duty of confidentiality. If a lawyer determines that the information necessary to report the misconduct is protected by Rule 1.6, the lawyer should seek informed consent from the client to disclose. However, any discussion to disclose must include the potential adverse impact that the disclosure may have on the client. Given this, the Committee notes that as "a practical matter, there may be little benefit for the client in consenting to report the misconduct to the disciplinary authorities."\textsuperscript{121}

IV. Alternative Dispute Resolution

A. New Mediation Rules

1. Uniform Mediation Act

In the mediation context, two developments are significant. First, consider the Uniform Mediation Act (UMA). The UMA was adopted by the National Conference of Commissioners on Uniform State Laws in August 2001. The UMA contains significant new provisions regarding the confidentiality of mediation communications and the privilege against disclosure.\textsuperscript{122} On May 13, 2003, Nebraska became the first state to adopt the UMA. Illinois followed. On November 22, 2004 New Jersey followed suit. Then Ohio enacted the UMA in December 2004. On April 5, 2005, the Washington legislature passed the UMA. Other jurisdictions having subsequently adopted the UMA are Iowa, Utah, and the District of Columbia. In Vermont, the UMA passed the House in March and Senate in early April 2006. It was signed by Governor Jim Douglas and took effect July 1, 2006. Other jurisdictions considering bills to enact the UMA at this writing include: Connecticut, Massachusetts, Minnesota, and New York.

2. New Model Standards of Conduct for Mediators

In 1994, the original Model Standards of Conduct for Mediators (Model Standards) were issued. The Model Standards were the collaborative effort of the American Arbitration Association (AAA), the ABA, and the Society of Professionals

\textsuperscript{115} Litigation Section, American Bar Association, Ethical Guidelines for Settlement Negotiations Preface (Aug. 2002).

\textsuperscript{116} See Model Rules of Prof. Conduct R. 8.3 (2004).


\textsuperscript{118} See id.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} See Uniform Mediation Act §5 (confidentiality and privilege), §6 (waiver and protection of privilege), §7 (exceptions to privilege), §8 (mediator disclosure).
in Dispute Resolution. The Model Standards provide general guidance for mediator conduct and information to mediating parties.\textsuperscript{125} Yet another joint effort to revise the standards by the AAA, ABA, and the Association for Conflict Resolution (ACR) was successfully completed.

On December 29, 2004, the Joint Committee issued the final draft of the New Model Standards. In January 2005, the Joint Committee submitted its final draft (December 2004) to their respective organizations for review. During the January–March 2005 period, the Joint Committee examined targeted suggestions from constituent sources, developed the April 10, 2005 document, and submitted it to their organizations for review and approval. The ABA’s Section of Dispute Resolution approved a revised version of the standards in April 2005. Additional comments and suggestions from constituent groups resulted in the Joint Committee developing the final version of the Standards.

The final version was adopted by each organization during the August–September 2005 period. The Model Standards were approved by the ABA’s House of Delegates on August 9, 2005, the Board of the ACR on August 22, 2005, and the Executive Committee of the AAA on September 8, 2005. By agreement of the organizations, the final document carries an effective date of September 2005.\textsuperscript{124}

B. Code of Ethics for Arbitrators

The Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) was first issued in 1977 by a joint committee consisting of the American Arbitration Association (AAA) and the American Bar Association (ABA). The Code of Ethics was revised in 2003 by an ABA Task Force and special committee of the AAA. It was formally adopted by the two organizations and became effective March 1, 2004.\textsuperscript{126}

The 2004 Code of Ethics purports to address the problem of nonneutral party-appointed arbitrators that has been a lightning rod for criticism of the former ethical code. Under the old Code of Ethics, “persons who have the power to decide should observe fundamental standards of ethical conduct.”\textsuperscript{127} To ensure broad public confidence, an arbitrator has a responsibility, not only to the parties but also to the process itself, to observe high standards of conduct preserving the integrity and fairness of the process.\textsuperscript{128} Canon V. also precludes predispension by an arbitrator.\textsuperscript{129} However, these obligations were diluted if one is a nonneutral party-appointed arbitrator. A nonneutral “may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith with integrity and fairness.”\textsuperscript{128} While the nonneutral still must act in good faith and with integrity and fairness, the specific prohibitions of the Code of Ethics—delaying tactics, harassment of witnesses, making knowingly untrue or misleading statements—punctuate the difference in standards applicable to neutral and nonneutral arbitrators.\textsuperscript{130}

This fundamentally different treatment is reflected in the different disclosure and ex parte communication requirements. Before accepting appointment, arbitrators should disclose: (1) direct or indirect financial or personal interest in the outcome of the arbitration; and (2) any existing or past financial, business, professional, family, or social relationships which are likely to affect impartiality or may reasonably create the appearance of bias. This includes disclosure of such relationships with any party, lawyer, or witness. The obligation extends to relationships involving members of their families or current employers, partners, or business associates.\textsuperscript{131} If requested to withdraw by less than all parties, the neutral arbitrator should do so, unless the parties’ agreement establishes procedures for challenges, or the arbitrator determines that the challenge is not substantial.\textsuperscript{132} In contrast, nonneutrals essentially have a one-time general disclosure requirement. Their disclosure “should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.”\textsuperscript{133} Significantly, nonneutral arbitrators are not obliged to withdraw if requested.\textsuperscript{134}

The “hallmark” of the party-appointed arbitrator is the ability to communicate with the nominating party about any part of the case. Party-appointed need only inform the other participants that they intend to engage in ex parte communication; content is not disclosed.\textsuperscript{135} This ability is considered by many as one of the key benefits of arbitration.\textsuperscript{136}

Scholars have criticized the dual ethical standards of the Code of Ethics. They argue that because a party-appointed is less constrained by the ethical rules, the arbitrator is free to act less impartially, yielding a decision tainted by partiality. Given that the arbitrator’s role is pivotal to the entire process and that commercial arbitration forms a significant part of our justice system, the highest standards of ethical conduct should be imposed on all arbitrators.\textsuperscript{137}

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\textsuperscript{125} A copy of the 1994 Model Standards is available at the AAA website at www.aaa.com.
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\textsuperscript{126} See Canon II(A).
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\textsuperscript{127} See Canon II(B)(1).
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\textsuperscript{128} See Canon II(B)(2).
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\textsuperscript{129} See Canon II(B)(3).
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\textsuperscript{130} See Canon II(B)(4).
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\textsuperscript{131} See Canon II(B)(1).
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\textsuperscript{134} See Canon II(C).
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\textsuperscript{135} See Canon II(D).
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\textsuperscript{137} See id., at 764-68.
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On March 4, 2005, the Alabama Supreme Court Commission on Dispute Resolution officially adopted the 2004 Code of Ethics. Effective immediately on that date, arbitrators on the state’s roster of arbitrators must sign an agreement to abide by the new Alabama Code of Ethics.142

However, at its quarterly meeting in July 2003, the Council of the ADR Section of the State Bar of Texas decided to adopt the 1977 Code of Ethics for Arbitrators following the report of a section task force that studied the AAA-ABA Code of Ethics, JAMS’ Ethics Guidelines for Arbitrators, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, and the Ethics Standards for Neutral Arbitrators in Contractual Arbitration adopted in California.143

C. Model Rule for the Lawyer as a Third Party Neutral

An additional source of ethical guidance in ADR is worth noting. In November 2002, the CPR-Georgetown Commission on Ethics and Standards in ADR (sponsored by Georgetown University Law Center and CPR Institute for Dispute Resolution) released its proposed Model Rule for the Lawyer as a Third Party Neutral. The purpose of the proposed rule is to offer a framework for consideration by the appropriate bodies of the ABA and any state agency or legislature charged with drafting lawyer ethics rules. The proposed Model Rule addresses the ethical responsibilities of lawyers serving as third-party neutrals, in a variety of different ADR fora.

D. Duty to Advise

1. Introduction

Academics and proponents of alternative dispute resolution have long argued that lawyers have a duty to advise clients about ADR options.144 Client choice of means of dispute resolution is likely to have a significant impact on the client’s time, money, relationship, privacy, and ultimately satisfaction.145 Because of the central importance of client choice, many scholars believe that there should be an express mandatory duty to advise clients of ADR options.146 Such a requirement, however, is largely absent from the ethical codes.

2. The Model Rules

The Model Rules as revised in 2002 slightly strengthen the duty to advise clients about ADR options. Three areas should be noted. First, Rule 1.2 concerning the allocation of authority between client and lawyer requires a lawyer to “abide by a client’s decisions concerning objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”147 Rule 1.4 (Communication) specifically outlines that lawyer’s duty to: promptly inform of decisions or circumstances involving informed consent; consult about means; inform about the status of the matter; comply with requests for information; and consult about limitations on the lawyer’s conduct.148 However, there is no specific reference to ADR. The lawyer’s duty to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” is the most likely source of an attorney duty to inform the client concerning ADR options. Finally, the comments to Rule 2.1

140. 2004 Code of Ethics X(B)(3).
141. See 2004 Code of Ethics X(C).
147. Model Rules of Prof’l Cond. R. 1.2(a).
148. See Model Rules of Prof’l Cond. R. 1.4(a) (1) (5).
ing and settling disputes.”\textsuperscript{153} Colorado incorporates the notification provision in the text of its Rule 2.1: “In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”\textsuperscript{154} Hawaii has a similar provision.\textsuperscript{155}

Michigan demonstrates the client control model. In a recent ethics opinion, the State Bar of Michigan was asked whether lawyers have an ethical obligation to inform their clients of alternatives to litigation. Based upon Rules 1.2, 1.4, and 2.1, the committee concluded that a “lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client’s interests, or if the lawyer has any reason to think that the client would find the alternative desirable.”\textsuperscript{156} The obligation was firmly rooted in client control:

There is generally an ethical duty to inform the client of any options or alternatives which are reasonable in pursuing the client’s lawful interests. MRPC 1.4. While not all options which are theoretically available need be discussed, any doubt about whether a possible option is reasonably likely to promote the clients interests, as well as any doubt about whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision. This decision should be rendered with the assistance of the lawyer’s best advice and judgment.\textsuperscript{157}

\section*{E. Collaborative Law}

The ADR newcomer currently getting the most attention is collaborative law. The collaborative law approach uses attorneys in a nonadversarial capacity to negotiate with the parties to achieve settlement. This paradigm shift from adversarial to collaborative is typically embodied in a participation agreement or contractual commitment between counsel and parties. The terms typically include a commitment to good faith negotiation, including full, open, and honest disclosure of all relevant information without request. Collaborative law’s unique twist is that legal counsel participates solely for settlement purposes, thereby increasing the stakes for participants in reaching agreement and diluting the litigation threat. This is embodied as a disqualification or termination provision providing that if any party decides to litigate, or there is abuse of the collaborative process, representation terminates requiring the parties to get new counsel.\textsuperscript{158}

The collaborative law movement began in 1988 in the family law area. Since then, over 3,000 lawyers have been trained in collaborative law techniques. The practice flourishes in certain states, including Minnesota, Ohio, and Texas, as well as in Canada. Currently there are eighty-seven identifiable collaborative law practice groups. The results of two recent empirical studies illustrate the effectiveness (and limitations) of collaborative law.\textsuperscript{159}

Texas was the first state to officially recognize the use of collaborative law in the family law area where it is now provided for by statute.\textsuperscript{160} This has served

\textsuperscript{149} Model Rules of Prof’l Conduct R. 3.1 cmt. 5.
\textsuperscript{150} See Cochran, supra note 145, at 918-99 (delineating weaknesses).
\textsuperscript{151} See Cochran, supra note 145, at 905-06.
\textsuperscript{153} The Ten, Lawyer’s Creed—A Manifest for Professionalism § II(A)(1) (2002).
\textsuperscript{157} Id.


as a model for other states exploring the collaborative law model. Whether collaborative law will take hold outside of the family law area remains to be seen.

One possible limitation to the overall expansion and use of collaborative law is legal ethics. A flurry of recent academic commentary explores whether collaborative law practices and procedures are consistent with current ethical codes.

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New HUD Predatory Lending and...

(Continued on page 513)

- all properties acquired by sellers by inheritance;
- all sales by GSEs;
- all sales by state and federally-chartered financial institutions;
- all sales by nonprofit organizations approved to purchase HUD REO single-family properties at a discount with resale restrictions;
- all sales by local and state governments and their instrumentalities; and
- only upon announcement by HUD through issuance of a notice, sales of properties located in areas designated by the President as a federal disaster area (the notice will specify how long this exemption will be in effect).

These exceptions recognize that there are many instances where a short-term resale at a higher price may be appropriate. Not addressed (except for federal disaster areas) are cases where local market conditions change or the seller renovates a distressed property. Also not excluded from the bar are properties that are purchased in a run-down condition and then refurbished for resale at a higher price (an important function in inner-city and older residential areas). Instead, the exceptions focus on who the seller is, rather than the circumstances of the transactions.

The final rule became effective on July 7, 2006.

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Montgomery County Injunction Extended

On Thursday, July 6, 2006, the judge hearing the lawsuit brought by the American Financial Services Association (AFSA) against the Montgomery County, Maryland, predatory lending ordinance indefinitely extended the preliminary injunction enjoining Montgomery County from enforcing the ordinance. The preliminary injunction will remain in effect until the court rules on AFSA’s motion for a permanent injunction. Your authors have received no information suggesting when the court will rule on the permanent injunction.

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Exclusion of YSPs from California’s Anti-Predatory Lending Law

On Friday, February 17, 2006, the California Department of Corporations (Department) issued Release No. 55-PS, in which the Department concluded that yield-spread premiums (YSPs) should not be included in the points and fees calculation under California’s anti-predatory lending law. In reaching its conclusion, the Department cited Wolski v. Fremont Invest. & Loan, despite the fact that Wolski has not been ultimately resolved.

As a result of the Department’s release, your authors have concluded that YSPs may now be excluded from the points and fees calculation.

The Ohio State University

From the SelectedWorks of Christopher M Fairman

February, 2003

Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?

Christopher M Fairman

Available at: http://works.bepress.com/christopher_fairman/5/
Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?

CHRISTOPHER M. FAIRMAN

I. INTRODUCTION

In his recent article, James Lawrence introduced many of us to an emerging form of appropriate dispute resolution—collaborative lawyering.1 The collaborative law approach uses attorneys in a nonadversarial capacity to negotiate with the parties to achieve settlement.2 Collaborative law’s unique

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1 James K.L. Lawrence, Collaborative Lawyering: A New Development in Conflict Resolution, 17 OHIO ST. J. ON DISP. RESOL. 431, 431–32 (2002). The origins of collaborative law can be traced to Stuart Webb, a Minnesota family law practitioner who, in 1990, rejected the adversarial nature of his practice and began experimenting with other trusted lawyers to achieve settlements in family law cases through nonadversarial collaboration with the parties. Douglas C. Reynolds & Doris F. Tennant, Collaborative Law—An Emerging Practice, BOSTON B.J., Nov./Dec. 2001, at 12. While collaborative law has proven most successful in the family law context, it has recently spread to all types of disputes. See Robert W. Rack, Jr., Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation, DISP. RESOL. MAG., Summer 1998, at 9, 10 (noting that family lawyers have taken the collaborative law lead, but recognizing emerging groups in environmental, personal injury, employment, and corporation law). As of 2001, collaborative law groups now exist in at least 20 states. Reynolds & Tennant, supra, at 12 n.6. Texas has recently given statutory recognition to collaborative law. See TEX. FAM. CODE ANN. §§ 6.603 (authorizing the use of collaborative law in marriage dissolution), 153.0072 (permitting the use of collaborative law in suits affecting parent-child relationships) (Vernon 2002). Specific courts have also explicitly authorized use of collaborative law. See HAMILTON COUNTY CT. C. P. R. 43 (authorizing collaborative law by local rule in an Ohio court).

