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Doe v. Grievance Committee: On the Interpretation of Ethical Rules

Bruce A. Green

*DOE v. GRIEVANCE COMMITTEE**: ON THE INTERPRETATION OF ETHICAL RULES

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> I think a court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend. We should not abdicate our constitutional function of regulating the Bar to that extent. When we agree that the Code applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned.[1]

INTRODUCTION

In *Doe v. Federal Grievance Committee*,[2] a panel of the Second Circuit took the opportunity to interpret a rarely-invoked provision of the Code of Professional Responsibility (Code).[3] The opportunity was provided by an attorney's appeal from a disciplinary decision of a Connecticut district court. The lower court rejected the recommendation of a federal grievance committee, which had upheld the attorney's conduct, and imposed sanctions upon the attorney for violating a disciplinary provision that was designed to promote the integrity of judicial proceedings. The attorney's appeal raised not only the narrow question of what the particular rule meant, but more importantly, the question of how ambiguous disciplinary rules should generally be interpreted by the courts.

The contested provision of the Code in *Doe* was Discipli-

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* 847 F.2d 57 (2d Cir. 1988). Before Van Graafeiland, Winter and Altimari, JJ.; opinion per Altimari, J.

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[1] J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359-60 (2d Cir. 1975) (Gurfein, J., concurring).

[2] 847 F.2d 57 (2d Cir. 1988).

[3] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1970).

nary Rule (DR) 7-102(B)(2), which provides: "A lawyer who receives information clearly establishing that [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."[4] This brief command, seemingly straightforward at first glance, revealed itself, by the end of the appellate process, to be riddled with ambiguity. The *Doe* panel chose to explore only one of at least six areas of uncertainty concerning the scope of DR 7-102(B)(2) — the question whether a lawyer must have "actual knowledge" of a fraud before he has a duty to disclose it to the court. To answer this question, the Second Circuit panel embarked on an interpretive quest in search of "the drafters' intent." The court's path was strewn with a variety of obstacles, chief among them the intentional unwillingness of the Code's drafters to record their deliberations. Notwithstanding the difficulties it encountered, the panel ultimately returned from its examination of the Code, satisfied that it had discovered the intent of the drafters, and, thus, the meaning of the disciplinary rule. The court concluded that "actual knowledge" is indeed required.

The court's opinion raises several problems which I explore in the course of this Article. First, it is uncertain what the panel meant by "actual knowledge." The court may have been referring to the strength of the evidence of fraud that is received by an attorney, to the character of that evidence, or to something else entirely. Second, it is doubtful whether a requirement of knowledge was actually intended by the drafters of DR 7-102(B)(2) to be a prerequisite for disclosure under the disciplinary rule. The court placed undeserved weight on various supposed indicia of intent while ignoring contrary evidence that suggests that the drafters deliberately omitted a knowledge requirement from the rule.

The most important question raised by the *Doe* case is one that the panel did not discuss: What principles of interpretation should govern a court's search for the meaning of ambiguous dis-

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[4] Disciplinary Rule 7-102(B) was a successor to Canon 41 of the 1908 American Bar Association *Canons of Professional Ethics*. Canon 41 provided:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he shall endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

ciplinary rules? The panel assumed that "the drafters' intent" is the appropriate object of an effort to discover the meaning of a disciplinary rule. Therefore, the panel employed the principles of statutory construction by which the intent of Congress is typically ascertained when a federal court is confronted with an ambiguous federal statute. This approach is inappropriate, however, in that it fails to take into account the unique authority of federal courts to enact standards of attorney conduct — an authority which justifies considerable discretion in the interpretation of ambiguous disciplinary provisions that were previously adopted by the federal courts pursuant to their rule-making authority. An examination of the *Doe* court's analytical approach reveals that it is not only an abdication of the court's traditional function of regulating the bar, but also a departure from the more appropriate common-law type of analysis employed by the Second Circuit in earlier decisions.

I. THE DECISION IN *Doe*

A. *The Facts*

At the conclusion of its opinion in *Doe*, the panel recalls the illusory nature of facts. Borrowing from the concurring opinion of Justice Stevens in *Nix v. Whiteside*, the court cautions that while a particular fact may appear "clear and certain" from the retrospective view of a judge, that same fact may have appeared far less certain to a lawyer at the time of the relevant events, just as " 'a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.' "[5] The court's injunction provides a useful point of departure, because in this case, the appellate court's opinion confines the reader to a single version of the facts — that of the court of appeals itself. Neither the grievance committee nor the district court published an opinion. Moreover, the appellate record — which even in the best of circumstances provides a selective and distorted view of what actually took place[6] — is unavailable, having been placed under seal in order to protect the reputation of the lawyer who was ultimately vindicated on appeal. Thus, it is impossible to

[5] 847 F.2d at 63 (quoting Nix v. Whiteside, 475 U.S. 157, 190 (1986) (Stevens, J., concurring in the judgment)).

[6] *See, e.g.*, J. FRANK, COURTS ON TRIAL 23-24, 224 (1950).

test whether the facts recounted by the appellate court were colored by the court's ultimate legal view, and whether those facts might not take on a different hue when set in the context of the full appellate record.

The facts sketched by the court of appeals are as follows. The pseudonymous appellant, John Doe, was the lawyer for the plaintiff in a civil suit assigned to District Judge Zampano of the Federal District of Connecticut. During the course of pretrial discovery, Doe arranged to depose an employee of the defendant. Shortly before the deposition, Doe's client told Doe about a conversation he recently had with the witness in which the witness said that he had been instructed by defendant's counsel to change his story. Doe initially discounted this conversation. He doubted that the defendant's lawyers would tell a witness to lie and assumed that the witness had misinterpreted things that he had been told in preparation for the deposition. Doe went ahead with the deposition without referring to the issue.[7]

A few months after the deposition, Doe had another conversation with his client about the same witness's testimony. The plaintiff told Doe that in the course of a more recent conversation with the defendant's employee, the employee claimed that he had purposefully lied at the deposition in accordance with the lawyers' instructions. No longer skeptical, Doe now believed that, in fact, the witness had lied. Doe's belief was based on other information that he had learned in the course of the representation. For example, the employee had denied being present at meetings which, according to other witnesses, he had in fact attended.[8]

At that point, Doe did not disclose to the district court that he had information indicating that the defendant's employee had lied in the deposition. Doe did not consider himself to be ethically obligated to reveal that information, since it consisted of statements made to him in confidence by his client. Doe planned, however, to make use of the information to impeach the witness in the event that he was called by the defendant to testify at trial.[9]

About one year after the deposition took place, the sub-

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[7] 847 F.2d at 58-59.
[8] *Id.* at 58-60.
[9] *Id.* at 59.

stance of Doe's two conversations with his client was brought to the district judge's attention — the opinion does not say how. In December 1984, Judge Zampano held a closed hearing for the purpose of determining whether various acts of misconduct had occurred during discovery, including whether the defendant's employee had intentionally lied during a deposition. After hearing Doe, Doe's client, and the witness, Judge Zampano decided not to resolve the issue, finding that the witness's credibility should be assessed by a jury at trial, and not by a judge at a special pretrial hearing.[10]

Judge Zampano was concerned, however, that Doe may have violated DR 7-102(B)(2) by failing to immediately bring the possible perjury to the court's attention. That rule, which has since been superseded, applied at the time to all members of the Connecticut bar because it had been adopted, along with the rest of the American Bar Association Code of Professional Responsibility, by the Connecticut Superior Court.[11] Whether or not Doe was himself a member of the Connecticut bar — and, again, the opinion does not say — the disciplinary rule applied to Doe by virtue of a local rule adopted by the judges of the district court that provided: "This court recognizes the authority of the 'Code of Professional Responsibility of the American Bar Association,' as approved by the judges of the Connecticut Superior Court, as expressing the standards of professional conduct expected of lawyers."[12] The district judge referred the matter to a grievance committee of the district court for its determination whether

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[10] *Id.* at 58-59.

[11] The Code was adopted by the judges of the Connecticut Superior Court with an effective date of October 1, 1972. *See* W. MOLLER & W. HORTON, CONNECTICUT PRACTICE 1 (1979). In 1983, the American Bar Association adopted the Model Rules of Professional Conduct in place of the Model Code of Professional Responsibility. On June 23, 1986, the judges of the Connecticut Superior Court approved the Rules of Professional Conduct, which went into effect on October 1, 1986. Unlike the Code, the Rules of Professional Conduct do not require the disclosure of frauds perpetrated on the court by third parties. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2) (1983). Disciplinary Rule 7-102(B)(2) continues to apply, however, in the minority of states, including New York, which have not adopted the Model Rules.

[12] D. CONN. R. CIV. P. 2(f). This rule was later renumbered and made Local Rule 3(a). After the judges of the Connecticut Superior Court adopted the ABA Model Rules, *see* note 11 *supra*, Local Rule 3(a) was amended to provide that lawyers practicing before that court would be bound by the Rules of Professional Conduct adopted by the judges of the Connecticut Superior Court.

Doe had violated DR 7-102(B)(2).[13]

B. *The Grievance Committee Hearing and Decision*

In January 1986, the grievance committee held a hearing at which Doe testified.[14] He described the conversations with his client, his reasons for believing that the witness had lied, and his reasons for believing that he was not obliged to make any disclosure to the trial judge. In addition, an ethics professor from New York University, testifying on Doe's behalf, gave his opinion about the meaning of DR 7-102(B)(2) and how it should be applied in Doe's case.[15]

The unnamed professor provided two opinions of law. First, he testified about the relationship between a lawyer's duty to disclose a fraud on the court and the lawyer's potentially contrary duty under DR 4-101 to preserve the confidences and secrets of his client.[16] Unlike DR 7-102(B)(1), which requires an attorney to make disclosure when he has information clearly establishing that his *client* has committed a fraud,[17] DR 7-

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[13] 847 F.2d at 59. The appellate court's opinion discloses that other allegations of misconduct were leveled against Doe during the course of the district court proceedings. Doe and his client were suspected of improperly receiving confidential documents from someone in the defendant's organization. The defendant even went so far as to depose Doe about the matter. Before referring Doe to the grievance committee, Judge Zampano sought to determine both whether Doe had improperly used confidential documents and whether Doe had testified falsely in the deposition. The Second Circuit noted that these allegations were not the subject of the appeal but did not indicate whether they had also been referred to the grievance committee. *Id.* at 58 n.2.

[14] The composition and procedure of the grievance committee is presently governed by Local Rule 3(b) of the Rules of the United States District Court of the District of Connecticut, the successor provision to Rule 2(d) of the court's local rules. The grievance committee is comprised of members of the bar who serve by appointment of the district judges. Counsel for the committee also serves by appointment, and both the committee and counsel have power of subpoena.

[15] *Id.* at 59-60. Although the professor is not named in the court's opinion, it is generally assumed that the court was referring to Professor Stephen Gillers, who has coauthored a case book and written numerous articles on professional responsibility, and who is regarded as one of a handful of leading scholars in the area of legal ethics.

[16] Disciplinary Rule 4-101 provides that, subject to various exceptions, a lawyer shall not knowingly reveal a "confidence" or "secret" of his client. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980). The rule defines confidences to include information protected by the applicable attorney-client privilege and secrets to include most other information gained in the professional relationship.

[17] Disciplinary Rule 7-102(B)(1) provides:

> A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or

102(B)(2), which requires disclosure of the fraudulent conduct of third parties, does not have an express exception to the duty of disclosure "when the information is protected as a privileged communication." The professor gave his opinion that an attorney's duty to disclose a fraud on a tribunal under DR 7-102(B)(2) is nevertheless overridden by the duty to preserve his client's confidences and secrets under DR 4-101.[18]

The professor also testified about the type of information needed to trigger a lawyer's duty of disclosure under DR 7-102(B)(2). By its terms, the rule requires disclosure when a lawyer has "information clearly establishing" a fraud on the tribunal. The ethics professor opined, however, that the rule requires disclosure only when an attorney has "actual knowledge of the alleged fraud." The failure of the drafters of the Code to include the term "knowledge" in the rule was, in the professor's view, merely the product of poor draftsmanship. The panel's opinion does not disclose whether the professor explained why he believed this to be the case and, if so, what the explanation was.[19]

Finally, the professor presented his view that, based on the record before the grievance committee, Doe had not had actual knowledge of the witness's perjury. Therefore, Doe had been under no obligation to apprise the district judge of the potential perjury and subornation of perjury.[20]

On July 12, 1986, having received this evidence, the grievance committee issued a unanimous decision exonerating Doe and recommending that the complaint against him be dismissed. Its decision accepted both interpretations of DR 7-102(B)(2) that had been advanced by Doe's expert witness. First, the committee found that, because Doe's knowledge of the alleged perjury and subornation of perjury was based on client confidences that were protected from disclosure, Doe had no ethical duty to alert the trial court to the possible fraud. Second, the committee

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> tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980). The last phrase, which creates an exception for privileged information, was added to the rule by amendment in 1974. *See* note 68 *infra*.

[18] 847 F.2d at 60.

[19] *Id.* at 60, 62.

[20] *Id.* at 60.

found that even if his conversations with his client were not privileged, Doe did not have an obligation to make disclosure "because he did not have *knowledge clearly establishing*" an alleged fraud — he "*merely suspected* from his own assessment of the facts" that the defendant's witnesses had been untruthful during their depositions.[21]

C. *The District Court's Decision*

The grievance committee's recommendation came before Chief Judge Daly. After reviewing the transcripts of the proceedings before Judge Zampano and the grievance committee, Chief Judge Daly rejected both the committee's interpretation of DR 7-102(B)(2) and its conclusion that the rule did not apply to Doe.[22]

The district judge construed the term "information clearly establishing" to mean "clear and convincing evidence."[23] Thus, he equated the amount of evidence needed to trigger a lawyer's duty to disclose evidence of fraud with the standard of proof applied in civil cases in which a fraud is alleged.[24] He found that Doe's conversations with his client did not in themselves amount to clear and convincing evidence of a fraud on the tribunal, but he considered those conversations, coupled with Doe's subjective belief that the defendant's employee had lied in a deposition, sufficient to require disclosure under DR 7-102(B)(2).[25] Conclud-

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[21] *Id.* (emphasis in original).

[22] *Id.* at 60-61.

[23] *Id.* at 61.

[24] *See, e.g.*, Holley Coal Co. v. Globe Indem. Co., 186 F.2d 291, 296 (4th Cir. 1950); Buzard v. Griffin, 89 Ariz. 42, 50, 358 P.2d 155, 159-60 (1961); Frazier v. Loftin, 200 Ark. 4, 7-8, 137 S.W.2d 750, 752 (1940).

[25] The chief judge apparently did not give any deference to the assessments made by both the grievance committee and by Doe himself. Ordinarily, the grievance committee's determination that Doe lacked "information clearly establishing" a fraud would have been entitled to deference because, having heard the witnesses at the grievance proceedings, the committee was best situated to make the relevant credibility findings. *See, e.g.*, Bach v. State Bar, 43 Cal. 3d 848, 855, 740 P.2d 414, 418-19, 239 Cal. Rptr. 302, 307 (1987) ("In testimonial matters, great weight is given the findings of the hearing body that saw and heard the witnesses and the petitioner."); *In re* Yamaguchi, 118 Ill. 2d 417, 424, 515 N.E.2d 1235, 1238 (1987) ("[T]he findings of the hearing panel, the body best positioned to evaluate the credibility of the witnesses, are entitled to great weight."). Similarly, Doe's own conclusion that he lacked sufficient evidence of a fraud would ordinarily have been entitled to substantial deference. *See, e.g.*, State v. Skjonsby, 417 N.W.2d 818, 828 (N.D. 1987) ("Judicial scrutiny of counsel's performance must be

ing that Doe's failure to make disclosure was a violation of the disciplinary rule, Chief Judge Daly ordered that Doe be suspended from practice before any court in the District of Connecticut for six months.[26] Doe brought an appeal from that order to the Second Circuit.

D. *The Second Circuit Decision*

In his opinion for a three-judge panel which included fellow Circuit Judges Van Graafeiland and Winter, Judge Altimari began his legal discussion by determining the standard governing the appellate court's review of the district court's opinion.[27] The court acknowledged that, as a general matter, a district judge's "decision disciplining an attorney for ethical misconduct ordinarily will not be set aside on appeal absent an abuse of discretion."[28] But the court recognized an exception to this deferential standard of review when the resolution of an attorney's appeal "turns upon an interpretation of a particular ABA disciplinary rule."[29] Since the reach of an ethical rule, in the panel's view, is a question of law as to which the district court has no discretion, the standard of review is "de novo."[30]

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highly deferential. It is all too tempting for a defendant to second-guess counsel . . . to conclude that a particular act or omission of counsel was unreasonable." (citing Engle v. Isaac, 456 U.S. 107, 133-34 (1982)). However, in this case the district court would not have owed any deference to the factual assessments made either by the disciplinary committee or by Doe, assuming that the district court's interpretation of DR 7-102(B)(2) was correct, because neither the grievance committee nor Doe would have been assessing the facts under a correct interpretation of the rule. The grievance committee believed that "knowledge" was required before an attorney could have "information clearly establishing" a fraud. Unlike the chief judge, Doe excluded the client's confidences in making his assessment.

