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Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers

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Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?

BRUCE A. GREEN*

ABSTRACT

State ethics codes based on the ABA Model Rules of Professional Conduct address lawyers' work in advocacy but do not target lawyers' work in particular areas of advocacy or in other specialized practice areas. For more than forty years, critics have asserted that existing ethics rules are too superficial and should be supplemented by specialized rules. This article examines the utility of specialized ethics rules for one particular sub-specialty—death-penalty defense practice. After identifying arguments for and against a specialized ethics code for death-penalty cases, the article analyzes the arguments in the context of a particular ethics dilemma that some death-penalty defense lawyers have encountered—namely, whether to pursue post-conviction relief on behalf of an ambivalent or unexpressive mentally-ill death-row inmate. The article finds persuasive reasons for courts to develop specialized rules that would provide death-penalty defense lawyers more clarity in how to address this and other ethics dilemmas. Recognizing that courts will likely remain indifferent to the idea of developing specialized ethics rules, however, the article concludes by identifying other ways for courts to mitigate the uncertainties that specialized rules would address.

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INTRODUCTION

This Article asks whether there should be a specialized ethics code for death penalty defense lawyers. The question is an occasion for exploring the nature of the legal profession's ethics rules and regulations. At present, state courts' rules of professional conduct are not tailored to specific practice settings but apply to lawyers across a broad range of practice areas. Do the rules provide too little guidance to lawyers regarding the problems they confront in their daily practices? Should courts give lawyers more, and better targeted, guidance by adopting specialized ethics codes or by incorporating specialized ethics rules within a single, lengthier, more comprehensive ethics code? Or do even the current generally applicable rules of professional conduct themselves impose too much constraint on lawyers' exercise of professional or personal judgment and independence? This Article explores these questions in the context of one particular sub-specialty—death-penalty defense practice.

In almost every state, the judiciary has adopted an ethics code, based on the *Model Rules of Professional Conduct*, to govern lawyers' work.¹ Because there is one ethics code for all lawyers in the state, the individual rules tend to be general. To be sure, some rules are particularly pertinent to broad classes of practitioners—for example, some of the rules' guidance is directed at litigators as opposed to transactional lawyers,² or private practitioners as opposed to government and public interest lawyers.³ But with the limited exception of a narrow rule specifically directed at criminal prosecutors,⁴ and another directed at government

1. See generally MODEL RULES OF PROF'L CONDUCT (2009) [hereinafter MODEL RULES].

2. See, e.g., MODEL RULES R. 3.1–3.9; Bruce A. Green, *Judicial Regulation of US Civil Litigators*, 16 LEGAL ETHICS 306, 306 (2013) (“Many rules apply specifically to lawyers serving as advocates.”).

3. See, e.g., MODEL RULES R. 1.5 (regulating legal fees); MODEL RULES R. 7.3(a) (restricting solicitation of clients for pecuniary gain).

4. See MODEL RULES R. 3.8 (“Special Responsibilities of a Prosecutor”). The rule forbids prosecutors from pursuing charges without probable cause; addresses dealings with unrepresented defendants; imposes a pretrial disclosure obligation that is largely (and in some courts' view, entirely) congruent with the constitutional disclosure duty; restricts the issuance of subpoenas to criminal defendants' lawyers; restricts extrajudicial

lawyers' conflicts of interest,⁵ the ethics rules do not target particular practice areas.⁶ Although several provisions make distinctions for criminal defense,⁷ none are specifically targeted at criminal defense representation much less at the sub-specialty of death penalty defense—the most complex and consequential kind of criminal defense representation.⁸

The generality of the state ethics codes poses a problem for lawyers when ethics questions that arise in specialized areas of practice are not answered adequately, clearly, or at all by any of the professional conduct rules.⁹ In such instances, lawyers might use their best judgment or seek guidance elsewhere, such as in judicial and bar opinions.¹⁰ Some bar associations try to fill the gaps by publishing unenforceable standards or guidelines for lawyers in particular practice settings.¹¹ Various federal agencies have also adopted specialized regulations for lawyers practicing before them.¹²

communications; and establishes post-conviction obligations upon the discovery of new exculpatory evidence. *Id.* The rule has been criticized for addressing prosecutors' special obligations to only a limited extent. See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587 (2003). Even at that, few if any states have adopted all of the provisions of Model Rule 3.8.

5. See MODEL RULES R. 1.11.

6. If judging were to be viewed as a specialized role of lawyers, then an exception would be the *ABA Model Code of Judicial Conduct* and counterpart state ethics codes for judges.

7. See MODEL RULES R. 1.2(a) (requiring that, in representing a criminal defendant, a lawyer must abide by the defendant's decisions whether to plead guilty, waive a jury trial, or testify); MODEL RULES R. 1.5(d)(2) (a lawyer generally may charge a contingent fee, but not in a criminal case); MODEL RULES R. 3.1 (although a lawyer generally may not assert a frivolous position, a criminal defendant's lawyer may "defend the proceeding as to require that every element of the case be established"); MODEL RULES R. 3.3(a)(3) (in general, an advocate may refuse to offer testimony "that the lawyer reasonably believes is false," but a criminal defense lawyer may not refuse to offer a criminal defendant's testimony based on this belief).

8. See, e.g., Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1096 (2006) ("The undeniable reality that litigating death penalty cases is infinitely more complicated than other criminal cases has only grown more stark as a result of [recent] legal developments . . ."); Andrea D. Lyon, *Mixed Media: Popular Culture and Race and Their Effect on Jury Selection*, 58 DEPAUL L. REV. 681, 681 (2009) ("Jury selection in a capital case is far more complicated and difficult than in an ordinary case."); Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENN. L. REV. 661, 661 (2009) ("[D]eveloping rapport with a client accused of capital murder can be one of the most challenging aspects of defending a capital case.").

9. See, e.g., Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 687 (1991) (arguing that ethics rules should give greater clarity in areas of conduct in which advocates are put at risk of violating criminal law); Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 650–64 (1994) (observing that ethics rules are too general and vague to guide banking lawyers).

10. See generally Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731 (2002) (discussing utility of bar associations' ethics opinions).

11. See, e.g., AM. COLL. OF TR. & ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT; ROBERT H. ARONSON ET AL., BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT (American Academy of Matrimonial Lawyers ed., 1991), <http://www.actec.org/publications/commentaries/> [<https://perma.cc/GA4K-EWYH>] (last visited May 19, 2016).

12. See, e.g., 31 C.F.R. § 10.20 (2015) (governing federal tax practitioners); see generally Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 465 n.22 (1996) [hereinafter Green, *Whose Rules*] (citing examples);

The professional conduct rules' failure to give adequate clarity and direction has long been a concern. Forty years ago, Monroe Freedman observed that the predecessor to the *Model Rules*, the ABA's *Model Code of Professional Responsibility*, on which most state ethics codes were then based, was "marred by considerable superficiality."¹³ In 1978, in response to this concern, a distinguished group of judges, practitioners and academics nearly unanimously recommended that the ethics code "be redrafted to incorporate standards of conduct applicable to specialty fields within the practice of law."¹⁴ Since then, others have similarly proposed adding specialized ethics rules for lawyers in particular fields of practice,¹⁵ such as criminal defense,¹⁶ or have urged courts to adopt entirely separate ethics codes for practitioners in some specialized areas of practice.¹⁷ However, the bench and bar have not responded to the call. To date, the American Bar Association ("ABA") has never proposed, and no jurisdiction

Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 190 n.97 (1997) [hereinafter Zacharias, *Reconceptualizing*] (citing examples). Regulations are not necessarily intended to explicate ethics rules or fill in the gaps. Consequently, they may not compensate for the uncertainty or incompleteness of ethics codes, but may make matters worse, either because they do not resolve lawyers' ethical questions appropriately or because they conflict with ethics rules.

13. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 128 (1975).

14. ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, *ETHICS AND ADVOCACY: FINAL REPORT* 10 (1978) [hereinafter *ETHICS AND ADVOCACY*].

15. See, e.g., Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. L. J. ON DISP. RESOL. 707 (2007) (advocating special rules for collaborative lawyering); David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. CAL. INTERDISC. L. J. 293, 323 (2007) (noting possibility of a special rule for representing juveniles); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 8 (2008) (advocating specialized ethics rules for national security lawyers); see also Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 498–99 (2002) (noting absence of specialized ethics rules for public interest practice); Jan E. Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1153 (1994) (suggesting utility of an ethics rule for multidisciplinary practice by elder law attorneys); cf. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 471 (1994) (maintaining that attention should be given to the particular ethics issues of lawyers in mass tort cases).

16. See, e.g., Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L. J. 2419, 2464–65 (1996) (advocating amendment of rules to address conflicts of interest in public defender offices). For discussions of whether criminal defense lawyers' ethical stance differs from that of other advocates, see generally David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1767 (1993).

17. See, e.g., Richard E. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L. Q. 413, 435–38 (1986) (advocating "special ethics code to govern matrimonial practice"); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993) (advocating specialized ethics codes in fields such as corporate and securities practice); see also Zacharias, *Reconceptualizing*, *supra* note 12, at 190 ("[C]ommentators have proposed the adoption of specialized codes of conduct covering lawyers engaged in particular areas of practice.") (citing examples).

has adopted, an enforceable ethics code that is specifically directed at criminal defense or any other specialized area of lawyers' work.

This essay explores the question of whether there should be specialized ethics rules or codes by focusing on the work of lawyers in one specialized area of practice—namely, death penalty defense. At present, criminal defense lawyers, including those defending death penalty cases, are regulated by the ethics rules applicable generally to lawyers. Recognizing the need for further guidance, including with regard to questions of professional conduct, the ABA has published various sets of guidelines for criminal defense lawyers and others in the criminal justice process,¹⁸ including guidelines on capital defense.¹⁹ The State Bar of Texas has adopted the ABA's capital defense guidelines as tailored to the state's criminal practice.²⁰ But the current guidelines for capital defense do not deal with ethics questions per se,²¹ but focus on how to provide high-quality representation in capital cases.²² Moreover, some may generally consider it inadequate to supplement professional conduct rules by adopting guidelines which, although they may influence courts' development of other law, are not themselves enforceable through the disciplinary process and do not otherwise have the force of law.²³ Through an examination of a professional conduct

18. The best known are the standards concerning the prosecution and defense functions. See *Criminal Justice Standards for the Prosecution Function: Table of Contents*, AM. BAR ASS'N, http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html [https://perma.cc/6LBF-LJVL] (last visited Mar. 14, 2016); *Criminal Justice Standards for the Defense Function: Table of Contents*, AM. BAR ASS'N, http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html [https://perma.cc/VW9T-DZLH] (last visited Mar. 14, 2016); see generally Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L. J. 1093 (2011) [hereinafter Green, *Developing Standards*]; Rory K. Little, *The ABA's Project To Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L. J. 1111 (2011). In 1980, the Massachusetts Supreme Court adopted a rule governing prosecutors and defense lawyers based on provisions of the ABA prosecution and defense function standards. See Rules of the Supreme Judicial Court, 382 Mass. 698, *135–50 (1980). However, the Court later repealed the rule, effective January 1, 1999. See MASS. TRIAL COURT LAW LIBRARIES, MASSACHUSETTS RULES OF THE SUPREME JUDICIAL COURT 3:08 (2015), <http://www.mass.gov/courts/docs/lawlib/docs/sjc-rules.pdf> [https://perma.cc/B5XR-7GND] (last visited May 19, 2016). For other standards addressing such subjects as criminal defense lawyers' representation of mentally ill clients, see *Criminal Justice Standards*, AM. BAR ASS'N, http://www.americanbar.org/groups/criminal_justice/standards.html [https://perma.cc/U5YV-PZDY] (last visited Mar. 14, 2016).