2 Lawrence, supra note 1, at 432 (describing the collaborative law process); see Tom Arnold, Collaborative Dispute Resolution: An Idea Whose Time Has Come, at http://www.mediate.com/articles/arnold.cfm (last visited Nov. 19, 2002) (describing collaborative law as when “the parties agree to scrap the idea of the adversarial system of law, and to work at every phase of their dispute resolution process in a collaborative, cooperative mode to resolve the dispute”); Chip Rose, Principles and Guidelines for the Practice of Collaborative Law, at http://www.mediate.com/articles/rose1.cfm (last visited Nov. 19, 2002) (describing the nonadversarial collaborative law process in the context of family law); Collaborative Law Institute, What is Collaborative Law?, at
twist is that counsel participates solely for settlement purposes, thereby increasing the stakes for participants in reaching agreement and diluting the litigation threat. Because the collaborative lawyer’s “responsibilities shift away from those associated with ‘pure’ advocacy and toward the creative, flexible representation that characterizes neutrality,” Lawrence contends that the collaborative lawyer falls in a “unique ethical position” somewhere between the ethical posture of a traditional advocate and a neutral.

Judge Sandra Beckwith and practitioner Sherri Goren Slovin flatly disagree. Describing Lawrence’s approach as an “unduly complicated starting point,” Beckwith and Slovin reject the premise that “the collaborative lawyer wears a third hat, distinct from the traditional lawyer and the neutral.” Rather, the collaborative lawyer’s ethical responsibilities “lie at the advocacy extreme.” According to Beckwith and Slovin, “[t]he collaborative lawyer has not taken off his advocacy hat or covered it with another.”

What gives rise to this sharp split in ethical perspective by these ADR proponents well steeped in the collaborative law process? An answer lies in placing their disagreement within the context of the larger on-going


3 Lawrence, supra note 1, at 432 (describing the limitation on counsel who are participating for settlement purposes only and the corresponding increased incentive to achieve settlement).

4 Id. at 442.

5 Id. at 439.


7 Id. at 502.

8 Id. at 489. Beckwith & Slovin similarly reject the notion that the collaborative lawyer wears both hats simultaneously. Id.

9 Id. at 501.

10 Id. at 503.

11 Both Lawrence and Beckwith serve on the Board of Trustees of The Collaborative Law Center in Cincinnati, Ohio. Lawrence, supra note 1, at 431; Beckwith & Slovin, supra note 6, at 469 n.1. Slovin chairs the Collaborative Law Center’s Family Section. Id. at 469 n.2. The Cincinnati group is recognized as leading the expansion of collaborative lawyering to practice areas outside of family law. Tom Arnold, Collaborative Dispute Resolution—An Idea Whose Time Has Come?, in ALI-ABA Course of Study Materials: ALTERNATIVE DISPUTE RESOLUTION: HOW TO USE IT TO YOUR ADVANTAGE 379, 389 (Oct. 2000).
conversation on the merits of different ethical guidelines for ADR participants. Beckwith and Slovin are correct in that currently a lawyer’s conduct in a collaborative law settlement might be evaluated against the ethical standards embodied in a specific jurisdiction’s ethical code, typically one based on the ABA’s Model Rules of Professional Conduct. The Model Rules certainly contemplate that as an “advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” While the process of collaborative lawyering could certainly be forced into this ethical scheme, should it be? Beckwith and Slovin’s view is that it should. Lawrence, however, recognizes the difficulty in shackling a new cooperative paradigm to existing ethical rules that were forged and fitted to the adversarial system. Hence, the Lawrence-Beckwith/Slovin exchange is really part of a broader debate: should ADR have its own ethical rules? The on-going discussions concerning the proper ethical treatment of third-party neutrals, party-appointed arbitrators, and party representatives in mediation provide guidance. The central lesson from these dialogues is that separate treatment may be warranted. While I risk becoming an ethical milliner,
II. LESSONS FROM OTHER ADR ETHICS DIALOGUES

A. The Model Rules and the Third-Party Neutral Experience

The questions of where on the ethical spectrum attorneys practicing ADR properly fit and whether separate ethical guidelines should control their conduct are certainly not new. Since the promulgation of the Model Rules in 1983, both the use and acceptance of ADR have rapidly expanded.\textsuperscript{16} However, when the Model Rules were drafted, even the two most prevalent forms of ADR, arbitration and mediation,\textsuperscript{17} were essentially unknown outside of a few narrow practice sectors.\textsuperscript{18} Not surprisingly, the Model Rules as drafted provided little guidance to lawyers participating in ADR.\textsuperscript{19}

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\textit{Adversarial Approach to Problem Solving: Mediation}, 28 FORDHAM URB. L.J. 935, 935 (2001) [hereinafter \textit{New Wine}] (titling her piece appropriately). Because Beckwith and Slovin introduce the hat analogy, I will stick with that. On a lighter note: “What did the hat rack say to the hat? You go on a head, and I’ll stay right here.” Telephone Interview with Laura J. Fairman, Wife, Austin, Tx. (Oct. 8, 2002) (following revelation of this Comment’s title).
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\begin{itemize}
\item Yarn, supra note 16, at 212 (describing arbitration and mediation as “barely on the legal ethics radar screen” except for specific commercial sectors, labor, and neighborhood or domestic disputes when the Model Rules were adopted).
\item See id. (noting dearth of direction from current ethics regimes); see also infra note 22.
\end{itemize}


18 Yarn, supra note 16, at 212 (describing arbitration and mediation as “barely on the legal ethics radar screen” except for specific commercial sectors, labor, and neighborhood or domestic disputes when the Model Rules were adopted).

19 See id. (noting dearth of direction from current ethics regimes); see also infra note 22.
Instead, they reflected the then dominant paradigm: lawyers are advocates in an adversarial system.\textsuperscript{20}

This orientation proved problematic for attorney third-party neutrals who, representing no one in particular, still operated under the rubric of the Model Rules.\textsuperscript{21} Commentators in the ADR field repeatedly pointed out this and other deficiencies in the state ethical codes as applied to appropriate dispute resolution.\textsuperscript{22} Professional organizations and ADR providers tried to take up the slack by drafting their own stand-alone ethical guidelines.\textsuperscript{23}

\textsuperscript{20} See Yarn, supra note 16, at 212 (“[T]he Model Rules reflected the common conceptual paradigm of the lawyer as advocate in an adversary adjudicative system of dispute resolution.”).

\textsuperscript{21} See id. (“This [adversarial] orientation in the Model Code and Model Rules has caused considerable confusion when considering the actions of lawyer-neutrals who do not represent anyone.”); John D. Feerick, \textit{Standards of Conduct for Mediators}, \textit{Judicature}, May–June 1996, at 317 (“[T]o what extent a lawyer-mediator is subject to the Model Rules of Professional Conduct is unclear . . . ”). For example, former Rule 2.2 dealing with a lawyer acting as an intermediary between two clients is both inapplicable on its face and confusing when applied by analogy. \textit{Id.} This rule was recently deleted from the Model Rules. \textit{Compare} \textit{Model Rules of Prof’l Conduct} R. 2.2 (2001), \textit{with} \textit{Model Rules of Prof’l Conduct} R. 2.1 – 2.3 (2002). As for arbitrators, they were only mentioned in Rule 1.12 along with former judges for conflicts purposes. \textit{See Model Rules of Prof’l Conduct} R. 1.12 (2001).


\textsuperscript{23} By 1996, there were at least 100 mediation codes of conduct. Feerick, supra note 21, at 315. There are also numerous codes of ethics for arbitration created by professional
Amazingly, it was not until last year that recognition of the most basic form of appropriate dispute resolution—use of a third-party neutral—found its way into the Model Rules. As a result of the work of the Ethics 2000 Commission,24 the ABA formally amended the Model Rules in February 2002 to include specific reference to third-party neutrals.25

In what has been called “the single most important” revision,26 the preamble to the Model Rules now recognizes that, in addition to representational functions, lawyers may serve in nonrepresentational roles as third-party neutrals.27 Additionally, a new Rule 2.4 was created specifically governing lawyers serving as third-party neutrals.28 This new rule defines third-party neutral29 and imposes a duty on a third-party neutral to inform organizations and providers. See infra notes 36, 60–61 and accompanying text (discussing arbitration ethics codes). The guidance provided by mediation and arbitration ethical codes has been mixed. For example, the AAA/ABA’s Code of Ethics for Arbitrators in Commercial Disputes is widely used by both arbitrators and arbitral institutions. See John D. Feerick, The 1977 Code of Ethics for Arbitrators: An Outside Perspective, 18 GA. ST. U. L. REV. 907, 907 (2002). In contrast, the Ethical Standards of Professional Responsibility promulgated in 1986 by the now-defunct Society of Professionals in Dispute Resolution (“SPIFDR”) has faded into oblivion. See Yarn, supra note 16, at 214. SPIFDR has since merged into the Association for Conflict Resolution. See Association for Conflict Resolution, at http://www.acresolution.org (last visited Nov. 25, 2002).


25 The Ethics 2000 report with its proposed changes to the Model Rules was presented to the ABA House of Delegates at its August 2001 meeting. The House voted on some of the proposed rules. The House completed its deliberations at its February 2002 meeting. As of February 2002, the Model Rules have been amended to reflect the Ethics 2000 recommendations. However, the Model Rules retain their traditional title, with a new date—Model Rules of Professional Conduct (2002).

26 Yarn, supra note 16, at 228.

27 See MODEL RULES OF PROF’L CONDUCT pmbl. para. 3 (2002) (“In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.”).


29 The new rule defines a third-party neutral as follows:

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include
unrepresented parties that the lawyer is not representing them. 30 While other minor changes relating to ADR are sprinkled throughout the newly revised Model Rules, 31 they are still a “model.” Individual jurisdictions must now determine which, if any, of the new provisions they will ultimately adopt. 32

The lesson of the struggle for third-party neutral inclusion into the Model Rules to collaborative lawyering is simple. Even the most basic recognition of the reconceptualization of lawyer roles away from the adversarial advocate to the nonrepresentational lawyer-neutral is taking a long time. 33 Indeed, there is still debate over whether lawyers acting as neutrals are “practicing service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties resolve the matter.

MODEL RULES OF PROF’L CONDUCT R. 2.4(a) (2002).

30 See MODEL RULES OF PROF’L CONDUCT R. 2.4(b) (2002). The comments to Rule 2.4 are more catch-all and include recognition that lawyer-neutrals may be subject to various codes of ethics, such as the AAA/ABA Code of Ethics for Arbitrators. Id. at cmt. 2. Additionally, the comments note that conflicts of interest are addressed in new Rule 1.12 and candor to the tribunal in new Rule 3.3. Id. at cmts. 4, 5.

31 For example, changes were also made to Rules 1.4, 1.12, 3.3 and 4.1. See infra notes 71 (describing changes to Rules 1.4 and 1.12), 108–114 and accompanying text (describing changes to Rules 3.3 and 4.1).


33 Clearly, there is widespread use of lawyers serving as third-party neutrals and the ethical rules regarding representational roles do not apply to their nonrepresentational ones. Silences, supra note 22, at 637–38. Recognition, however, remains slow. Consider the problem presented by the new Restatement of the Law Governing Lawyers released in 2000 by the American Law Institute. This two-volume work is a major piece of legal scholarship that goes well beyond the scope of either the Model Code or Model Rules. However, the Restatement fails to address issues relating to alternative dispute resolution, especially third-party neutrals. See id. at 638–39 (arguing that the Restatement fails to include any definition or conception of lawyers as arbitrators, mediators, early neutral evaluators, or representatives or advocates within these dispute resolution formats). But see Hazard, supra note 22, at 671 (contending that the Restatement is not silent, but speaks in more general terms). While there is some mention of ADR in the Restatement, it is generally limited to issues such as attorney-client fee disputes and malpractice. RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 42 cmt. b(iv) (“In many jurisdictions, fee-arbitration procedures entitle any client to obtain arbitration . . . .”), 54 cmt. b (“A client and lawyer may agree in advance . . . to arbitrate claims for legal malpractice . . . .”) (2000); see also Silences, supra note 22, at 647–48.
law” and thereby subject to lawyer ethical codes at all. While the recognition of third-party neutrals in the Model Rules is a step in the right direction, even this falls short of expectations. The stand-alone nature of new Rule 2.4, however, shows some willingness to embrace unique rules for ADR participants. With this context, it is not surprising to me that Lawrence and Beckwith/Slovin disagree on the need for ethical guidelines for the new collaborative lawyer.

Imagine a spectrum with a lawyer representing a client in litigation at one extreme and a judge presiding over the dispute at the other. There is no question that different ethical standards govern the litigator and the judge. Add a third-party neutral to the spectrum. The neutral would lie close to, if not on, the judicial end of the spectrum. Hence, it makes sense that ethical guidelines different from the advocate and more similar to the judge should control. Despite this conceptually easier application of the need for different ethical rules for neutrals, such recognition is still not universal. As we move farther in on the ethical spectrum, as with collaborative lawyering, resistance to new rules intensifies. The ethical treatment of party-appointed arbitrators, considered in the next section, illustrates this.

B. Domestic Arbitration and the Party-Appointed Problem

If the ethical orientation of third-party neutrals is the “easier” question, the ethical posture of the party-appointed arbitrator introduces a hard twist. Should party-appointed arbitrators be held to lesser ethical standards than their neutral colleagues? Currently, certain ethical codes for domestic arbitration create dual ethical responsibilities for party-appointed arbitrators and third-party neutrals on tripartite panels. The duality of these codes is

34 See New Wine, supra note 15, at 940–41 (noting the continuing debate about whether lawyer-neutrals are practicing law and subject to the ethical considerations governing lawyers).


36 See AAA/ABA, Code of Ethics for Arbitrators in Commercial Disputes Canon VII (1977) [hereinafter Code of Ethics] (creating exceptions from canons for nonneutral
simple; they impose the highest standards of impartiality and fairness on a neutral arbitrator while permitting predisposition toward the nominating party by a party-appointed arbitrator. Criticism of this “party-appointed problem” and the current moves to correct it further inform the discussion of collaborative lawyer ethics.

The widely used AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes embodies this duality and squarely presents the party-appointed problem in that it requires that “persons who have the power to decide should observe fundamental standards of ethical conduct.” To ensure broad public confidence, an arbitrator has a responsibility, not only to the parties but also to the process itself, to observe high standards of conduct preserving the integrity and fairness of the process. This requires arbitrator independence and precludes predisposition. However, these ethical obligations are diluted if one is a nonneutral party-appointed arbitrator. Nonneutrals “may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith with integrity and fairness.” While the nonneutral still must act in good faith and with integrity and fairness, the specific prohibitions of the Code of Ethics—delaying tactics, harassment of witnesses, or making knowingly untrue or misleading statements—punctuate the difference in standards. Thus, the

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37 Feerick, supra note 23, at 907.
38 Code of Ethics, supra note 36, at pmbl. para. 3.
39 Id. at Canon I(A).
40 See id. at Canon V(B) (“An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.”).
41 Technically, the Code of Ethics sets a series of canons applying to all arbitrators. Canon VII, entitled “Ethical Considerations Relating to Arbitrators Appointed by One Party,” then creates exceptions that apply to nonneutral party-appointed arbitrators. Significantly, the Code of Ethics establishes a presumption that party-appointed arbitrators are nonneutral. Id. at Canon VII Introductory Note.
42 Id. at Canon VII(A)(1); see id. at Canon VII(E)(1) (“Nonneutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them.”).
43 Id. at Canon VII(A)(1). By specifically identifying and prohibiting these actions, but not more, the Code of Ethics appears to set this as the boundary for fairness and integrity as applied to the party-appointed arbitrator. See Deseriee A. Kennedy, Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations, 8 GEO. J. LEGAL ETHICS 749, 762–63 (1995).
Code of Ethics prescribes one form of treatment for the neutral and a different, lesser standard for the nonneutral party-appointed arbitrator.

This fundamentally different ethical treatment also manifests in different disclosure and ex parte communication requirements. Under the Code of Ethics, before accepting appointment, arbitrators should disclose: (1) direct or indirect financial or personal interest in the outcome of the arbitration and (2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or may reasonably create the appearance of bias. In contrast, nonneutral party-appointed arbitrators essentially have a one time, general disclosure requirement. The disclosure “should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.” Significantly, nonneutral arbitrators are not obliged to withdraw if requested.