[26] 847 F.2d at 60.

[27] *Id.* Although the district court's grievance committee had taken disciplinary action in previous instances, *see In re* Weissman, 203 Conn. 380, 380-81, 524 A.2d 1141, 1141 (1987), the Second Circuit had not previously had occasion to discuss the standard of review of a disciplinary decision arising out of a district court grievance proceeding.

[28] 847 F.2d at 61.

[29] *Id. Compare, e.g.*, Armstrong v. McAlpin, 606 F.2d 28, 34 n.7 (2d Cir. 1979) ("Some disqualification issues present legal questions that leave 'little leeway for the exercise of discretion' " (quoting American Roller Co. v. Budinger, 513 F.2d 982, 985 n.3 (3d Cir. 1975))), *vacated*, 625 F.2d 433 (2d Cir. 1980) (en banc).

[30] *Id.* I assume that what the *Doe* panel meant when it decided to "review this matter de novo," *id.*, was that it was giving no deference at all to the district judge's interpretation of the disciplinary rule. *See, e.g.*, Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D.L. REV. 468, 475-76 (1989). And, indeed, in the course of its discussion, the panel clearly did not give any weight to Chief Judge Daly's interpretation

The court then undertook a de novo inquiry into the meaning of DR 7-102(B)(2). The court did not address the first basis of the grievance committee's determination, namely, that the rule does not extend to information received by an attorney in confidence from his client. Instead, the court focused exclusively on what it characterized as Doe's "main argument": that the district court had misinterpreted the term "information clearly establishing." According to Doe, the disciplinary rule required disclosure only when a lawyer had "actual knowledge," and not simply "clear and convincing evidence," of a fraud.[31]

The court began by reflecting on the difficulty of its "inquiry into the term's meaning."[32] No court or professional ethics committee decision had "definitively interpreted" the term "information clearly establishing."[33] The term did not appear anywhere else in the Code other than in DR 7-102(B). Moreover, the term did not appear at all in either the Code's predecessor, the 1908 *Canons of Professional Ethics*, or the Code's successor, the 1983 *Model Rules of Professional Conduct*, which has now been adopted by more than half of the states. Thus, no guidance was provided by these sources.[34]

Accordingly, the court embarked on an independent effort to discover the meaning of DR 7-102(B)(2). The court equated the meaning of the disciplinary rule with "the drafters' intent."[35] Thus, the court approached the problem of interpreting the disciplinary rule in much the same way as it had typically approached the interpretation of ambiguous statutory provisions in the past. In this case, of course, the "drafters" were not duly elected legislators. They were members of the American Bar Association (ABA), a self-regulating professional organization which claims as members several hundred thousand of this nation's lawyers. Indeed, the drafters were not even the elected leadership of the bar association. They were a select number of

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of the rule.

[31] 847 F.2d at 60-61.

[32] *Id.* at 61.

[33] *Id.* at 62. The panel's suggestion that a professional ethics committee decision might be "definitive" is somewhat surprising. *Compare, e.g.*, Bilzerian v. Cluett, Peabody & Co., 863 F.2d 251, 255 (2d Cir. 1988) (Bar association "ethics opinions are merely advisory and not binding on this court . . . .").

[34] 847 F.2d at 61-62.

[35] *Id.* at 62; *see also id.* at 63.

distinguished members of the bar who had been appointed to the ABA Special Committee on Evaluation of Ethical Standards.[36]

The court noted a number of considerations which obscured the intent of the ABA drafters. Most significantly, the court observed that "no comprehensive legislative history of the Code exists."[37] Unlike federal legislators, whose reports, debates, hearings, and statements may provide a clue to their "intent," the ABA drafters did not record their deliberations.[38] In addition, the court noted that DR 7-102(B)(2) was not included in the earliest drafts of the Code and, therefore, was never made the subject of public scrutiny and discussion.[39]

In the absence of "legislative history," the court sought enlightenment in four other places. First, the court examined the Code itself. According to the court, "in most Code provisions that obligate an attorney to take affirmative measures to preserve the integrity of the judicial system, knowledge is required before the disclosure duty arises," and therefore it "seems reasonable that the Code's drafters would have intended a knowledge standard be included in DR 7-102(B)(2)."[40]

Second, the court found some "benefit" in the ethics professor's testimony before the grievance committee. Without disclosing the basis for the expert witness's conclusion that the omission of a knowledge requirement was simply an oversight, the court opined that, like the grievance committee, it "was satisfied with the professor's analysis."[41]

Third, the court found some guidance in the law of other jurisdictions. Specifically, the court pointed to the ethical code of Virginia, which, like the ABA Code, requires an attorney to disclose "information clearly establishing" that his client has perpetrated a fraud on a tribunal, but which, unlike the Code, elaborates on this requirement by providing that "[i]nformation is clearly established when the client acknowledges to the attor-

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[36] *See* note 14 *supra*.

[37] 847 F.2d at 62 n.3.

[38] *Id.* (citing AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY xi (1979)).

[39] 847 F.2d at 62 n.3.

[40] *Id.* at 62.

[41] *Id.*

ney that he has perpetrated a fraud upon a tribunal."[42] Based on this provision, the panel concluded, "Virginia has adopted an actual knowledge requirement for determining when an attorney has received sufficient information to 'clearly establish' that his client has committed a fraud."[43] Consistent with this approach, in the court's view, were decisions from other jurisdictions which permit an attorney to disclose his client's perjury "only if the attorney has information establishing a 'firm factual basis' that the client will commit perjury."[44]

Fourth, the court cited its "experience," which indicated that "if any standard less than actual knowledge was adopted," the judicial system would be thrown into a "morass."[45] According to the panel, attorneys would inundate courts with reports that witnesses had committed perjury and the courts themselves would become overburdened by collateral inquiries into the truthfulness of the witnesses.[46]

The court characterized the decision before it as a choice between two alternatives. Either DR 7-102(B)(2) requires "that the attorney have actual knowledge of a fraud before he is bound to disclose it" or the rule "require[s] attorneys to disclose mere suspicions of fraud which are based upon incomplete information or information which may fall short of clearly establishing the existence of a fraud."[47] The court opted for the first alternative. In the panel's view, "[T]he only reasonable conclusion is that the drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal."[48]

Applying its interpretation of DR 7-102(B)(2), the panel found that Doe had not been obliged to alert the court to the possible perjury committed by plaintiff's employee in a deposition. The court explained:

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[42] *Id.* (quoting REVISED VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(1) (1983)).

[43] *Id.*

[44] *Id.* at 62-63 (citing Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984), *rev'd on other grounds*, 475 U.S. 157 (1986), and United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977)).

[45] *Id.* at 63.

[46] *Id.*

[47] *Id.*

[48] *Id.*

> Neither the information Doe received from [his] conversations [with his client], nor his independent information concerning the facts of the case, provided him with knowledge that a fraud on the court had taken place. Although Doe's subjective beliefs may have caused him to suspect strongly that [the] witness lied, they did not amount to actual knowledge that [the] witness committed a fraud on the court.[49]

The court concluded by observing that Doe's "fail[ure] to report his suspicion that an adverse witness lied," and his decision to use his information for purposes of impeachment in the event that the witness testified at trial, was "consistent with the traditional role of a trial lawyer."[50]

E. *Judge Van Graafeiland's Concurring Opinion*

While "concur[ring] fully" in Judge Altimari's opinion for the court, Judge Van Graafeiland filed a separate three-paragraph opinion in order to "put the case even more strongly."[51] He emphasized that Doe's conviction that the opposing witness had testified falsely would not be enough to give rise to a duty of disclosure:

> The drafters of [DR 7-102(B)(2)] must have realized that it is one thing to be convinced of something; it is another thing to prove it. I can think of no better way for a lawyer to damage his client's case than by making a pretrial accusation of perjury that he is unable to prove.[52]

In addition, Judge Van Graafeiland advanced an alternative ground for the court's determination that Doe had not violated DR 7-102(B)(2). He asserted that "[u]ntruthful testimony by a witness, which has not been suborned by his lawyer, does not standing alone, constitute fraud upon the court," particularly when, as in Doe's case, the testimony was "given during a pretrial deposition" that had not been "placed in evidence" at a trial.[53]

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 64.

[52] *Id.*

[53] *Id.*

II. Two Preliminary Questions

A. *Why Did the Court Interpret the Disciplinary Rule?*

Given the acknowledged difficulty of discerning the meaning of the disciplinary rule, one may wonder at the outset why the court embarked on this pursuit in the first place. The court had an obvious alternative. It could have said that, even accepting the district court's interpretation of the rule, there was no disciplinary violation in this case, because Doe did not have clear and convincing evidence of a fraud.

The court clearly disagreed with Chief Judge Daly's assessment of the facts. The panel did not believe that Doe had clear and convincing evidence that the opposing witness had lied. This is reflected in the court's characterization of Doe's belief as a "subjective" one and its references to Doe's mere "suspicion" of perjury. But if the court thought that Doe lacked objective information that clearly and convincingly established a fraud, why didn't it just say so?

The answer may be that, in order to overturn the district judge's factual determination, the court thought that it would have had to decide another question of law that is just as thorny as the question whether DR 7-102(B)(2) requires "actual knowledge." The question relates to the judicial standard of review in cases arising out of a federal disciplinary committee: By what standard does the court of appeals review factual determinations made by a district judge on the basis of the cold record of a grievance committee hearing?

Ordinarily, a federal appellate court defers to a district judge's factual findings unless those findings are "clearly erroneous."[54] The reason for this deferential standard of review is that a district judge is ordinarily in a better position to determine the

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[54] *See, e.g.*, United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945) (L. Hand, J.); Fed. R. Civ. P. 52(a); Fed. R. Crim. P. 23(c); *see generally* 9 C. Wright & A. Miller, Federal Practice and Procedure §§ 2585-87 (1971).

The "clearly erroneous" standard typically applies to "basic, primary, or historical facts" as distinguished from legal conclusions, which require the application of law to fact. *Cf.* Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963). In addition, appellate courts generally give some deference to the trial court's legal conclusions, insofar as they are premised on the application of a proper legal standard. *See, e.g.*, United States v. Vasquez, 634 F.2d 41, 45 (2d Cir. 1980) (A district court's finding of probable cause is entitled to "great deference" on appeal.).

facts. A district judge has the opportunity to observe witnesses and to assess their credibility, whereas the appellate court's view of what took place is based solely upon a written transcript — a cold record — which cannot fully communicate the flavor of what occurred in the proceedings below.[55]

It is questionable whether this deferential standard is appropriate in a case such as *Doe*, in which the district court and the appellate court are in precisely the same position. In this case, the original trier of fact was the grievance committee. Both the district court and the court of appeals were confined to the printed record of what took place before the committee. The district court was in no better position to make findings of fact than the appellate court, and there was therefore no reason in theory why the appellate court should have accepted the district court's factual determinations. On the other hand, there were strong institutional reasons why the appellate court would be reluctant to abandon the traditional standard. The "clearly erroneous" standard discourages appellants from challenging factual determinations and spares appellate courts from the difficult and time-consuming task of scrutinizing appellate records in detail.[56] The question whether to apply the clearly erroneous standard or a less deferential standard is, therefore, not an easy one.[57] But if the court had applied a less deferential standard, it

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[55] *See* note 25 *supra*.

[56] *See, e.g.*, Lundgren v. Freeman, 307 F.2d 104, 113-14 (9th Cir. 1962); Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950).

[57] Prior to 1985, it was unclear whether an appellate court was governed by the "clearly erroneous" standard in cases in which the district judge's findings were based entirely on undisputed facts or on documentary evidence. *See* C. WRIGHT & A. MILLER, *supra* note 54, § 2587. The long-standing view in the Second Circuit was that the appellate court was not bound by such factual findings and that review was de novo. *See, e.g.*, Taylor v. Lombard, 606 F.2d 371 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States ex rel. Lasky v. LaVallee, 472 F.2d 960 (2d Cir. 1973); Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 589 (2d Cir. 1965); Bertel v. Panama Transp. Co., 202 F.2d 247, 249 (2d Cir. 1953); Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950); Stokes v. United States, 144 F.2d 82, 85 (2d Cir. 1944). This was contrary to the view of commentators, see C. WRIGHT & A. MILLER, *supra* note 54, § 2587, as well as to pronouncements in Supreme Court decisions. *See, e.g.*, United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963); United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948).

It is now settled that in civil cases governed by the Federal Rules of Civil Procedure, the "clearly erroneous" standard applies even when the trial judge made no credibility determinations, but only made findings of fact based on inferences from documentary evidence. *See* FED. R. CIV. P. 52(a) (as amended effective Aug. 1, 1985); *see generally* C.

could presumably have concluded that the information received by Doe was insufficient to give rise to a duty to disclose under the disciplinary rule.

Although the appellate court did examine "the appropriate standard governing our review of the district court's decision,"[58] it did not specifically address the standard governing factual determinations by the district court. The court referred to two different standards. First, the court stated that "de novo" or "plenary" review would be applied to the district judge's interpretation of a disciplinary rule.[59] Second, the court stated that in other, ordinary cases involving attorney discipline, the appellate court would apply an "abuse of discretion" standard.[60]

The court's reference to the "abuse of discretion" standard is somewhat mystifying in light of the court's view that the interpretation of disciplinary rules is a matter of law as to which there is no room for discretion. The "abuse of discretion" standard customarily applies to an appellate court's review of trial court decisions which rest within the sound discretion of the trial judge.[61] For example, a trial judge has broad discretion to determine the admissibility of evidence. Evidentiary determinations are therefore overturned only when the trial judge's decision is so patently erroneous that it amounts to an abuse of discretion.[62] The standard adopted by the court would likewise be

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WRIGHT & A. MILLER, *supra* note 54, § 2587 (Supp. 1988); Note, *Review of Findings Based on Documentary Evidence: Is the Proposed Amendment to Rule 52(a) the Best Solution*, 30 VILL. L. REV. 227 (1985). However, since the Federal Rules of Civil Procedure do not apply to federal grievance proceedings, the Second Circuit would be free to reject the "clearly erroneous" standard and retain its de novo standard for reviewing trial court findings based on a documentary record.

[58] 847 F.2d at 61.

[59] *Id.*

[60] *Id.*

[61] As the late Judge Friendly observed, the "abuse of discretion" standard is a vague one, susceptible to varying definitions "ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes." Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982); *see also* Matlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1975); United States v. Criden, 648 F.2d 814, 817-18 (3d Cir. 1981).

[62] *See, e.g.*, United States v. Heinemann, 801 F.2d 86, 93 (2d Cir. 1986); United States v. Birney, 686 F.2d 102, 106 (2d Cir. 1982); United States v. Dazzo, 672 F.2d 284, 288 (2d Cir.), *cert. denied*, 459 U.S. 836 (1982); United States v. Albergo, 539 F.2d 860, 863 (2d Cir.), *cert. denied*, 429 U.S. 1000 (1976); *see generally* Davis, *supra* note 30, at 480-81.

relevant in reviewing the sanction imposed by the district judge after determining that an attorney committed a disciplinary violation. The district court obviously has broad discretion in selecting an appropriate sanction, just as it has broad discretion to choose an appropriate sentence in criminal cases, and it is, therefore, appropriate for an appellate court to uphold the district court's sanction except in extreme cases.

It is uncertain that the "abuse of discretion" standard would have any relevance upon review of a district judge's determination that a disciplinary violation had been committed. The three cases cited by the *Doe* panel when it referred to this standard were all cases in which the Second Circuit reviewed a district judge's ruling on a motion to disqualify an attorney. The Second Circuit has recognized in these cases that in ruling on a claim that an attorney ought to be disqualified because of a conflict of interest proscribed by the Code, the trial judge must balance a variety of factors in the exercise of sound discretion.[63] In the disciplinary context, the *Doe* panel did not envision an exercise of discretion by the district judge. As conceived by the panel, the trial judge's decision rests on two determinations: first, an interpretation of the relevant ethical rules, and second, a determination of the relevant facts. Neither the interpretation of law nor the finding of fact calls for an exercise of discretion by the district court.