19. See generally *The Tenth Anniversary of the ABA Capital Defense Guidelines: The Road Traveled and the Road to be Traveled*, 42 HOFSTRA L. REV. 913 (2013) [hereinafter *ABA Capital Defense Guidelines*].

20. *Guidelines and Standards for Texas Capital Counsel*, ST. B. OF TEX. (Apr. 21, 2006), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/TX_Bar_Association_adopoted_version_of_ABA_Guidelines.authcheckdam.pdf [https://perma.cc/7ZEH-4NX6]; see Catherine G. Burnett, *Guidelines and Standards for Texas Capital Counsel: The Dilemma of Enforcement*, 34 AM. J. CRIM. L. 165 (2007).

21. See Victor L. Streib, *Would You Lie to Save Your Client's Life? Ethics and Effectiveness in Defending Against Death*, 42 BRANDEIS L. J. 405, 432 (2004) (observing "the ABA Guidelines' treatment of ethical issues cannot be characterized as more than a passing nod").

22. See *ABA Capital Defense Guidelines*, supra note 19, at 919.

23. See, e.g., Wiggins v. Smith, 539 U.S. 510, 524–25 (2003) (citing GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C) (AM. BAR ASS'N 1989)); Strickland v.

question that death penalty defense lawyers might confront, this essay considers whether the public would be better served by the adoption of specialized, enforceable ethics rules to govern lawyers' resolution of ethical dilemmas that appear to present unique problems or merit unique resolutions in particular practice settings.

I. GENERAL ARGUMENTS REGARDING A SPECIALIZED ETHICS CODE FOR DEATH PENALTY DEFENSE LAWYERS

In the abstract, the argument in favor of a separate set of ethics rules for death penalty defense lawyers seems straightforward. Capital defense is significantly different from the contexts in which lawyers, including litigators, generally practice.²⁴ "Context is important to determining what professional conduct is proper;"²⁵ and "specific rules are superior to general rules in capturing appropriate contextual distinctions."²⁶ Specialized rules for capital defenders could resolve some problems that the generalized rules either do not answer clearly or overlook altogether. Specialized rules could also address some questions that the generalized rules *do* answer clearly but do not answer optimally insofar as one believes that the generally preferred approach does not always work well in the capital defense context. The *Model Rules* and their state counterparts currently make some distinctions for criminal defense representa-

Washington, 466 U.S. 668, 688–89 (1994) (holding that ABA Standards may be guides to determining whether criminal defense lawyer's performance fell below the standard of reasonableness for purposes of the Sixth Amendment right to effective assistance of counsel); see Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635 (2013) (discussing and critiquing the Supreme Court's debate regarding the utility of the ABA Guidelines); see also *infra* notes 45–48 and accompanying text.

24. See, e.g., Streib, *supra* note 21; see also Christy Chandler, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1897 (1998) ("The professional model rules and ethics codes fail to provide capital defense attorneys with adequate guidance when faced with a client who wants to die."); Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 528 (2000) ("For the capital defense lawyer, issues of ethics are neither theoretical nor abstract. How he or she addresses these issues will drive virtually every aspect of how the client's case will be investigated and litigated.").

25. Green, *Whose Rules*, *supra* note 12, at 517. More than two decades ago, David Wilkins underscored the importance of context in resolving professional responsibility questions. See David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993) [hereinafter Wilkins, *Making Context Count*]; David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515–19 (1990); see also David B. Wilkins, *Some Realism about Legal Realism for Lawyers*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 25, 40 (Leslie C. Levin & Lynn Mather eds., 2012). There is now a robust body of literature reflecting an academic consensus around Wilkins's insight that "context counts." See, e.g., LESLIE C. LEVIN & LYNN MATHER, *Epilogue*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 365–70, 370 (2012); James G. Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1, 54 (1989); Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 191 (2011); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449, 2449–50 (1999); Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 282–83 (2014).

26. Green, *Whose Rules*, *supra* note 12, at 517.

tion,²⁷ and it is possible that further distinctions are warranted in the highly specialized setting in which death penalty defense lawyers work.

If there are areas of practice where generalized ethics rules provide insufficient guidance, one might assume that death penalty defense is one of them. The differences between criminal defense and corporate practices, or between criminal and civil advocacy, are further sharpened when it comes to death penalty defense, which is significantly different even from ordinary criminal defense representation. For example, the process differs: in the death penalty process, an unsuccessful defense with regard to criminal culpability is immediately followed by a proceeding before the jury regarding the sentence, and a defense lawyer must prepare for, and be sensitive to the interrelationship between, the trial and penalty phases.²⁸ The investigative and advocacy work that lawyers are expected to undertake to persuade a jury that mitigating factors predominate differs from criminal defense lawyers' ordinary work in seeking leniency for clients.²⁹ The unusual nature and vulnerability of the clientele—individuals, many with mental impairments, whose lives are on the line—leads to particular challenges of decision-making and counseling.³⁰ That the client's life is at stake means that tensions between values underlying the ethics rules—for example, between the client's best interests and the client's autonomy—can be posed particularly sharply.³¹ Death penalty defense is complex and demanding,³² and the quality of

27. See MODEL RULES R. 1.2(a); MODEL RULES R. 1.5(d)(2); MODEL RULES R. 3.1; MODEL RULES R. 3.3(a)(3).

28. See, e.g., *Florida v. Nixon*, 543 U.S. 175, 192 (2004) (concluding “in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed”); see generally Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

29. See generally Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359 (1997); cf. Todd Haugh, *Can the CEO Learn from the Condemned? The Application of Capital Mitigation Strategies to White Collar Cases*, 62 AM. U. L. REV. 1 (2012); see also *infra* note 106.

30. See, e.g., Rebecca J. Covarrubias, Comment, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 413, 436–53 (2009).

31. See, e.g., J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 154 (2006) (“The most difficult ethical dilemma that faces capital attorneys may be what to do about the ‘volunteer,’ the client who wishes to waive his appeals and to expedite his own execution. The situation . . . disrupts the normal processes of the law and leaves the defense attorney in an awkward no-man's land, wrestling against a knot of thorns, unsure of what legal duty ultimately requires.”); see also Brian D. Shannon & Victor R. Scarano, *Incompetency to Be Executed: Continuing Ethical Challenges & Time for A Change in Texas*, 45 TEX. TECH L. REV. 419, 427–28 (2013) (discussing ethical tension where death penalty defense lawyer must take a position regarding whether a mentally ill client should receive medical treatment that would restore him to competency to stand trial); cf. Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma when Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1988).

32. See, e.g., James M. Doyle, *The Lawyers' Art: “Representation” in Capital Cases*, 8 YALE J. L. & HUMAN. 417 (1996); Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in*

the defense matters to the outcome.³³

Further, death penalty defense would seem to be an area of practice where it is especially important for lawyers to resolve ethics problems appropriately, and where lawyers would need more guidance than usual in determining how to reach adequate resolutions. First, the life-or-death stakes in this area of practice enhance the need for lawyers to make wise choices, including with regard to professional conduct questions.³⁴ In commercial lawsuits and transactions, where typically only money is on the line, the consequences of wrong choices pale in comparison. Second, death penalty defense is an area of practice where there is particular skepticism about the quality of representation. Historically, there has been a vast mismatch between the necessary level of skill and the trial lawyers' qualifications,³⁵ and post-conviction challenges to death sentences typically include attacks on the trial lawyers' competence.³⁶ Needless to say, unlike most corporate clients, most criminal defendants—and probably all capital defendants—lack the sophistication and wherewithal to oversee their lawyers to ensure that they comply with professional expectations.³⁷

But if one were to suggest that death penalty defense lawyers should have their own set of ethics rules, objections of various kinds would predictably fly in from every corner—from the organized bar, the judiciary, practitioners, and academics alike.

The organized bar disfavors specialized ethics codes, whether for death penalty defense or any other area of practice. One reason is that the bar wants lawyers to be part of a unified profession and perceives that specialized codes

Federal Habeas to Promote Structural Reform Within States, 34 AM. J. CRIM. L. 293, 314 (2007) (noting the ABA's recognition of "the extraordinary demands of capital representation").

33. Cf. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L. J. 154 (2012).

34. Cf. *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924 (1994) (arguing for a higher constitutional standard for effective assistance of counsel in capital cases, in part, because "[t]he quality of counsel is often literally a matter of life and death for the capital defendant").

35. See, e.g., Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 491 (1993) ("In states where assigned lawyers do not necessarily specialize in the defense of criminal cases, the assignment of unqualified lawyers appears, by virtually all accounts, to be a common occurrence."); Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is it Possible to Keep Innocent People Off Death Row?*, 29 U. DAYTON L. REV. 319, 321 (2004) (referring to "the hundreds of reported cases where defendants facing the death penalty were given representation that would be utterly unaccepted in any other legal context"); Jordan M. Steiker, *supra* note 32, at 293 n.1 ("Virtually everyone involved in capital litigation recognizes and laments the poor representation afforded capital defendants at trial.").

36. NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 28 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/S4JZ-EH78>] (last visited May 19, 2016) ("81% of capital cases studied included at least one claim alleging ineffective assistance").

37. See generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 824–30 (1992) (explaining why corporate clients need not resort to the disciplinary process when they are victims of their lawyers' disciplinary misconduct).

would undermine professional unity³⁸—an objective of which some commentators are skeptical.³⁹ Those involved in the drafting process also state a philosophical preference for ethics rules that express general principles over a series of provisions addressing particular settings in which relatively few lawyers practice.⁴⁰ They do not want the ethics code to resemble the tax code in length or complexity.