But the true “hallmark” of the nonneutral party-appointed arbitrator is the ability to engage in ex parte communication. As a general rule, a neutral arbitrator should not discuss a case with any party in the absence of the others. Nonneutral party-appointed arbitrators, however, may communicate with their nominating party about any part of the case provided they first inform the other participants that they intend to engage in ex parte communication; content need not be disclosed. This ability is considered by many participants as one of the key benefits of arbitration.

44 Code of Ethics, supra note 36, at Canon II(A). This includes disclosure of such relationships with any party, lawyer, or witness and extends to relationships involving members of their families or current employers, partners or business associates. Id.

45 Id. at Canon VII(B)(1). The JAMS ethical guidelines do not require a nonneutral arbitrator to make any disclosure of actual or potential conflicts. See JAMS, Ethics Guidelines for Arbitrators, Guideline X (2002).

46 Code of Ethics, supra note 36, at Canon VII(B)(2). In contrast, if requested to withdraw by one of the parties, the neutral arbitrator should do so, unless the parties’ agreement establishes procedures for challenges, or the arbitrator determines the challenge is not substantial. See id. at Canon II(E). Given this standard, it is not surprising that judicial inquiry into a neutral’s conduct often focuses on nondisclosure issues that might reveal impartiality; nonneutrals, who are expected to have relationships, rarely provide a basis to vacate an arbitral award. See Kennedy, supra note 43, at 763 (describing the difference in judicial inquiry into neutral and nonneutral conduct).

47 Kennedy, supra note 43, at 764.

48 Code of Ethics, supra note 36, at Canon III(B).

49 Id. at Canon VII(C)(2).

50 See Kennedy, supra note 43, at 764.
Proponents of this system of nonneutral party-appointed arbitrators contend that it has numerous benefits. It ensures that the party has a champion on the panel to serve as an effective advocate. It allows for selection of an arbitrator familiar with the industry and with relationships to thereby increasing the expertise of the decision makers. Additionally, the very fact of party participation ensures greater support for both the process of arbitration and the result.

However, the nonneutral party-appointed arbitrator—unique to domestic arbitration—is under fire. Calling this system everything from “a stepsister of dubious integrity” to an “embarrassment,” critics argue that because a party-appointed arbitrator is less constrained by the ethical rules, the arbitrator is free to act less impartially, yielding a decision tainted by partiality. Given that the arbitrator’s role is pivotal to the entire process and that commercial arbitration forms a significant part of our justice system, the highest standards of ethical conduct should be imposed on all arbitrators. Judicial reluctance to reexamine arbitral awards based on party-appointed arbitrator decisions is troubling. As a result, it is imperative to consider whether modifications are necessary to ensure the integrity of the process.

[51] See id. at 762 (describing advocacy as a reason for arbitrator choice); John P. McMahon, *The Role of Party-Appointed Arbitrators—The Sunkist Case*, 49 DISP. RESOL. J. 66, 66 (1994) (noting “that an attorney who does not choose an arbitrator who will champion the client’s case and prepare the arbitrator to do so is not fulfilling a duty to the client and that a party-appointed arbitrator who does not advocate the appointing party’s position is not doing his job.”).


[53] See Kennedy, *supra* note 43, at 759 (noting proponents argument that tripartite arbitrations provide even greater control than other forms of ADR); Stipanowich, *supra* note 52, at 437 (commenting that the party-appointed process may “stimulate greater faith in the process and lessen the chance of appeal”).


[58] See id. at 768 (advocating higher ethical standards to ensure the integrity of the process).
arbitrator conduct reinforces the need for the highest ethical standards. The dual ethical approach is also criticized as inconsistent and incompatible with international arbitration rules. International arbitration rules uniformly reject two-tiered ethical burdens for party-appointed and neutral arbitrators. Even

59 See id. at 768–87 (outlining the refusal of courts to intervene in the arbitral process). Consider Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815 (8th Cir. 2001). Following a tripartite arbitration under the Federal Arbitration Act (FAA), AFC Coal sought to vacate the arbitration award because a nonneutral party-appointed arbitrator had an on-going consulting relationship with Delta Mine and its attorneys, participated in pre-hearing preparation of Delta Mine’s case, and had ex parte communications with Delta Mine’s attorneys during deliberations. Id. at 819. The district court agreed and held that the nonneutral’s conduct violated the Code of Ethics, justifying vacating the award under the FAA’s “evident partiality” standard. Id. at 820. The Eighth Circuit reversed on the grounds that the arbitration agreement contemplated the selection of partial arbitrators and that disclosure of a “client consultant relationship” was sufficient. Id. at 820–22. Delta Mine illustrates a substantial judicial tolerance for partisan, party-appointed arbitrators. See also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 756–59 (11th Cir. 1993) (finding that a nonneutral party-appointed arbitrator did not violate the Code of Ethics “good faith” standard where the arbitrator helped the party prepare its case and published views on issues involved in the dispute prior to the arbitration).

60 See Carter, supra note 56, at 299 (“Prominent rules in international arbitrations provide expressly that all arbitrators, including those appointed by parties, must be impartial and independent.”)

In 1986, nearly a decade after the joint AAA-ABA effort produced the Code of Ethics, the International Bar Association (IBA) adopted ethical guidelines. Int’l Bar Ass’n, Ethics for Int’l Arbitrators (1986), available at 26 I.L.M. 583 (1987). The IBA’s ethical guidelines diverge from the Code of Ethics and take the approach that the same ethical standards should control all arbitrators, regardless of the appointment method. The IBA starts with a fundamental rule: “Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias.” Id. at art. 1. The IBA requires disclosure of all facts or circumstances that may give rise to justifiable doubts as to a prospective arbitrator’s impartiality or independence. Id. at art. 4.1. Regarding ex parte communications, the IBA requires that “an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives.” Id. at art. 5.3.

Effective January 1998, the International Chamber of Commerce (ICC) established its set of arbitration rules. Int’l Chamber of Commerce, Rules of Arbitration of the Int’l Chamber of Commerce (1998), available at http://www.iccwbo.org/court/english/arbitration/rules.asp. These rules require that, “[e]very arbitrator must be and remain independent of the parties involved in the arbitration.” Id. at art. 7, § 1. To this end, all prospective arbitrators must sign a written statement of independence and disclosure and submit it to the Secretariat of the International Court of Arbitration (the ICC’s arbitration body) disclosing any facts or circumstances which might call into question the arbitrator’s independence in the eyes of the parties. Id. at art. 7, § 2. The Secretary General then
the AAA’s own International Arbitration Rules reject the distinction. 61 Consequently, the uniquely domestic dual approach should give way to a harmonized and higher ethical burden consistent with the international models. 62

Reformers may be getting their wish. Currently underway is a joint project involving the ABA, AAA, and CPR to revise the Code of Ethics and create a unified code applicable to both domestic and international commercial arbitration. 63 Resolving the party-appointed problem is one of the major tasks of this reform effort. 64 Representatives of the three groups reached tentative agreement at the ABA’s annual conference in August

61 The International Centre for Dispute Resolution, a division of the AAA, has issued its own arbitration rules. Int’l Centre for Dispute Resolution, Int’l Arbitration Rules (2001), available at www.adr.org. Unlike the domestic Code of Ethics, the International Arbitration Rules do not promote separate ethical standards for neutrals and party-appointed arbitrators. All arbitrators “shall be impartial and independent” and disclose any circumstance likely to give rise to justifiable doubts as to impartiality or independence. Id. at art. 7, § 1. Additionally, no party shall have ex parte communications with any arbitrator, or candidate for party-appointed arbitrator, except to advise of the general nature of the controversy, the anticipated proceedings, and discuss qualifications, availability, or independence. Id. at art. 7, § 2.

62 See Carter, supra note 56, at 305 (calling for a revised code of ethics that seeks consensus with the international codes by defining and limiting nonneutrals); Kennedy, supra note 43, at 787–90 (advocating reform of tripartite arbitration by requiring the highest ethical standards modeled after the Code of Judicial Conduct).


64 Feerick, supra note 23, at 909.
The new guidelines, called the “Code of Ethics for Arbitrators in Domestic and International Commercial Disputes,” are still a working draft and unfinalized. While the most recent draft has not been publicly circulated, it reportedly includes the following: a “neutral presumption” that the default status of an arbitrator is one of neutrality, no ex parte communications absent consent of the other party, and required disclosures for “partisan” arbitrators mirroring those of neutrals.

What does this mean for collaborative lawyering? In a parallel form of dispute resolution, a party representative is currently allowed and expected to be an advocate. The ethical problems raised by these standards, especially those concerning the process of arbitration, have been increasingly scrutinized and challenged. It now appears as if the domestic arbitration community itself is prepared to hold even party-appointed arbitrators to higher standards more in line with those widely recognized for neutrals.

There are, of course, differences, such as the long-standing ethical requirement that even nonneutral party-appointed arbitrators must decide disputes with good faith, fairness, and integrity. However, the trend away from advocacy toward neutrality is instructive.

C. Lawyer Representatives in Mediation

While there may be a trend toward reassessing the ethical standards applicable to party-appointed arbitrators and third-party neutrals (both

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65 Agreement, supra note 63.
66 Id. Following finalization, it will then be circulated to interested ABA sections before forwarding it to the ABA House of Delegates next summer.
67 See id. (reporting agreement to call nonneutral party-appointed arbitrators “partisan”).
68 See id. (reporting agreement on neutral presumption and no ex parte communication absent consent); Feerick, supra note 23, at 921 (noting working draft contains parallel disclosures for all arbitrators).
69 The trend is certainly not universal. The newly revised Model Rule 1.12 retains a conflicts provision that “[a]n arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.” MODEL RULES OF PROF’L CONDUCT R. 1.12 (2002). This retention is another criticism of Ethics 2000. See Many C’s, supra note 35, at 986 (criticizing the partisan arbitrator rule).
70 See Code of Ethics, supra note 36, at Canon VII(A)(1). Interestingly, this may not be such a significant difference given collaborative law’s good faith requirement. See Lawrence, supra note 1, at 436 (describing good faith discovery procedures with collaborative law); Reynolds & Tennant, supra note 1, at 12 (noting that in collaborative law the parties agree to act in good faith).
arbitrators and mediators), what about party representatives in mediation? Even the newly revised Model Rules are silent as to ethical guidance for the lawyer representing a party in mediation.71 This silence, however, should not be taken as consensus that current ethical codes provide sufficient answers.72

71 See James Alfini, E2K Leaves Mediation in an Ethics “Black Hole,” DISP. RESOL. MAG., Spring 2001, at 3 [hereinafter E2K] (pointing out this “glaring deficiency” in Ethics 2000); New Wine, supra note 15, at 951 (noting the absence of modifications addressing the ADR representative lawyer in Ethics 2000). Aside from the recognition of third-party neutrals in the preamble and new Model Rule 2.4, discussed supra notes 26–30 and accompanying text, the only other changes relevant to mediation involve the duty to advise and conflicts. See MODEL RULES OF PROF’L CONDUCT R. 1.2, 1.4, 1.12, 2.1 (2002).

Arguably, the new Model Rules slightly strengthen the duty to advise clients about ADR options. Three areas are relevant. First, Model Rule 1.2 concerning the allocation of authority between client and lawyer is amended to require a lawyer to “abide by a client’s decisions concerning objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002). New Model Rule 1.4 relating to communication is completely redrafted to specifically outline a lawyer’s duty to do the following: promptly inform of decisions or circumstances involving informed consent, consult about means, inform about the status of the matter, comply with requests for information, and consult about limitations on the lawyer’s conduct. Id. at R. 1.4(a)(1)–(5). However, there is no specific reference to ADR. The lawyer’s duty to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” is the most likely source of an attorney’s duty to inform concerning ADR options. Id. at R. 1.2(a). Finally, while Rule 2.1 remains unchanged, the comments include a new sentence: “Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” Id. at R. 2.1 cmt. 5. Taken as a whole, these changes may enhance the duty to advise. However, the changes have been challenged as “weak” due to the lack of specific guidance, weak use of language, and poor location. See Cochran, supra note 35, at 908–09 (describing weaknesses). But cf. Rogers & McEwen, supra note 16, at 862–63 (contending that the placement of an ethical duty to advise is less important than whether such a duty is even advisable).

Additionally, Model Rule 1.12 is amended to include mediators or other third-party neutrals to the preexisting former judge or arbitrator rule. MODEL RULES OF PROF’L CONDUCT R. 1.12(a) (2002). The gist of the rule remains the same—a lawyer who participated personally and substantially in a matter as a judge, arbitrator, or other third-party neutral shall not represent anyone in connection with the matter, absent informed consent in writing from all parties. Id. The rule also places limitations on negotiation for employment and includes screening procedures. Id. at R. 1.12(b), (c).

72 State-adopted lawyer ethics codes are not the only source for ethical guidelines in mediation. The vast majority of states have also enacted legislation to afford confidentiality in mediation. 1 SARAH R. COLE, NANCY H. ROGERS, & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE § 9:1, at 9-3 (2d ed. 2001). However, in many jurisdictions legislatures have given little weight to the need and effect of increased
To the contrary, as readers of this Journal already know, there is an emerging debate on the appropriate ethical behavior of lawyer-representatives in mediation and the need for ethical codes for lawyers to provide guidance.73 These discussions further illuminate the Lawrence-Beckwith/Slovin colloquy.

In a 1999 issue of this Journal, Professor Jean Sternlight surveyed the literature of how attorneys represent clients in mediation.74 She concluded that essentially two camps emerged: one arguing that advocacy has a limited role in mediation and the other arguing for active advocacy.75 This division remains. There are those—such as Professor Carrie Menkel-Meadow and Professor Kimberlee Kovach—who lament the stranglehold the adversarial model has on lawyer ethics, criticize this ethic of zeal as incompatible with mediation, and call for new ethical rules to guide lawyer behavior.76 Others


74 Sternlight, supra note 73.

75 Id. at 276–90.

76 See Ethics, supra note 22, at 426–29, 452–53 (discussing the inappropriateness of zealous advocacy for ADR representatives and suggesting development of a nonadversarial ethics code); Carrie Menkel-Meadow, Ethics and Professionalism in Non-Adversarial Lawyering, 27 FLA. ST. U. L. REV. 153, 161–66 (1999) [hereinafter Professionalism] (describing the proliferation of new roles for lawyer-representatives in ADR and proposing a new, nonadversarial aspirational code); New Wine, supra note 15, at 951–53, 959–72 (describing the disconnect between the adversarial paradigm and mediation and advancing a separate, nonadversarial code of ethical considerations); Kimberlee K. Kovach, Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, DISP. RESOL. MAG., Winter 1997, at 9, 9–10 (noting the continued and inappropriate adversariness in mediation and calling for a new good faith requirement); Good Faith, supra note 22, at 604, 622–23 (denouncing the adversarial model’s use in mediation and detailing a recommended good faith requirement); see also COLE ET AL., supra note 72 (2d ed. Supp. 2001), § 4.11, at 3 (“Some commentators advocate adoption of ethical rules to guide lawyers’ behavior in mediation . . . .").
concur. In contrast, there are advocacy advocates—such as former U.S. Magistrate John Cooley, Professor Geoffrey Hazard, and I would include Professor Sternlight—who contend that attorney advocacy is appropriate in mediation. To be sure, there are significant subtleties and differences advanced by all of these contributors to this mediation ethics conversation. However, one point is plain: there are both proponents and critics of having adversarial ethics models applied to lawyer-representatives in mediation.

The positions advanced by Beckwith, Slovin, and Lawrence on collaborative lawyering reflect this broader debate. Beckwith and Slovin note as much: “[t]he collaborative format presents . . . the same ethical issues as do mediation and negotiation without a neutral.” They are also correct that “a body of comment has developed recognizing the zeal of the lawyer in mediation.” However, the implication that there is consensus on application of this zealous advocacy standard to lawyer-representatives in mediation, thereby resolving the question in the collaborative context, is wrong. Lawrence’s position that the collaborative lawyer’s ethical orientation should shift away from pure advocacy is entirely consistent with the position of those criticizing a zealous advocacy standard and calling for new nonadversarial ethics standards for lawyer-representatives in mediation.