In sum, the court's preliminary discussion of the standard of review of disciplinary determinations made by the district court leaves one uncertainty and generates another. First, it remains uncertain how the court of appeals will regard factual determinations made by the district court on the basis of the record of grievance proceedings. The *Doe* panel did not expressly address this question. Second, it becomes uncertain what, if any, legal determinations made by the district court will be accorded def-

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[63] In determining that a "decision disciplining an attorney for ethical misconduct ordinarily will not be set aside absent an abuse of discretion," 847 F.2d at 61, the *Doe* panel relied on three Second Circuit decisions, *In re* Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977); Allegaert v. Perot, 565 F.2d 246, 248 (2d Cir. 1977); and Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975), each of which had involved the review of a trial court's ruling on a motion to disqualify opposing counsel. Those decisions relied on two additional cases, NCK Organization Ltd. v. Bregman, 542 F.2d 128, 131 (2d Cir. 1976), and Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), which also involved the review of decisions of disqualification motions.

erence in future cases arising out of disciplinary proceedings.[64]

B. *Why Did The Court Decide Whether DR 7-102(B)(2) Requires "Actual Knowledge"?*

One might also wonder, as a preliminary matter, why the court chose to decide the particular question whether "actual knowledge" is needed before a lawyer is compelled to make disclosure under DR 7-102(B)(2). The court could have disposed of this case by resolving various other questions concerning the reach of the rule. While the court implied that its choice was dictated by the appellant's decision to focus on "the 'information clearly establishing' element of the rule,"[65] another possible explanation should be considered — that the other questions of interpretation were no less difficult than the one ultimately confronted by the court.

One alternative question was raised and resolved by the grievance committee: Does a lawyer have a duty under the disciplinary rule to disclose information which is received in confidence from a client and which would therefore ordinarily be privileged from disclosure both under the rules of evidence and under the Code of Professional Responsibility?[66] The answer to this question is not obvious.[67] As noted earlier, DR 7-102(B)(2) does not expressly except privileged communications from disclosure, as does the counterpart provision governing the disclosure of frauds committed by one's client.[68] Moreover, the interest

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[64] There is a similar unclarity in the federal courts of appeals concerning the standard by which an appellate court should review a district court order awarding sanctions against an attorney pursuant to Federal Rule of Civil Procedure 11. *Compare, e.g.*, Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988) (en banc) *and* Adams v. Pan Am. World Airways, Inc., 828 F.2d 24 (D.C. Cir. 1987) (all aspects of an order imposing sanctions are reviewed under the "abuse of discretion" standard), *with* Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987) and Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986) (adopting a tripartite standard under which factual determinations are upheld unless "clearly erroneous," legal conclusions are reviewed de novo, and the appropriateness of the particular sanction is reviewed under the "abuse of discretion" standard). *See generally* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 225-27 (1988).

[65] 847 F.2d at 60-61.

[66] *See id.* at 60.

[67] *See* Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 864 n.214 (1977).

[68] The ABA added this exception to DR 7-102(B)(1) by amendment in February 1974 for the purpose of correcting what some members of the ABA Special Committee later acknowledged to have been an "oversight." *See* AMERICAN BAR FOUNDATION, ANNO-

in favor of preserving the client's confidence is less compelling under DR 7-102(B)(2); the impact on the relationship of trust between an attorney and client is likely to be much greater when disclosure of a client's confidence will reveal a fraud by the client, rather than by a third party.[69]

A second question was raised by Judge Van Graafeiland's concurring opinion: Is a single witness's perjury, standing alone, a "fraud" within the meaning of the disciplinary rule? Judge Van Graafeiland said no. He relied exclusively on decisions interpreting Federal Rule of Civil Procedure (Rule) 60(b), which

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TATED CODE OF PROFESSIONAL RESPONSIBILITY 306-07 (1979); *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). The amendment did not entirely succeed in restoring clarity to the disciplinary rule, because the amendment raised questions about the nature of the information that came within the privilege. Among other things, it was uncertain whether the rule excepted all confidential information that came within DR 4-101 or only that information that was privileged under prevailing rules of evidence. *See, e.g.*, Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80's and Beyond*, 67 A.B.A. J. 1116, 1119 (Sept. 1981); *see also* Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 615-23 (1979). In addition, not all states subsequently adopted the amendment. Courts in a number of states have held that counsel must make disclosure under DR 7-102(B)(1) even when the information derives from client confidences. *See, e.g., In re* Price, 429 N.E.2d 961 (Ind. 1982); *In re* Drexler, 290 Minn. 542, 546 n.7, 188 N.W.2d 436, 438 n.7 (1971); Bar Ass'n of Cleveland v. Cassaro, 61 Ohio St. 2d 62, 399 N.E.2d 545 (1980); *see also* Meyerhoffer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974); Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1980); *In re* Nadler, 91 Ill. 2d 326, 438 N.E.2d 198 (1982); Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976); State v. Hoover, 223 Kan. 385, 574 P.2d 1377 (1978).

It is unclear what significance to ascribe to the absence of a similar exception from DR 7-102(B)(2). The failure to amend DR 7-102(B)(2) at the time when its counterpart was amended might be viewed as the second in a succession of oversights, this one occasioned by the fact that subsection (B)(2) was rarely the subject of attention. On the other hand, since it is unlikely that the distinguished attorneys who were responsible for the rule would have nodded twice, it might be assumed that the omission was deliberate. *See, e.g.*, C. WOLFRAM, MODERN LEGAL ETHICS 658 (1986) ("[N]o similar amendment was made to DR 7-102(B)(2) . . . . Apparently, therefore, despite the 1974 amendment, disclosure continues to be required in all states that have adopted DR 7-102(B)(2) for perjury by nonclient friendly witnesses.").

[69] It would have made sense for the court to address this issue, since it was the basis on which Doe initially decided not to make disclosure and the first of two grounds on which the grievance committee upheld Doe's conduct. However, the court may have believed that recognizing an exception for privileged information would not have been dispositive in *Doe*. Although the information received from Doe's client was privileged, Doe largely discounted that information, and relied primarily upon the disparity between the witness's testimony and other evidence. The contrary testimony of other witnesses would not have fallen within the attorney-client privilege and may have been enough in itself to constitute "information clearly establishing" a fraud.

allows the court to set aside a civil judgment that was the product of a "fraud on a court."[70] Those decisions hold that a single instance of perjury in and of itself is not a "fraud on the court" that justifies setting aside a civil judgment.[71] But the word "fraud" has no fixed meaning.[72] The word "fraud" should not necessarily be interpreted as narrowly for purposes of the Code as it is for purposes of Rule 60(b).[73] The important public interest in the finality of civil judgments weighs in favor of a strict construction of the term as used in the procedural rule. This interest is essentially irrelevant to the disclosure obligation estab-

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[70] 847 F.2d at 64 (Van Graafeiland, J., concurring) (citing Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.), *cert. denied*, 409 U.S. 883, *reh'g denied*, 409 U.S. 1029 (1972); Bulloch v. United States, 721 F.2d 713, 718-19 (10th Cir. 1983); and Great Coastal Express, Inc. v. International Bhd. of Teamsters, 675 F.2d 1349 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983)). The Second Circuit's most recent decision concerning the meaning of "fraud upon the court" for purposes of Rule 60(b) is Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988) (Altimari, J.). In that case, which was decided after *Doe*, the court held that perjury and nondisclosure do not constitute fraud on the court, but only fraud on a single litigant, and that, by contrast, Rule 60(b) reaches only "the type of fraud which 'subvert[s] the integrity of the court itself, or is . . . perpetrated by officers of the court.' " *Id.* at 560 (quoting 7 J. MOORE, FEDERAL PRACTICE ¶ 60.33, at 360 (2d ed. 1987)).

[71] A distinction between individual acts of perjury and concerted efforts to present false testimony is a reasonable one in some contexts. As the Washington Supreme Court observed in *In re* Stroh, 97 Wash. 2d 289, 644 P.2d 1161 (1982):

> Although an occasional witness may perjure him/herself, the presentation of the opponent's other witnesses and effective cross-examination frequently reveals the falsehood before a fraud has been perpetrated upon the court. A witness, tampered by an attorney, however, becomes much more destructive to the search for truth. That witness, privy to the testimony of other witnesses, can avoid the pitfalls of contradiction and refutation by judicious fabrication. Vigorous cross-examination may become ineffective as the coached witness would know both the questions and the proper answers. In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness.

Id. at 295, 644 P.2d at 1164-65.

[72] *See* W. PROSSER, TORTS § 105, at 684 (4th ed. 1971).

[73] *See, e.g.*, Attorney Grievance Comm'n v. Sperling, 296 Md. 558, 564, 463 A.2d 868, 870-71 (1983) (as used in DR 7-102(B), the term "fraud" has a broader meaning than the definition of "fraud" in tort actions for damages sounding in deceit); Brazil, *supra* note 68, at 602-03 n.1; Callan & Davis, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 359 (1976); *see also* Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U. L. REV. 437, 461-62 (1974); Myers, *The Attorney-Client Relationship and the Code of Professional Responsibility: Suggested Attorney Liability for Breach of Duty to Disclose Fraud to the Securities and Exchange Commission*, 44 FORDHAM L. REV. 1113, 1135-36 (1976).

lished by DR 7-102(B)(2).[74] It is questionable whether comparable interests justify a similarly narrow view of those acts of deceit which can be characterized as a "fraud" for purposes of the disciplinary rule.[75] Thus, courts and professional ethics committees have generally thought that the counterpart to this rule which requires the disclosure of a "fraud" by one's client extends to the commission of perjury.[76]

A third question was also raised by the concurring opinion: When the fraudulent conduct occurs in a civil deposition, has there been a fraud "on a tribunal" within the contemplation of the disciplinary rule? Judge Van Graafeiland thought not, but again the answer does not seem so easy. Judge Van Graafeiland's view was that the tribunal would not be defrauded unless and until the witness's false deposition testimony was introduced at trial.[77] Until that time, the court presumably would have no interest in the truthfulness of the witness's testimony. This view overlooks that, under the rules of civil procedure, a deposition is not a purely private matter; it occurs subject to the supervisory authority of the trial judge, and, once completed, a transcript of the witness's deposition testimony is ordinarily filed with the court.[78]

Moreover, fraudulent conduct in connection with discovery may well implicate the fairness of a final judgment, even in a case in which false evidence is not ultimately introduced at trial.

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[74] When disclosure under DR 7-102(B)(2) is made in the course of an ongoing proceeding, the concern for the finality of judgments would be entirely irrelevant. Even if disclosure was made after a judgment was rendered, the interest in finality would adequately be protected by the relevant rules governing attacks on civil and criminal judgments. It might be argued that there is no benefit to postjudgment disclosure when the law does not permit reopening the proceedings, and that disclosure would be harmful in that it would undermine public acceptance of the judgment. But disclosure would have the benefit of allowing the victim of the fraud to seek whatever remedies may be available.

[75] The most relevant countervailing interests would be the interest of the client in preserving the secrecy of the lawyer's information unless and until it can be used to best advantage, *see* notes 80-82, 226 and accompanying text *infra*, and the interest of the court in judicial economy. *See* notes 138-41 and accompanying text *infra*.

[76] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 341 (1975); Brazil, *supra* note 68, at 604 n.5; *see also* Nix v. Whiteside, 475 U.S. 157, 168-69 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3, model code comparison ("[U]se of perjured testimony or false evidence is usually regarded as 'fraud' upon the court" for purposes of DR 7-102(B)(1).).

[77] 847 F.2d at 64 (Van Graafeiland, J., concurring).

[78] FED. R. CIV. P. 30(f).

For example, false testimony may influence an attorney to underestimate the strength of a client's case and therefore to recommend that the client accept a less favorable settlement. The trial court's acceptance of the terms of the settlement will be at least indirectly affected by the fraud.[79] Similarly, a civil lawyer's trial strategy may be affected by fraudulent conduct in the course of discovery. For example, a lawyer may be induced by the fraudulent conduct to refrain from calling a witness who would provide favorable testimony. In such a case, the fairness and reliability of the court's final judgment is implicated just as much as in a case where false testimony is presented directly to the tribunal.

A fourth question was suggested by the majority opinion in *Doe*. The court opined that it was "consistent with the traditional role of a trial lawyer" for Doe to use evidence of the witness's perjury for purposes of impeachment in the event that the witness took the stand at trial, rather than making disclosure sooner and losing the advantage of surprise.[80] Does the disciplinary rule require prompt disclosure to the court by an attorney whose client is the intended victim, rather than beneficiary, of the fraud? As the court recognized, it would undoubtedly be contrary to the client's interests if the attorney were required to make disclosure immediately. Although the disciplinary rule is designed to protect the integrity of the court, rather than the interests of the opposing party,[81] it may be argued that the court's interests would be adequately served, and the client's interests would be best served, if the attorney were to make "disclosure" in the manner ordinarily contemplated by the adversary process, that is, by cross-examining the perjurious witness.[82]

One problem with this argument is that the disciplinary rule presupposes that disclosure will not be in the client's best inter-

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[79] *See id.* 41(A)(2) ("[A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.").

[80] 847 F.2d at 63.

[81] Unlike DR 7-102(B)(1), which requires the disclosure of frauds on the opposing party as well as on the court, DR 7-102(B)(2) extends only to frauds on the court.

[82] Obviously, this argument could not be made when the lawyer's client was the intended beneficiary of the third party's fraud. In such a case, in the absence of an ethical obligation, the lawyer will generally have no reason to ever make disclosure. In addition, this argument would have less relevance when the fraud consisted of conduct that, unlike perjury, would not ordinarily be revealed in the course of trial.

est; if it were, there would be no need for the rule: the attorney would reveal the fraud voluntarily.[83] There is a more obvious problem with the argument. However wise it might be, as a matter of policy, to allow a lawyer to defer disclosure under DR 7-102(B)(2) when the client is meant to be the victim of the fraud, the rule itself contains no such provision. It requires that the fraud be revealed "promptly," rather than at the moment most propitious for the attorney's client.[84]

The fifth question that might have disposed of the *Doe* case is this: Must a lawyer disclose frauds that are immaterial to the proceeding?[85] Since the record in *Doe* is sealed, and the appellate court did not extensively review the facts, there is no way to know the significance of the witness's deposition testimony. However, there is nothing in the *Doe* opinion to suggest that the witness's questionable testimony was of much, or any, significance. If the testimony was not significant, the *Doe* court could have decided that no disclosure was required for that reason alone. On the other hand, unlike its counterpart in the *Model Rules of Professional Conduct*,[86] DR 7-102(B) does not expressly require only the disclosure of "material" information. It is not immediately obvious that the limitation that is explicit in the Model Rules is implicit in DR 7-102(B) of the Code.[87]

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[83] *See, e.g.*, United States v. Grasso, 413 F. Supp. 166 (D. Conn. 1976), *aff'd*, 552 F.2d 46 (2d Cir. 1977), *vacated and remanded on other grounds*, 438 U.S. 901 (1978).

[84] The term "promptly" is not self-defining. Nevertheless, it is unlikely that Doe's disclosure would be considered "prompt" if it were deferred until trial, since more than a year would have elapsed from the time that Doe first learned of the witness's perjury. *Cf. In re* King, 7 Utah 2d 258, 260-62, 322 P.2d 1095, 1097-98 (1958) (Attorney who waited eleven days before disclosing his client's perjury failed to make timely disclosure.).

[85] This issue was recently raised in a criminal case brought against an attorney, Theodore Friedman, in Manhattan. According to a press account following his acquittal, Friedman was accused of committing a "deceit" on the court during the course of his representation of a plaintiff in a wrongful death action because he failed to disclose that one of the plaintiff's witnesses had lied on cross-examination. The prosecution's theory was that the "fraud" consisted of Friedman's failure to make disclosure as required by DR 7-102(B)(2). In his defense, Friedman called a number of expert witnesses, including Professor Geoffrey C. Hazard of Yale Law School, whose view was that false testimony regarding a peripheral issue did not have to be disclosed. In addition, Friedman called two negligence attorneys who testified that it was customary for lawyers in New York to remain silent under such circumstances. *See Friedman Acquitted in Perjury Case*, N.Y.L.J., Nov. 3, 1988, at 1, col. 3.

[86] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3(a)(2) requires an attorney to "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."

[87] *See, e.g.*, Attorney Grievance Comm'n v. Sperling, 296 Md. 558, 559, 463 A.2d 868,

Without attempting to provide a definitive answer to any of these five questions, several observations might be made. First, the disciplinary rule, however plain it might appear at first glance, is extraordinarily uncertain in scope. Second, and as a consequence, the court of appeals had a fair number of alternative grounds on which to overturn the disciplinary sanction imposed in this case.[88] Most importantly, the *Doe* panel's decision to clarify only one aspect of the disciplinary rule and to allow the other ambiguities to remain suggests how narrowly the court conceived its institutional role. The *Doe* case gave the court an opportunity to give substantial guidance to lawyers concerning the reach of DR 7-102(B)(2). Consistent with the courts' traditional responsibility to set standards governing the conduct of lawyers, the *Doe* panel could have used the case as a vehicle for resolving many of the areas of uncertainty with which Doe was faced in deciding whether to make disclosure. Instead of taking advantage of the opportunity, the panel addressed the minimum number of issues necessary to resolve the case: one.