At least in the context of death penalty defense, the bar's traditional concerns do not seem particularly compelling, however. There is little need to worry about the possibility that death penalty lawyers, who are few in number and highly dependent on the organized bar for support, would seek to set themselves up as a separate profession. The adoption of specialized rules for these few lawyers would not significantly challenge the concept of a unified bar but would signify simply that death penalty defense representation differs in some respects from other practice areas. In any case, the symbolic and aesthetic concerns seem unimportant as compared with the public interest in helping death penalty defense lawyers make better decisions on questions of professional conduct when lives are on the line.

Judiciaries are unlikely to welcome the burden of adopting specialized ethics codes because drafting them could demand considerable time and effort on judges' part.⁴¹ While courts could simply rubber-stamp rules drafted by bar

38. See Bruce Green, *Foreword: Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 *FORDHAM L. REV.* 1713, 1718 n.24 (1999) (noting the organized bar's "commitment to the principle that the legal profession is a unified profession with a universally applicable set of professional norms"); Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 *DUKE L. J.* 1243, 1245 (2014) (maintaining that the current regulatory system is founded on the premise that the legal profession is unified, and that this premise justifies "a single, broadly applicable code of conduct"); Wilkins, *Making Context Count*, *supra* note 25, at 1218–19 ("By suppressing undeniably relevant differences among types of lawyers, the argument runs, uniform rules of professional responsibility foster a feeling of communal solidarity across the entire profession."); see also Fred C. Zacharias, *Federalizing Legal Ethics*, 73 *TEX. L. REV.* 335, 385–86 (1994) (noting the ethics codes' "basic approach of considering lawyers' duties to be uniform, whatever role the lawyer plays").

39. Commentators have questioned both the legitimacy and the utility of the concept of a "unified profession." See, e.g., Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 *U. MICH. J. L. REFORM* 1017, 1144 (2004) ("Manipulation, motivated by politics and self-interest, of the ideology of the bar to adhere to rules of ethics predicated on an antiquated and no longer realistic model of a unified profession has likewise been counterproductive."); Rebecca Roiphe, *A History of Professionalism: Julius Henry Cohen and the Professions as a Route to Citizenship*, 40 *FORDHAM URB. L. J.* 33, 74 (2012) (arguing that the "unified profession" is a "myth" and that regulators risk carrying the concept beyond its useful limits).

40. See Green, *Whose Rules*, *supra* note 12, at 490 n.146 (quoting then-Chair of ABA ethics committee: "the proper role of the Model Rules is best served by preserving their character as relatively general statements of principle rather than detailed prescriptions for implementation of those principles").

41. For example, the ABA's adoption of the *ABA Model Rules of Professional Conduct*—building on the existing ethics code—was "the product of six years of exhaustive study, drafting and debate." *A New Ethics Code: ABA Adopts Model Rules of Professional Conduct*, 70 *A.B.A.J.* 79 (Jan. 1984). And that was only the beginning. State judiciaries then studied the ABA model, typically with engagement of the state bar, to decide which model rules to adopt, which to revise, and which to reject entirely, perhaps in favor of an existing provision or one newly drafted. To do the same for multiple sets of specialized rules might seem to be an even

associations, they might be reluctant to do so, lest they wind up with rules that are not well-balanced but that reflect the preferences of an unrepresentative segment of the bar.⁴² Additionally, specialized codes would narrow courts' latitude to establish professional norms in the course of litigation either by announcing standards of conduct pursuant to their supervisory authority or by interpreting rules loosely to achieve favorable outcomes.⁴³ Many judges prefer to establish professional norms on an ad hoc basis in adjudication in this common-law manner, based on a concrete factual situation and with the benefit of argument by opposing counsel, because they see this as a better process for discerning and expressing the optimal norms, or because they do not believe that rules can capture relevant factual nuances and subtleties. In the death penalty context in particular, judges may prefer ethics rules that are general, rather than specific, in order to preserve death penalty defense lawyers' ability to exercise independent judgment and to preserve courts' ultimate authority to judge lawyers' conduct in light of the particular circumstances.

Some of these themes were sounded in the Supreme Court opinions in *Bobby v. Van Hook*,⁴⁴ which addressed the relevance of ABA standards in deciding ineffective assistance of counsel claims. In *Van Hook*, the Court unanimously overturned an appellate court's finding that the capital defendant's lawyer provided constitutionally substandard representation at trial. In concluding that the lawyer's investigation and presentation of evidence were inadequate, the appeals court had relied on the ABA's 2003 guidelines for death penalty defense lawyers, even though *Van Hook*'s trial was in the 1980's.⁴⁵ In the course of taking the lower court to task for judging the reasonableness of the defense according to later-adopted standards, the Court questioned the utility of professional standards in general. It noted, as it had in a previous opinion, that a court is not bound by "specific rules adopted by states to ensure that criminal defendants are well represented," but that, for constitutional purposes, what matters is whether the lawyer's conduct was objectively reasonable.⁴⁶ Further, professional standards

more daunting undertaking. Even the processes for amending the *ABA Model Rules* by making comparatively few changes or additions have involved considerable process.

42. See Bruce A. Green, *Doe v. Federal Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989) (arguing that courts have authority to adopt ethics rules liberally, in common-law fashion); Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L. J. 73, 92-97 (2009) [hereinafter Zacharias & Green, *Rationalizing Judicial Regulation*] (criticizing courts' inclination to disregard ethics rules that the judiciary adopted without adequate consideration, based on bar proposals).

43. See Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 42 (arguing that courts should not be entirely free to disregard ethics rules when ruling in adjudication).

44. *Bobby v. Van Hook*, 558 U.S. 4 (2009).

45. *Id.* at 6 (citing *Van Hook v. Anderson*, 560 F.3d 523, 525 (6th Cir. 2009)).

46. *Id.* at 9 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)). One might take issue with the premise that a lawyer's professional conduct can be "reasonable," for constitutional purposes or otherwise, if the conduct clearly violates a rule of professional conduct. See *United States v. Williams*, 698 F.3d 374, 390 (7th

might not even be relevant evidence of what reasonable legal representation entails if they are “so detailed that they would ‘interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.’”⁴⁷

At least when it comes to the *Model Rules* and their state counterparts, as opposed to other standards or guidelines, one might question the significance of these judicial concerns. As noted, standards and guidelines are adopted by bar associations, not by courts or other law-making authorities. They may provide the interpretive views of a non-authoritative body, offer professional guidance regarding optimal practice where the ethics rules are vague or silent, encourage lawyers to aspire to a “higher” standard of professionalism than ethics rules demand, or delineate high-quality representation rather than ethics per se. Unlike bar association standards or guidelines, ethics rules are law. They are legally enforceable in the disciplinary process and are entitled to as much respect as the common law or any other law adopted by courts.⁴⁸ Moreover, it is by no means clear that when courts have the opportunity to develop standards by either means, courts adopt better standards of conduct through the common law process rather than through the rule-making process.⁴⁹

In the death penalty context in particular, a preference for common-law decision-making seems questionable because courts may wait a long time before they conclusively resolve questions that could be the subject of a rule. Death penalty cases are infrequent. Even more rare are occasions in death penalty cases when ethics questions are called to courts’ attention and require judicial resolution.⁵⁰ Consequently, many or most thorny ethics questions encountered by

Cir. 2012) (Hamilton, J. dissenting) (“Where the standards of professional conduct, including explanatory comments, reflect such a clear and broad consensus as they do here, they provide a reliable guide to the Sixth Amendment and the advocacy that an accused has every right to expect from his lawyer.”). The professional conduct rules are not mere guidelines or recommendations but are adopted by courts, in their law-making capacity, to establish the governing legal standard for professional discipline, including disbarment and suspension—in other words, unlike bar association standards, the rules are enforceable law for lawyers. Given that violations of the law are ordinarily negligence per se, *see, e.g.*, *Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 318 (2005), it is hard to see how a court, or a lawyer, can ordinarily conclude that a rule violation is “reasonable” professional conduct.

47. *Van Hook*, 558 U.S. at 8 n.1 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

48. *See Zacharias & Green, Rationalizing Judicial Regulation*, note 42, at 92–97 (concluding that “although the motivation for treating the professional rules as weak law is understandable, that approach is neither legitimate as a theoretical matter nor likely to be an efficient method of regulating lawyers’ professional conduct as a practical matter”).

49. *See generally Green, Whose Rules, supra* note 12.

50. The relatively few published judicial decisions regarding defense lawyers’ professional conduct in death penalty cases tend to involve unquestionably wrongful conduct. *See, e.g.*, *Fla. Bar v. Niles*, 644 So.2d 504 (Fla. 1994); *In re Atkins*, 320 S.E.2d 146 (Ga. 1984); *In re Hawver*, 339 P.3d 573 (Kan. 2014); *State ex rel. Okla. Bar Ass’n v. Wintory*, 350 P.3d 131 (Okla. 2015). Particularly when the lawyer’s conduct is within an area of uncertainty, rather than comprising obviously egregious misconduct, disciplinary authorities would not ordinarily be expected to initiate disciplinary proceedings. To the extent they come before the court, questions

death penalty lawyers in actual practice may go unaddressed by courts for long periods of time, leaving the lawyers uncertain how to resolve them in the interim.

Concurring in *Bobby v. Van Hook*, Justice Samuel Alito questioned the relevance of professional standards entirely, based in part on a different concern: the concern he voiced was essentially about regulatory capture⁵¹—namely, that rather than advancing the public’s best interest, courts deferring to the ABA Standards would be advancing the perceived interests or preferences of the organized bar, of the subset of lawyers who are members of the ABA, or of the much smaller subset responsible for drafting the Standards.⁵² Underlying this concern is a recognition of the organized bar’s eagerness to influence how the bar is regulated,⁵³ coupled with attendant skepticism about the purity of the bar’s motives. Justice Alito would not be alone in questioning whether professional norms advocated by the ABA invariably best serve the public interest rather than that of lawyers.⁵⁴

At least in this context, however, it is hard to see why declining to regulate through rule making is the appropriate response to the risk of regulatory capture. Unlike the ABA Standards, which are drafted and adopted by the ABA, professional conduct rules are ultimately the judiciary’s responsibility.⁵⁵ Courts

of criminal defense lawyers’ ethics are typically raised in the context of ineffective assistance of counsel claims or other claims in post-conviction challenges to the conviction or death sentence.

51. Cf. Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 223–24 (2012) (observing that regulatory capture has no fixed meaning, but defining “capture as occurring when agencies consistently adopt regulatory policies favored by regulated entities”).

52. Justice Alito observed:

The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

Van Hook, 558 U.S. at 14 (Alito, J., concurring).