III. WHY NEW HATS ARE NECESSARY

The current trend to reevaluate the ethical standards applied to lawyers as ADR participants—such as, third-party neutrals, nonneutral arbitrators, and mediation party-representatives—provide context for the dialogue started by

77 See E2K, supra note 71, at 3 (finding mediation lying and gamesmanship “troubling” and calling for creation of a new ethics infrastructure); Settlement Ethics, supra note 73, at 266–70 (same).

78 See John W. Cooley, Mediator & Advocate Ethics, DISP. RESOL. J., Feb. 2000, at 73, 75 (stating that in mediation a lawyer has an ethical duty of advocacy of the client’s interests and applying the ABA Model Rules of Professional Conduct relating to lawyer conduct in negotiations); Geoffrey C. Hazard, Jr., When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues, 12 ALTERNATIVES TO HIGH COST LITIG. 147, 147 (1994) (contending that a lawyer acting on behalf of a party in mediation “has a role analogous to that of an advocate in litigation” and is governed by the Model Rules); Sternlight, supra note 73, at 291–97 (arguing that attorney advocacy is entirely consistent with mediation yet stressing that using certain zealous litigation tactics may be poor advocacy in the context of mediation).

79 Beckwith & Slovin, supra note 6, at 502.

80 Id. at 502–03.

81 Lawrence, supra note 1, at 442.

82 See supra notes 76–77 and accompanying text.
Lawrence and Beckwith/Slovin on the ethics of collaborative lawyering. While this conversation is just beginning, there are signs that point toward the merits of departing from the traditional, general ethical standards applicable to lawyers. Briefly consider the following.

A. The Paradigm Shift

Central to the process of collaborative law is a paradigm shift away from a traditional adversarial model to a problem-solving model. The win-lose dynamic is replaced with essentially a team approach. This shift is embodied in the collaborative lawyer’s agreement to avoid litigation, engage in good faith questions and answers, and participate in four-way conferences. These structural process changes are designed to encourage attorneys to work cooperatively and creatively while empowering clients to play an active role in resolving their own disputes. Attorneys who succeed in collaborative law must make the mental shift from the inherently competitive adversarial approach to one focusing on the needs of the parties.

Ethical rules borrowed from the adversarial model—such as zealous advocacy—seem ill-suited to this paradigm shift. This is certainly the lesson in other ADR contexts. When a lawyer engages in the nonrepresentational role of a neutral, the Model Rules now recognize that different ethical rules

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83 Reynolds & Tennant, supra note 1, at 12; see New Wine, supra note 15, at 975 (discussing the distinct differences between litigation and collaboration); Chip Rose, Collaborative Concepts (Mar. 2002) (noting that professionals have embraced the paradigm shift), at http://www.mediate.com/collaborativelaw/editrose2.cfm (last visited Nov. 21, 2002).

84 See New Wine, supra note 15, at 975 (describing the team approach of problem solving with collaborative law); Laflin, supra note 22, at 480–81 (describing winner and loser characteristic of adversarial litigation).

85 See Lawrence, supra note 1, at 433–36 (outlining components of collaborative law); see also Arnold, supra note 2; Arnold, supra note 11, at 383–89.

86 See William F. Coyne, Jr., The Case for Settlement Counsel, 14 OHIO ST. J. ON DISP. RESOL. 367, 401 (1999) (detailing the collaborative law process and noting that it “has been found to reduce both contentiousness and cost”); Lawrence, supra note 1, at 433–34 (explaining how collaborative law encourages attorney and client cooperation and legitimization of interests); Chip Rose, Introduction to Collaborative Negotiating, at http://www.mediate.com/articles/rose3.cfm (last visited Nov. 21, 2002) (describing collaborative law’s attention to the process and outcome needs of clients).

87 See Rose, supra note 86 (contending that a mental shift is necessary for success).
should apply.\textsuperscript{88} Even when the lawyer is selected as a party-representative, the trend in tripartite arbitration is to hold the party-appointed arbitrator to standards more akin to a neutral than those of a party advocate.\textsuperscript{89} Additionally, the call for abandoning the ethics of advocacy as applied to lawyer mediation-participants and creating nonadversarial codes provides a close parallel to collaborative lawyering.\textsuperscript{90} In fact, collaborative lawyering presents an even stronger case for its own nonadversarial ethics standards than mediation given the team orientation and “powerful problem-solving potential” at the core of collaborative law.\textsuperscript{91}

To be sure, there are ways to shoehorn the process of collaborative law into traditional lawyer ethical codes. Lawrence himself recognizes that collaborative law’s goals of avoiding litigation, withdrawal if unsuccessful, and good faith questions and answers could exist under traditional codes given the right interpretation.\textsuperscript{92} Beckwith and Slovin note the same.\textsuperscript{93} Other commentators similarly observe the potential coexistence with traditional ethics provisions.\textsuperscript{94}

Even “zealous advocacy” could be interpreted to include collaborative law by determining that the client’s needs are best served by a collaborative, as opposed to adversarial, model.\textsuperscript{95} This, however, seems unsatisfactory. It could be the notion of trying to equate cooperative problem solving with

\textsuperscript{88} \textit{MODEL RULES OF PROF’L CONDUCT} pmbl. para. 3, R. 2.4 (2002); see \textit{supra} notes 26–30 and accompanying text (discussing inclusion).

\textsuperscript{89} See \textit{supra} notes 63–68 and accompanying text (describing trend).

\textsuperscript{90} See \textit{supra} notes 76–77 and accompanying text (explaining the position of critics of adversarial ethics in mediation).


\textsuperscript{92} See Lawrence, \textit{supra} note 1, at 442–44.

\textsuperscript{93} See Beckwith & Slovin, \textit{supra} note 6, at 502.


\textsuperscript{95} See Beckwith & Slovin, \textit{supra} note 6, at 498; Reynolds & Tennant, \textit{supra} note 1, at 28 (applying duty of zealous representation through interpretation); Rack, \textit{supra} note 1, at 9 (noting concern over zealousness, but concluding that collaborative law is consistent if the client consents); Sholar, \textit{supra} note 94, at 677–80 (interpreting and applying the Model Code’s zealous representation standard).
“zealotry” that is unsettling.96 Maybe it is reluctance to anchor collaborative law to an ethical concept that is subject to such extreme interpretations including “hired gun,” “Rambo,” and “gladiator.”97 Given the distinct paradigm shift, new clearer standards would provide superior guidance for the collaborative lawyer.

B. The (Non)Duty of Candor

The precise contours of what the ethical standards should be for collaborative lawyers are beyond the scope of this Comment. Beckwith and Slovin, however, identify the “appropriate level of candor” as the major ethical issue in collaborative law.98 This is a fine starting point. They contend that the ethical issue is the same as presented in mediation or negotiation with the exception of collaborative lawyers’ agreement to provide good faith answers to good faith questions.99 Therefore, collaborative lawyers should look to mediation and negotiation to determine the appropriate level of candor required.100 This, however, is unhelpful. The Model Rules provide poor, if any, guidance as to the lawyer’s duty of candor in mediation.

Lawyers lie.101 It is not just a few unethical ones at the margins, but “a permanent feature of advocacy.”102 This is especially true in negotiation where willingness to lie is “central to one’s effectiveness in negotiations.”103 Why? Lies work, or at least that is the common perception.104 Lying is so

96 See New Wine, supra note 15, at 950 (“This zealotry, however, has been exaggerated to the extent that some contend it gives rise to an unworkable view of the lawyer’s task.”).
97 See Rob Atkinson, A Dissenter’s Commentary on the Professionalism Crusade, 74 Tex. L. Rev. 259, 304 (1995) (describing the hired gun and Rambo analogies); New Wine, supra note 15, at 950 (noting Rambo approach); Tesler, supra note 91 (describing the gladiator model); see generally Sternlight, supra note 73, at 291–97 (examining different conceptualizations of advocacy in mediation).
98 Beckwith & Slovin, supra note 6, at 501–02.
99 Id.
100 Id.
102 Wetlaufer, supra note 101, at 1272.
103 Id.
104 See id. (contending “well-told lies are effective”); cf. Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation
ingrained that we have developed an ethical discourse to support it.\textsuperscript{105} Hence, “zealous advocacy” means to many lawyers an obligation to perform all lawful acts including those the lawyer might consider unethical.\textsuperscript{106} In other words, “a lawyer is required to be disingenuous.”\textsuperscript{107}

What then is the guidance the Model Rules provide to curb this tendency? There is no specific rule governing mediation conduct. The provision generally referred to as instructive is Model Rule 4.1, “Truthfulness in Statements to Others.”\textsuperscript{108} However, Model Rule 4.1 only prohibits false statements of fact.\textsuperscript{109} As applied to negotiation, the comments have been used to support an exception for “puffery”—a euphemism for lying.\textsuperscript{110} Because this conduct is inconsistent with mediation principles, ADR advocates sought revision in Ethics 2000 to require a duty of candor to mediators.\textsuperscript{111} They received virtually nothing. While a true duty of candor was extended to arbitration in revised Rule 3.3, mediation was excluded.\textsuperscript{112} Meditation proponents did get a word—“ordinarily”—to qualify the comment

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\textsuperscript{106} See Wetlaufer, supra note 101, at 1255–57 (describing the argument that zealous representation permits lying).

\textsuperscript{107} Id. (quoting H. EDWARDS & J. WHITE, PROBLEMS, READINGS, AND MATERIALS ON THE LAWYER AS NEGOTIATOR 378 (1977)).


\textsuperscript{109} Id. at R. 4.1(b).

\textsuperscript{110} See id. at R. 4.1 cmt. 2 (“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”); E2K, supra note 71, at 3 (“It thus opens the door for what some refer to ‘puffery,’ and others as lying, in negotiations.”); Cooley, supra note 78, at 75 (noting comments suggest puffing is permissible and noting the absence of a bright line distinguishing lying); Reed E. Loder, Moral Truthseeking and the Virtuous Negotiator, 8 GEO. J. LEGAL ETHICS 45, 51 (1994) (“The codes are far less clear regarding the status of false statements made to opponents in negotiation including whether such statements count as lies at all.”).

\textsuperscript{111} See Bruce E. Meyerson, Telling the Truth in Mediation: Mediator Owed Duty of Candor, DISP. RESOL. MAG., Winter 1997, at 17 (advocating a duty of candor to mediators); Settlement Ethics, supra note 73, at 269–72 (proposing revision to Rule 4.1).

\textsuperscript{112} See MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (defining tribunal to include an arbitrator), R. 3.3 cmt. 1 (noting duty is owed to a tribunal) (2002); see also Yarn, supra note 16, at 255–56 (describing a proposal to include other ADR processes and noting ultimate rejection of the idea).
in Rule 4.1 on negotiation puffery.\textsuperscript{113} This is the “black hole”\textsuperscript{114} of ethical guidance now controlling candor in mediation.

When the Model Rules are consulted, no duty of candor exists in mediation. Collaborative lawyering, however, needs such an ethical infrastructure.\textsuperscript{115} This nonadversarial, consensus-building, problem-solving approach cries out for an explicit duty of candor.\textsuperscript{116} While the good faith provision might provide some relief, it is limited to questions and answers. Thus, the “major ethical issue relating to collaborative lawyering”\textsuperscript{117} cannot be adequately resolved by looking at current mediation or negotiation standards.

C. \textit{Why Hats at All?}

Collaborative lawyering had its genesis in family law where practitioners became disgruntled with the adversarial nature of the practice and the belief that it did more harm than good for their clients.\textsuperscript{118} While collaborative law has expanded out of this field, it continues to attract those who fundamentally question the adversarial model and seek a cooperative way to solve problems.\textsuperscript{119} Given this, why are ethical rules necessary at all? It would seem that self-selection would ensure that only like-minded collaborators would choose this type of practice. If so, a collaborative lawyer could easily go without an ethical hat or ethically “bare-headed.”

While it is comforting to hold to the belief that all lawyers practicing collaborative lawyering follow a similar personal ethics, this is unrealistic. As Professor Menkel-Meadow laments, “[t]he romantic days of ADR appear to be over.”\textsuperscript{120} The success of ADR led to expansion of its use. This, in turn, led ADR proponents, once content with flexibility and creativity, to call for

\textsuperscript{113} \textit{MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (2002).}
\textsuperscript{114} \textit{E2K, supra note 71, at 3.}
\textsuperscript{115} \textit{Cf. id. (stating there is a critical need to create an ethics infrastructure to support settlement culture).}
\textsuperscript{116} \textit{See Arnold, supra note 2 (describing the process as collaboration on “all aspects of the dispute resolution, without secrets from each other”); New Wine, supra note 15, at 951–52 (arguing negotiation standard permitting deception should not be the standard in mediation given its different characteristics).}
\textsuperscript{117} \textit{Beckwith & Slovin, supra note 6, at 501.}
\textsuperscript{118} \textit{Reynolds & Tennant, supra note 1, at 27–28; Tesler, supra note 91.}
\textsuperscript{119} \textit{Rack, supra note 1, at 8.}
\textsuperscript{120} \textit{Ethics, supra note 22, at 408.}
ethics and standards. This broader ADR trend is now playing out in collaborative lawyering.

In only its second decade, collaborative law is predicted to “become mainstream in a significantly shorter period of time than it has taken for mediation.” This rapid expansion has led collaborative law proponents to call for uniform standards. As more lawyers are exposed to collaborative lawyering, a new ethical code is needed to both guide lawyers’ behavior and help educate and train new professionals on the ethical principles underlying the process. The educational function is especially important given the dramatic paradigm shift embraced by collaborative law. Thus, the best way to preserve collaborative law’s fundamental principles and prepare for future expansion is with development of its own ethical standards.

IV. CONCLUSION

The conversation about new ethical hats for new collaborative heads is just beginning. Lawrence, Beckwith and Slovin have done collaborative lawyering a favor by squarely joining the issue. Undoubtedly, others will

121 See id. (describing Menkel-Meadow’s conversion to the need for new rules).
122 Rose, supra note 83.
123 See id. (stating that the best opportunity for success is with a “core of uniform processes and protocols”).
124 See New Wine, supra note 15, at 953–54 (explaining effect of new rules on lawyer conduct). Dean Nancy Rapoport has set forth a helpful test for determining if new and distinct ethical rules are warranted in a specific area of legal practice. See generally Nancy B. Rapoport, Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics, 6 AM. BANKR. INST. L. REV. 45 (1998). The test includes a baseline assessment of whether there is a poor fit with general models of ethics, followed by “second order” questions including: (1) repeat players with novices, (2) jurisdictional layers, (3) ease of code enactment, and (4) benefits of a single code balanced by disadvantages of abandoning state regulation. See id. at 65–77. Applying the Rapoport test to mediation, Professor Kovach concludes that entry of new, inexperienced lawyers to the field justifies new and distinct rules. See New Wine, supra note 15, at 957–58.
125 There are numerous questions unanswered by this call. Not only must there be determination of what ethical provisions are warranted, but also whether the separate standards should be subsumed into Model Rules or exist on a stand alone basis. See New Wine, supra note 15 at 960 (noting options). While transsubstantivity has advantages I have advocated elsewhere in the context of civil procedure, it appears in this context that one set of rules for all lawyers may be unworkable given the differences in roles and ethical burdens. See Christopher M. Fairman, Heightened Pleading, 81 TEX. L. REV. 551, 622–23 (2002) (rejecting heightened pleading in part due to transsubstantivity advantages).
weigh in. Placed in perspective, the ethical concerns present in collaborative lawyering are already playing out for third-party neutrals, party-appointed arbitrators, and mediation representatives. Much can be learned from these related areas. The process of acceptance of the nonrepresentational role of lawyers as a third-party neutral and ultimate incorporation of a separate ethical rule in the Model Rules lays the foundation: different ethical rules are necessary when lawyers function in different roles. Even when the role is still as a party representative, ethical rules approaching those of the neutral can be appropriate as the very recent trend in handling party-appointed arbitrators illustrates. If, as many contend, the adversarial zealous advocacy standard should not apply to lawyers acting as party representatives in mediation, collaborative lawyering presents an even more compelling case for rejection of the standard. Applying these lessons, collaborative lawyers can best ensure that the core ethical qualities of their discipline continue by promoting development of separate ethical rules. It is time to don a new hat.
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Why We Still Need A Model Rule for Collaborative Law: A Reply to Professor Lande

Christopher M Fairman
Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande

CHRISTOPHER M. FAIRMAN*

I confess I have an affinity for rules. My dual interests in civil procedure and professional responsibility—both fields largely dominated by trans-substantive rules—likely drive this.1 Certainly my appreciation for the Federal Rules of Civil Procedure and the ABA Model Rules of Professional Conduct (Model Rules) has increased exponentially since I joined the legal academy. As one who teaches procedure and ethics to future lawyers, I repeatedly see the value of rule-based guidance.2 It is through this lens that I view collaborative law and the ethical issues surrounding it.