III. The Court's Elusive Holding: What Is Knowledge?

Before trying to decide whether the court of appeals decided this case correctly, one must first determine just what the court of appeals decided. Apparently, the court decided that DR 7-102(B)(2) has an actual knowledge requirement. But one of the more perplexing questions raised by the *Doe* decision is this: What is "actual knowledge"? Or, to be more precise, what did the *Doe* panel mean by "actual knowledge"? It is hard to escape the suspicion that the signal accomplishment of the *Doe* panel was to add one more element of uncertainty to a disciplinary rule whose reach was already more than sufficiently uncertain.[89]

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868 (Md. 1983) (attorney sanctioned for failing to correct false deposition testimony that "was not directly germane to the issues in the lawsuit").

[88] This is not an exclusive list of alternative grounds on which this case could have been decided. For example, even if the court agreed with Judge Daly about both the law and the facts, and even accepting that deference must generally be given to the trial court's selection of a sanction for unethical conduct, the court could have overturned the sanction imposed in this case in light of the uncertainty of the disciplinary rule's reach. *See* notes 221-25 and accompanying text *infra*.

[89] Monroe Freedman has written extensively on the ambiguity of the knowledge requirements of the ABA's ethical rules, initially in M. Freedman, Lawyers' Ethics in an Adversary System 51-58 (1975), and most recently in Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. Pa. L. Rev. 1939, 1940-46

The "actual knowledge" requirement may refer to either of two things: the strength of the evidence or the character of the evidence.

A. *The "Strength" of the Evidence*

The term "actual knowledge" may refer to the strength of the lawyer's belief or conviction that a fraud has been committed as measured by the amount and quality of the evidence known to the lawyer. One can imagine a continuum ranging from "mere suspicion," on the one extreme, to "moral certainty," on the other. Positioned at various points on that continuum are the different degrees of belief or certainty that are required as a predicate for the various decisions made by triers of fact and others in our legal system. Toward the lowest end of the continuum is "a particularized and objective basis for suspecting [a person] of criminal activity." That is all that a police officer needs in order to stop and question an individual on the street.[90] Close to the highest end is "proof beyond a reasonable doubt," which is needed in order for a trier of fact to convict a criminal defendant.[91] In between are, for example, "probable cause" to believe that an individual has committed a crime, which is required in order to make an arrest;[92] a finding that a fact was "more likely than not" to be true, which is required for a trier of fact to find in favor of a party to most civil disputes;[93] and "clear and convincing evidence," which is required for a trier of fact to find in favor of the civil plaintiff in some fraud cases[94] and in various other contexts — including attorney disciplinary proceedings in many states.[95] Or, to put it in more collo-

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(1988). *See also* Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 506-08.

[90] United States v. Cortez, 449 U.S. 411, 417-18 (1981).

[91] *In re* Winship, 397 U.S. 358, 362 (1970).

[92] *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976).

[93] *See* MODEL CODE OF EVIDENCE Rule 1(3) (1942); E. MORGAN, SOME PROBLEMS OF PROOF 84-85 (1956); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246 (1944); *see also* Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961); Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34 (1979); Orloff & Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159 (1983); Winter, *The Jury and the Risk of Nonpersuasion*, 5 LAW & SOC'Y REV. 335 (1971).

[94] *See* note 24 and accompanying text *supra*.

[95] *See, e.g.*, Matter of Palmer, 296 N.C. 638, 647-48, 252 S.E.2d 784, 789-90 (1979) (citing cases in which state courts have required clear and convincing evidence in judicial

quial terms, one can imagine a continuum where at one end is "a slim possibility," at the other end is "dead certainty," and in between are various gradations of possibility or probability, such as a "good possibility," a "likelihood," a "substantial likelihood," and a "virtual certainty."

There are suggestions in *Doe* that the "actual knowledge" standard was in fact meant by the panel to refer to a degree of certainty or quantum of evidence. For example, the court contrasts "actual knowledge" with both the undemanding standard of "mere suspicion[] of fraud,"[96] and with the extraordinarily demanding standard of "proof beyond a moral certainty that fraud has been committed."[97] The court seemingly places the "actual knowledge" standard between those two points, although closer to the second.

If this is what the court means by "actual knowledge," then one of the fundamental premises of its decision is highly suspect. After announcing that the drafters of DR 7-102(B)(2) must have intended an "actual knowledge" standard, the court asserts that "[t]o interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud."[98] This choice between mere suspicion and actual knowledge is a false dichotomy. The court's pronouncement ignores the vast array of alternatives in between these two standards.[99] Among these alternatives is "clear and convincing evidence," the standard that District Judge Daly considered to be the equivalent of the term "information clearly establishing" in the disciplinary rule. As interpreted by the district court, the rule would not have required

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disbarment proceedings).

[96] 847 F.2d at 63.

[97] *Id.*

[98] *Id.*

[99] *See, e.g.*, State Bar of New Mexico Advisory Opinions Committee, Advisory Opinion No. 1988-8, *reprinted in* 27 NEWS & VIEWS 10 (Aug. 11, 1988) [hereinafter New Mexico Advisory Opinion No. 1988-8]. The advisory committee was questioned concerning the duty of an attorney under Disciplinary Rule 1-103 and its successor, Model Rule 8.3, to inform an appropriate authority when he has "knowledge" of an ethical violation by another lawyer. The committee determined that: "The quality and quantity of information which will constitute 'knowledge' of a serious violation is such information, whether obtained by the senses as personal knowledge, or obtained by third persons, which would create a substantial basis for believing that the violation had been committed." *Id.* at 11. The committee explained that the "substantial basis" standard requires more than either "mere suspicion" or "probable cause," but at the same time "is not so rigorous as to set an impracticable standard of knowledge." *Id.*

attorneys to make disclosure upon a mere suspicion of fraud, but only upon the receipt of clear and convincing evidence of fraud. That is an extremely high threshold, and certainly much higher than "mere suspicion."

One might also wonder where "actual knowledge" falls on the continuum. Viewing the term in a colloquial rather than legal sense, one might suspect that "knowledge" falls somewhere between "beyond a reasonable doubt" and "moral certainty." This every-day understanding of the term becomes clear when one contrasts a lawyer's "knowledge" of fraud with a jury's guilty verdict in a criminal case in which fraud was alleged. What level of certainty is connoted by the jury's finding of guilt beyond a reasonable doubt? Certainly, the finding connotes more than "mere suspicion," or even "strong suspicion." As a civilized society, we would never tolerate the imprisonment of a criminal defendant merely on the basis of a jury's "strong suspicion" that the defendant committed the crime charged. On the other hand, a jury's finding of guilt, which may be based on circumstantial evidence, on the testimony of accomplices, and/or on the testimony of fallible eyewitnesses, would scarcely be equated with a determination by the jury that it *knows* that the defendant committed the crime charged. The jury's finding falls short of knowledge. Knowledge implies far greater certainty. A judgment of conviction is simply a finding that, based on the information presented to the jury, there is not a reasonable doubt about the defendant's guilt.[100]

It is hard to conceive of many situations in which an attorney would have "knowledge" of a fraud in the sense of evidence amounting to a virtual certainty. One situation would be when the attorney knowingly participated in the fraud. However, it is hard to imagine that DR 7-102(B)(2) was principally aimed at attorneys who intentionally defraud the court. Having committed both a crime and an ethical violation, such lawyers probably would not be persuaded to reveal their fraudulent conduct simply to avoid committing an additional disciplinary violation.[101] A

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[100] *See generally* McBaine, *supra* note 93, at 246; Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 457-62 (1989).

[101] *See, e.g., In re* Yamaguchi, 118 Ill. 2d 417, 427, 515 N.E.2d 1235, 1239 (1987) (Attorney violated DR 7-102(B)(2) by failing to disclose a third party's fraud which the attorney assisted.); *Matter of* Price, 429 N.E.2d 961, 965 (Ind. 1982) (Attorney violated several disciplinary rules by engaging in conduct involving misrepresentation before

second situation in which an attorney might "know" of the commission of a fraud is when the attorney has personally witnessed the events which demonstrate that a fraud occurred.[102] For example, if a prosecution witness on cross-examination falsely denies having met with the prosecutor, a prosecutor who in fact met with the witness would obviously know that the testimony was false and would have an obligation to correct it.[103] Similarly, a lawyer who saw a witness shredding documents that had been subpoenaed by the opposing party would have "knowledge" of that conduct.

It is hard to understand why the disciplinary rule should require something more than proof of fraud beyond a reasonable doubt, and indeed, one would expect the rule to require much less. After all, the "reasonable doubt" standard is reserved for cases in which the stakes are highest — the defendant's liberty, and sometimes the defendant's life, are at stake — and society is, therefore, most concerned about the possibility of an erroneous factual determination.[104]

In contrast, the risks attendant to an erroneous disclosure under DR 7-102(B)(2) are much lower. All that the disciplinary rule requires is disclosure to the court. No one is required to act on the basis of the disclosure. If the information disclosed by counsel is not cause for concern, the trial judge can ignore it. The only possible unfairness is to the disclosing attorney's client, insofar as the opposing party received some potentially useful information to which it might not otherwise have been entitled. This should be a matter of comparatively little concern, however, particularly in a civil case, in which the rules of discovery are intended to facilitate the disclosure of information useful to the opposing party. Moreover, this risk of unfairness pales in comparison to the risk of an erroneous criminal conviction; it is, therefore, hard to see why a standard more stringent than "beyond a reasonable doubt" should be required by the disciplinary

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grand jury and failing to reveal settlement to welfare officials, when required by law.).

[102] *Cf.* Matter of Malloy, 248 N.W.2d 43 (N.D. 1976) (Attorney knew that his client was lying when he testified in a deposition that he had no written lease agreement with particular individuals, because the attorney had drawn up the lease agreement.).

[103] *Cf.* Giglio v. United States, 405 U.S. 150 (1972), and Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977) (prosecutor's failure to correct false testimony of government witness violates due process).

[104] *See generally* Winter, *supra* note 93, at 339-40.

rule.[105]

B. *The Character of the Evidence*

There is also evidence in the *Doe* opinion that the court viewed "actual knowledge" as something other than a level of certainty or a quantum of proof. The court may have been referring instead to the nature or character of the information establishing that someone had committed a fraud on a tribunal. In general, the information available to an attorney who is contemplating disclosure under DR 7-102(B)(2), like the information received by a trier of fact, may take any of a variety of forms — it may consist of first hand observation or hearsay, direct or circumstantial evidence. A lawyer may believe that something occurred because the lawyer was there when it happened and observed it directly; was told by someone else that it happened; or received other information, either first hand observation, physical evidence, or testimonial evidence, that tended circumstantially to establish that the event occurred.

The suggestion in *Doe* is that some types of information are better than others. This suggestion is made most clearly by the court in its discussion of Virginia's version of the Code, which provides that when a client acknowledges having committed a fraud, the lawyer has "information clearly establishing" a fraud. The court equated this with "an actual knowledge standard."[106]

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[105] It is unlikely that many would consider it far better that frauds on the court go undiscovered than that innocent conduct be erroneously disclosed by counsel. Compare *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."). Professor Brazil has nevertheless argued that under DR 7-102(B)(1), the level of certainty required before lawyers disclose their own clients' fraudulent conduct should be as great, and perhaps greater, than that required as the basis of a criminal conviction. Brazil, *supra* note 68, at 608-09. He reasons that disclosure would be so contrary to the attorney's duty of loyalty to the client, and would undermine the relationship of trust between attorney and client to so great an extent that an extraordinarily high degree of certainty should be required. *Id.* Other commentators have argued that because a lawyer's ethical relationship with his client generally requires a lawyer to believe his client, it should take much more compelling evidence to convince a lawyer that his client is giving false information than it would take to convince a lawyer that a third party is testifying falsely. *See* W. HAZARD & G. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 342-43 (1986); Wolfram, *supra* note 67, at 842. However, these arguments have little relevance to the level of certainty required under DR 7-102(B)(2), which requires disclosure of a third party's fraud.

[106] 847 F.2d at 62. In *Doe*, of course, the attorney had been apprised of the witness's

In contrast to this was the statement of Doe's client that recounted the deposition witness's acknowledgment of perjury. According to the court, this did not "provide [Doe] with knowledge that a fraud on the court had taken place."[107] At best, Doe "suspect[ed] strongly that [the] witness lied."[108] Thus, when the court speaks of "information which the attorney reasonably knows to be a fact,"[109] it may be referring to certain sources of information, such as personal observation by the attorney[110] or admissions by the alleged perpetrator of the fraud, as distinguished from other, presumably "inferior" sources of information, such as the eyewitness accounts of others, hearsay accounts of admissions made by the alleged perpetrator, and evidence which tends to establish a fraud circumstantially.[111]

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confession of perjury. Presumably, the panel thought it to be of critical significance that Doe did not receive the confession firsthand. Rather, the confession was made to Doe's client who, in turn, recounted it to Doe. Presumably, in the panel's view, the client could have been lying about his conversation with the witness, and for that reason, Doe did not have actual knowledge. Ironically, the argument that is conventionally used to justify nondisclosure of client perjury would, in this case, have argued in favor of disclosing the witness's perjury. The argument is that an attorney has a general responsibility to believe his client or, at least, to give his client the benefit of all reasonable doubts. *See* note 105 *supra*. If Doe was entitled to believe his client's account of the witness's confession, then the evidence would have been just as compelling as a confession made directly to Doe.

[107] 847 F.2d at 63.

[108] *Id.*

[109] *Id.*

[110] In other contexts, the Second Circuit has equated "knowledge" with firsthand observation, as distinguished from hearsay. *See, e.g.*, Christian Dior-New York, Inc. v. Koret, Inc., 792 F.2d 34, 38 (2d Cir. 1986) (Affiant's allegations were "based on personal knowledge.").

[111] The court may also have been drawing a distinction between a lawyer's subjective impressions and those inferences which may objectively be drawn from information. This is suggested by the emphasis which the court places on the subjectivity of Doe's beliefs. *See, e.g., Doe*, 847 F.2d at 61 ("[T]he [district] court concluded that Doe's subjective beliefs concerning [the] witness's veracity coupled with the information he received from [the] client provided him with clear and convincing evidence of [the] witness's perjury."); *id.* at 63 ("Although Doe's subjective beliefs may have caused him to suspect strongly that [the] witness lied, they did not amount to actual knowledge that [the] witness committed a fraud on the court."). The court may have been expressing the view that a lawyer's subjective evaluation of factors such as a witness's demeanor should not give rise to a duty of disclosure. What gives one pause about whether, in fact, this was the court's point, is that Doe had a substantial amount of objective information that established that the plaintiff's employee had lied in a deposition. Among other things, he was aware of his client's assertion that the witness had admitted lying as well as the statements of other witnesses that contradicted those of the plaintiff's employee.

If this was not the court's point, it is hard to understand why the court seemingly

If this is what the court means by "actual knowledge," then one might also wonder what an attorney is required to have actual knowledge of: the fraud itself or the pieces of information that, taken together, established the fraud. The first possibility is suggested by the court's explanation that it is a "requir[ement] that the attorney have actual knowledge of a fraud,"[112] as well as by its determination that "the information Doe received" did not "provide[] him with knowledge that a fraud on the court had taken place."[113] The second possibility is suggested by the court's conclusion "that the drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge would clearly establish the existence of a fraud on the tribunal."[114]

If what the court means by "actual knowledge" is information of a certain type — such as direct, first hand information or a confession — then its decision is hard to fathom. There is no meaningful basis for distinguishing between different sources of information. Suppose, for example, that the witness in the *Doe* case was later tried on perjury charges. The jury would be entitled to find him guilty "beyond a reasonable doubt" based on hearsay evidence such as the testimony of Doe's client concerning the witness's admissions.[115] Similarly, the jury would be enti-

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belittled Doe's subjective belief that the witness had lied. Doe's subjective belief would scarcely seem irrelevant. If it were, then, as interpreted in *Doe*, DR 7-102(B)(2) would require a lawyer to make disclosure even if he did not believe that a fraud had been committed as long as he "should have known," based on the objective evidence, that a fraud had been committed. By adopting a standard of *actual* knowledge, the court seems to be rejecting this approach.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Although a defendant's admission that he committed perjury in a deposition would probably be offered against him at a criminal trial as an admission by a party-opponent under Federal Rule of Evidence 801(d)(2)(A), such an admission would also be contrary to the defendant's penal interest and would, therefore, have a circumstantial guarantee of reliability. *See* FED. R. EVID. 804(b)(3). If Doe's client were to testify about the admission at a criminal trial, and the jury were to determine that Doe's client was a credible witness, the jury could rely on the admission. There is no reason why Doe, a trained lawyer, should not be trusted to make a comparable assessment. In deciding how much weight to give to the client's account for purposes of DR 7-102(B)(2), attorneys such as Doe would have an opportunity similar to that of a jury at a criminal trial. They could assess their client's credibility, and, if they determined that their client's account was not credible, they could discount it.

tled to find guilt "beyond a reasonable doubt" based entirely on circumstantial evidence, and, indeed, the jury might be instructed, in accordance with the established law of the Second Circuit, "that circumstantial evidence is not 'probatively inferior to direct evidence.' "[116] If federal law does not distinguish between types of proof in criminal cases, in which society is most concerned about avoiding erroneous factual determinations, it would be anomalous to distinguish between types of proof for purposes of an attorney's ethical duty of disclosure.[117] Attorneys should be required to consider all relevant information and to give it whatever weight is appropriate under the circumstances.[118]

To put it another way, the fact that someone acknowledges the commission of a fraud, while extremely persuasive, is not necessarily more conclusive than other evidence of a fraud. Suppose, for example, that a witness testifies in a deposition that he did not attend a particular meeting, but later tells the attorney that this testimony was a lie. It may later prove to be the case that the witness was bribed, threatened, or improperly influenced in some other way to recant the deposition testimony, which in fact was truthful. Even after hearing a witness's confession of perjury, a lawyer cannot colloquially be said to "know" that the witness committed perjury, although the lawyer would

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[116] United States v. Woodner, 317 F.2d 649, 651 (2d Cir.), *cert. denied*, 375 U.S. 903 (1963) (quoting United States v. Brown, 236 F.2d 403, 405 (2d Cir. 1956)).