53. For a discussion of the bar’s interest in “self-regulation,” see Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 602–07 (2013).

54. See, e.g., Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes To Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 966 (1996) (observing that “commentators have questioned the non-partisan nature of the ABA and its expertise in fashioning ethics rules”) (citing, inter alia, JETHRO K. LIEBERMAN, *CRISIS AT THE BAR: LAWYERS’ UNETHICAL ETHICS AND WHAT TO DO ABOUT IT* 216–17 (1978) (noting that in drafting ethics rules the ABA has “the conflict of interest inherent in balancing self-interest against public and client interest”)); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 692 (1981) (observing that ethics codes “consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving”). Even at its most well-intentioned, the organized bar may have difficulty engaging in disinterested efforts to promote law reform in the public interest. See Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425 (2008).

55. See Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 42, at 94–95.

need not defer to the ABA and may take responsibility for the drafting process if they choose.⁵⁶ Further, judicial skepticism about the legitimacy of the ABA Standards, which courts are free to ignore, heightens the need for legally enforceable rules to both guide lawyers and protect those who comply. Consequently, the preferable response to concerns about regulatory capture by the organized bar or its defense-oriented constituents would seem to be for courts to take a stronger role in the drafting process. In doing so, courts can ensure that others, such as prosecutors, with different perspectives from those of the organized bar's representatives, have an opportunity to be heard.

Lawyers at opposite ends of the ideological spectrum might raise concerns of their own about regulatory capture.⁵⁷ Death penalty defense lawyers might fear that prosecutors would dominate the rule-making process and that controversial defense practices would be fair game for prosecutors to expose and delegitimize.⁵⁸ Prosecutors, in turn, might think it more likely that criminal defense lawyers would have the dominant role. They would worry that specialized rules would be less restrictive for death penalty lawyers than for other lawyers, even other criminal defense lawyers. For example, they might imagine that the rules would authorize death penalty defense lawyers to file deleterious motions under circumstances in which the current rules forbid other lawyers from doing so.⁵⁹

Lawyers' political worries, while going part way to explaining the absence of a professional constituency in favor of an ethics code for death penalty lawyers, seem somewhat trivial from the public perspective, however. Surely, courts are able to avoid the risk that either defense lawyers or prosecutors would have an inordinate influence over the rules. An adept and inclusive judicial rule-making process that results in well-thought-out specialized rules would seem to be preferable to maintaining a generalized set of ethics rules that is vague, incomplete and potentially ill-suited to the particular problems of death penalty defense.

Death penalty advocates might also feel stigmatized by the adoption of specialized rules just for them, viewing the rules as implying that they are less ethical than other lawyers and therefore in greater need of ethical restraint. However, the inference would likely be belied by the content of the specialized rules, which could well be less restrictive than the generally applicable rules or

56. *Id.*

57. See ETHICS AND ADVOCACY, *supra* note 14, at 11 (critics of conference recommendation in favor of specialized ethics rules "claimed that the drafting of subcodes would be like having the fox guard the hen house, because the very lawyers most involved in the specialties would be drafting their own codes of conduct").

58. For an example of where capital defenders were criticized for overreaching in their efforts to persuade a client to attempt to avoid the death penalty by pleading guilty, see *Williams v. Chrans*, 742 F. Supp. 472 (N.D. Ill. 1990).

59. For cases where prosecutors perceived that capital defenders engaged in abusive motions practice, see for example, *State v. Huskey*, 82 S.W.3d 297 (Tenn. Crim. App. 2002); *Archuleta v. Galetka*, 197 P.3d 650 (Utah 2008).

address situations not ordinarily encountered by other lawyers. In any event, professional reputational concerns seem unimportant as measured against the interest in promoting sound professional conduct through effective professional regulation.

Finally, some academics would oppose specialized ethics codes for an entirely different reason: In their view, existing ethics rules already unduly constrain lawyers' ethical discretion because the rules cover too much ground and are too much like law.⁶⁰ Rather than stating general moral principles to encourage and guide lawyers' exercise of independent moral judgment, the rules dictate behavior, thereby tending to atrophy lawyers' ability to engage in moral reasoning.⁶¹ Specialized codes would presumably constrain lawyers' discretion even more. For some who favor enhancing individual self-regulation, this is undesirable, because they assume that lawyers ordinarily make better decisions about how to resolve ethical dilemmas by exercising independent professional judgment rather than by applying ethics rules.⁶² To like effect, some believe that lawyers should have more room to resolve ethics questions in light of their own moral or religious values, rather than having to defer to professional values as codified in ethics rules.⁶³

Whatever the general merits of leaving lawyers' ethical decision-making unburdened by rules—and both the bar and the judiciary reject this regulatory strategy—the concept seems particularly inapt in the specialized setting of death penalty defense. As noted previously, in this setting, the stakes are high but the standard of practice has traditionally been low.⁶⁴ There is nothing in experience

60. See, e.g., David Luban & Michael Milleman, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995).

61. See Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1538 (1984) (noting some philosophers' objection that "imposing an elaborate and comprehensive set of rules on lawyers in the name of promoting ethical behavior is apt to backfire—to undermine the individual lawyer's sense of responsibility and cause her moral faculties to atrophy") (citing Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980)).

62. For a discussion of the distinction between lawyers' professional and personal judgment, and the significance of the distinction in the context of professional regulation, see Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005).

63. See, e.g., Michael S. McGinniss, *The Character of Codes: Preserving Spaces for Personal Integrity in Lawyer Regulation*, 29 GEO. J. LEGAL ETHICS 489, 566 (2016) ("The most fundamental reason to exercise restraint when imposing specific mandates in lawyer regulation is to create space for individual lawyers to integrate their personal, moral, and religious convictions with their professional lives."). For a discussion of how ethics rules leave room for the expression of lawyers' personal values, see Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997). For an expression of skepticism that professional norms are frequently at odds with conventional social or religious norms, see Bruce A. Green, *The Religious Lawyering Critique*, 21 J. L. & RELIGION 283 (2005–2006).

64. See *supra* notes 34–37 and accompanying text. For a recent disciplinary decision depicting death penalty defense at its worst see *In re Hawver*, 339 P.3d 573 (Kan. 2014) (disbarring lawyer for unethical and incompetent representation in death penalty case).

to justify a prediction that death penalty defense lawyers will make better decisions on their own than they would make with the benefit of court-adopted ethics rules.

In sum, while it is easy to see why there is no constituency for specialized ethics rules generally, or for specialized rules for death penalty lawyers in particular, it is by no means clear that the reasons are compelling, when measured against the public interest in effective professional regulation. Assuming that courts can adopt rules that give clearer and better tailored guidance regarding how defense lawyers should resolve professional dilemmas in death penalty cases—and, in the absence of an attempt, one cannot discount the likelihood that courts can achieve this—it is hard to see the advantage of uncertain and incomplete provisions in codes of general applicability.

II. THE PRACTICAL VALUE OF SPECIALIZED RULES

A. A PROFESSIONAL DILEMMA UNDER THE CURRENT RULES

Part II examined the argument for specialized ethics rules for death penalty defense lawyers in the abstract. The argument seems strong, and none of the counter-arguments seem especially persuasive. But an unexamined assumption underlying the abstract argument existed, namely, that the specialized ethics rules would look different from the current, generalized rules—that is, that they would address additional questions, and give either more precise or different answers. If not, then specialized rules would serve no purpose. But, while one might intuit that rules for death penalty defense lawyers will differ in some material respects from the *Model Rules*, this is not a foregone conclusion. The concrete problem proposed below, loosely based on a recent case,⁶⁵ is designed to test the assumption that the *Model Rules* do not adequately address death penalty defense, and that there would therefore be a significant benefit to additional or different rules.

Consider the dilemma of a lawyer who has been dispatched to meet with a death-row inmate. The inmate unsuccessfully appealed his conviction and death sentence and is now unrepresented. The defendant may now pursue federal habeas relief, and doing so will both delay his execution and offer hope for overturning his death sentence and perhaps even his conviction. However, the one-year period within which to file for a writ of habeas corpus is coming to an end, the inmate's mental state is deteriorating, and over the course of several meetings, the inmate has been noncommittal about whether to accept the lawyer's offer of help. At moments, the inmate has expressed despondency and a wish to be allowed to die. At other times, the inmate has expressed a wish to live, but it is unclear whether that translates into a desire to retain the lawyer and to

65. See *infra* notes 100-103 and accompanying text.

authorize the lawyer to file a habeas petition. Should the lawyer file the habeas petition she has prepared in order to preserve the inmate's options, or refrain, because she has not been clearly authorized to do so? If the lawyer files a petition, should she accompany it with a statement expressing doubt about her authority to act for the inmate, explaining the circumstances and requesting the court's approval?

One might argue that, to the extent this situation raises an ethical dilemma, the lawyer should resolve it the way any other lawyer would resolve a similar question regarding whether she has been retained and has authority to act for another. But there are two problems with this argument: first, any lawyer facing this sort of dilemma would find inadequate guidance in the existing ethics rules; and second, it is not necessarily correct that the death penalty defense lawyer should approach the question in the same way as a lawyer in a seemingly analogous situation, such as that of a prospective lawyer for an indecisive or uncommunicative individual who has an opportunity to file a civil lawsuit.⁶⁶

To begin with, the *Model Rules* and equivalent state rules are both incomplete and unclear. They do not include a provision setting forth a standard to govern whether and when a lawyer-client relationship has been established so that the lawyer may act at least to some extent as an agent on the client's behalf.⁶⁷ The ethics codes regard the formation of a lawyer-client relationship as essentially a legal question governed by the common law of contract.⁶⁸ But it is a legal question that must be answered for purposes of the ethics codes, because many of the rules take a lawyer-client relationship as a starting point. A lawyer has some authority to decide how to carry out the client's objectives, but that presupposes that the lawyer has a client.⁶⁹

Assuming a lawyer-client relationship exists, the rules do not specify all the decisions that a lawyer may make over the client's objection or without the client's express or implied consent.⁷⁰ The rules do say that a lawyer must defer to

66. For an example of how legal services lawyers deal with incapacitated individuals in eviction proceedings and other emergency situations, see Mark Spiegel, *The Story of Mr. G: Reflections upon the Questionably Competent Client*, 69 *FORDHAM L. REV.* 1179 (2000); see also Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073, 1093-96 (1994); Jan E. Rein, *Clients With Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *FORDHAM L. REV.* 1101 (1994).