I explained the particular importance of legal ethical rules in the article that spawned this colloquy:

Rules of ethics serve a vital educational function. Those who are new to the practice of law need guidance on their role and responsibilities. Similarly, lawyers who are new to a particular practice area benefit from clear rule-based guidance. This is particularly true in the field of alternative dispute resolution. While lawyers embrace new representational models, scant attention is given to developing a coherent ethical foundation for these new representational roles.3

Nothing in Professor John Lande’s humbling4 and ambitious work moves me from this point of view.

*Associate Professor of Law, The Ohio State University Moritz College of Law. I thank Professor John Lande for the opportunity and the editorial board of this journal for the forum to engage in this colloquy.


2Professor Lande would label me a “legal centralist”—a term I am willing to embrace. John Lande, Principles for Policymaking About Collaborative Law and Other ADR Processes, 22 OHIO ST. J. ON DISP. RESOL. 642 (2007).


4As a legal scholar, I have always wanted two things: my work to be read and my ideas to be clear. It is an honor to have John Lande give it such a careful read and a critical eye. Nonetheless, it remains a humbling experience to have your work dissected.

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Professor Lande sees ethical rules as “typically adopted to regulate behavior.” 5 Education, on the other hand, “is not the primary purpose of such rules, but rather is a mechanism to promote compliance.” 6 “Ethical rules are primarily intended to protect clients from harm that might be caused by their lawyers and to provide legal sanctions when they violate the rules.” 7 Thus, Professor Lande views client protection through regulation as the primary thrust of ethical rules; he subordinates their educational function. I see things differently.

I cannot unweave the fabric of our ethical rules and conclude, as Professor Lande does, that education plays a mere tertiary “byproduct” role. As the Preamble to the Model Rules states, they “are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role.” 8 This description and definition of a lawyer’s role—such as how the duty of candor applies in collaborative law—is precisely the vital educational function of the Rules I tout.

To be sure, clients are protected when unethical attorney behavior is regulated. However, there can be no effective compliance without first fulfilling the educational function. Again, the drafters of the Model Rules explain: “Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.” 9 The educational role is primary to any regulatory function given that reliance on voluntary compliance is the chief form of regulation. Simply put, you cannot

in this fashion. I thank Professor Lande for giving me this opportunity and, in the process, helping me to refine my thoughts on the intersection of collaborative law and legal ethics.

5 Lande, supra note 2, at 695.
6 Id.
7 Id. at 674. I disagree with Professor Lande’s point that the rules are designed to provide legal sanctions or remedies when professionals violate them. The Model Rules explicitly denounce that they form a basis for remedy:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

8 Id. at para. 14.
9 Id. at para. 16.
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protect clients from unethical conduct if lawyers are not educated on what is ethical behavior in the first place. Thus, the educational function of the Model Rules in general, and of my proposal specifically, is sufficient in itself to justify creation of a new rule.

In fact, Professor Lande clearly states why we need a change in the Model Rules to perform this basic educational function:

“Thinking like a lawyer” does not refer to lawyers pondering how they can assure that their clients obey the law. Rather, it generally means that lawyers strategize how they can accomplish their clients’ objectives to the greatest extent possible without running afoul of the law. This approach to advocacy is embodied in the ethical rules and legal culture in the US. Thus would-be ADR regulators should consider how lawyers are likely to react to—and possibly “game”—any new rules as they try to accomplish their clients’ goals.10

Professor Lande not only recognizes the Hobbesian world of adversarial ethics in which collaborative law must function, but he also correctly notes the need for baseline ethical guidance on how collaborative law differs from the dominant paradigm. To me, this says we need a change in the Model Rules.

It is telling that Professor Lande uses the description above in his argument as to the inherent limitations of the Model Rules, yet I see it as reinforcing precisely why we need model rules in this context. Alternative Dispute Resolution (ADR) as a field is populated with many who, like me, are practice-oriented, pragmatic, and likely legal centralists to boot.11 As a former litigator, I view ADR not through a “touchy-feely” prism of conversion; I have seen no light to expose the errors of my past ways. To the extent I ever walked the ethical edge in resisting discovery, encouraging thorough (yet costly and time-consuming) pretrial motions, or promoting valiant (but ultimately unsuccessful) appellate efforts, I do not believe I ever crossed into the realm of Rule 11.12 Rather, I did what I thought was in the

10 Lande, supra note 2, at 646.
11 Id. at 643.
12 Federal Rule of Civil Procedure 11 currently requires that every pleading, written motion, and other paper be signed by at least one attorney of record. This signature certifies to the court that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that:

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
best interests of the clients who were willing and able to pay my reasonable hourly rate. I see collaborative law no differently. It is merely a tool to use in furtherance of a client’s legitimate objective. This means, of course, that those like me need a very clear statement, not of any aspirational high ground, but the baseline under which I should not stoop. That’s why we still need a model rule for collaborative law.

My good fortune to be part of the Dispute Resolution Program at the Moritz College of Law reinforces my belief in the value of ethical rules in the ADR context. I have witnessed firsthand the genesis, development, and success of two major ethical rule projects—the Uniform Mediation Act (UMA) and the Model Standards of Conduct for Mediators. Consider first the UMA. The UMA is the first joint drafting effort by the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). My colleagues at Moritz played an

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(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11.


14 While the two organizations had worked together for nearly a century, they never before had participated jointly in the actual drafting of proposed legislation. Rueben,
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instrumental role in the development of the UMA. “[O]ne of the founders of
the modern mediation movement,” Dean Nancy Rogers “worked tirelessly”
as the NCCUSL Reporter for the UMA. Six additional Moritz faculty
members served as Academic Advisory Faculty to the project. While I
played no role in this project, my belief in the value of model rules is
influenced by my colleagues’ commitment to the UMA.

Similarly, the newly-revised Model Standards of Conduct for Mediators
highlights for me the importance of model rules. Like the UMA, the Model
Standards of Conduct for Mediators is a joint project involving the American
Arbitration Association (AAA), the ABA, and the Association for Conflict
Resolution (ACR). This time it was the then Director of the Moritz Dispute

supra note 13, at 103. The organizations shared resources, met together, and worked
“collaboratively but independently in the drafting of the Act.” Id.

15 Id. at 102.

16 The joint project was structured to include separate ABA and NCCUSL drafting
committees, with interlocking members, which would be supported by a shared team of
Reporters and an Academic Advisory Faculty. Id. at 103.

17 These were: James J. Brudney, Sarah Rudolph Cole, L. Camille Hébert, Joseph B.
Stulberg, Laura Williams, and Charles Wilson. Id. at 103 & n.25.

18 Professor Lande, however, did play an active role in the development of the UMA
as part of the contingent from the University of Missouri-Columbia School of Law that
also served as Academic Advisory Faculty. Id. In addition to Lande, Chris Guthrie, James
Levin, Leonard L. Riskin, Jean R. Sternlight, and Richard Reuben (who was the ABA
Reporter as well) also participated. Id.

19 The original Model Standards of Conduct for Mediators were issued in 1994 as a
collaborative effort of the American Arbitration Association, ABA’s Section of Dispute
Resolution, and the Association for Conflict Resolution. ABA, AM. ARB. ASS’N, & ASS’N
FOR CONFLICT RESOL., THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005),
The Model Standards provide general guidance for mediator conduct and information to
mediating parties. A copy of the 1994 Model Standards is available at

20 On December 29, 2004, the Joint Committee issued the final draft of the new
Model Standards. See Model Standards of Conduct for Mediators, Final Draft, (Dec. 29,
the Committee’s webpage:

In January, 2005, the Joint Committee submitted its final draft (December 2004) to
their respective organizations for review. During the January–March 2005 period,
the Joint Committee examined targeted suggestions from constituent sources,
developed the April 10, 2005 document, and submitted it to their organizations for
review and approval. Additional comments and suggestions from constituent groups
Resolution Program and now Associate Dean Joseph Stulberg who manned the laboring oar as Reporter for the project. Once again, my colleague modeled the inherent value of an ethical code to address concerns about appropriate conduct by ADR participants.\textsuperscript{21}

The commitment of so many of my colleagues in the dispute resolution field to play such integral roles in the promulgation of the UMA and new Model Standards speaks volumes as to the beneficial role model rules can play in ADR. So if my Proposed Model Rule for Collaborative Law ironically “assumes that adopting a new rule is the best way to regulate behavior in ADR process,”\textsuperscript{22} I find myself in good company.

Of course, Professor Lande does not marginalize all rules; he recognizes the importance of some. “Some rules are necessary and appropriate in policymaking about CL, and thus the issue is not whether to have rules.”\textsuperscript{23} On this point, we certainly agree. Similarly, we are of like minds in our

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\textsuperscript{21} Once again, I played no role in this project. However, at a critical stage in the drafting process, I had the good fortune to be piloting a team teaching approach to the capstone course in our ADR program—Advanced Issues in ADR. Josh Stulberg, Ellen Deason, and I were the instructors. Because of the collaboration inherent in team teaching and my interest in ethical issues in ADR, informal conversation often turned to the Model Standards project.

\textsuperscript{22} Lande, supra note 2, at 628.

\textsuperscript{23} Id. at 629.
common commitment to the goals of collaborative law, grounding the practice in legal ethical rules, and providing appropriate structures for lawyers and clients to work through inevitable conflicts.24

Professor Lande also succinctly identifies where we part ways. “[T]he issue is whether it is necessary or wise to adopt a new and uniform rule now.”25 Embedded in this simple statement are Professor Lande’s three major challenges to my Proposed Model Rule for Collaborative Law. First, it is unnecessary and probably unwise to adopt any form of collaborative law ethics rule. Second, even if there is some showing of ethical problems in collaborative law, new rules are premature. Third, if a need is shown that sufficiently supports taking action, a more flexible approach rather than a uniform rule is superior.

Professor Lande argues that my “narrow” focus on a Model Rule both freezes the development of collaborative law and promotes its use to the exclusion of other forms of ADR.26 The better approach would be a contractual model of professional ethics, illustrated by Professor Scott Peppet’s proposed changes to Rule 4.1,27 that would have broader usefulness to practicing lawyers employing various dispute resolution processes.28 The best approach, however, is one premised on dispute systems design.29 These comparisons are problematic. Proposed Model Rule 2.2 for collaborative law is just that—a change in the Model Rules of Professional Conduct to provide the ethical foundation for collaborative law that is currently absent. It does not have traction outside of the area of collaborative law—nor is it intended to have an effect on other forms of legal practice. Hence, a comparison between my proposal and Professor Peppet’s illustrates the classic “apples to oranges” problem.30 Additionally, unlike my worthy colleague in this

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24 See id.
25 Id.
26 See id. at 692.
28 Lande, supra note 2, at 670–73.
29 Id. at 624.
30 Mindful of the scholarly criticism, I use the “apples to oranges” idiom reluctantly. By its use, I mean a comparison of two things that cannot be properly compared. Consider Eugene Volokh’s reaction to the phrase:

[We] compare apples and oranges all the time! We compare them by price, by how much we like the taste, by likely sweetness and ripeness, by how well they’ll go in a tasty fruit cocktail, and so on. In fact, every time we go to the store and buy apples rather than oranges—or vice versa—we are necessarily (if implicitly) comparing
colloquy, I have no design on systems design. It is no wonder that my
Proposed Model Rule 2.2 risks being eclipsed by Professor Lande’s grand
rubric. If it is hard to compare my “apple” of a rule change to Peppet’s
“orange,” it is impossible to compare my single apple to Lande’s “green
grocery.”

Instead, my goal is more pedestrian. Simply put, Professor Lande
contends that a new ethics rule for collaborative law is not needed, certainly
not now, and not in the form I suggest. My aim with this reply is equally
simple—to rehabilitate Proposed Model Rule 2.2 by tackling this trilogy of
arguments directly.

I. DOES COLLABORATIVE LAW NEED A NEW ETHICS RULE

Professor Lande believes that collaborative law “fits in the general model
of lawyering”\(^\text{31}\) and “the general model of legal ethics clearly permits
lawyers to act collaboratively”\(^\text{32}\) so that the two models are not
fundamentally incompatible. This assessment that collaborative law is an
easy fit with the general model of adversarial litigation and the ethical rules
that govern lawyers\(^\text{33}\) is contrary to virtually every other authority. The
unresolved issues—duty of candor, withdrawal and termination,
confidentiality, and conflicts—capture virtually every major topic in the law
governing lawyers. I am hard-pressed to see that collaborative law fits quite
well with this litany of concerns.

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\(^{31}\) Lande, \textit{supra} note 2, at 678.
\(^{32}\) \textit{Id}.
\(^{33}\) \textit{Id.} at 682–91. Professor Lande now appears to have greater confidence in the
compatibility of ethical codes to collaborative law than in his recent article in Dispute Resolution Magazine where he concluded: “It is hard to assess definitively whether CL practice complies with lawyers’ rules of professional conduct.” John Lande, \textit{The Promise and Perils of Collaborative Law}, DISP. RESOL. MAG., Fall 2005, at 29, 30.
On only one ethical issue—zealous advocacy—does there seem to be consensus. There is little support for the notion that a lawyer must take every possible action to further the client’s advantage or conform to some caricature of a hyper-zealous pitbull litigator. Why then does this strawman argument persist when there is little support for such a duty in our ethical codes? Part of the answer lies with what Professor Lande has already stated: “[L]awyers strategize how they can accomplish their clients’ objectives to the greatest extent possible without running afoul of the law. This approach to advocacy is embodied in the ethical rules and legal culture in the US.”

Even recognition of this inherent characteristic does not immunize collaborative lawyers from its effect. Professor Macfarlane’s research reveals some collaborative lawyers experience role tension as they switch from traditional advocacy to collaborative problem solving. If this is the case, it does not matter what the scholarly consensus is. While a new Model Rule may not be necessary to legitimize collaborative law, its added clarity would still benefit those conflicted by role tension.

Professor Lande criticizes my use of Macfarlane’s findings, labeling it an “unconvincing empirical claim.” However, his rationale for rejecting the claim is equally unconvincing: “Adversarial and problem-solving orientations are probably elements of lawyers’ identities that are deeply imbedded. It is hard to believe that simply promulgating a new ethical rule would have much effect on fundamental aspects of professional roles and identities.” Lande’s claim proves too much. It supports the depth of commitment to these differing identities that provides the crucible for

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34 However, there are still staunch advocates of zeal as a fundamental lawyering obligation. See Alexis Anderson, Lynn Barenberg, & Paul R. Tremblay, Lawyer’s Ethics in Interdisciplinary Collaboratives: Some Answers to Some Persistent Questions, CLINICAL L. REV. (forthcoming 2007) (manuscript at 29–30), available at http://ssrn.com/abstract=921590 (follow “Download Document” link) (maintaining that zeal remains an important component of lawyer ethics); see generally Monroe H. Freedman, In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct, 34 HOFSTRA L. REV. 771 (2006); Anita Bernstein, The Zeal Shortage, 34 HOFSTRA L. REV. 1165 (2006). If one ever needs an example of a hyper-zealous pitbull litigator, consult the video deposition conducted by Texas icon Joe Jamail available at YouTube.com under the title of “Old Lawyer Fight,” http://www.youtube.com/watch?v=td-KKmcYtrM.

35 Lande, supra note 2, at 646.


37 Lande, supra note 2, at 682.

38 Id.
unethical conduct. Absent a clearly stated ethical foundation, the “Adversarials” will game the current rules; the “Collaboratives” will push the collaborative model onto clients without adequate informed consent and in violation of the duty of competence. Those “In-betweens”—with one foot in each world of which I spoke originally—remain conflicted.