[117] There is at least one significant difference between guilty verdicts in criminal cases and the disclosure of information under DR 7-102(B)(2) that tends to weigh in favor of a higher standard under the disciplinary rule. Since a trial is an adversary proceeding, the trier of fact gets the benefit of arguments made by opposing parties about the contrary inferences that might be drawn from the evidence as well as the benefit of evidence amassed by the opposing parties during the course of their independent investigations. In contrast, attorneys who are contemplating disclosure under DR 7-102(B)(2) generally have not engaged in an extensive investigation to develop information indicating that the third party's conduct is not fraudulent. *Cf.* Brazil, *supra* note 68, at 609-14. Nor have the attorneys received the benefit of arguments about exculpatory inferences that might be drawn from their information. Even if the evidence in their possession seems clearly to establish a fraud, there may be substantial evidence to the contrary that they have not received or contrary explanations that have not occurred to them.

[118] *Cf.* New Mexico Advisory Opinion No. 1988-8, *supra* note 99, at 11-12 & n.2 (For purposes of ethical rules establishing a duty to disclose another lawyer's misconduct, information of an ethical violation may be "obtained by the senses as personal knowledge, or [be] obtained from third persons," except that the information received from third persons need not be disclosed if the attorney subjectively believes that the information is probably false.).

certainly have clear and convincing evidence. At the same time, evidence other than admissions of guilt may be just as convincing. Suppose that (1) five other individuals admit that they attended the meeting in question, they all swear that the witness was there, and none has a discernible motive to lie; (2) on the witness's desk calendar is a notation referring to the meeting; and (3) the witness has a strong motive to deny having attended the meeting. However "inferior" each piece of information may be, collectively this information may be every bit as convincing as a witness's confession of perjury.

The difficulty in figuring out just what the court has decided in *Doe* may provide a problem for practitioners as well as for commentators. It seems safe to say that however uncertain may be the contours of the "actual knowledge" standard, the standard is a difficult one to meet. Both because of the uncertainty and because of the difficulty of this standard, DR 7-102(B)(2), which is probably ignored by most practicing lawyers anyway, will probably be ignored with greater impunity.[119] Based on a superficial reading of *Doe*, a practitioner might decline to disclose a fraud upon the tribunal, even if firmly convinced that a fraud has been committed, in the absence of the most overwhelming proof, consisting of either first hand evidence of the fraud or admissions by those who committed it. Yet it may be a mistake to rely on a superficial reading. Because of the unavailability of the appellate record and the imprecision of the panel's opinion, one cannot know for certain whether the court was referring to "knowledge" in a colloquial sense or in a special legal sense. In a later case, in which an attorney is in a less sympathetic position than was Doe, another panel of the court would be free to opine that the "knowledge" requirement means little more than "clear and convincing evidence" after all.[120] Thus, while one may have strong suspicions, it is impossible to know from the *Doe* opinion precisely when a lawyer has "knowledge" that requires disclosure of a fraud on the court.

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[119] Professor Lynch has made a similar observation concerning the application of DR 1-103(A), which requires a lawyer to report violations of the Code of Professional Responsibility that are known to have been committed by another lawyer. *See* Lynch, *supra* note 89, at 516 ("Because a lawyer will rarely know all the facts, and because the Disciplinary Rules are riddled with difficult interpretive questions, rarely will a duty to report actually arise.").

[120] *See, e.g.*, New Mexico Advisory Opinion No. 1988-8, *supra* note 99.

IV. The Court's Elusive Reasoning: Did the Court Discover the Drafters' Intent?

A. *The Panel's Analysis*

Not only is it unclear what the court meant by "actual knowledge," but it is unclear where the court finds the "actual knowledge" requirement in the disciplinary rule. Is it an interpretation of the term "information clearly establishing," which essentially substitutes for the plain language of that term? This possibility is suggested by the court's discussion of the Virginia Code's definition of the term "information clearly establishing," which the court understood to have embodied "an actual knowledge standard."[121] This is also suggested by the court's reliance on expert testimony "that the term 'information clearly establishing' requires that the attorney have actual knowledge of the alleged fraud."[122] In the court's mind, the term "information clearly establishing" may thus be equated with "actual knowledge." On the other hand, is "actual knowledge" a judicially implied requirement that exists side-by-side with the requirement of "information clearly establishing" a fraud? This second possibility, that the "actual knowledge" requirement somehow supplements rather than defines the term "information clearly establishing," is suggested by the court's conclusion that "the drafters intended disclosure of only that information which the attorney reasonably *knows* to be a fact and which, when combined with other facts *in his knowledge*, would *clearly establish* the existence of a fraud on the tribunal."[123]

Ultimately, for the *Doe* panel the "actual knowledge" requirement is rooted less in the language of the disciplinary rule than in the minds of its drafters. The court went about the task of interpreting DR 7-102(B)(2) in essentially the same manner in which it customarily interprets legislative enactments: it looked for the "intent" of the drafters. While bemoaning the absence of traditional guides to the drafters' intent such as legislative history, the court sought guidance in some of the sorts of places that one would have explored if interpreting federal legislation, including other provisions of the same enactment and

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[121] 847 F.2d at 62.

[122] *Id.*

[123] *Id.* at 63 (emphasis added).

similar enactments.

Accepting — for the moment — that the court's course was an appropriate one, the panel's opinion is clearly inadequate in that it failed carefully to follow the course on which it embarked. This is true whether one considers, on the one hand, the evidence of "intent" on which the court chose to rely, or, on the other hand, the contrary evidence that the court entirely disregarded.

B. *What the Court Considered*

1. Other Provisions of the Code

The first item that, in the court's view, helped to demonstrate the "drafters' intent" to require actual knowledge was the fact that "most" of the provisions of the Code require "knowledge" before an attorney must "take affirmative measures to preserve the integrity of the judicial system."[124] The court's generalization was based on two provisions of the Code. One provision, DR 1-103(B), does not in fact support the court's generalization. It provides: "A lawyer possessing unprivileged knowledge *or evidence* concerning another lawyer or judge shall reveal fully such knowledge *or evidence* upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges."[125] In its opinion in *Doe*, the court chose to underscore the word "knowledge" in this rule.[126] The court overlooked that the rule speaks equally about "evidence." This provision does not support, and in fact undercuts, the court's point. It demonstrates that an attorney's duty of disclosure under the Code may extend to evidence that falls short of actual knowledge.[127]

The only other provision cited by the court, DR 1-103(A), does require knowledge before a duty to disclose arises. It pro-

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[124] *Id.* at 62.

[125] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(B) (emphasis added).

[126] 847 F.2d at 62.

[127] This rule, in any event, does not seem closely analogous to DR 7-102(B)(2). It adds nothing to the duty that attorneys would have wholly apart from the Code. Unlike DR 7-102(B), DR 1-103(B) does not require disclosure by attorneys on their own initiative, but requires attorneys to provide unprivileged evidence when requested to do so by a tribunal engaged in a lawful investigation. Like all other individuals, attorneys must provide nonprivileged evidence upon the lawful request of a court, whether the evidence concerns another lawyer, a judge, or anything else.

vides that "[a] lawyer possessing unprivileged knowledge of" another lawyer's misconduct "shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such" misconduct. The court's reliance on this rule, as an indicium of the drafters' intent, is misplaced for at least two reasons. First, this rule is designed to accomplish something very different from DR 7-102(B)(2). There is no reason why the standard governing the disclosure of disciplinary violations should be the same as the standard governing the disclosure of third-party frauds on a tribunal.[128] Second, a single disciplinary rule, standing alone, cannot justify the court's generalization that knowledge is required in "most Code provisions that obligate an attorney to take affirmative measures."[129]

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[128] There are good reasons why this rule should require greater certainty before disclosure is required. First, DR 1-103(A), the so-called "snitch rule," is immensely unpopular: many states have refused to adopt it, and in those states where it is in effect, it is often ignored and almost never enforced. *See* Committee on Ethics of the Maryland State Bar, Opinion 85-6, ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 801:4348; Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66, 100-01 (1974); Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 980 (1984); Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 99; Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509, 511 & n.21 (1978). *See also* Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation*, 1974 U. ILL. L.F. 193, 202-03 (Lawyers rarely report misconduct by fellow lawyers.). Given the intense reluctance of lawyers to disclose the wrongdoing of fellow members of the bar, it makes sense to require such disclosure only in those rare circumstances when an attorney cannot blink at a disciplinary violation.

Second, attorneys are presumptively ethical. *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 784, *reh'g denied*, 483 U.S. 1056 (1987); Cuyler v. Sullivan, 446 U.S. 335, 347 (1980). Therefore, it should require a higher threshold of conviction to impugn the integrity of a fellow member of the bar.

Finally, from the point of view of "the integrity of the judicial system," disclosure under DR 1-103(A) is arguably less important than disclosure under DR 7-102(B)(2). DR 1-103(A) requires disclosure of attorney misconduct whether it or not it affects a judicial determination. For example, it might require the disclosure of misconduct that is not directly relevant to the integrity of the courts' judgments and processes, such as a fellow attorney's illegal use of controlled substances. *See, e.g.*, Virginia Legal Ethics Op. 977 (1987).

[129] 847 F.2d at 62. One might wonder why the court analogized only to those disciplinary rules which required an attorney to "take affirmative measures" — that is, to make disclosure or undertake comparable remedial action — in order "to preserve the integrity of the judicial system." The court's point would have been much stronger had it relied on all of the disciplinary rules that protect the integrity of the judicial system, including those which do so by requiring an attorney to refrain from engaging in deceitful conduct. For example, DR 7-102(A)(4) forbids lawyers from "knowingly" using perjured or false testimony. This rule presumably allows attorneys to use testimony which

2. Expert Testimony

The second item on which the court relied was the opinion of the NYU ethics professor about the meaning of DR 7-102(B)(2). The court's reliance on an expert opinion regarding the interpretation of domestic law is unusual, to say the least. Ordinarily, under the Second Circuit's case law, the courts are themselves responsible for the interpretation of domestic — as opposed to foreign — law.[130] That is not to say that the expert testimony was not properly admitted before the grievance committee. Because the grievance committee's proceedings were not supervised by a judge, it was not inappropriate for the expert witness to provide legal advice.[131] However, it is questionable whether the expert testimony was entitled to much weight from the court of appeals. Although the Code may be foreign to some members of the legal profession, it is presumably, like federal statutes, for the court to interpret. Expert testimony should be entitled to no more weight than a law review article and probably less.[132] Moreover, its weight should depend on the persuasiveness of its reasoning. Yet, as far as the *Doe* opinion discloses, the court relied solely on the credibility of the expert witness whom it did not even hear testify. It is hard to see why the expert opinion was of much benefit, since no explanation was given

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they believe to be false, as long as they do not *know* of its falsity. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) ("A lawyer may refuse to offer evidence that the lawyer reasonably believes is false."). The court might have pointed out the anomaly of requiring disclosure of false testimony and yet permitting its use when a lawyer's belief in the falsity of the testimony falls short of knowledge.

[130] *See, e.g.*, Marx & Co. v. Diners Club, Inc., 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

[131] A prosecutor performs a similar task as a legal advisor to the grand jury. *See, e.g.*, United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979); *see also* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 3-3.5(a) (2d ed. 1979). However, it may be argued that the testimony of an expert witness is unnecessary in the grievance committee since its counsel and its members are all attorneys.

[132] Reliance on expert testimony is different from reliance on published works of scholarship. Scholarly opinions are usually explained and substantiated. Their weight does not rely on the credibility of the author so much as on the quality of the author's research and argument. Moreover, opinions held out to the academic community are likely to be more considered than those made in sealed proceedings, since authors will be aware that their opinions will be subject to challenge by other writers. In contrast, in the grievance proceedings in *Doe*, there was no incentive for members of the grievance committee to seek contrary expert opinion or to challenge the opinions offered by the ethics professor, and there was no opportunity for other scholars to learn of the testimony and challenge it on their own.

for the basis of that opinion.

3. The Virginia Code

The next item on which the court relied was the Virginia Code's definition of the term "information clearly establishing."[133] The court's reliance on this is questionable for several reasons. First, the *Virginia Code of Professional Responsibility* gives no indication of the ABA drafters' intent since the Virginia Code was first considered and adopted after the completion of the ABA Code.[134] Second, the provision cited by the court is directly contrary to the counterpart in the ABA Code. As noted earlier, DR 7-102(B)(1) of the ABA Code, as amended, expressly provides that the disclosure of "information clearly establishing" fraud by one's client may not be disclosed "when the information is protected as a privileged communication." In contrast, the counterpart provision in the Virginia Code finds "information clearly establishing" a client's fraud to include the client's "acknowledg[ment] to the attorney that he has perpetrated a fraud," notwithstanding that such acknowledgment would otherwise be privileged in most cases.[135] Third, the contrast between the two provisions suggests that the definition contained in the Virginia Code was not added for the purpose of establishing an actual knowledge requirement, but for the purpose of establishing that privileged communications were not excepted from disclosure under the disciplinary rule.[136] Finally, there is nothing in

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[133] 847 F.2d at 62.

[134] *Cf.* Kaufman, *Judges or Scholars: To Whom Shall We Look for Our Constitutional Law*, 37 J. LEGAL EDUC. 184, 189 (1987) (doubting that subsequent judicial precedent illuminates the "intent" of the constitutional framers); *but see* Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 394 (1985).

[135] The client's acknowledgment of a fraud would not be privileged in the rare cases in which the client was simultaneously seeking the attorney's assistance in the fraud. Then the client's statements would come within the crime-fraud exception to the attorney-client privilege. *See, e.g.*, Clark v. United States, 289 U.S. 1 (1933); *In re* John Doe Corp., 675 F.2d 482, 491-92 (2d Cir. 1980); *In re* Berkley & Co., Inc., 629 F.2d 548 (8th Cir. 1980); *In re* Doe, 551 F.2d 889 (2d Cir. 1977); United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973).

[136] Thus, the duty to reveal a client's fraud is included in Canon 4 of the Virginia Code, which deals generally with the duty to preserve confidences and secrets of one's client. DR 4-101(D)(2) of the Virginia Code of Professional Responsibility provides:

> A lawyer shall reveal . . . [i]nformation which clearly establishes that his client has, in the course of the representation, perpetrated a fraud related to the representation upon a tribunal. Before revealing such information, however, the

the Virginia Code to suggest that a client's confession is the exclusive means by which "information clearly establishing" a fraud can be acquired.[137]

4. Judicial Experience

Finally, it is difficult to take seriously the court's asserted belief, based on its "experience," that any requirement short of "actual knowledge" would lead attorneys to inundate the courts with claims of fraud and, thus, overburden courts with collateral inquiries into the veracity of witnesses. Underlying the court's belief is an assumption that perjury and/or the perception of perjury is common coin in adversary proceedings in the Second Circuit.[138] Even accepting the validity of this bleak assumption, it does not necessarily follow that attorneys like Doe often receive specific information that clearly establishes that an opposing witness has deliberately lied. Prior to the *Doe* decision, many attorneys presumably shared the view of Chief Judge Daly that

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> lawyer shall request that his client advise the tribunal of the fraud. Information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal.

REVISED VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(2). In contrast, the duty to reveal frauds committed by third parties is set forth in DR 7-102(B)(1) of the Virginia Code.

[137] The cases decided by other courts prior to *Doe* also do not provide much support for the view that "actual knowledge" is required. For example, the panel cited two decisions that found that an attorney must have a "firm factual basis" before disclosing his client's intention to commit perjury. 847 F.2d at 63 (citing Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984), *rev'd on other grounds*, 475 U.S. 157 (1986); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977)). Yet a "firm factual basis" is scarcely equivalent to actual knowledge. *See also* United States v. Koller, 737 F.2d 1038, 1057 (D.C. Cir. 1984) (The disciplinary rules require an "objective and informed recognition by an attorney that specific evidence or a client's claims are fraudulent" before there is an affirmative obligation to take action contrary to the client's interests.); *In re* Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985):

> So long as the attorney does not have obvious indications of the client's fraud or perjury, the attorney is not obligated to undertake an independent determination before advancing his client's position . . . . To subject a lawyer to the obligation of investigating his client's behavior on less than "clear information" would undoubtedly undermine a client's confidence in his attorney.