67. See, e.g., NYS Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (2001) (referring to Restatement of the Law Governing Lawyers for the standard establishing the formation of a lawyer-client relationship for purposes of the confidentiality rule). Interestingly, the ABA *Model Rules* and state counterparts do define a prospective client. See MODEL RULES R. 1.18(a) (a prospective client is "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter"). However, this rule is of no usefulness in the hypothetical scenario, because, while addressing conflicts of interest and confidentiality, it provides no guidance regarding whether a lawyer is authorized to take protective action on behalf of a death-row inmate who is a prospective client.

68. See, e.g., NYS Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 761 (2003).

69. See, e.g., MODEL RULES R. 1.2, cmts. 1-2.

70. See MODEL RULES R. 1.2 & cmt. 2.

the client's decision in a criminal case whether to plead guilty, testify, or waive a jury trial.⁷¹ They do not say, however, what decisions a lawyer may make on her own and, in particular, whether the criminal defense lawyer needs a client's specific authorization to file a post-appeal motion. This is another situation where the rules defer to other law.⁷² Little help is afforded by judicial decisions addressing the allocation of decision-making authority in the context of constitutional challenges to the adequacy of counsel's performance, because the question in ineffective assistance of counsel cases is whether the lawyer's performance fell outside the range of reasonableness. Given the ethical and legal ambiguity, lawyers' conduct will typically be upheld whether or not they defer to the client's decision on questions other than those specifically entrusted to the defendant by the Constitution.⁷³

When a lawyer represents a sophisticated and articulate client, the lawyer might seek to withdraw from the representation if the client deliberately refuses to give clear, unequivocal instructions.⁷⁴ But it is unclear whether a lawyer is obligated to end the representation even in that situation, much less in the case of a mentally ill client who is uncommunicative, irrational or equivocal. The rules make allowances in cases involving clients whose capacity to make decisions regarding the representation is diminished. For instance, Model Rule 1.14 allows a lawyer to take protective action on behalf of a client with diminished mental capacity, and allows emergency legal action on behalf of an incapacitated person who cannot form a lawyer-client relationship.⁷⁵ This suggests that, to some extent, the lawyer may choose to represent the mentally ill client differently and more paternalistically. But it is uncertain precisely how this rule would apply to a lawyer's interaction with an inmate who may or may not be a client and whose pending filing deadline in a death penalty case may or may not be regarded as an emergency.⁷⁶

71. See MODEL RULES R. 1.2(a).

72. Comment 2 to Rule 1.2 of the *Model Rules* observes that the rule does not prescribe how lawyers should resolve most disagreements with clients about the means to accomplish the lawyer's objectives, but that "[o]ther law . . . may be applicable and should be consulted by the lawyer." MODEL RULES R. 1.2 cmt. 2. Presumably, the "other law" will ordinarily be agency law, which itself provides no clear answers. MODEL RULES R. 1.2 cmt. 2.

73. Compare *United States v. Masat*, 896 F.2d 88 (5th Cir. 1990) (holding that lawyer was not ineffective in arguing ridiculous theories upon the defendant's insistence), and *Foster v. Strickland*, 707 F.2d 1339 (11th Cir. 1983) (holding that lawyer was not ineffective in deferring to death penalty defendant's decision not to present an insanity defense), and *Nelson v. State*, 21 P.3d 55 (Okla. 2001) (holding that, although the defendant's most plausible defense was insanity, trial counsel was not ineffective in acceding to the defendant's decision not to raise the defense), with *Jones v. Barnes*, 463 U.S. 745 (1983) (holding that appellate lawyer was not required to accede to the defendant's request to raise particular non-frivolous arguments); *State v. Davis*, 506 A.2d 86 (Conn. 1986) (holding that trial lawyer was not constitutionally required to call a witness whom the defendant instructed him to call).

74. See MODEL RULES R. 1.16.

75. See MODEL RULES R. 1.14(b); see also MODEL RULES R. 1.14 cmt. 9.

76. See *infra* note 99.

Wholly apart from the uncertainty regarding how the existing rules apply either in the death penalty defense lawyer's situation or in analogous situations, one can question whether one-size-fits-all rules should apply here. Assuming we know how the rules apply when a lawyer is uncertain whether a client wants to file a civil complaint before the statute of limitations runs, should the same rule apply to a death penalty case, or should the lawyer have greater leeway? One reason for a more lenient standard is that the inmate's life is at stake: as courts have recognized with regard to other procedural questions, "death is different," and the difference calls for greater assurance that the adjudicative process is fair and reliable.⁷⁷ The difference has implications for defense lawyers' professional obligations.⁷⁸ The lawyer may have greater latitude to advocate on the client's behalf, overriding the client's self-destructive preferences, because of the importance of vigorous advocacy in ensuring the fairness and reliability of the conviction and death sentence.⁷⁹ This may be true especially when the capital defendant is mentally ill and incommunicative.⁸⁰ As to other aspects of a capital defense, such as conducting pretrial investigation, a death penalty defense lawyer is not only permitted but also constitutionally obligated to override the defendant's contrary and self-destructive instructions; therefore, the idea of acting in the capital defendant's best interest, in derogation of his autonomy interest, is not foreign.⁸¹

Further, in post-conviction capital proceedings, greater leeway to act on uncertain authority may compensate for the unusual impediments to clarifying what the inmate wants. The lawyer's access to the inmate may be impeded because an inmate imprisoned on death row cannot meet or speak freely; further, depending on the inmate's mental state, which incarceration typically erodes, the inmate may not respond clearly and decisively.⁸² In other situations, the lawyer may be able to rely on others for help in ascertaining the prospective client's

77. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 357–358 (1977); see also *Furman v. Georgia*, 408 U.S. 238 (1972).

78. See, e.g., *Marshall v. Cathel*, 428 F.3d 452, 467 (3d Cir. 2005).

79. See, e.g., *Robertson v. Florida*, 143 So.3d 907 (Fla. 2014) (finding it proper to deny appellate lawyer's motion to withdraw from representing defendant in capital case, and to require the lawyer to continue the appeal, even though the defendant wished to argue in favor of his death sentence).

80. See, e.g., *Florida v. Nixon*, 543 U.S. 174 (2004) (holding that the trial lawyer for mentally ill, incommunicative defendant in death penalty case may undertake strategy of admitting guilt, if the lawyer believes that is in the client's best interest, even absent the client's express consent); see also *ABA Capital Defense Guidelines*, *supra* note 19, at 1009–10 ("Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide.").

81. See *ABA Capital Defense Guidelines*, *supra* note 19, at 1021 n.206.

82. See *id.* at 1082 ("[T]he mental condition of many capital clients will deteriorate the longer they remain on death row. This may result in suicidal tendencies and/or impairments in realistic perception and rational decision-making.").

wishes, or the court may appoint someone else to make decisions for the incapacitated individual. Neither is likely to be true in the case of a death-row inmate, however.

Within the framework of the rules, it is unclear how the death-penalty lawyer should resolve the posed dilemma. The Preamble to the *Model Rules* observes that:

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.⁸³

The dilemma at issue here is one that implicates a constellation of competing public and professional values and therefore calls for just such a sensitive professional and moral judgment, taking account of all the relevant facts and relevant ethics principles.

Most importantly, the inmate himself has competing interests. His interests in life and liberty generally weigh in favor of the lawyer's pursuit of legal relief even with questionable authorization, but at the same time, the inmate's interest in avoiding a torturous existence on death row weighs against initiating possibly unwanted proceedings that will prolong his confinement by delaying his execution. Ordinarily, if the inmate made a reasoned choice between these interests, the decision would be entitled to respect. That is to say, the inmate has an interest in decision-making autonomy that may be paramount in dealing with the lawyer. But that interest does not dictate how to resolve the lawyer's dilemma, because it is unclear what decision the inmate is making, and because the inmate's diminished mental capacity, exacerbated by prison conditions, may make his pronouncements or silence untrustworthy. Based on his interactions with the inmate, the lawyer may have an intuition about what the client wants, but may not be able to articulate the factual predicate for this intuition.

Taking into account only the competing interests of the mentally ill death-row inmate, it is uncertain how a lawyer should resolve ambiguity about what the inmate wants. Must the prospective client express an unambiguous decision to retain counsel to file papers, or may the lawyer act on less, and, if so, how much less? It may seem anomalous to think that mentally ill individuals can be tried for capital murder (because the due process standard of competence to stand trial is low⁸⁴), but that once convicted, they cannot seek post-conviction review because their mental illness undermines their ability to retain and direct counsel. That an

83. MODEL RULES, pmbi. ¶ 9.

84. See Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 466 (2000) ("The legal test for mental competence to stand trial is low: understanding of the charges and the legal proceedings, and ability to aid in one's own defense.").

inmate does not express, and adhere to, a decision to have a petition filed on his behalf, does not necessarily mean that the inmate does not want the lawyer to pursue further legal relief. The inmate's occasional willingness to meet with the lawyer may be evidence of a desire to obtain the lawyer's help. If the inmate appears to vacillate, to which decision at which moment in time should the lawyer defer? Further, if there are additional opportunities for the lawyer to meet with the inmate and to develop a relationship of trust, the inmate may later be persuaded to ratify whatever interest he expressed earlier in keeping the case, and himself, alive.⁸⁵ Given that the inmate's life is at stake, some will have the instinctual reaction that if the mentally ill inmate is otherwise unrepresented and the filing deadline is looming, the lawyer should be able to act on virtually any expression of interest in her services by filing a substantive motion and, certainly, by requesting an extension of time.

The judiciary and the public also have competing interests at stake in this scenario. The courts have an interest in access to justice, which includes correcting significant trial error. The public has a related interest in ensuring that the criminal process is fair before putting a defendant to death. These weigh in favor of allowing the lawyer to bring claims on behalf of the inmate, even if the lawyer's agency is uncertain.⁸⁶ Otherwise, the judiciary may lose the opportunity to correct procedural defects, some of which may not have been evident to, or able to be remedied by, the trial court—for example, the prosecution's suppression of evidence or the defense lawyer's ineffective assistance. But there is also a judicial and public interest in finality and in the conservation of judicial resources, both of which weigh against allowing capital defense lawyers to initiate proceedings in which the nominal client is uninterested.

There are also competing judicial and public interests around the question of whether the lawyer should disclose her dilemma to the court so that it can decide whether the lawyer has adequate authority to proceed on the inmate's behalf.⁸⁷ Disclosure would promote the interest in an objective, judicial resolution of what may be a difficult legal and ethical question, rather than leaving it to the lawyer to resolve. However, the interests and values underlying the attorney-client privilege and the professional duty of confidentiality weigh against disclosure.