On each of the remaining ethical issues I originally raised, there is ample authority for outright incompatibility between the Model Rules and collaborative law. Let me simply highlight the conclusions of authorities beyond reproach: Professors Peppet, Macfarlane, and Lande. On the issue of candor and Rule 4.1, it goes without saying that Professor Peppet sees a significant problem here—one severe enough to form the basis of its own article and to merit drafting a new rule to address.39 Professor Lande agrees with Peppet based upon “substantial research, which is consistent with common experience, to show that this is a widespread problem . . . clearly related to the fact that lawyers are authorized to use ‘puffing,’ thus misrepresenting some of the most critical facts in negotiation, including the parties’ perceptions, interests, and intentions.”40 It is precisely this fact that generates my concern in the first place.

In fact, my concern over the potential mischief of Rule 4.1 has intensified. On April 12, 2006, the ABA’s Standing Committee on Ethics and Professional Responsibility not only reiterated its commitment to the puffery exception in negotiation, but explicitly expanded it to apply to caucused mediation:41

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules.42

Thus, Rule 4.1 continues to permit attorneys to lie under the puffery exception for negotiation and now mediation. Absent some intervening ethical guidance to the contrary, the same standard must be applicable to

39 See generally Peppet, supra note 27.
40 Lande, supra note 2, at 674.
42 Id.
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collaborative law. To avoid the inappropriate application of Rule 4.1 puffery to collaborative law, Proposed Model Rule 2.2 and the accompanying comments directly address this issue, establish a standard, and succinctly explain how it is to be applied.

Ethical concerns over collaborative law’s withdrawal agreement are similarly deep. Professor Peppet has “doubts about whether mandatory mutual withdrawal provisions can be squared with Rule 1.2.” He finds that the withdrawal agreements “effectively permit one party to fire another

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43 Because of the clarity of the candor issue, Professor Lande avoids the natural conclusion that a new rule is necessary by asserting an absence of proof of harm. “There is no evidence that any CL clients have been harmed by the lack of a special ethical rule for CL. As far as I know, there have been no complaints against CL lawyers to bar associations and no malpractice claims against CL lawyers.” Lande, supra note 2, at 674. Despite the obvious data collection issue given the absence of a source that compiles all disciplinary actions and malpractice lawsuits, why is measurable harm to clients the standard? Must clarity in our ethical rules wait for this to arise when there is uniform recognition that the Model Rules permit collaborative lawyers to behave ethically, but in direct opposition to the goals of collaborative law?

44 Proposed Model Rule 2.2 (e) provides: “A collaborative lawyer shall make a voluntary, full, honest, and open disclosure of all relevant information that a reasonable decision maker would need to make an informed decision about each issue in the dispute.” Fairman, supra note 3, at 117. The proposed comments further explain the ethical duty of candor and disclosure:

[10] The collaborative process requires voluntary production of all information that a reasonable decision maker would need to decide an issue. If a client discloses to a collaborative lawyer relevant information with the instruction that the lawyer not disclose it, the collaborative lawyer is ethically bound by paragraph (e) to advise the client that refusal to disclose relevant information is contrary to the principles of collaborative law. The collaborative lawyer must refuse to proceed unless the information is disclosed. If, after advice and counsel, the client continues to refuse voluntary disclosure, the collaborative lawyer must withdraw from representation and terminate the collaborative process in accordance with paragraph (g).

[11] The collaborative lawyer should not take advantage of inconsistencies, inadvertent misstatements of fact or law, or miscalculations, but should disclose them and seek to have them be corrected. If a collaborative lawyer discovers inconsistencies, inadvertent misstatements of fact or law, or miscalculations, made by the client, any consulting professional, or the other collaborative lawyer, the lawyer should inform the person of the discovery and request the person to make the required disclosure. The collaborative lawyer must disclose the lawyer’s own inconsistencies, misstatements, and miscalculations.

Id. at 120.

45 Peppet, supra note 27, at 489. Professor Lande is well aware of Peppet’s position having himself noted that Peppet “doubts whether such agreements comply with the ethical rules.” Lande, supra note 33, at 30.
party’s lawyer.”46 This “seems at odds with the most fundamental premises of the legal ethics codes”—protection of the lawyer-client relationship.47 Peppet concludes that “[n]othing in Model Rule 1.2 or its Comments suggests that it is reasonable for a lawyer to limit his representation of his client to the extent that the client is exposed to such disadvantage.”48

This does not seem like a mere fine tuning problem to me. But it is certainly familiar ground for Professor Lande who concluded himself in 2003 “that the traditional rules of legal ethics do not clearly answer questions about the propriety of disqualification agreements.”49 In 2005, Professor Lande declared that the “CL participation agreements probably violate ethics rules if they authorize lawyers to withdraw if clients do not follow the lawyers’ advice.”50 It is unclear what intervening circumstances have led Professor Lande to a different conclusion today.51

It would seem that this is an area squarely within even Professor Lande’s paradigm for limited use of ethical rules. Lande admits that the withdrawal agreement “creates pressures to settle that could easily devolve into coercion at ‘crunch-time.’”52 He also agrees that another “category of issues

46 Peppet, supra note 27, at 489.
47 Id.
48 Id. at 490.
49 John Lande, Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering, 64 OHIO ST. L.J. 1315, 1329–30 (2003). Professor Lande also takes issue with the notion that questions of ethics surrounding the withdrawal agreement have stunted collaborative law’s growth outside the family law area. Specifically, he contends that while the disqualification agreement is a major barrier to expansion, it is not due to the “ethical aspects” of it. See Lande, supra note 2, at 690. This misunderstands my point: Any issue surrounding withdrawal of counsel involves legal ethics rules. Whether the motivation to eschew the withdrawal agreement is also economic does not change its inherent ethical character.
50 Lande, supra note 33, at 30.
51 Professor Lande does offer an explanation for the about-face on this topic—the discovery of three additional informal nonbinding ethics opinions. Lande, supra note 2, at 682. One of the three is a stale advisory letter opinion from Minnesota’s Office of Lawyers Professional Responsibility. See id. at 682 n.298 (citing Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (Mar. 12, 1997)). The remaining two from Kentucky and New Jersey provide better coverage of the ethical issues but are still far from thorough. Id. at 683–86. While I suppose one could trumpet that the number of jurisdictions addressing collaborative law by ethics opinion has more than doubled. I still find this a slender reed on which to so quickly reverse directions.
52 Id. at 653 n.144.
appropriate for regulation involves rules governing the relationship between ADR processes and the courts.”\footnote{Id. at 652.} This surely encompasses whether a court would enforce the withdrawal provision of a participation agreement.\footnote{In a recent reported decision, the North Carolina courts illustrate the struggle over enforcement of participation agreements. \textit{See} Kiell v. Kiell, 633 S.E.2d 827 (N.C. Ct. App. 2006). In \textit{Kiell}, the parties entered into an agreement entitled “North Carolina Collaborative Family-Law Agreement” indicating the couple’s intention “to use the principles of Collaborative Law to settle the issues arising from the dissolution of their marriage.” \textit{Id.} at 828. The agreement also contained a provision that if any issues could not be settled through the collaborative process, “we agree to submit the matter to mediation, mediation/arbitration, or binding arbitration under the North Carolina Family Law Arbitration Act, rather than submitting the problem to the Courts.” \textit{Id.} Despite the agreement, the wife filed for divorce in district court alleging fraudulent inducement in entering the collaborative agreement in the first place. The district court found that she was entitled to a jury trial on the fraud allegation and stayed all proceedings pending trial. \textit{Id.} On appeal, the appellate court reversed on the right to a jury trial on this issue. \textit{Id.} at 830. While the legal issue presented in this case is independent of collaborative law, the district court must still determine whether to enforce the collaborative law agreement and plainly illustrates that a break-down in the collaborative process can place the participation agreement squarely before the trial court—exactly what the agreement is designed to prevent.} Proposed Model Rule 2.2(g) delineates the collaborative lawyer’s ethical duty to withdraw from representation under specific circumstances.\footnote{Fairman, \textit{supra} note 3, at 117–18:} In so doing, it provides a clear roadmap for collaborative lawyers, clients, and ultimately courts to determine if withdrawal is permissible or required.

Ongoing concerns about confidentiality also continue, but are often framed as issues of informed consent. As Professor Peppet notes, absent informed client consent, the disclosure of confidential information violates Model Rule 1.6;\footnote{Peppet, \textit{supra} note 27, at 494–95.} Professor Lande also notes confidentiality concerns, but correctly points out that informed consent is the obvious solution to disclosure of information during either four-way conferences or subsequent...
The persistence of confidentiality concerns is therefore anchored to the success of obtaining informed consent.

Moreover, Lande admits that this is an appropriate area for an ethical rule: “[R]ules are needed to regulate—and restrict—the use of information generated during ADR processes in litigation.”

Drawing parallels to the UMA’s mediation privilege, Lande concludes that it is appropriate “for states and courts to adopt evidentiary rules regulating use of information produced in those processes.” We certainly agree on the importance of this ethical area and the need for rule-based regulation. As I have pointed out before, attorney-client privilege, work product, and confidentiality are all essential elements of this problem. As to the privilege issue, I raised the need for separate state statutes to address the intersection of the ethical issue of confidentiality and the evidentiary issue of privilege. Neither a privilege statute nor an ethical rule including confidentiality provisions can cover this area independently. They work in tandem. Proposed Model Rule 2.2 provides the confidentiality foundation that will enable effective privilege statutes in the future.

57 Lande, supra note 49, at 1342.
58 Lande, supra note 2, at 651.
59 Id. at 652.
60 See Fairman, supra note 3, at 122.
61 Professor Lande states that it is not clear how the confidentiality provision of Proposed Model Rule 2.2 improves the status quo. Lande, supra note 2, at 674–75 n.253. Proposed Model Rule 2.2(f) provides: “All information arising from and relating to a collaborative representation is confidential including any written or verbal communications or analysis of any third-party experts used in the collaborative law process.” Fairman, supra note 3, at 117. The proposed commentary elaborates:

Confidentiality of the collaborative process is essential. A collaborative lawyer shall not disclose information arising from and relating to the collaborative representation whatever the source unless required or permitted to do so under Rules of Professional Conduct or other applicable law. The collaborative lawyer should ensure that the client and consulting professional also adhere to strict confidentiality provisions.

Id. at 120. This confidentiality provision makes clear that confidentiality attaches to all information arising from collaborative representation. It extends the reach to third party experts and imposes a duty on counsel to ensure compliance by both clients and consultants. This is a significant in both the clarity of the obligation and the coverage of the duty. While I believe the better practice would be to keep confidentiality contained in the Model Rules and deal with privilege by statute, confidentiality could be imposed by statute as well. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon 2005):
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Professor Lande also claims that a new rule is unnecessary because “[t]here is no evidence that any CL clients have been harmed by the lack of a special ethical rule for CL.”62 Are all these ethical concerns about collaborative law merely the product of scholarly imagination, or is there a real reason for concern? Professor Macfarlane’s preliminary research findings give us the clearest view to date.63 Described as a “mismatch of advocacy values between the lawyer and the client,”64 Macfarlane uncovered widely varying norms on disclosure of information generating confidentiality concerns. Specifically, the research exposed client concerns regarding privacy, safety, and discomfort at the closeness of counsel to opposing counsel.65

The solution to these confidentiality concerns—informed consent—is itself problematic. While one may attempt informed consent, lower functioning clients cannot process the abstract concepts in a meaningful way.66 Inexperienced collaborative lawyers also fail to anticipate potential problems warranting disclosure and consent.67 The end result is client complaints on breaches of confidentiality and loyalty. Luckily, Professor Lande finds informed consent to be another one of the areas appropriate for new ethical rules.68

A related ethical problem is the suitability of clients for the collaborative process. Professor Macfarlane found that many collaborative lawyers

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62 Lande, supra note 2, at 674.
63 Professor Lande describes Macfarlane’s study as “landmark.” See Lande, supra note 33, at 29.
64 Macfarlane, supra note 36, at 207.
65 Id.; see Lande, supra note 33, at 30 (noting Macfarlane’s findings regarding disclosure).
66 See Macfarlane, supra note 36, at 209.
67 Id.
68 Lande, supra note 2, at 653 (“Third, it is appropriate to legally regulate professional conduct to protect consumers’ interests by defining the professionals’ duties, dealing with issues such as requirements of informed consent and prohibitions against conflicts of interests.”).

[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

Id.; N.C. GEN. STAT. § 50-77(a) (2005) (“All statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding.”).
promote the process universally. When this includes clients who are not suitable for collaborative law, informed consent is again strained. This type of entrapment would preclude effective limitations on the scope of representation used to justify the withdrawal agreements.

Professor Macfarlane also finds evidence of conflicts of interest: “Some CL lawyers appear to go beyond a general strategic or good faith regard for the interests of the other side and describe themselves as being in the service of the complete family unit . . . .” Others corroborate this finding as significant. At least one practice treatise explicitly states that “the attorney in collaborative lawyering is placed in a unique position in which a balance must be struck between advocate and neutral.” This is a foundational issue upon which collaborative lawyers disagree. The ethical propriety of collaborative law hinges upon the answer to this question.

Professor Lande recognizes that “there are some views in the CL community inconsistent with traditional notions of lawyers’ duties to represent their clients . . . .” This poses no problem however. After labeling it a “minority view,” Lande declares “CL lawyers are obligated to represent their clients’ interests.” It is interesting that on this ethical topic where over 15% of collaborative lawyers disagree with Lande, he does not advocate experimentation, percolation, variety, choice, or systems design; instead he resolves the conflict by fiat. Professor Lande also correctly notes that Proposed Model Rule 2.2(c) reaches the same result.

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69 Macfarlane, supra note 36, at 210–11.
70 Id. at 203.
71 See William H. Schwab, Collaborative Lawyering: A Closer Look at an Emerging Practice, 4 PEPP. DISP. RESOL. L.J. 351, 380 (2004) (finding that 15.9% of collaborative lawyers either agreed with the statement “Collaborative lawyers are more like neutrals than like counsel for individual clients” or were uncertain).
72 Harold Baer, Jr., Evaluating and Selecting an ADR Forum, 4 BUS. & COM. LITIG. FED. CTS. § 44:22 (Robert L. Haig ed., 2006) (“Unlike other forms of dispute resolution, there is no third party participation. Therefore, the attorney in collaborative lawyering is placed in a unique position in which a balance must be struck between advocate and neutral.”).
74 Lande, supra note 2, at 678 n.275.
75 Id. at 678, n.275.
76 See id.
77 See id.; Fairman, supra note 3, at 117 (“While all collaborative lawyers engaged in resolving a dispute share a common commitment to the collaborative law process, a collaborative lawyer represents the client who has retained the collaborative lawyer’s services.”).
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course is that I am proposing a new rule to resolve a tension in collaborative law; Professor Lande supposedly is not.

Having identified significant gaps in ethical guidance from the current Model Rules, I propose Model Rule 2.2 to provide clarity. Professor Lande, of course, disagrees with my approach, taking the position that new ethical rules are unnecessary for the issues presented by collaborative law—with a few exceptions. However, the “exceptions” Lande endorses swallow the rule. By my count, Lande would permit some form of ethical rule-based regulation to resolve collaborative law issues involving candor, confidentiality, withdrawal, informed consent, and conflicts.78

Given this situation, the real question shifts to whether now is the time to go forward with a new rule unless there is some other tool to establish consistency. The only other sources of authority—state ethics opinions—do nothing to dissuade me from my premise of collaborative law’s incompatibility with the Model Rules. While Professor Lande is correct that no state has found collaborative law impermissible, no state has yet confronted the ethical question with any real facts before it.79 However, even this collection of advisory opinions is not a safe haven.

78 See supra notes 40–43 and accompanying text (candor); supra notes 57–59 and accompanying text (confidentiality); supra notes 52–54 and accompanying text (withdrawal); supra note 68 and accompanying text (informed consent and conflicts); see also Lande, supra note 2, at 676 nn.263–64 (“In addition, states could enact statutes establishing requirements for candor in CL, as Texas has done, and lawyers would be ethically required to comply with those laws.”). Of course, Professor Lande and I disagree on what type of ethical rule should address these concerns. Nonetheless, I posit that an area of law that implicates a potential need for ethical rules so some type in this many categories is one ripe for my proposal.