Id. at 969. Moreover, these cases decided *after* the Code was drafted were not known to the drafters and, therefore, could not provide a clue about the drafters' intent. *See* note 134 *supra*.

[138] The judicial belief that perjury is widespread is not confined to the Second Circuit. *See, e.g.*, Schwelb, *Lying in the Court*, LITIGATION 3, 3 (Winter 1989) (In more than thirty years as a lawyer and a judge in the District of Columbia, the author "encountered many hundreds of instances of perjury or deception.").

DR 7-102(B)(2) meant essentially what it said and did not require actual knowledge as a prerequisite of disclosure. Yet there is nothing in the published case law prior to *Doe* to suggest that attorneys, believing themselves to be governed by a lesser standard than actual knowledge, made disclosure of third-party frauds with any degree of frequency.[139] The panel's expectation that the district court's "clear and convincing" standard would have opened the floodgates to complaints about third-party fraud also overlooks that DR 7-102(B)(2) contains other elements that might make its applicability rare.[140]

Moreover, even if the absence of an actual knowledge requirement led to an onslaught of disclosures, it is not clear why the courts should be burdened by collateral proceedings as a result. A court need not take any action at all in response to an assertion of fraud, even if the court is impressed by the weight and quality of the evidence presented. In a case unlike *Doe*, in which the information is disclosed by an attorney whose client was the intended beneficiary of the fraud, it may be sufficient to allow the opposing lawyer to use that information for the benefit of the client. In the alternative, the court may refer the informa-

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[139] It is possible, of course, that in many cases attorneys believed that the disciplinary rule did apply but nevertheless ignored it. When a lawyer believes that the client's own witnesses have committed fraud, the lawyer can serve the client's interests by withholding disclosure without much risk that the possible failure to comply with DR 7-102(B)(2) will ever be made known. On the other hand, when an attorney believes that an opposing witness has committed perjury, disclosure generally will not be made, in part because of the perception that there is nothing the court can or will do about it. Assuming that the failure to make disclosure is a disciplinary violation, there is generally little risk that the violation will ever be revealed. Even if a lawyer who has information regarding a witness's perjury later uses that information to impeach the witness at trial, it is unlikely that the court will inquire into when the attorney first received the information and whether it was sufficiently convincing to have required earlier disclosure.

Moreover, the panel opinion fails to consider the possible benefit that might result even if courts were in fact inundated by claims of fraud. The demonstrated willingness of attorneys to disclose frauds on the court might discourage third parties from attempting to commit such frauds. The willingness of attorneys to expose fraudulent conduct might also enhance public respect for the legal profession.

[140] Assuming that there is an important interest as a matter of judicial economy in discouraging attorneys from disclosing third-party frauds, it is unclear why an "actual knowledge" requirement is the appropriate way to promote this interest. It might make more sense to limit disclosure to the cases in which the alleged fraud is particularly significant, or to the cases in which the intended victim of the fraud cannot learn of it through any other means, and to mandate disclosure in such cases even when the evidence of fraud does not amount to "knowledge."

tion to prosecuting authorities.[141]

C. *What the Court Disregarded*

1. Plain Language

Ordinarily, the starting point for an inquiry into the intent of the drafters of a law is the language of the law itself.[142] When the language of the law is plain, there is a strong presumption that the drafters meant what they said.[143] In the case of DR 7-102(B)(2), there is no reference to "knowledge." Ordinarily, a court will presume, absent good reason to the contrary, that the drafters meant what they said — or didn't say. The drafters knew how to establish a "knowledge" requirement — they did it in another disciplinary rule. Their failure to do so in the case of this disciplinary rule would ordinarily mean that they did not intend to condition a duty of disclosure upon knowledge of fraud.[144] In *Doe*, the court eschewed this conventional regard for the letter of the law and, instead, accepted the expert witness's opinion that the absence of a knowledge requirement was merely the result of an oversight on the part of the ABA Special Committee.

Insofar as the court purports to be interpreting the term "information clearly establishing" — rather than simply infer-

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[141] Equally inapposite is Judge Van Graafeiland's observation that there is "no better way for a lawyer to damage his client's case than by making a pretrial accusation of perjury that he is unable to prove." 847 F.2d at 64 (Van Graafeiland, J., concurring). Nothing in the disciplinary rule requires a lawyer to *prove* that a third party has attempted to defraud the court. All the lawyer has to do is disclose information. The lawyer need not ask the court to initiate an inquiry or take other action in response to the information, and the disclosure itself does not amount to a formal accusation of fraud that must be answered. *Cf.* New Mexico Advisory Opinion No. 1988-8, *supra* note 99, at 11 (An attorney who reports another attorney's misconduct need not report the information in the form of a complaint; the ethical rule "merely requires the attorney to inform.").

[142] *See, e.g.*, United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940).

[143] *See, e.g.*, Bourjaily v. United States, 483 U.S. 171 (1987); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978); *see generally* Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

[144] *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 534-35 (1981) (Congress intentionally omitted a state-of-mind requirement from 42 U.S.C. section 1983.) (*reaffirmed* in Daniels v. Williams, 474 U.S. 327 (1986)).

ring an additional, unstated element — its approach is a particularly egregious departure from the conventional method of interpretation. Although this term is unquestionably vague in the sense that it is indefinite at the margins, it is not ambiguous.[145] It cannot be construed to mean "knowledge." The term is a counterpart to the phrase "evidence clearly establishing," which is customarily used by courts, although never to mean "actual knowledge."[146] To the contrary, the phrase means what it says: it refers to information received by a fact finder — in the form of statements, documents, or physical evidence — that clearly establishes a particular fact.

2. The *Precision* Case

Although the *Doe* court referred to a number of judicial decisions, it made no reference to the one decision which gives any insight at all into what the ABA Special Committee had in mind when it drafted DR 7-102(B)(2). The footnotes to the Code, although "not intended to be an annotation of the [committee's] views," were included with the disciplinary rules "to enable the reader to relate the provisions of [the] Code" to other sources with which the ABA Special Committee was undoubtedly familiar.[147] Footnote 72, the footnote accompanying DR 7-102(B)(2),

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[145] *See* E. FARNSWORTH, CONTRACTS 479-83 (1982); W. QUINE, WORD AND OBJECT 85, 129 (1960).

[146] *See, e.g.*, Wilson v. Ruffa & Hanover, P.C., 844 F.2d 81, 83 (2d Cir. 1988) (District court found that "the evidence clearly establishe[d]" law firm's material participation in fraudulent securities transaction.), *vacated*, 872 F.2d 1124 (2d Cir. 1989); Christian Dior-New York, Inc. v. Koret, Inc., 792 F.2d 34, 39 (2d Cir. 1986) ("[D]ocumentary evidence clearly establish[ed] that such negotiations actually took place . . . ."); United States v. Wilkinson, 754 F.2d 1427, 1435 (2d Cir. 1985) (The "evidence clearly established a strong 'likelihood of illegal association' " between the defendant and his alleged co-conspirators.), *cert. denied*, 472 U.S. 1019 (1985); Croce v. Kurnit, 737 F.2d 229, 237 (2d Cir.) ("[I]f the evidence so clearly establishes what interpretation should be given to the contract that reasonable minds could not conclude that it could be interpreted in any other way, a directed verdict on the issue is proper."), *cert. denied*, 469 U.S. 828 (1984); Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir.) ("[T]he documents and testimony clearly showed that the intent of both parties was not to be bound prior to the execution of a formal, written contract."), *cert. denied*, 469 U.S. 828 (1984); United States v. Rubinson, 543 F.2d 951, 960 (2d Cir.) ("[T]he evidence clearly established a single overall conspiracy."), *cert. denied*, 429 U.S. 850 (1976).

[147] MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble and preliminary statement n.1. *But see* Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 687 ("[T]he footnotes are not to be read as declarative of the views of the draftsmen. For interpretive purposes they are, therefore, irrelevant.").

directs the reader to the Supreme Court's 1945 decision in *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*[148] Given the Second Circuit panel's far-flung effort to divine the drafters' understandings, it is somewhat surprising that the panel failed to mention this case.

Precision involved a suit for patent infringement and breach of a related contract. The question before the Supreme Court was whether the plaintiff, Automotive Maintenance Machinery Company (Automotive), was barred from enforcing its patents and the contracts because it had "unclean hands." Automotive's alleged misconduct arose out of its attorney's failure to apprise the Patent Office of perjurious statements made by an opposing party in a patent application as well as during the course of testimony in an interference proceeding conducted to determine which party's patent claim had priority.[149] The Su-

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[148] 324 U.S. 806 (1945).

[149] The facts of *Precision Co.* were not entirely dissimilar to the facts of *Doe*. In 1937 an Automotive employee named Zimmermann developed an idea for a new torque wrench. Another Automotive employee, Thomasma, learned of the idea and secretly gave it to an outsider, Larson. Thomasma and Larson organized the Precision Instrument Manufacturing Company to make the wrenches and arranged to supply the wrenches to another company, Snap-On Tools Corporation. *Id.* at 808-09.

Both Zimmermann and Larson applied for a patent. In 1939, the Patent Office declared an interference between claims contained in the patent applications. The following year, in a statement filed in connection with the Patent Office proceedings, Larson claimed that he was the sole inventor of the wrench and gave false dates concerning his claimed invention that were designed to antedate the dates in Zimmermann's application. *Id.* at 809-10.

When he read Larson's application, Automotive's attorney, Fidler, suspected that something was amiss and undertook a thorough investigation. By September 1940, Fidler had discovered Thomasma's role in the development of the wrench and in the organization of Precision. The following month, interference proceedings commenced. Larson and eight witnesses testified in support of Larson's claim. One day before the proceedings ended, Thomasma admitted to Fidler that Larson's application was a "frame-up." He subsequently swore to an eighty-three page statement that recounted what had occurred. *Id.* at 810.

At that point, Fidler considered whether to disclose this information either to the Patent Office or to the United States District Attorney. He sought the guidance of an outside attorney, who advised him not to take any action, because the "evidence was insufficient to establish Larson's perjury" and neither the Patent Office nor the district attorney would consider the matter while the interference proceedings were continuing. Based on that advice, Fidler made no disclosure to the relevant authorities, but he did make disclosure to Larson's attorney, who confronted his client and eventually wrested an admission from him that his patent claim was false. Later, after retaining a new attorney, Larson agreed to concede the priority of Zimmermann's patent claim. The parties entered into several contracts under which Larson, Precision and Snap-On assigned their patent claims to Automotive. *Id.* at 810-14.

preme Court agreed with the trial judge that Automotive had acted wrongfully in failing to disclose the opposing party's perjury to the Patent Office. It stated:

> Automotive, with at least moral and actual certainty if not absolute proof of the facts concerning the perjury, chose to act in disregard of the public interest. Instead of doing all within its power to reveal and expose the fraud, it procured an outside settlement of the interference proceedings, acquired the [opposing party's] application itself, turned it into a patent and barred the other parties from questioning its validity. Such conduct does not conform to the minimum ethical standards and does not justify Automotive's present attempt to assert and enforce these perjury-tainted patents and applications.[150]

The Court went on to reject Automotive's argument that it was not obligated to make disclosure to the Patent Office because "it did not have positive and conclusive knowledge of the perjury" until the pleadings were filed in its lawsuit and the opposing party admitted his fraud on pretrial examination.[151] The Court found that the company "knew and suppressed facts that, at the very least, should have been brought in some way to the attention of the Patent Office," and that the duty to report "all facts concerning possible fraud or inequitableness" was "not excused by reasonable doubts as to the sufficiency of the proof of inequitable conduct."[152]

The *Precision* case obviously afforded some guidance to the ABA drafters, since it provided an example of what the Supreme Court regarded as a failure to "conform to minimum ethical standards."[153] The drafters' awareness of the *Precision* decision

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Automotive subsequently brought an action for breach of contract and patent infringement, claiming that Precision and Snap-On were manufacturing and selling a wrench that infringed on Automotive's patents. The district court dismissed Automotive's complaints "for want of equity," and the Supreme Court upheld that action, finding that Automotive was barred from pursuing its equitable claim because the company had "unclean hands," that is, the company had willfully engaged in conduct relevant to its cause of action that transgressed equitable standards of conduct. *Id.* at 807-08.

[150] *Id.* at 816.

[151] *Id.* at 816-17.

[152] *Id.* at 818 (citation omitted).

[153] This is not to say that the duty of disclosure as recognized by the Court in the *Precision* case provided a perfect analogue for the duty prescribed by DR 7-102(B)(2). It may be argued, for example, that a patent lawyer's duty to protect the integrity of the patent office is greater than a litigator's duty, as an officer of the court, to protect the integrity of judicial proceedings. It may also be significant that the lawyer's misconduct in *Precision* included his exploitation of another party's fraud for the benefit of his cli-

might have caused them to hesitate to adopt a "knowledge" requirement, since, as that decision made clear, it is not proper for an attorney to act in disregard of his belief that a fraud has been committed, even if the evidence of fraud is not conclusive.[154]

3. Judicial Integrity

The panel ascribed considerable importance to one of the court's institutional interests — the interest in judicial economy. Yet the panel ascribed no importance whatsoever to the judicial interest which DR 7-102(B)(2) was designed to protect —the interest in the integrity and reliability of judicial proceedings.[155] Like the provisions of DR 7-102 that proscribe the use of perjured testimony,[156] the making, use, and preservation of false evidence[157] and the making of false statements,[158] this provision, to a very limited extent, requires an attorney to act in furtherance of the interests of the truth-seeking process, rather than solely in the interests of the client.[159] The interest in the integrity of judicial determinations would certainly be promoted by a requirement that an attorney disclose "clear and convincing evidence" of perjury, even where that evidence falls short of actual

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ent, as well as his failure simply to disclose the fraud. Notwithstanding these distinctions, it is hard to understand the *Doe* panel's decision to disregard the case entirely.

[154] Besides casting doubt on the drafters' intent to adopt an "actual knowledge" requirement, the *Precision* case may be relevant in at least two other respects. First, that case makes clear that the duty to disclose is designed to protect the interests of the tribunal, not just the interests of the opposing party. Thus, even though Automotive, like Doe's client, was the intended victim of the fraud, it had a duty to make disclosure. Second, the case suggests that the term "fraud" should be interpreted broadly to include perjury.

[155] By contrast, the Supreme Court's decision three days earlier in Wheat v. United States, 108 S. Ct. 1692, 1698 (1988), signalled the Court's view of the considerable importance of the judiciary's "institutional interest in the rendition of just verdicts." Indeed, the *Wheat* Court considered that interest to be so important that, in criminal cases in which defense counsel has a potential conflict of interest, the interest in judicial integrity may justify overriding a defendant's choice of counsel.

[156] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4).

[157] *Id.*; *see id.* at (6).

[158] *Id.* at (5).

[159] The limited nature of the lawyer's responsibility under DR 7-102(B)(2) becomes particularly clear when one compares the disclosure required by that rule with the far broader disclosure once advocated by Judge Frankel in order to promote the truth-seeking function of trials. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

knowledge.[160] Moreover, it is hard to say that there is much less interest in judicial integrity in a case in which the attorney has clear and convincing evidence than in a case in which the attorney has actual knowledge.

V. The Court's Illusory Analysis: Why is the Intent of the ABA Drafters So Important?

A. *Background*

In interpreting DR 7-102(B)(2), the *Doe* panel decided to view the search for the ABA drafters' intent as the determinative — if not controlling — inquiry. Perhaps the most interesting question raised by the *Doe* decision is not whether the panel successfully discovered the intent of the ABA drafters, but whether, in seeking to discover the drafters' intent, the panel adopted the appropriate method of interpreting an ambiguous provision of the *Code of Professional Responsibility*. The panel did not explain why it adopted an approach that focused on the ABA drafters' intent, nor did it acknowledge that, in doing so, it was departing from the Second Circuit's traditional method of interpreting ambiguous disciplinary provisions. As a starting point for considering whether the panel undertook an appropriate analysis, it is useful to bear in mind both the breadth of the courts' traditional authority to supervise the bar and the circumstances by which DR 7-102(B)(2) came to be the subject of disciplinary proceedings in the District of Connecticut.

Both the federal and state courts have broad common-law authority to supervise and discipline lawyers who appear before them.[161] This authority is derived primarily from the inherent

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[160] *Cf.* Nix v. Whiteside, 475 U.S. 157, 185 (1986) (Blackmun, J., concurring) ("The proposition that presenting false evidence could contribute to . . . the reliability of a criminal trial is simply untenable."); *In re* Michael, 326 U.S. 224, 227 (1945) ("All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.").