85. Cf. *ABA Capital Defense Guidelines*, *supra* note 19, at 1085 (“Collateral counsel has the same obligation as trial and appellate counsel to establish a relationship of trust with the client. But by the time a case reaches this stage, the client will have put his life into the hands of at least one other lawyer and found himself on death row. Counsel should not be surprised if the client initially exhibits some hostility and lack of trust, and must endeavor to overcome these barriers.”).

86. See, e.g., *Robertson v. Florida*, 143 So. 3d 907, 912–13 (Fla. 2014) (Pariente, J., concurring) (“[A] high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly.’ . . . This is actually of particular concern when the defendant expresses a desire to be executed because ‘it is not necessarily those most deserving of the death penalty (e.g., the most aggravated and least mitigated) who seek its imposition.’”) (internal citations omitted).

87. Cf. *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 509–12 (E.D. Mich. 1983) (holding that a lawyer must disclose the death of a party whom the lawyer represents).

The inmate's trust in this lawyer and any other lawyers may be eroded if the lawyer discloses her dilemma to the court. Future clients might be discouraged from trusting lawyers if word were to spread about a lawyer who, after meeting with a death-row defendant, disclosed their conversation to the court without any prompting.

Finally, the lawyer has professional and personal interests at stake that may or may not be worthy of respect. If the lawyer has chosen to make her career as a death penalty defense lawyer, she almost certainly has a political or humanitarian interest in serving capital defendants and trying to prevent their execution. This lawyer will have a strong impulse to resolve uncertainty in favor of trying to delay or prevent the inmate's execution. At the same time, the lawyer has an interest in her own professional reputation and license. This may weigh in favor of taking the course of action that is the least professionally risky, whatever that may be. The lawyer's reputation in the larger professional community may be served by professional caution, but her reputation among peers—the subgroup of death penalty defense lawyers—may be better served by taking professional risks to serve the legal interests of death-row inmates.

B. THE DUBIOUS VIRTUES OF PRESERVING THE UNCERTAINTY ARISING UNDER THE GENERALIZED RULES

One's initial reaction might be that the lawyer's dilemma whether to file a habeas petition on behalf of an ambivalent or unexpressive death-row inmate proves the virtue of the *Model Rules* and state counterparts: the rules seemingly leave it to the lawyer to decide what to do. The lawyer has little choice but to decide what to do on her own. In effect, the rules require the lawyer to do what she thinks is best.

There are understandable reasons why, in certain situations, professional conduct rules might explicitly or implicitly leave decisions to lawyers' discretion.⁸⁸ Those reasons do not seem particularly compelling in this death-penalty scenario, however.

First, there are some situations in which a lawyer's autonomy interest outweighs public interests that might justify regulation. For example, this explains why, absent a court appointment (as occurs in most criminal cases), lawyers may decide for themselves whether to accept a representation.⁸⁹ Although there are relevant public interests, such as the interests in expanding the availability of legal services and in preventing discrimination in how legal services are allocated, the lawyer is thought to have a paramount interest, as a

88. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006) [hereinafter Green & Zacharias, *Permissive Rules*].

89. See MODEL RULES R. 6.1; MONROE FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 70 (4th ed. 2010).

matter of personal and professional autonomy, in deciding for whom to work.⁹⁰ This autonomy interest might go part of the way toward explaining why the *Model Rules* provide limited guidance in the death penalty scenario: a lawyer should have freedom to decline to represent the inmate in post-conviction proceedings who fails to express adequate enthusiasm for the representation, at least if the lawyer clearly conveys her decision to the inmate⁹¹ and does not impede the inmate's ability to secure other counsel. But the lawyer's personal interests are not important enough to justify allowing the lawyer unregulated discretion to initiate proceedings against an inmate's wishes. The interests of the inmate, the judiciary and the public, however conflicting they may be, will almost certainly be paramount.

Further, there are sometimes regulatory justifications for allowing lawyers discretion to make their own ethical choices. For example, regulators may not agree on an answer because there may be compelling arguments in favor of different line-drawing alternatives.⁹² Other reasons for giving lawyers discretion to resolve an ethical dilemma within broad limits include the difficulty of drafting a rule that adequately captures the profession's intuitions, and that the optimal standard would be difficult or unfair to enforce because it would turn on subjective considerations or on contestable facts.⁹³ If rule drafters sought to guide death row defenders who are called on to translate the uncertain and ambivalent expression of clients and would-be clients, it is conceivable that the drafters could not do substantially better than to leave it to the lawyers to decide what is best to do. But the regulatory rationales plainly do not justify the existing ethics

90. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1078–79 (1976); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1096 (1988).

91. Absent clarity, the lawyer may create a lawyer-client relationship inadvertently. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

92. This may explain, at least in part, why lawyers have discretion to decide whether to disclose client confidences to prevent or rectify certain harms. See, e.g., MODEL RULES R. 1.6(b)(1)–(3). In many concrete situations, lawyers would reasonably disagree whether the interests in disclosure or confidentiality are paramount. The relevant interests are those of the public, not the individual lawyer, but there is disagreement how competing public interests should be resolved. Giving more discretion to lawyers is one way of allowing the profession and judiciary to avoid having to make a choice as to which there would be significant opposition. See Green & Zacharias, *Permissive Rules*, *supra* note 88, at 313; see also Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 830 (2002).

93. These may further explain rules giving lawyers discretion to disclose confidences to prevent or rectify certain harms. See Green & Zacharias, *Permissive Rules*, *supra* note 88. For example, in deciding whether to disclose a client's threat to substantially injure another, it would be relevant to consider the credibility of the threat, the likelihood that the client could successfully carry it out, the extent of the threatened harm, the likely consequences to the client and to the lawyer-client relationship of revealing it, and the extent to which the lawyer's future clients and other lawyers' clients would mistrust lawyers if disclosure were made. It would be difficult to draft a standard that articulates how a lawyer should weigh these considerations, and a later disciplinary authority that was called on to second-guess the lawyer could never perfectly put itself in the lawyer's shoes.

rules' silence, because there is no evidence that rule drafters ever thought about the problem and tried to offer more direction.

Finally, some may posit that the lawyer will make better decisions if she is forced to resolve her ethical dilemma on her own rather than having to follow a legally enforceable ethics rule. The theory might be that the lawyer herself will derive and apply a better standard of conduct than whatever one would be incorporated in a rule. Alternatively, the theory may be that the process of having to resolve an ethical dilemma without direction from an enforceable rule will help the lawyer develop sensitivity to ethics issues and greater sophistication in resolving them, which will benefit her future work. The death-penalty hypothetical challenges these arguments. Fraught decisions like whether to continue to litigate on behalf of a death-row inmate or let the inmate march along to the execution chamber seems best not made in a vacuum. Although the ideal legal standard may be a relaxed and permissive one, that would seem preferable to leaving the lawyer free to make a decision without any limitations and without any obligation whatsoever to seek guidance from others or from professional standards.⁹⁴

C. THE PROBLEM WITH UNCERTAINTY

Even if one were to conclude that lawyers should be allowed additional leeway to decide whether it is permissible to file for post-conviction relief on behalf of a death-row inmate who has not clearly authorized her to do so, that is not the current state of the ethics rules and law. The rules leave the lawyers' proper course uncertain for regulatory purposes. The problem is that uncertainty about what kind of decision to make is not the same as permission to make any decision the lawyer wishes. In failing to establish a clear standard of conduct, the *Model Rules* simply leave the lawyer in a dilemma unassisted, putting her at risk of violating a disciplinary rule no matter which way she responds.

Suppose that, after meeting with the inmate on more than one occasion, and just as the filing deadline is about to expire, the lawyer decides not to file a habeas petition because she concludes that the inmate has not been clear enough in engaging her and authorizing her to act. The risk is that, after the filing deadline expires, the inmate will authorize another lawyer to pursue post-conviction remedies. The next lawyer will seek to excuse the inmate's failure to meet the habeas filing deadline. The obvious, and perhaps only, available argument for equitable tolling of the filing deadline will be that the first lawyer was grossly negligent or unethical.⁹⁵ The inmate (through counsel) will undoubtedly argue

94. See Green, *Developing Standards*, *supra* note 18, at 1099–2000 (discussing how well-intentioned lawyers may make the best professional decisions among available legal and ethical options).

95. See *Maples v. Thomas*, 132 S. Ct. 912 (2012); *Holland v. Florida*, 560 U.S. 631 (2010); see generally Marni von Wilpert, Comment, *Holland v. Florida: A Prisoner's Last Chance, Attorney Error, and the*

that he gave adequate authorization and, relying on the lawyer to file in time, never sought other counsel. Regardless of what actually transpired, the inmate will have substantial latitude in his recollection and characterization of his earlier conversations with the lawyer, since those conversations would have been unrecorded. Out of concern for the inmate's interests, the lawyer may decide not to dispute the inmate's assertion that he was retained to file a habeas petition. Even though the factual record may be incomplete, experts and amici may support the inmate's claim by attacking the lawyer's conduct.⁹⁶ If a later court finds the inmate's complaint to be credible, a disciplinary investigation may follow, on the theory that the lawyer failed to act competently, failed to carry out the client's objectives, and failed to proceed diligently and promptly.⁹⁷ By declining to file a petition on behalf of an ambivalent death-row defendant, the lawyer will face a risk of professional discipline.⁹⁸

As an alternative, the lawyer may file a habeas petition protectively—that is, both to protect the inmate's post-conviction procedural rights and to protect the lawyer against a later claim of incompetence.⁹⁹ This might seem to be the cautious approach, but recent events show that it has perils of its own. The inmate may later complain that the lawyer acted unethically by filing the habeas petition without permission. Recently, the Supreme Court received a complaint of this

Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review, 79 *FORDHAM L. REV.* 1429 (2010).

96. *See, e.g.*, Brief of Legal Ethics Professors and Practitioners et al. as Amici Curiae in Support of Petitioner, *Maples v. Thomas*, 132 S. Ct. 912 (2012) (No. 10-63), 2011 WL 2132708.

97. MODEL RULES R. 1.1, 1.2 & 1.3. A savvy lawyer may write a long letter to the client and/or to the file explaining why she is not filing the federal habeas petition, but this is no guarantee against a complaint and an adverse fact finding.

98. For a decision disciplining a lawyer for failing to file a post-conviction petition on a death-row inmate's behalf, see *In re Hunoval*, 247 S.E.2d 230 (N.C. 1977), which held that a lawyer wrongfully withdrew from the representation.

99. A comment to ABA Model Rule 1.14 ("Client With Diminished Capacity") provides mild support for this approach even if there are serious doubts whether the inmate has engaged the lawyer. The black-letter rule itself, although affording lawyers leeway in limited circumstances to act protectively on behalf of mentally incapacitated clients, would not apply absent a lawyer-client relationship. However, Comment 9 to the rule provides that:

In an emergency, where the . . . safety . . . of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on the person's behalf has consulted with the lawyer.