79 I reviewed the ethics opinions of three state bar associations—Pennsylvania, North Carolina, and Kentucky—in my initial article proposing a model rule. Fairman, supra note 3, at 108–16. The North Carolina State Bar answered discrete questions, often in cryptic fashion, on whether a lawyer who is a member of a collaborative family law group could represent a spouse if another member represented the other spouse. See N.C. State Bar, Formal Ethics Opinion 1 (2002), available at 2002 WL 2029469. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued an informal opinion on collaborative law authored by Professor Laurel Terry of Penn State-Dickinson School of Law. Pa. Bar Ass’n Comm. Leg. Ethics & Prof’l Responsibility, Informal Opinion 2004-24 (2004), available at 2004 WL 2758094. The Committee dealt with only a general question of whether the practice of collaborative law in a domestic relations context was ethical provided clients are given full disclosure and their rights waived by choosing the collaborative law method. See id. at *2. The request even failed to include a definition of collaborative law. Id. At the request of collaborative law practice group, the Kentucky Bar Association explored the general compatibility of the Kentucky Rules of Professional Conduct and collaborative
Having already explored three of these opinions (Pennsylvania, North Carolina, and Kentucky), I need not repeat the particulars. Suffice it to say, their inconsistencies on such basic questions as what rules apply do not model ethical clarity. Subsequently, the New Jersey Advisory Committee on Professional Ethics weighed into the ethical issues of collaborative law and *sua sponte* declared that the withdrawal agreement required imposition of a heightened duty of informed consent, specifically including “the risk of fees paid to that point becoming waste.” It went so far as to declare that a lawyer should not accept representation if “there is a significant possibility that the collaborative process will fail.”

The ethical contours of collaborative law as viewed by academics, researchers, and state ethics committees, are a far cry from Lande’s compatibility with current rules. There are genuine ethical concerns present with collaborative law. It is not that an advocate (or academic) cannot cobble together a case for compliance with the Model Rules; one can. But why? As the Pennsylvania Committee on Legal Ethics and Professional Responsibility suggests, if collaborative law wants to develop, the movement might be well suited by considering rules changes that are more accommodating.


Id. at 108–16.

Id. at 115–16.


Id. The only other “new” ethics opinion Lande offers is a stale 1997 advisory letter from Minnesota’s Office of Lawyers Professional Responsibility containing analysis that is so cursory no more need be said about it. See Lande, *supra* note 2, at 682 n.298 (citing Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (March 12, 1997)).

See generally Fairman, *Old Hats, supra* note 1.

The Committee stated:

If you should find that the essential and required elements of a collaborative law system cannot co-exist with the current or proposed Pennsylvania Rules of
II. A NEW RULE NOW OR LATER?

Professor Lande’s next concern is that the ethical issues in collaborative law do not merit a new rule at this time. Collaborative law does not yet suffer from mediation’s extreme multiplicity of conflicting provisions that spawned the UMA and Model Standards for Mediators. For the ethical questions that do exist, Professor Lande notes that collaborative law practice groups provide guidance and infrastructure, as do state legislation and ethics opinions; he favors continuation of this experimentation and the diversity of practice it creates. Uniformity of practice is not only undesirable, but also unobtainable. According to Lande’s assessment, we “are years away from that level of sophistication.”

I take a different view. To be sure, collaborative law is not yet confronted with the same dimension of statutory confusion that plagued mediation pre-UMA. However, the multiple layers of ethical norms from the ABA Model Rules, varying state ethics rulings, numerous professional organizations at all levels, even more numerous practice groups, and ultimately individual participation agreements, create the same type of duplicity and confusion. We need not wait until there is calamity in the field to motivate ethical guidance.

Professional Conduct because collaborative law involves a paradigm shift, then you may want to consider proposing special ethics rules for the collaborative law situation. The Pennsylvania Supreme Court has recently published proposed ethical rules for lawyers who work as ADR neutrals. It may be similarly appropriate to have a separate ethics rule or rules for collaborative law lawyers.


86 Lande, supra note 2, at 697–99.
87 Id. at 702.
88 The Pennsylvania Committee on Legal Ethics and Professional Responsibility suggests collaborative lawyers seek rule changes. See supra note 85 and accompanying text. Other commentators are similarly sympathetic to rule changes to address ethical issues. See, e.g., Zachery Z. Annable, Comment, Beyond the Thunderdome—The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and its Conformity with the Model Rules of Professional Conduct, 29 J. LEGAL PROF. 157, 168 (2004–05) (“Because of the accommodation for the adversarial paradigm on which the Model Rules were crafted, I join those authors who think that it would probably be best to push for the implementation of new ethical standards to accommodate ADR processes like collaborative lawyering.”); Elizabeth K. Strickland, Comment, Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes, 84 N.C. L. REV. 979, 1001 (2006) (advocating adoption of statutes to address ethical problems).
Recognizing the strata of ethical guidance that exist within collaborative law, Professor Lande offers a suggestion: “[t]o the extent that CL participation agreements and ethical codes do not properly address nuanced ethical issues, the solution should be to revise the agreements or specialized codes rather than for the ABA to adopt a new general ethical rule about CL.” 89 I certainly agree that these downstream agreements and codes need to be cleaned up. But how will these revisions ever take place absent an authoritative model? In order to facilitate the revision process, Model Rule 2.2 is needed first.

Professor Lande further justifies his wait-and-see approach on the hopes that percolation of ethics committee opinions will brew away unpleasant rulings and inconsistencies, 90 but there is certainly no present evidence of such a percolation effect. Consider one core example: How do ethics opinions resolve questions of compatibility of the withdrawal agreement with the Model Rules? The 1997 Minnesota opinion concludes “the subject of withdrawal from the representation appears to be adequately covered by the Manual.” 91 The letter opinion continues, “It is my opinion that Rule 1.16(b) MRPC, would permit withdrawal from representation should it appear that a collaborative process would not be appropriate.” 92 The opinion does not, however, make any attempt to explain which sub provision of Rule 1.16(b) it was applying.

In 2002, the North Carolina opinion addressed the withdrawal provision in one sentence: “Rule 1.2(c) permits a lawyer to limit the objectives of a representation if the client consents after consultation.” 93 Without explanation, it applied the scope rule instead of the termination rule. In 2004, the Pennsylvania opinion applied Rule 1.16. While the opinion seemed clear on the need to comply with Rule 1.16(c) on seeking court permission and with 1.16(d) on protecting clients’ interests, it concluded that permissive withdrawal under 1.16(b)(4) was problematic. 94 It concluded with the

89 Lande, supra note 2, at 698.
90 Id. at 690–91 nn.328–31.
91 Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (March 12, 1997) (on file with the Journal).
92 Id.
93 N.C. State Bar, Formal Ethics Opinion 1, supra note 79, at *1.
94 Pa. Bar Ass’n Comm. Leg. Ethics & Prof’l Responsibility, supra note 79, at *10–12. Ironically, it was on the strength of Professor Lande’s own work that the Pennsylvania opinion balked at acceptance of permissive termination under Rule 1.16(b)(4). Id. at *12.
WHY WE STILL NEED A MODEL RULE

unhelpful recommendation “that you consider why you believe you have grounds for the withdrawal under either Rule 1.16(a) [mandatory withdrawal] or 1.16(b) [permissive withdrawal].”95

In 2005, two states issued opinions. Kentucky applied Rule 1.16 to the discrete question of withdrawal because of the client’s misrepresentation or bad faith; it applied Rule 1.2 to disqualification based upon non-settlement.96 In contrast, the New Jersey opinion rejected Rule 1.16(b) analysis in favor of a Rule 1.2(c) scope inquiry.97 It then declared representation and withdrawal not reasonable if “there is a significant possibility that an impasse will result or the collaborative process otherwise will fail.”98 Given this saga (first application of the termination Rule 1.16, then to scope with Rule 1.2(c), then back to Rule 1.16, to application of both Rules 1.2 and 1.16, then back to Rule 1.2), I smell the coffee of confusion, not percolation of clarity.99

Even though the multiple sources of ethical guidance fail to provide uniform guidance on fundamental questions, the collaborative law movement is nonetheless primed for a Model Rule. Both Professors Lande and Macfarlane each identify the internal drive of collaborative lawyers to pursue greater uniformity of ethical practice.100 Even though collaborative law is on shaky ethical ground with regard to the current Model Rules, that does not mean that the collaborative law movement lacks an ethical core. Among collaborative lawyers, a practice norm already exists for each disputed area. For example, it is settled that most collaborative lawyers view themselves as lawyers for individual clients, not for the situation acting as quasi-neutrals.101 Similarly, the vast majority of collaborative lawyers embrace the withdrawal

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95 Id.
98 Id. at *4.
99 Interestingly, as with the duty to client issue, when there are developments that deviate from Lande’s norm, he does not embrace the percolation model. For example, in response to the New Jersey ethics opinion that representation is unreasonable if there is a significant possibility that an impasse will result, Lande rejects this “experimentation” outright. “[I]n my view, it is not appropriate to preclude clients from using a CL process even if there is ’substantial’ risk that the parties will not reach agreement.” Lande, supra note 2, at 686–87 n.316.
100 See Lande, supra note 2, at 637 n.75; Macfarlane, supra note 36, at 193.
agreement as essential to their practice. Advocates for so-called cooperative law are already squeezed from the mainstream of collaborative practice. The same kind of consensus counsels against too restrictive a use of the four-way meetings. As it stands now, the collaborative law field already has the start of a general practice model. What it lacks, however, is an authoritative rule-based ethical infrastructure that a model rule provides.

Finally, Professor Lande contends that a model rule is not only premature because the level of ethical confusion does not warrant uniformity, but there is also no corresponding level of expertise to develop such a rule. On this count, Lande is wrong. The National Conference of Commissioners on Uniform State Laws (NCCUSL)—the same organization that was instrumental in creating the UMA—has already convened a Drafting Committee on Collaborative Law. At the July 2006 meeting of the Scope and Program Committee of the NCCUSL, the Study Committee on Collaborative Law (Study Committee) reported that while there were only two state enactments, a number of states had local rules. The Study Committee also

102 See, e.g., PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 6 (2001) (“There is really only one irreducible minimum condition for calling what you do ‘collaborative law’: you and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other.”).

103 Cooperative law is a spin-off of collaborative law where the lawyers do not have to agree to the withdrawal agreement. See John Lande & Gregg Herman, Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases, 42 FAM. CT. REV. 280, 284 (2004) (describing cooperative law).

104 See Schwab, supra note 71, at 365 (noting most collaborative lawyers reject the minority practice of only conferring with the client in the presence of the opposing party and counsel and increasing the risk to attorney-client privilege).

105 See Lande, supra note 2, at 698, 702 n.367.

106 Prior to the appointment of the Drafting Committee, the NCCUSL had appointed a Study Committee on Collaborative Law. Commissioner Harry L. Tindall was the Chair of the Study Committee on Collaborative Law. National Conference of Commissioners on Uniform State Laws, Meeting Minutes of the Committee on Scope and Program, at 3 (July 8–9, 2006), http://www.nccusl.org/Update/Minutes/scope070806mn.pdf [hereinafter NCCUSL, Meeting Minutes]. NCCUSL Study Committees are charged with reviewing an assigned area of law in light of defined criteria and recommend whether NCCUSL should proceed with a draft on that subject. NCCUSL, NCCUSL Committees, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=39 (last visited Feb. 20, 2007).

107 NCCUSL, Meeting Minutes, supra note 106, at 3.

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reported that “NCCUSL should set the mark in this area of the law” and predicted that “it might have great legislative success.” The Committee on Scope and Program unanimously supported recommending that a drafting committee be formed and approved the following motion: “RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a drafting committee on collaborative law be formed, and that the committee be instructed to make a recommendation to the Committee on Scope and Program on the scope of the project after its first meeting.”

The appointment of the new Drafting Committee on Collaborative Law is complete. As Professor Lande himself emphasizes, the NCCUSL already uses a balancing test to assess whether the benefits of uniformity outweigh the costs. When those most in tune to the need for uniform laws and the competency to create them set their sights on collaborative law, Professor Lande’s contention that a new rule is premature is no longer viable.

There are ample reasons for a new rule for collaborative law. Procrastination on confronting these tensions will not yield beneficial experimentation and practice diversity. Left unattended, collaborative law will continue to spin off variations at odds with our ethical rules and

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108 Id.
109 Id.
111 See Lande, supra note 2, at 638 n.78.
112 Confronted with the reality of the NCCUSL actually going forward with a uniform law, Professor Lande tries to distance himself from the impact of this dramatic development. First he mentions that NCCUSL is not in the business of drafting Model Rules, that is the role of the ABA. Lande, supra note 2, at 702 n.367. He is certainly right on that account. However, the Uniform Mediation Act was a joint effort between the ABA and NCCUSL, and its end product was clearly in the realm of ADR ethics. See supra notes 13–18 and accompanying text. Another joint effort is certainly not foreclosed. Next, Lande is unsatisfied with the state of the record produced by the Study Committee. Lande, supra note 2, at 702 n.367. While the paper trail appears thin, the speed at which the project went from Study to Drafting Committee may have led to a smaller report does not mean that the Study Committee abdicated doing a thorough job. Having touted the NCCUSL process as a way to assess the need for uniform regulation, it is telling that Professor Lande now marginalizes the process after it leads to a result contrary to his position. At bottom, Professor Lande does not completely abandon the NCCUSL effort in drafting a uniform act on collaborative law. If fact, he will be an active participant as an invited observer to the Drafting Committee. So will I.
mainstream collaborative practice. As Professor Lande notes, “we can already see an accumulation of anomalies in the Collaborative paradigm.” Waiting to clarify ethical expectations until these differences and ensuing uncertainties somehow sort themselves out makes no sense. As the NCCUSL already sees, it is better to add clarity before calamity. But what form should a new rule take?

III. FAIRMAN’S MODEL RULE 2.2, PEPPET’S MODEL RULE 4.1, OR LANDÉ’S STATUS QUO?

Professor Lande’s final position is that if a new rule is needed, process is as important as the proposal itself. Drawing upon his experience, Lande carefully explains the basic premises of dispute systems design (DSD). He does a tremendous service to the field by clearly outlining DSD theory, including its principles, processes, and policy options. As applied to ADR,  

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113 Lande, supra note 2, at 662. In addition to the NCCUSL effort, another example that the collaborative law movement is hungry for guidance comes from the recent California experience. In 2006, the California legislature passed A.B. 402 entitled “Collaborative Law Family Act.” Governor Schwarzenegger signed it into law last September. David L. LeFevre, California Adopts Collaborative Law Process for Family Law, DISP. RESOL. MAG., Winter 2007, at 19, 19. The Act defines collaborative law as follows:

“Collaborative law process” means the process in which the parties and any professionals engaged by the parties to assist them agree in writing to use their best efforts and to make a good faith attempt to resolve disputes related to the family law matters as referenced in subdivision (a) on an agreed basis without resorting to adversary judicial intervention.

CAL. FAM. CODE § 2013(b) (West 2007). The only other provision of the Act that is codified is a statement allowing for parties to “utilize a collaborative law process to resolve any matter” governed by the Family Code. Id. § 2013(b). But what precisely would the process entail? The answer remains open. The legislation provided:

It is the intent of the Legislature that legislation be enacted during the 2007–08 legislative session to provide a procedural framework for the practice of collaborative law, as described in Section 2 of this act. Towards that end, the Committees on the Judiciary of the Senate and Assembly are requested to convene a working group to study and make recommendations for a comprehensive statute governing the practice of collaborative law.

2006 Cal. Legis. Serv. ch. 496 (A.B. 402), § 5(a) (West). In essence, California adopted the collaborative law process first and intends to flesh it out in the next legislative session.

114 Lande, supra note 2, at 629–58.
Lande highlights the importance of variety and choice, inclusive participation of stakeholders, the need to eschew uniformity and rule-based regulation, and the development of comprehensive plans empowering the participants and reinforcing the value of experimentation. 115 If rule-based regulation is ultimately necessary as a last resort, the process will create a better ethical rule that can be supported by a broader cross-section of stakeholders. Having fully developed a DSD paradigm, Professor Lande proceeds to compare my Proposed Model Rule 2.2 to his DSD rubric, followed by a comparison of Professor Peppet’s Proposed Model Rule 4.1 to DSD and, ultimately, a direct comparison between the two proposed Model Rules. Having changed not just the rules of the game—but the game itself—it is not surprising that my plan may fall short by comparison.