[161] *See, e.g., In re* Ruffalo, 390 U.S. 544, 547 (1968); Theard v. United States, 354 U.S. 278, 281 (1957); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1873); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378-79 (1866); *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1859); Rodgers v. United States Steel Corp., 508 F.2d 152, 163 (3d Cir. 1975); *see also* Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964), *aff'd on rehearing*, 370 F.2d 418 (9th Cir. 1966) ("When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct.").

authority of courts to admit, suspend, and disbar attorneys who practice within the jurisdiction of the court.[162] The courts' contempt power affords an additional source of authority by which courts supervise the conduct of trial lawyers who appear before them.[163] Pursuant to this authority, courts have developed a common law of professional responsibility on an ad hoc, case-by-case basis. As learned professionals who are charged with knowledge of the case law and who can seek additional guidance in the "lore of the profession," lawyers are generally expected to be aware of what the courts expect of them.[164]

Because the traditional sources of guidance are not entirely adequate, lawyers and judges in the late nineteenth century sought to codify the prevailing norms of professional conduct. In 1908 the American Bar Association's efforts in this regard culminated in the adoption of the Canons of Professional Ethics (Canons). The Canons were designed simply to guide practitioners, not to comprise a set of legally enforceable disciplinary pro-

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[162] *See, e.g., In re* Snyder, 472 U.S. 634, 643 (1985) (citing Theard v. United States, 354 U.S. 278, 281 (1957); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); and *Ex parte* Burr, 22 U.S. (9 Wheat.) 529 (1824)); Howell v. State Bar, 843 F.2d 205, 206 (5th Cir. 1988) (Van Graafeiland, J., sitting by designation) ("Since the early days of English common law, it has been widely recognized that courts possess the inherent power to regulate the conduct of attorneys who practice before them and to discipline or disbar such of those attorneys as are guilty of unprofessional conduct."); *see generally* Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635 (1935); Green, *The Courts' Power Over Admission and Disbarment*, 4 TEX. L. REV. 1 (1925); Jeffers, *Government of the Legal Profession: An Inherent Judicial Power Approach*, 9 ST. MARY'S L.J. 385 (1978); Martineau, *The Authority of a State Supreme Court to Regulate Judicial Ethics*, 15 ST. LOUIS U.L.J. 237 (1970); Note, *Legislative or Judicial Control of Attorneys*, 8 FORDHAM L. REV. 103 (1939); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law — A Proposed Delineation*, 60 MINN. L. REV. 783 (1986).

[163] *See, e.g.*, United States v. Agajanian, 852 F.2d 56 (2d Cir. 1988) (affirming conviction for criminal contempt of court when an attorney failed to appear for trial without excuse and made incomplete and misleading statements to the trial court); United States v. Thoreen, 653 F.2d 1332, 1341 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (affirming conviction for criminal contempt of court when an attorney replaced the defendant with a look-alike at counsel table without notice to the prosecutor or the court); *see generally* C. WOLFRAM, *supra* note 68, at 625-30; Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971).

[164] Howell v. State Bar, 843 F.2d at 208 (quoting *In re* Snyder, 472 U.S. 634, 645 (1985)); *cf.* United States v. Sabater, 830 F.2d 7, 8-9 (2d Cir. 1987) (Defense counsel's substitution of the defendant's sister for the defendant at counsel table violated DR 7-106(C)(5), which proscribes a lawyer's "[F]ail[ure] to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.").

visions.[165] But in the years following the ABA's promulgation of the Canons, some state courts, including the Connecticut Superior Court, adopted the Canons as a basis for disciplining members of the state bar.[166] They did so pursuant to their inherent authority to supervise members of the bar, which includes the authority not only to discipline attorneys on a case-by-case basis, but also, in an administrative capacity, to establish rules governing the conduct of attorneys. In many states, including Connecticut, state legislation provided an additional source of authority to enact rules governing attorney conduct.[167]

In 1964, in response to complaints about the inadequacy of the Canons, both as teaching devices and as disciplinary provisions,[168] a special committee of the ABA was appointed to suggest amendments. As the *Doe* panel recognized, DR 7-102(B)(2) was initially included in the final version of a *Model Code of Professional Responsibility* that was drafted by the Special Committee.[169] The Model Code was adopted by the bar association's house of delegates on August 12, 1969. Thereafter, the Connecticut Bar Association House of Delegates recommended the Code for adoption by the judges of Connecticut's highest court, the Connecticut Superior Court.

Neither the adoption of the Code by the ABA nor its endorsement by the Connecticut Bar Association made it enforceable against an attorney who was practicing in Connecticut, whether before a state court or federal court. As far as such an attorney was concerned, the Code would simply have embodied "the lore of the [legal] profession."[170] The Code may have given such an attorney guidance about the propriety of certain conduct or have asserted some moral influence upon the attorney,

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[165] *See* CANONS OF PROFESSIONAL ETHICS preamble (1908); C. WOLFRAM, *supra* note 68, at 53-56.

[166] *See* 1 J. KAYE & W. MOLLER, CONNECTICUT PRACTICE 9 n.* (1966).

[167] *See* Maltbie, *The Rule-Making Power of Judges*, in 1 J. KAYE & W. MOLLER, *supra* note 166, at 1.

[168] *See* AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY xvi.

[169] The Special Committee on Evaluation of Ethical Standards was created by the ABA's House of Delegates in 1964 at the request of then-ABA President Lewis F. Powell, Jr. After meeting with 37 units of the profession and corresponding with more than 100 additional groups, the Special Committee issued a final draft in July 1969. *Id.* at xv.

[170] *In re* Snyder, 472 U.S. 634, 645 (1985) (footnote omitted).

but it would have been legally unenforceable.[171] The Code took legal effect in Connecticut when, in accordance with the state bar's recommendation, the judges of the superior court approved the Code, effective October 1, 1972,[172] thereby making Connecticut one of the last states to adopt the Code in place of the old Canons.[173]

Although the superior court's adoption of the Code would have subjected Doe to the disciplinary rules and to sanctions for violating those rules if he had been practicing in Connecticut state court, the Code, standing alone, could not properly have been the basis of a disciplinary sanction by the federal district court.[174] As the Supreme Court has recognized, a "state code of professional responsibility does not by its own terms apply to sanctions in the federal courts."[175] However, like state courts, federal courts have authority to regulate the lawyers who practice before them either by imposing disciplinary sanctions on a case-by-case basis or by enacting rules. Pursuant to their rulemaking authority,[176] the district judges of the District of Connecticut, acting in an administrative capacity, promulgated a

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[171] *See* Culebras Enters. Corp. v. Rivera-Rios, 846 F.2d 94, 98 (1st Cir. 1988) ("Absent promulgation by means of a statute or a court rule, ethical provisions of the ABA or other groups are not legally binding upon practitioners."); *see also* International Elecs. Corp. v. Flanzer, 527 F.2d 1288, 1293 (2d Cir. 1974).

[172] 1 W. MOLLER & W. HORTON, CONNECTICUT PRACTICE 1 (1979).

[173] *See* 1 J. KAYE & W. MOLLER, *supra* note 166, at 9 n.*. (1966); AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY ix n.2 (By the summer of 1972 the Code had been adopted by more than forty states.).

[174] *In re* Snyder, 472 U.S. at 645 n.6.

[175] *Id.* Violations of disciplinary rules that occur while an attorney is practicing in federal court may, however, be the subject of sanctions by state disciplinary authorities. *See, e.g.*, Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (4th Cir. 1989) (State bar disciplinary proceeding against United States attorney was removable to federal court.); Waters v. Barr, 103 Nev. 694, 747 P.2d 900 (1987) (State supreme court had jurisdiction to discipline assistant United States attorneys, even where they were not admitted to state bar.); *cf.* M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 873 n.2 (10th Cir. 1987) (Misconduct in federal litigation may be referred to state licensing authorities.).

[176] The federal court's supervisory authority would itself have allowed the Connecticut district judges to adopt rules governing the conduct of attorneys in federal proceedings. *See, e.g.*, United States v. Klubock, 832 F.2d 649, 652-53 (1st Cir.), *aff'd on rehearing en banc by equally divided court*, 832 F.2d 664 (1st Cir. 1987). In addition, the district judges had statutory authority which derived from a number of sources, including rule 83 of the Federal Rules of Civil Procedure and section 2071 of Title 28 of the United States Code. *Id. See also In re* Sutter, 543 F.2d 1030, 1036 (2d Cir. 1976) (affirming trial court's assessment of costs against an attorney who caused a three day delay at start of criminal trial).

rule which recognized "the 'Code of Professional Responsibility of the American Bar Association,' as approved by the judges of the Connecticut Superior Court, as expressing the standards of conduct expected of lawyers."[177] It is because of this rule that Doe's possible violation of DR 7-102(B)(2) of the Code of Professional Responsibility came to be the subject of federal grievance proceedings. One of the questions facing the *Doe* panel, in deciding how to apply this rule, was the extent to which the district court's incorporation of the disciplinary rule, by reference in a local rule of court, supplanted the traditional, common-law authority of the district and circuit courts to define the standards of professional conduct through case-by-case adjudication.

B. *The Court's Departure from Prior Approaches*

The *Doe* panel's use of traditional tools of statutory construction in an effort to discern the ABA drafters' intent was a departure from the Second Circuit's traditional approach to the interpretation of ambiguous disciplinary provisions.[178] In its earliest decisions after the Code was adopted by the ABA and incorporated by reference in the local rules of the district courts, the Second Circuit declined to be bound by the ABA's intent, but instead sought to preserve its traditional, "common-law" authority to supervise the practice of law. The court's approach to the interpretation of the Code differed significantly from the

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[177] *See* note 11 *supra*.

[178] The Second Circuit's initial decision in United States v. Hammad, 846 F.2d 854 (2d Cir.), *reh'g denied*, 855 F.2d 36 (2d Cir.), *revised*, 858 F.2d 834 (2d Cir. 1988), provides another example of that court's resort to traditional tools of statutory construction. *See generally* Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 313-17 (1988). In *Hammad*, the court upheld a district judge's determination that the prosecutor had violated DR 7-104(A)(2) when he authorized an informant to contact the represented target of a grand jury investigation. The court's initial decision elicited criticism both from prosecutors, see *Hammad*, 855 F.2d at 37, and from a district judge, see United States v. Galanis, 685 F. Supp. 901, 903-04 (S.D.N.Y. 1988), as well as from commentators. *See* Gillers, *Ethical Questions for Prosecutors in Corporate-Crime Investigations*, N.Y.L.J., Sept. 6, 1988, at 1, col. 1. The subsequent decisions reflected an effort to provide reassurance both that district judges may exercise discretion in applying the disciplinary rule to prosecutors and that the rule need not be applied categorically in a way that would forbid the use of informants in cases where important law enforcement interests justify the practice. Taken together, the *Doe* and *Hammad* decisions suggest the Second Circuit's inability, as a court, to agree upon, enunciate, and apply a uniform set of principles governing the interpretation of disciplinary rules.

manner in which courts customarily interpret federal statutes. This approach reserved a large measure of the discretion that was traditionally exercised by courts prior to the adoption of the Code.

The Second Circuit's earlier, common-law mode of interpretation was briefly, but well, justified and summarized by Judge Gurfein in 1975 in the paragraph that is quoted at the outset of this Article.[179] In addition, Judge Gurfein's opinion for the panel that same year in *International Electronics Corp. v. Flanzer*[180] provided a further explanation, as well as an illustration, of this approach. In that case, the plaintiffs brought an action for securities fraud against a number of individuals, including a retired lawyer. At that time, as during the proceedings in *Doe*, local rule 2(f) of the Connecticut district court incorporated by reference the ABA Code as adopted by the Connecticut Superior Court. Relying on the Code, the plaintiffs moved to disqualify the defendant's former law firm from representing him. The plaintiffs claimed that the continued representation would be a conflict of interest that violated disciplinary provisions contained in canon 5 of the Code. The district court agreed in part, finding that the law firm could properly represent the defendant prior to, but not during, trial. Both sides appealed.

At the outset of its discussion of the Code's conflict-of-interest provisions, the panel in *International Electronics Corp.* made clear that it did not consider itself bound by these provisions of the Code. The court quoted from an amicus curiae brief which had been solicited from the Connecticut Bar Association and which embodied the "spirit" in which the panel decided to "approach the problem":

> It behooves this court, . . . while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.[181]

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[179] J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359-60 (2d Cir. 1975) (Gurfein, J., concurring). *See* text accompanying note 1 *supra*.

[180] 527 F.2d 1288 (2d Cir. 1975).

[181] *Id.* at 1293. *See also* Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 215 (N.D. Ill. 1975) ("No code of ethics could establish unalterable rules governing all possible

In addition, the court cited Judge Gurfein's earlier concurrence and agreed with the district court that, notwithstanding the local rule, a district court judge has no statutory obligation to apply the disciplinary rules of the Code in deciding disqualification motions.[182] Applying its approach to the case before it, the court considered not only the relevant code provisions and their origins, but also the applicability of their underlying justifications to the particular case before the court and concluded that there was no justification for disqualifying the law firm from representing a former partner.

In a recent article, I suggested in slightly greater detail the justifications for the courts' exercise of discretion in interpreting disciplinary rules:

> When a court interprets an ethical rule, it need not and should not limit itself to the traditional tools of statutory interpretation. The court is not, after all, construing a statute. In the case of a statute, the court must attempt to divine the legislature's intent because judges are not allowed to make statutory law, only to interpret it. However, when a state court interprets an ethical rule, it is not usually attempting to ascertain the will of a legislature. On the contrary, in most states the judiciary itself promulgates the ethical rules pursuant to its inherent authority to regulate the practice of lawyers who appear before it. In essence, the court is attempting to ascertain and implement its own intent. Because the court is not constrained to implement the will of the legislature, but is operating in an area of law in which it has a special expertise and authority, it should have far greater latitude in interpreting ethical rules than it would have in interpreting legislation.
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> Particularly when those who drafted and enacted the ethical rule gave no attention to the question whether the rule extended to the type of case before the court, the court should feel free to approach the question as a maker, not interpreter, of law. In other words, the court should determine the scope of the rule in much the same way that the drafters would have determined it . . . .[183]

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eventualities. Ultimately, therefore, the resolution of these problems rests in the reasoned discretion of the court.").

[182] 527 F.2d at 1293. *See also* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976); Keoseian v. Von Kaulbach, 707 F. Supp. 150, 155 (S.D.N.Y. 1989); United States v. Perlmutter, 637 F. Supp. 1134, 1137 (S.D.N.Y. 1986).

[183] Green, *supra* note 178, at 314-15 (footnotes omitted). *But see* Lawry, *supra* note 147, at 688 ("Although not arguing for an unsophisticated 'plain meaning' philosophy in interpreting the Code, I would argue that the Disciplinary Rules were meant to be read and interpreted as a statute.").

This does not mean that the ABA drafters' intent is not relevant. When the ABA drafters' intent is clear, although imperfectly embodied in a particular rule, it should be given consideration as an expression of what thoughtful representatives of the organized bar considered to be the bounds of proper attorney conduct.[184] Decisions of other courts and of ethics committees of various bar organizations would be entitled to similar consideration, as would the views expressed in legal scholarship.

Nor does this mean that, when the disciplinary rules are ambiguous, they should themselves be ignored. As I suggested in the earlier article, the court should not exercise unbridled discretion but should make a judgment "informed by the values, policies, and practical considerations which guided the drafters of the Code" in the first instance, when they fashioned the disciplinary rules, and which then guided the court which adopted the rules.[185] In light of these considerations, the district court should be free to decide for itself how most appropriately to in-

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[184] *Cf.* Black v. State, 492 F. Supp. 848, 874-75 (W.D. Mo. 1980) (An opinion issued by an advisory committee of the state bar "is entitled to and has received consideration by this Court . . . since it is to some extent indicative of the ethical judgment of the Bar of the state in which this federal district court sits.").

[185] As I note in my Article, *supra* note 178, at 315-17:

> After all, the provisions of the Code are not arbitrary. As a general matter, the scope of an ethical rule reflects a resolution of legitimate interests that weigh in favor of or against the application of the rule. In classes of cases in which the interests sought to be protected by the rule are paramount, the rule applies. Where the interests underlying the rule are outweighed by legitimate countervailing interests, the rule does not apply. Thus, the competing interests are resolved differently in different classes of cases. A judicial interpretation of an ambiguous ethical rule should take account of these competing interests in a systematic way.
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> When deciding whether a disciplinary rule applies to a situation that was not explicitly considered by the drafters of the Code, a court should identify the legitimate interests weighing for and against the application of the rule. If the interests in favor of applying the rule are just as strong as in the typical case contemplated by the drafters of the rule, and the interests against applying the rule are just as weak as in the typical case, then the court should not hesitate to hold that the rule is applicable. If the balance is markedly different, however, because the interests which usually justify the rule are not as strongly implicated, or because the legitimate countervailing interests are unusually strong, the court should not apply the rule to the case before it. This approach recognizes that the disciplinary rules are not infinitely expansive . . . . [T]his analysis accords as much significance to the legitimate countervailing interests which limit the application of the ethical rule as it accords to those interests which the rule was designed to promote.