MODEL RULES R. 1.14 cmt. 9. The Comment was added, based on recommendations of a conference on ethical issues in representing older clients, in order to allow lawyers to act for vulnerable, incapacitated clients in emergency situations such as where an incapacitated person's home will be foreclosed absent immediate legal intervention. *See* Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 *FORDHAM L. REV.* 1429, 1431 (1994). It is debatable, however, whether there is any basis in Rule 1.14 or other law for lawyers to act for incapacitated non-clients in emergency situations. It would also be debatable whether the death-row inmate's situation is an emergency of the sort covered by the Comment.

nature from a mentally ill death-row inmate after a Pennsylvania lawyer filed an allegedly unauthorized cert petition in the inmate's case.¹⁰⁰ The accusation was that the lawyer falsely represented that the inmate authorized him to file the petition.¹⁰¹ Rather than simply accepting the lawyer's word that he had acted with authority,¹⁰² the Supreme Court referred the lawyer to the state disciplinary agency,¹⁰³ which, having received a referral from the nation's highest federal court, would undoubtedly feel constrained to commence an investigation.

A third alternative available to the lawyer would be to accompany a habeas petition with a confession by the lawyer that she is uncertain about her authority to file. The lawyer could be straightforward in the declaration that her conversations with the client are privileged, but try to explain her dilemma in general terms: she believes serious mental health issues have contributed to the client's failure to give unequivocal affirmative consent to file a petition and that she is ethically obligated, in an abundance of caution, to file a protective petition. This may win points for candor, but it is not necessarily ideal from an ethics and disciplinary perspective. Unlike the situation where the lawyer doubts the criminal defendant's competence to stand trial,¹⁰⁴ this is not a situation where courts have authorized or required lawyers to raise competence concerns with the court notwithstanding the duty of confidentiality. There is no established procedure for entering an appearance of counsel while raising doubts about one's own authority to do so. The confession of uncertainty may be regarded as a breach of the confidentiality duty, which applies to any information, not just privileged information, learned in a current or prospective lawyer-client relationship.¹⁰⁵ The confession also undermines the putative client's interest in securing habeas relief and may therefore be disloyal. At the same time, based on her own statement, the lawyer can be accused of acting without proper authority if the court concludes the inmate was not a client or that the lawyer did not have the inmate's consent to file the petition.

The disciplinary risk posed by each of the three alternatives illustrates why the uncertainty of the *Model Rules* is often problematic from a regulatory perspective. The lawyer may be influenced to make the choice that seems to afford the lowest disciplinary risk rather than the choice that appears best from the public's

100. Letter from Michael E. Ballard to the U.S. Supreme Court (June 2, 2014), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/08/Ballard-file-Part-I1.pdf> [https://perma.cc/V338-Q55S].

101. *Id.*

102. Letter from Marc Bookman, to Scott S. Harris, Office of the Clerk of the U.S. Supreme Court (July 8, 2014), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/08/Ballard-file-Part-I1.pdf> [https://perma.cc/V338-Q55S].

103. Order List, U.S. Supreme Court (Aug. 11, 2014), http://www.supremecourt.gov/orders/courtorders/081114zr_8mj8.pdf [https://perma.cc/QLN5-2LAJ].

104. See ABA STANDARD FOR CRIMINAL JUSTICE 7-4.2 (2d ed. 1986); see generally Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Client: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65 (1988).

105. See MODEL RULES R.1.6 & 1.18.

perspective. It is hard to envision this as the best of all possible regulatory approaches.

D. THE VIRTUES OF SPECIALIZED RULES

The dilemma of a death penalty defense lawyer whose agency is uncertain illustrates the potential utility of specialized rules. Assuming that a judicial and professional consensus could be developed around some standard of conduct, codifying that standard in a specialized ethics rule would promote optimal professional conduct, while relieving lawyers of the anxiety that comes with disciplinary risk in areas of uncertainty. If capital defenders do not know how to act when their agency is uncertain, they are likely to act inconsistently with how courts, as ultimate arbiters of legal ethics, believe these lawyers should act. When lawyers guess wrong, they may undermine the interests of the death-row inmate, the judiciary, and the public. They are likely to experience anxiety about how best to act when this situation confronts them and to risk professional opprobrium and sanction for acting in good faith, but erroneously, in a difficult situation. No one benefits when the ethics codes sow uncertainty, particularly when each of the alternative courses of conduct poses professional risks. In other words, ethical clarity is preferable to uncertainty, at least in this situation, and a specialized rule could afford greater clarity.

One might argue that ethics rule drafters should provide guidance, not by adopting a special rule for criminal defense practice, or for death-penalty defense practice, but by adopting a one-size-fits-all rule for lawyers who are uncertain about their agency. In most cases, adopting a general rule will be the preferable drafting strategy when a problem cuts across a range of practice settings. In such situations, many lawyers, not just specialists or sub-specialists, would benefit from guidance. There is ordinarily no reason for different practitioners to be held to different standards, and generally applicable rules reduce the risk of regulatory capture by a particular segment of the bar. But a generally applicable rule may be undesirable in this instance if one concludes that the capital defense context calls for a different approach because death penalty advocacy is different. That is, the justification for resolving ambiguity in favor of intervening on behalf of a mentally incapacitated individual is more compelling when the individual faces the death penalty than when he is at risk of relinquishing a civil claim for monetary damages.

If one is convinced by this example about the utility of at least one specialized rule for death penalty defense lawyers, the next question is whether there should be an ethics code for capital defense containing a collection of specialized ethics rules. This depends on how many distinctive ethics problems arise in this area of practice. Death penalty defense lawyers may face distinctive professional questions because procedural aspects of this practice, including the capital sentencing stage and post-conviction exoneration proceedings, are contextually

unique or because the roles of these lawyers and those acting at their direction, such as mitigation specialists, differ from the roles that lawyers ordinarily serve.¹⁰⁶ Because the stakes are so high, these lawyers may also face questions that are addressed by generally-applicable rules but that should be resolved differently in capital cases.¹⁰⁷ Additionally, death penalty defense lawyers and, ultimately, their clients may benefit if the court adopted rules that provide detailed guidance regarding some professional duties (such as the competence and consultation duties), which are too vaguely addressed by existing rules.¹⁰⁸

If there are enough fraught and consequential dilemmas like the question of how to deal with uncertain agency where more guidance would be helpful, then perhaps these questions should be answered in a specialized code. In all likelihood, this would not be an entirely different set of ethics rules but rather additional rules that supplement, interpret and, in exceptional instances, supersede the general rules. These rules would clarify the application of the general rules to death penalty defense, fill in gaps where the existing rules are silent, and

106. For example, death-penalty standards urge lawyers to contact the victim's family to seek its support for a plea bargain that avoids the death sentence. *ABA Capital Defense Guidelines*, *supra* note 19, at 1042. But lawyers may be sanctioned for efforts to secure support for leniency from the victim's family, if the lawyers' efforts are regarded as "prejudicial to the administration of justice." *See, e.g.*, Florida Bar v. Machin, 635 So.2d 938 (Fla. 1994). *But see* Conn. Bar Ass'n Standing Comm. on Prof'l Ethics, Informal Op. 15-05 (2015), http://c.ymcdn.com/sites/www.ctbar.org/resource/resmgr/Ethics_Opinions/CBA_Informal_Opinion_15-05_.PDF [<https://perma.cc/JA2N-VNHW>] (last visited April 1, 2016). Professional conduct rules might draw clearer lines between permissible and punishable conduct in capital cases, to provide assurance that the efforts urged in the professional standards will not subject lawyers to sanction under the rules.

107. For example, death penalty advocates have been encouraged to raise all potential legal issues and preserve all conceivable errors for appellate and post-conviction review. *See ABA Capital Defense Guidelines*, *supra* note 19, at 1030–32 ("Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case."). This may suggest that Model Rule 3.1, which subjects a lawyer to discipline for making a frivolous argument, should be relaxed for death-penalty defense lawyers in order to avoid chilling legitimate advocacy in death penalty cases. *See* MODEL RULES R. 3.1. Further, death penalty trial advocates have been instructed that, as a matter of loyalty, they are professionally obligated to provide assistance to successor appellate counsel, even at their own reputational expense. *See ABA Capital Defense Guidelines*, *supra* note 19, at 1074–78 (citing, *inter alia*, State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1992-127 (1992)). This may suggest the need to supplement Rule 1.16(d), which might be read to suggest that once appellate counsel has taken over, the trial lawyer's job is done. *See generally* Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY (forthcoming).

108. For example, existing rules provide that the criminal defendant must receive advice "reasonably necessary" to make an "informed decision" whether to plead guilty. MODEL RULES R. 1.2(a) & 1.4(b). Given the stakes, death-penalty advocates might benefit from more detailed guidance on what information is reasonably necessary, as well as about how forcefully the lawyers may seek to persuade the defendant, given the impulse to discourage the defendant from making a fatal decision. *Cf. ABA Capital Defense Guidelines*, *supra* note 19, at 1046 ("Counsel's role is to ensure that the choice is as well considered as possible. This may require counsel to work diligently over time to overcome the client's natural resistance to the idea of standing in open court, admitting to guilt, and perhaps agreeing to permanent imprisonment. Or it may require counsel to do everything possible to prevent a depressed or suicidal client from pleading guilty where such a plea could result in an avoidable death sentence.").

perhaps modify some of the general rules when they are not well suited to the particular work of death penalty defense lawyers. If there were only a handful of distinctive ethics problems, however, then perhaps the addition of a few specialized rules to the existing code would suffice.

E. ANSWERS TO CONVENTIONAL OBJECTIONS

A specialized rule may be useful for death penalty defense lawyers who seek to serve mentally ill clients in that it might provide guidance about how best to deal with the dilemma of uncertain agency. Clearer guidance may serve the interests of death-row inmates, the judiciary and the public, as well as lawyers themselves. This may not in itself answer all of the predictable objections to specialized ethics rules identified in Part II. But if one were to propose drafting and adopting a rule for death penalty defense lawyers who are uncertain about their authority to act for a mentally ill inmate, the objections do not seem especially compelling.

For example, it is hard to imagine that a specialized rule, or set of specialized rules, for capital defenders will make inroads into the concept of a unified profession, whatever value one may ascribe to the idea.¹⁰⁹ Death penalty advocates would still be governed, for the most part, by the ordinary ethics rules. The specialized rules would simply suggest that these lawyers need greater clarity about how the rules apply in the particular context in which they work. This is no secret. It is the rationale for bar association ethics opinions and standards. Nor does a specialized rule or code necessarily defy the ordinary preference for general rules. Not every area of practice necessitates its own set of ethics rules. Further, specialized rules would presumably not be written on a blank slate but would build on the generally-applicable ethics rules.