Despite the shift, Professor Lande and I still share much common ground. I certainly agree that a dispute resolution model that involves input from the various stakeholders has many benefits, including guarding against cooptation and producing a broader base of support. This has vitality even when the end product is a uniform ethical rule, as the recent UMA experience and ultimate success illustrates. 116 I do not presume to have Solomonic wisdom sufficient to unilaterally dictate the best answers for the ethical questions raised by collaborative law. I certainly hope that my Proposed Model Rule is not received as an act of intellectual hubris. I hope and expect that any efforts to implement a new rule of ethics would include the various stakeholders for the precise reasons that Professor Lande suggests.

My intention in synthesizing the literature and processing what I see as a consensus on the ethical limits of collaborative law is not to prejudge the precise language of a new rule. Rather, I merely hope to move the debate one step further. It has been my experience that any joint or committee effort requires one person to eventually take the risk to put collective thoughts into words. Having done so, the rest are free to “run their quill pens through it.” 117

Similarly, Professor Lande praises the rich and incredible array of educational resources already available in collaborative law that can provide ethical guidance. 118 I have no desire to purge the collaborative law culture of its practice groups, training sessions, or participation agreements.

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115 Id.
116 Id. at 637–38.
117 BUT, MR. ADAMS, IN 1776 (Columbia Pictures Corp. 1972) (“Well, if I’m the one to do it, They’ll run their quill pens through it.”).
118 Lande, supra note 2, at 695.
Collaborative law groups are free to establish ethics committees, develop new protocols and educational materials, offer more ethics training, or listserv their keyboards night and day. As Lande admits, “these are not mutually exclusive policy options.”119 Lande’s preference, however, is more educational efforts first and a new rule later if need be.120 In contrast, I find that collaborative law’s “incredible array of educational resources”121 already needs the support that comes from a model rule to continue being effective.

But it is not process alone that troubles Professor Lande. He also criticizes Proposed Model Rule 2.2 on three additional fronts. First, he argues it is conceptually inferior to a DSD product or Professor Peppet’s Proposed Model Rule 4.1 because it lacks choice.122 Lande sees choice as a design fundamental—on both the case level and with regard to general policies.123 Having elevated the concept of choice, it is not surprising that he finds the uniformity inherent in Proposed Model Rule 2.2 unwarranted.

However, even Professor Lande admits that “[u]niformity is certainly appropriate in some situations,”124 such as where the cost-benefit analysis of the NCCUSL finds the matter suitable for a model act. This is precisely the situation that now presents itself with collaborative law. The NCCUSL is past the study stage and has a drafting committee already at work to create a model law in this area.125 If we can rely on the NCCUSL cost-benefit analysis—as Lande suggests we can—collaborative law is another area where uniformity outweighs the need for choice.

A second complaint Professor Lande lodges against Model Rule 2.2 is a corollary of lack of choice. He claims that my goal is to focus “specifically on promoting CL practice rather than dispute resolution options more generally.”126 This is only partially true. I do focus my Proposed Model Rule on collaborative law alone, but my goal is not its promotion per se. I have no stake in seeing more collaborative practice over other forms of ADR or litigation.127 All I have tried to do is wrap my rudimentary problem-solving
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skills around an unresolved ethical problem in ADR and advance the conversation.

If anyone appears to promote one form of ADR over another, it would be Professor Lande’s preference for so-called “cooperative law.” Professor Lande sees cooperative law as a variation of collaborative law that has the potential to transcend family law limitations and make the collaborative process more widely accepted. According to Professor Lande, uniformity will stymie this access. Thus, a better approach would accommodate this decidedly minority variation. But why?

There is a good reason why cooperative law is absent from Proposed Model Rule 2.2. It does not invoke the same ethical issues with the same intensity. By jettisoning the withdrawal provision, cooperative law avoids altogether any clash with withdrawal and termination rules, limitations on the scope of representation, or conflicts—arguably the most problematic parts of ethical compatibility. Because cooperative law does not mirror the same ethical problems raised by collaborative law, the Proposed Model Rule ignores it.

Finally, Professor Lande rejects Proposed Model Rule 2.2 not for what it excludes, but includes—a good faith provision. Proposed Model Rule 2.2 includes a provision requiring collaborative lawyers to “use their best efforts and participate in good faith.” Admittedly, it does not define what is “good faith.” Lande points to the failure to more fully articulate the contours of

heavily involved in the development of collaborative law in Ohio. My plan was to experience collaborative law up close. After my initial consultation with my lawyer, she quickly disabused me of that notion. Given my situation—no minor children and comparable incomes—there was no strategic reason to use collaborative law processes where other emotionally-laden issues might come forward. I had a simple “balance sheet” divorce. I learned firsthand the value of informed consent.

128 Lande, supra note 2, at 625 n.27 (defining collaborative law).
129 John Lande, Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law (2004), http://law.missouri.edu/lande/publications/lande%20cooperative%20law%20policy.pdf; Lande, supra note 33, at 31. Professor Lande sees his support for cooperative law as providing a choice, not a preference. I see accommodation for this variant as tantamount to promotion given that cooperative law is contrary to collaborative law on the defining element of the withdrawal agreement.
130 See Lande, supra note 2, at 633.
131 While questions surrounding the duty of candor and possibly confidentiality may exist, these ethical risks are likely lessened by the removal of the withdrawal agreement as well.
132 See Fairman, supra note 3, at 117 (Proposed Model Rule 2.2(a)).
good faith, the judicial struggle to define good faith in other contexts, and the
general reduction of the concept to the lowest common denominator.133

These criticisms are also unfounded. Where did this language come
from? I gleaned it from the state collaborative law statutes.134 Neither Texas
nor North Carolina appear to have difficulty in use of the term, even in the
absence of definition. It is also a frequent component of participation
agreements.135 Even Professor Peppet’s proposal—which Professor Lande
prefers over mine—includes an undefined good faith provision.136 If it is
sufficient for all these purposes, it should suffice for mine.

As an alternative to Model Rule 2.2, Professor Lande prefers Professor
Peppet’s Proposed Model Rule 4.1 as an example of the use of DSD
principles in ethical rulemaking.137 While conceptually interesting, this new
theoretical blur of law and ethics is not a viable alternative, at least for what I
thought was the issue—providing an ethical foundation for collaborative law.
As an illustration of this novel concept of contractarian ethics, Professor
Peppet proposes changes to Rule 4.1 to include various options on the duty
of candor. Specifically, his proposal would allow attorneys to choose: (1) the
current rule with the puffery exception; (2) a higher standard requiring one to
be truthful, disclose all material information, abandon puffery, and negotiate
in good faith; (3) a provision to refuse to participate in negotiation that works
substantial injustice upon another party; and (4) to bind themselves to
withdraw from representation if unable to comply with the higher
standards.138

Professor Peppet further envisions that law firms could designate
themselves as operating under these alternative levels of candor, or it could
be done on a case-by-case basis.139 Additionally, lawyers could choose to
“opt down” from the enhanced standards with written notice.140 According to

133 Lande, supra note 2, at 646–47).
134 See TEX. FAM. CODE ANN. § 6.603(a) (Vernon 2006) (defining collaborative law
as a procedure in which the parties and their attorneys “agree in writing to use their best
efforts and make a good faith attempt to resolve their dissolution”); N.C. GEN. STAT.
135 See Schwab, supra note 71, at 358 (noting commitment to good faith is a central
component of participation agreements). The inclusion in participation agreements is
presumably as an educational function.
136 See Peppet, supra note 27, at 523 (Proposed Model Rule 4.1(2)(c)).
137 Lande, supra note 2, at 673–74.
138 See Peppet, supra note 27, at 523–24.
139 See id. at 524.
140 Id. at 525.
Professor Lande, these provisions provide the ethical clarity to permit collaborative law and cooperative law and promote a systematic change in negotiation by lawyers.\textsuperscript{141} By having usefulness outside the narrow collaborative law field, Lande predicts that a greater number of lawyers will be able to take advantage of the options.\textsuperscript{142}

This cafeteria approach to legal ethics is unwise because it ignores the educational function of the Model Rules. Rather than providing a foundation for clarity of the ethical guidelines for collaborative lawyers, Professor Peppet’s proposal further blurs the lines. Given that the evidence points toward a general lack of consideration of ethical issues in the first place by collaborative lawyers,\textsuperscript{143} more options do not address the needed ethical education that comes from a targeted approach.

While I find Professor Peppet’s reconceptualization of Rule 4.1 intriguing, it also has its own distinct limitations. As an illustration of the application of contractarian legal ethics, the example works fine. But if the objective is to use the proposal as a viable alternative to an ethical rule for collaborative law it falls short. One reason looms large. It will never happen.

The history of the ABA and its reluctance to accommodate ADR is well documented. The Model Rules were drafted by the ABA before ADR experienced its meteoric ascent.\textsuperscript{144} Obviously, the Model Rules were silent as to the ethical obligations of lawyers practicing in arbitration and mediation.

\textsuperscript{141}See Lande, supra note 2, at 693.
\textsuperscript{142}See id.
\textsuperscript{143}See Macfarlane, supra note 36, at 208. While Professor Lande tries to dilute the impact of Professor Macfarlane’s conclusion, Macfarlane’s methodology illustrates the relevancy of her ultimate conclusion that “the study has found little explicit acknowledgment and recognition of ethical issues among CL lawyers.” Macfarlane, supra note 36, at 208; see Lande, supra note 2, at 677 (commenting on the limits of Macfarlane’s study). The study developed a “laundry list” of “potential ethical dilemmas that might confront CL lawyers.” Macfarlane, supra note 36, at 208. This list included: (1) “whether CL should be promoted to all divorce clients” (informed consent); (2) “whether CL should be proposed to clients who are emotionally or physically vulnerable to the other spouse” (informed consent); (3) how to “discharge the obligation to disclose all ‘relevant’ information and how to deal with questions of lawyer-client privilege” (confidentiality); (4) how to ensure a voice for “significant third parties in the CL process” (conflicts); (5) “under what circumstances CL lawyers would consider it necessary to withdraw from a case” (termination and withdrawal); and (6) “when CL lawyers should encourage their clients to continue to negotiate, versus commence litigation” (duty of candor and loyalty). Id. It is easy to see that each of the questions Macfarlane used to probe the depth of collaborative lawyers’ understanding of ethical issues is, in fact, directly related to our core Model Rules.
\textsuperscript{144}See Fairman, Old Hats, supra note 1, at 508–09.
For years, colleagues in the ADR field pointed out the deficiencies in the ethical codes as applied to ADR. Professional organizations and ADR providers tried to take up the slack by drafting their own stand alone ethical guidelines, not unlike the collaborative law pattern. Amazingly, it was not until 2002 that recognition of the most basic form of ADR—use of a third-party neutral—found its way into the Model Rules. There is a lesson to be learned from the long journey to third-party neutral inclusion into the Model Rules as Rule 2.4: Even the most basic recognition of the reconceptualization of lawyer roles takes a long time.

If the new Rule 2.4 on third party neutrals is a long-in-coming success story, consider ADR advocates’ attempts to require a duty of candor to mediators. When they pressed for such a rule change during Ethics 2000, they received virtually nothing. While a true duty of candor was extended to arbitration in revised Rule 3.3, mediation was excluded. Given that even


146 See Fairman, *Old Hats*, supra note 1, at 509–10 & n.23 (collecting authorities).

147 As a result of the work of the Ethics 2000 Commission, the ABA formally amended the Model Rules in February 2002 to include specific reference to third-party neutrals in Rule 2.4. Prior to this change in 2002, the Model rules did contain former Rule 2.2 concerning a lawyer acting as an intermediary. Compare *Model Rules of Prof’l Conduct* R. 2.2 (2001), with *Model Rules of Prof’l Conduct* R. 2.1–2.3 (2002). Former Rule 2.2 involved the classic “lawyer for the situation” model where the lawyer engages in common representation of multiple clients with potentially conflicting interests. See *Model Rules of Prof’l Conduct* R. 2.2 (2001); see also John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741. This rule was recently deleted from the Model Rules on the recommendation of the Ethics 2000 Report because Rule 2.2 concerning a lawyer acting as an intermediary between two clients was duplicative of provisions in Rule 1.7 and confusing. See Reporter’s Explanation of Changes, Model Rule 2.2, Ethics 2000 Report, available at http://www.abanet.org/cpr/e2k/e2k-rule22rem.html (“The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of ‘intermediation’—as distinct from either ‘representation’ or ‘mediation’—nor the relationship between Rules 2.2 and 1.7 has been well understood.”).

148 The stand-alone nature of new Rule 2.4, however, shows willingness to embrace unique rules for ADR participants, making my Proposed Model Rule format more likely.

149 See Fairman, supra note 3, at 88–89.

150 See *Model Rules of Prof’l Conduct* R. 1.0(m) (2002) (defining tribunal to include an arbitrator); *Model Rules of Prof’l Conduct* R. 3.3 cmt. 1 (2002) (noting
mediator candor could not be included into the Model Rules, it is folly to think realistically that Professor Peppet’s Rule 4.1 offers a viable option. Regardless of the scholarly interest in reorienting ethical rules to maximize lawyer choice, this involves such a major conceptual shift that I cannot see the ABA House of Delegates embracing such a revisionist position in my professional lifetime.¹⁵¹ Neither Professor Peppet nor Professor Lande seems very optimistic either.¹⁵²

While Professor Lande does a fine, yet ultimately unpersuasive, job of comparing the two Model Rule proposals, what precisely does he offer as a concrete alternative? Nothing—except the status quo. To be sure, Professor Lande has a grand DSD vision elevating attorney autonomy, choice, and participation above all other goals of our ethical rules. How does this DSD theory translate from academia into an ethical rule? Who exactly are these stakeholders that should be included in collaborative law’s ethical rulemaking? Collaborative lawyers for sure, but anyone else? A cooperative law practitioner—if one exists? General practitioners? Former clients? A triumvirate of academics—like Professors Lande, Peppet, and me? If these are our stakeholders, couldn’t we already identify this group and go forward? But move forward with what? Who will set the ethical agenda and convene the stakeholders? And to what end? Apparently there are distinct advantages to laying claim to the option to do nothing except wait and see.

IV. THE FUTURE ETHICS OF COLLABORATIVE LAW

Professor Lande speaks of “principles” and “policymaking.” I prefer the practicalities. I believe my Proposed Model Rule adds clarity to the ethical foundation of collaborative law—and that alone. As to Proposed Model Rule

duty is owed to a tribunal); see also Douglas H. Yarn, Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application, 54 ARK. L. REV. 207, 255–56 (2001) (describing rejection of a proposal to include other ADR processes). Mediation proponents did succeed in getting the word “ordinarily” included to qualify the comment in Rule 4.1 on negotiation puffery. See MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (2002).

¹⁵¹ Professor Peppet is the first to recognize what he labels understatedly the “enactment problem.” See Peppet, supra note 27, at 537–38.

¹⁵² Id.; Lande, supra note 2, at 700–03. I do not intend to imply that Professors Peppet and Lande have any speculation about the behavior of the ABA House of Delegates on this or any other issue. Rather, I think it fair to say that the enactment problem presented by Peppet’s proposal is significant. All three of us can agree on that fact.
2.2, Professor Lande basically concludes that whatever the ethical problems faced by collaborative law, collectively they are not big enough or bad enough to mess with. Instead, we should wait and continue experimentation. But why wait? I am persuaded by the actions of the NCCUSL that now is the appropriate time to push forward with a Model Rule for Collaborative Law. Lande provides a tremendous service to those with interests in DSD, legal ethics theory, or dispute resolution theory. Professor Lande constructs a powerful case for why he prefers dispute systems design dominated by freedom of choice. But is this what is best for collaborative law? Ultimately, I believe it is freedom from choice, not freedom of choice,\textsuperscript{153} that collaborative law needs.

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