Some might argue that the rules about how death penalty defense lawyers should act when their agency can be challenged should remain vague, taking the position that it would be preferable for future courts, disciplinary agencies or others to provide guidance. For example, courts can issue opinions interpreting the rules in concrete cases in which death penalty defense lawyers encounter this problem. Leaving questions unanswered is often a legitimate regulatory approach. Many ethics rules are vague or ambiguous by design.¹¹⁰ Many questions are best answered by the courts in adjudication, or by others, rather than by rule drafters, and the *Model Rules* acknowledge this.¹¹¹ But leaving this particular question unresolved seems undesirable because, as experience shows, courts and

109. See Wilkins, *Making Context Count*, *supra* note 25, at 1219 (“[A] middle-level approach is unlikely to lead to the disintegration of the profession. There will still be many issues of common concern—for example, preserving honesty and competence in the profession as a whole.”).

110. See, e.g., MODEL RULES R.1.5(a) (forbidding unreasonable legal fees); see also MODEL RULES R. 8.4(d) (forbidding conduct that is “prejudicial to the administration of justice”).

111. See, e.g., MODEL RULES R. 1.2 cmt.2; MODEL RULES R. 4.4 cmt. 2; see Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1,

other bodies have never had the occasion to address and publicly resolve it, and perhaps never will. For example, in the case of the death penalty defense lawyer whom the Supreme Court referred to state disciplinary authorities for allegedly filing an unauthorized cert petition, there may never be a public decision explaining the resolution. If the disciplinary authority decides that there was no disciplinary violation, it need never explain why or enunciate the underlying standard of conduct governing its decision.¹¹²

Another concern with specialized ethics rules and standards might be that they interfere with lawyers' independent professional judgment; some academics might share that concern. But a specialized rule can also do the very opposite: it can carve out an area of professional discretion and protect it. As noted in an earlier article:

Particularly when lawyers lack certainty about how to proceed in a given case, a rule can give lawyers leeway or place them on a razor's edge [O]ne function of 'permissive' rules of professional conduct—that is, rules that say a lawyer 'may' engage in conduct but that implicitly authorize lawyers not to engage in the particular conduct—is to give lawyers wiggle room, a space where they will not be disciplined no matter how they act as long as they act in good faith.¹¹³

In this instance, it seems likely that the preferable rule will be one that establishes the lawyer's broad discretion to act on less than clear authorization to preserve a mentally ill inmate's procedural rights that might otherwise be lost. In other words, the lawyer should have room to decide whether or not to act without running the risk of discipline. A permissive rule could also resolve legal uncertainties aside from those in the ethics rules, insofar as the lawyer might be at risk of violating relevant procedural rules or agency law standards that are unclear about how the lawyer should behave. The courts would have latitude to interpret the other law consistent with whatever authorization is provided in a specialized ethics rule.

Courts' principal objection to specialized ethics rules for death penalty defense lawyers is that developing the rules would require too much effort to benefit too few lawyers and clients. By definition, specialized rules would relate to only a subgroup of lawyers. Death penalty defense lawyers are a subgroup of the

7 n.29 (1998) ("codes of conduct governing lawyers tend to be vague and general, making it difficult to determine what conduct is unacceptable in certain practice settings").

112. In Pennsylvania, unless a formal complaint is filed, disciplinary proceedings are confidential. *See* PA. DISC. BD. RULES & PROCEDURES, § 93 (F) (2015).

113. Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 391–92 (2007) (citing Green & Zacharias, *Permissive Rules*, *supra* note 88, at 300); *see also* Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 224 (1995) ("Allowing lawyers to choose their own rules, in effect to make their own disclosure warranties, would permit lawyers to decide which rules best suit their practice, their clients, and their ethical beliefs.").

subgroup of criminal defense lawyers. These few lawyers may encounter problems of uncertain agency only on rare occasions. Precisely because it is a hard problem, considerable effort would be required to win consensus around a standard. Precisely because the standard may be nuanced, and will have to take account of various relevant facts, it may be hard to codify. It seems infinitely easier for a court to deal with the problem when it is presented, if that day ever comes. To be sure, courts would benefit from having a rule on which to draw when the time comes. But for judges, the benefits will not seem to be worth the effort. However valuable a rule might be for death-row defendants and their lawyers, the interest in judicial economy is often paramount.

This institutional argument seems unpersuasive and perhaps even unworthy. Although overseeing adjudication is the judiciary's principal responsibility, another responsibility is to regulate lawyers, including by adopting professional conduct rules. Historically, state judiciaries have been jealous of this prerogative. But with the power to regulate lawyers comes a responsibility to exercise the power in the most effective manner, not to shirk. Insofar as judiciaries decline to take charge of rule-drafting, one might suggest that it is the judges themselves who have limited the judiciary's rule-making function, acting at the expense of the greater public good to promote their self-interest in reducing their own workload.

CONCLUSION: OTHER WAYS TO MITIGATE THE PROBLEM THAT SPECIALIZED RULES AND CODES WOULD ADDRESS

Regardless of one's conclusion as to the utility of specialized ethics rules and codes, the foregoing discussion points to a regulatory problem: there are areas of professional conduct where lawyers—particularly those working in specialized legal practices—do not have adequate guidance about how to resolve ethics problems. These lawyers face disciplinary and other legal risks because of the vagueness, uncertainty, or incompleteness of the ethics rules. Further, in some of these areas, acting cautiously does not avoid the problem, because lawyers are pushed in different directions, facing risks whichever way they go. Ideally, the problem would be addressed by additional, clearer rules that are tailored to the relevant areas of legal practice, including, in some cases by rules that give lawyers some discretion or permission in light of factual or legal complexities. Such rules would provide some protection from professional sanction as well as from civil liability and reputational risk by establishing a standard of reasonable professional practice that gives lawyers breathing room.

Experience shows, however, that bar associations are unlikely to draft and propose the necessary rules, and courts are unlikely to encourage their creation or adopt them on their own. There is no significant constituency within the bench and bar for specialized ethics rules. But that does not mean that the problem is

insoluble. Judiciaries might consider alternative ways of assisting lawyers with the problem identified here.

First, courts might develop processes to give authoritative guidance to lawyers in specialized areas of practice about how to resolve hard ethics questions. For example, courts might develop a judicial process for providing confidential advisory opinions to lawyers on questions of legal ethics and for publishing the opinions while preserving the anonymity of the inquiring lawyers. Many judiciaries currently employ such processes to provide ethics advice to judges in their jurisdiction regarding compliance with the applicable codes of judicial conduct.¹¹⁴ State judiciaries could offer similar advice to members of their state bars, who, after all, are said to be “officers of the court.”¹¹⁵ The judicial opinions would have an advantage over opinions and guidelines issued by bar associations in that they could be authoritative and, in any event, would receive more deference.¹¹⁶ Alternatively, other state judiciaries could adopt processes, such as those currently employed in Kentucky and New Jersey, for selectively reviewing ethics opinions issued by their state bar associations.¹¹⁷ Through the review process, courts could issue a limited number of advisory judicial opinions on questions of particular importance that have not previously been addressed in judicial opinions, thereby reducing lawyers’ uncertainty.

Courts might also look for ways to reduce the risks lawyers face when they act in good faith in areas of professional uncertainty. For example, courts might explicitly adopt the principle that professional sanctions will not be imposed when lawyers resolve uncertain ethics questions in good faith. Presently, subordinate lawyers avoid sanction if they act “in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”¹¹⁸ Given the number of judicially unresolved disagreements about the meaning and scope of the professional conduct rules, and the vagueness of some of the rules, perhaps all lawyers should be given similar latitude. Many courts and disciplinary authorities exercise discretion not to impose or pursue sanctions against lawyers who, in their view, transgressed uncertain boundaries in good faith.¹¹⁹ But lawyers would be better protected if this were a matter of law, since courts

114. See, e.g., Ariz. Comm’n on Jud’l Conduct, Jud’l Ethics Advisory Op., <http://www.azcourts.gov/azcjc/Judicial-Ethics-Advisory-Opinions> [<https://perma.cc/3V23-DYUR>] (last visited Mar. 14, 2016).

115. See generally James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court”*, 48 BUFF. L. REV. 349 (2000).

116. See *United States v. Smallwood*, 365 F. Supp. 2d 689, 684 n.10 (E.D. Va. 2005) (noting that bar association representatives’ informal advice on ethics questions is not binding and, history suggests, “may miss the mark”) (citing *In re Ryder*, 263 F. Supp. 360, 362–63 (E.D. Va. 1967)).

117. See Ky. Sup. Ct. R. 3.530(12); N.J. Court Rules, R. 1:19-8 (2015).

118. MODEL RULES R. 5.2(b).

119. See *In re Discipline of Haley*, 126 P.3d 1262, 1271–72 (Wash. 2006) (applying new interpretation of rule prospectively); see generally Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1310–11 (1998) (discussing whether disciplinary authorities, like prosecutors, should sometimes exercise discretion not to pursue provable charges).

currently consider themselves free to sanction lawyers, including criminal defense lawyers, who transgress uncertain standards.¹²⁰

Likewise, courts might exercise authority to limit lawyers' risk of civil liability where they exercise good faith judgment on questions of professional conduct in areas of uncertainty. At present, when lawyers are sued for breaching their fiduciary duties based on violations of unclear professional norms, juries typically determine not only the lawyers' relevant conduct but the applicable standard, often based on the competing testimony of expert witnesses or on vague jury instructions.¹²¹ But common-law courts could make the standard of liability more protective by instructing juries that lawyers are not liable unless they acted on an unreasonable understanding of their professional duty.

At the end of the day, lawyers can never be given absolutely clear guidance nor can they be protected from all professional risk when acting in areas of uncertainty. Like clients, lawyers sometimes have to exercise their best judgment and hope that others will later see it as they did. That is the hazard of living in a regulated society, and lawyers, by virtue of their training and experience, should be expected to navigate legal and ethical complexities as well as anyone. But that said, a well-regulated profession should not needlessly leave too many questions of professional ethics unresolved.

120. See, e.g., *Tyler v. State*, 47 P.3d 1095 (Alaska Ct. App. 2001).

121. See Pamela A. Bresnahan & Timothy H. Goodman, *Breach of Fiduciary Duty and Expert Testimony Regarding Attorney Ethics Rules*, 2003 Prof. Law. 53 (2003); Note, *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1564–65 (1994).