Id. (footnotes omitted).

terpret an ambiguous disciplinary rule, just as the court would be free, in the absence of a body of rules, to define attorney misconduct as an exercise of its inherent supervisory authority over attorneys. Thus, the intent of the ABA drafters, although relevant, is neither dispositive nor even of paramount importance.

The *Doe* decision provides a good illustration of the virtues of such a common-law approach, as opposed to the analysis adopted by the *Doe* panel, which drew far more closely upon traditional methods of statutory construction. By exercising its informed discretion on an ad hoc basis, a court could legitimately bring to the forefront all of the policy considerations that were either stated as afterthoughts by the *Doe* majority or left entirely unstated. A court could expressly consider and balance the various interests of the attorney, the client, and the judiciary within the context of the particular facts of the *Doe* case. The legitimacy of the court's ultimate determination would depend on the persuasiveness of its conclusion that a particular result was dictated by a proper balancing of these interests, rather than by its claim to have gleaned the intent formed by a small, unrepresentative committee of a private organization of lawyers more than sixteen years earlier.

This approach has an additional virtue. It avoids a substantial problem that arises when disciplinary rules are treated like statutes, that is, that a single course of conduct may or may not violate a disciplinary rule depending on the context in which the rule is interpreted. This problem arises because, in cases in which there is scant evidence of legislative intent, courts often resolve ambiguity in light of familiar principles of statutory construction.[186] Thus, penal statutes are typically construed strictly,[187] whereas remedial legislation is often construed liberally to effectuate its underlying purpose.[188] These principles may lead to different results depending on who is interpreting a disciplinary rule. For example, it is generally recognized that disciplinary proceedings are quasi-criminal in that they may result in

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[186] *See generally* Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 363-65 (1976).

[187] *See, e.g.*, FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954). *But see* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).

[188] *See, e.g.*, Gomez v. Toledo, 446 U.S. 635, 639 (1980); Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980).

sanctions against an attorney, including the loss of livelihood.[189] It could, therefore, be expected that disciplinary rules would be construed strictly in the context of disciplinary proceedings.[190] On the other hand, when an ethics committee of the bar is asked to give advice to an attorney about the propriety of proposed future conduct, there is no need to construe a disciplinary rule strictly. It may be construed liberally, in a manner that would forbid the proposed conduct, without causing the attorney to be sanctioned without adequate notice of the wrongfulness of his conduct. The advice of the ethics committee will itself provide notice sufficient to compensate for the ambiguity of the disciplinary rule as written. The implication of this approach is that, viewed as legislation subject to traditional techniques of statutory construction, the reach of ambiguous disciplinary rules may be inherently indeterminative.

Although the *Doe* panel might have been tacitly applying an approach much like that endorsed by Judge Gurfein, the panel explicitly purported to be discovering and carrying out the ABA drafters' intent.[191] The court's approach undermined the legitimacy of its decision in several respects. First, as illustrated earlier in this Article, the panel's claim to have discovered the drafters' intent is fairly weak. Viewed as an exercise in legislative interpretation, the opinion would deserve low marks. In order to reach a result that it obviously considered to be desirable from the point of view of sound policy, the court was con-

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[189] *See, e.g., In re* Ruffalo, 390 U.S. 544, 551 (1968); Charlton v. Federal Trade Comm'n, 543 F.2d 903, 906 (D.C. Cir. 1976); *cf. Matter of* Pennica, 36 N.J. 401, 418-19, 177 A.2d 721, 730 (1962) (Although disciplinary proceedings are "essentially civil in nature," more than a preponderance of the evidence is required to sustain an adverse finding "[b]ecause of the dire consequences that may flow from" it.).

[190] *See Matter of* Thalheim, 853 F.2d 383, 388 (5th Cir. 1988):

> Attorney disbarment and suspension cases are quasi-criminal in character . . . . Accordingly, the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged. Moreover, the same principle of construction follows from the fact that it was the court that drafted these rules. The court wrote its own rules; it must abide by them.

Id. (citations omitted).

[191] The court's departure from the common-law approach to disciplinary rules is somewhat ironic when juxtaposed against what one critic perceived to be the Second Circuit's adoption several years ago of such an approach to the interpretation of criminal statutes. *See* Duke, *Legality in the Second Circuit*, 49 BROOKLYN L. REV. 911, 930 (1983) ("There is something very disturbing about a society in which judges make criminal law by the 'common law method' but require legislatures to be explicit when enacting noncriminal legislation.").

strained to place undeserved weight on some, and ignore other, indicia of "intent". A court could expect to encounter similar problems any time it undertook to interpret an ambiguous disciplinary provision in accordance with the drafters' intent. The indicia of the drafters' intent will invariably be weak given the drafters' decision to meet in closed session and to dispense with any record of their deliberations.

The legitimacy of the panel's approach is also questionable in that it does not necessarily conform with the ABA drafters' general intent as to how the Code should be interpreted. There is nothing to suggest that the Special Committee ever meant its "intent" regarding specific provisions of the Code to be of significance, other than, perhaps, to the extent that its intent was plainly embodied in the Code itself.[192] The Code was an imperfect resolution of a variety of competing interests. Many of its provisions are ambiguous or vague. This is less likely a reflection of the drafters' oversights than of their expectation and hope that courts, ethics committees of the bar, and disciplinary committees would use their sound judgment to resolve uncertainties on a case-by-case basis.[193] It would scarcely be surprising if the drafters' decision to deliberate in secret was motivated not only by a desire to encourage their own uninhibited discussion,[194] but also by a desire to encourage courts and others to interpret the Code uninhibited by the drafters' "intent."

Finally, as Judge Gurfein suggested in his concurring opinion in *J.P. Foley & Co. v. Vanderbilt*, the approach which is fixated on the ABA drafters' intent "abdicate[s the court's] constitutional function of regulating the Bar."[195] The *Doe* panel's

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[192] *Cf.* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 552 (1983) (Certain statutes, such as the Sherman Act, authorize courts to create common-law doctrine.); Posner, *Legal Formalism, Realism and Interpretation of Statutes and the Constitution*, 37 CASE W. RES. 179, 194-95 (1987) (Legislature drafting and enacting law may not intend that its specific intention be controlling.).

[193] *See, e.g.*, A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 146-47 (1976) (The drafters of DR 7-102(B)(1) set up a conflict between the principle in favor of preserving client confidences and the principle in favor of disclosing perjury and fraud, "thus leaving lawyers, ethics committees, and courts the problem of resolving conflicts in different factual situations.").

[194] *See* AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY xi.

[195] 523 F.2d 1357, 1359-60 (2d Cir. 1975) (Gurfein, J., concurring). To be sure, such an approach is not a wholesale abdication of the courts' traditional function, since the district judges themselves adopted the disciplinary rules pursuant to their rule-making

approach sharply circumscribes the federal courts' traditional authority to define the standards of attorney conduct in the context of particular cases and limits the courts' role to administering the will of the ABA. Both the public and the bar are entitled to a broader, more flexible conception of the courts' role — a conception under which, in the context of concrete cases, the courts will proscribe improper conduct that was not specifically foreseen and addressed by drafters of the Code, while permitting conduct that seems to fall within the proscriptions of the Code but that is proper under the unique circumstances of the particular case. This conception of the courts' role as interpreter of ethical provisions may not be entirely problem free,[196] but it is

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authority. But given the district judges' decision to incorporate the rules in their entirety by reference, rather than to give detailed consideration to the appropriateness of particular rules either in the abstract or in the context of particular cases, strict reliance on the rules is, in effect, a substantial abdication of the courts' traditional responsibility.

The Second Circuit's decisions since the enactment of the Code have reflected conflicting attitudes toward the traditional supervisory authority of the courts. In some cases, the court has been quite willing to opine about the propriety of the conduct of the lawyers who come to their attention, even when the court's pronouncements do not affect the outcome of the case before them. *See, e.g.*, United States v. Pinto, 850 F.2d 927, 933-34 (2d Cir.), *cert. denied*, 109 S. Ct. 174 (1988) (criticizing prosecutor for contacting a defense witness without the consent of the witness's counsel); United States v. Sabater, 830 F.2d 7, 9 (2d Cir. 1987) (criticizing defense counsel for "dubious tactics" during trial); *In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 248 n.6 (2d Cir. 1986) (en banc), *cert. denied*, 475 U.S. 1108 (1986) (admonishing against the possibility of undesirable outside influence in accepting legal fees from a third party for representation of a client). In other cases, however, the court has regarded the propriety of attorney conduct as a matter for disciplinary committees, not the courts. *See, e.g.*, United States v. Dennis, 843 F.2d 652, 657 (2d Cir. 1988) (" 'The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it.' ") (quoting W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976)); Armstrong v. McAlpin, 625 F.2d 433, 443-44, 446 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981); Board of Education v. Nyquist, 590 F.2d 1241, 1248 (2d Cir. 1979) (Mansfield, J., concurring) ("Only where the attorney's unprofessional conduct may affect the outcome of the case is there any necessity to nip it in the bud. Otherwise conventional disciplinary machinery should be used and, if this is inadequate, the organized bar must assume the burden of making it effective as a deterrent.").

[196] It might be said, for example, that this analysis attains flexibility at the expense of uniformity. An analysis which permits every court to sit, in effect, as a legislator, might be expected to generate more disparate interpretations than an analysis under which every court looked to the ABA drafters' intent. A Connecticut lawyer might have to comply with one interpretation of the disciplinary rules when he appears in state court and a different interpretation of the same rules when he appears in federal court.

There are several responses to this problem. First, this lack of uniformity is neither novel nor particularly undesirable. Entirely different rules of procedure apply in state and federal court. More significantly, this sort of disparity is endemic in the area of

nevertheless the conception most consistent with the courts' historic responsibility to supervise the practice of law.[197]

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attorney discipline. Different state courts freely interpret the provisions of identically worded disciplinary provisions in vastly different ways, in accordance with the historic authority of courts to adopt independent standards of professional conduct on an ad hoc, case-by-case basis. Second, this disparity would not necessarily be avoided by an analysis based on the drafters' intent. There is as much room for disagreement about the drafters' intent as there is about sound policy. The indicia of intent are so weak that, in most cases, courts would adopt their own policy preferences in any event.

A related concern is that an analysis based on an ad hoc balancing would give insufficient guidance to attorneys who are seeking to conform to professional standards. The responses to this are similar. First, such an analysis leaves lawyers no worse off, and probably much better off, than they were before the Code was adopted, when professional discipline was entirely a matter of common law. Second, such an analysis gives lawyers no less guidance than they generally now have when they are required to comply with vague provisions of the Code, such as DR 1-102(A)(5), which provides that an attorney shall not "[e]ngage in conduct that is prejudicial to the administration of justice." *See, e.g.*, Howell v. State Bar, 843 F.2d 205, 208 (5th Cir.), *reh'g denied*, 849 F.2d 1471 (en banc), *cert. denied*, 109 S. Ct. 531 (1988); *In re* Finkelstein, 706 F. Supp. 1581 (M.D. Ga. 1989). Most importantly, as noted above, there is little reason to believe that an alternative analysis would afford greater certainty.

[197] This approach recognizes that the district court, as well as the court of appeals, is vested with discretion in applying the disciplinary rules. It is consistent with the cases cited in *Doe*, 847 F.2d at 61, which applied an "abuse of discretion" standard upon review of lower court decisions on motions to disqualify counsel. *See* note 63 *supra*. Those cases recognized that a district judge has discretion to deny a motion to disqualify counsel for a conflict of interest in order to protect counsel's client from the unfair hardship of retaining new counsel even when the representation would apparently be forbidden by the Code.

The cases applying the "abuse of discretion" standard can be viewed, however, as solely recognizing that the disciplinary rules are not necessarily enforceable in the disqualification context (as opposed to disciplinary proceedings), and not as also recognizing the courts' discretion generally to interpret disciplinary rules in order to do justice in individual cases. If viewed this way, these cases merely follow Second Circuit decisions which establish that disqualification is not always the appropriate remedy for an attorney's conflict of interest, even when that conflict comprises a disciplinary violation. *See, e.g.* Armstrong v. McAlpin, 625 F.2d 433, 446 (2d Cir. 1980) (en banc); Community Broadcasting of Boston, Inc. v. F.C.C., 546 F.2d 1022, 1027 n.37 (2d Cir. 1976); W.T. Grant Co. v. Haines, 531 F.2d 671, 677-78 (2d Cir. 1976). Although attorneys must comply with the disciplinary rules regarding conflicts of interest, courts need not enforce those rules at the trials over which they preside. The implication of this view is that attorneys can be disciplined, either by a district court grievance committee or by a disciplinary committee of the state bar, for continuing in the representation after the disqualification motion is denied. This approach seems questionable since the risk of discipline would have essentially the same effect as disqualification: it would compel the attorney to withdraw from the representation in order to avoid disciplinary sanctions. This problem would be avoided by recognizing that, in many cases, a district judge's denial of a disqualification motion should be viewed as a determination that the challenged representation does not violate the disciplinary rules of the federal district court.

Regardless of how the disqualification cases are viewed, they seem to be irrelevant in light of the *Doe* panel's approach to the interpretation of disciplinary rules. The panel's

C. *Whose Intent Is It, Anyway?*

Why did the ABA's intent matter to the *Doe* panel? Assume for the moment that the ABA drafters had a view as to whether actual knowledge should be an element of DR 7-102(B)(2); assume further that the ABA drafters wanted the rule to be interpreted in light of their particular understanding. Was the *Doe* panel under any constraint to discover and carry out the drafters' intent? Clearly not.

Courts customarily equate the search for the meaning of an ambiguous writing with the search for the drafters' intent. The most obvious illustration, and the one on which the *Doe* panel undoubtedly drew, is the federal courts' interpretation of ambiguous federal statutes in accordance with congressional intent.[198] But in the case of federal statutory provisions, Congress generally drafts as well as enacts the law. The courts' deference to legislative intent arises primarily out of Congress's role as enactor, rather than as drafter. When a federal court interprets a statute, its duty to ascertain and defer to the will of Congress, insofar as possible, derives from the court's role subordinate to that of Congress in the making of public policy. The legitimacy of the court's decision thus depends, in large part, on its claim to have discovered and carried out the intent of those who enacted the law.[199]

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approach greatly diminishes the use of discretion in interpreting disciplinary provisions, at least in the context of disciplinary proceedings. Given this approach to interpretation, it made little sense for the panel to say that "[a] district court's decision disciplining an attorney for ethical misconduct ordinarily will not be set aside absent an abuse of discretion." 847 F.2d at 61. *See* notes 58-64 and accompanying text *supra*.

[198] *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress . . . ."); Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). *See generally* Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 158-63 (1989). Although the search for legislative intent has long been the prevailing judicial approach to the interpretation of statutes, it has often been questioned by commentators. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Curtis, *A Better Theory of Interpretation*, 3 VAND. L. REV. 407, 415 (1950); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); Comment, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). This Article is agnostic about the virtues of the traditional approach to statutory construction; its point is that, even accepting the wisdom of that approach when it comes to legislation, the traditional approach should not be applied to ambiguous disciplinary provisions.

[199] *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 8 (1975); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533-35

Unlike most federal statutes, the ambiguous disciplinary rule at issue in *Doe* was not enacted by the body that drafted it. As noted earlier, the rule had no legal effect in Connecticut until it was approved by the superior court.[200] As between the intent of the ABA committee that drafted the Code and that of the superior court judges who adopted the Code, it is quite clearly the intent of the state judges that is of paramount importance. Although the ABA committee's understanding of a disciplinary rule may be a guide to the state judges' intent, particularly insofar as that understanding was known to the superior court judges at the time they adopted the Code, the ABA drafters' intent is not controlling. A court has no obligation to carry out the intent of the ABA as it would the intent of a legislature that enacted an ambiguous statute. The ABA is in an equivalent position to a private lobbying group that drafts a proposed bill and provides the draft to a member of Congress.[201] Even if that proposal is ultimately signed into law *in haec verba*, a court must interpret that law in light of the intent of Congress when it enacted the law, and not the intent of the lobbying group which drafted it.[202] Ordinarily, a court would, therefore, seek to ascertain and carry out the intent of the state court judges who enacted the Code. If Doe had been a Connecticut lawyer who was brought before a disciplinary committee of the state court, the intent of the Connecticut Superior Court would have been controlling on issues involving the interpretation of ambiguous disciplinary provisions.[203]

In *Doe*, of course, the task of interpreting DR 7-102(B)(2) was further complicated by the fact that the case arose in fed-

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(1947); Kernochan, *supra* note 186, at 345-48; Posner, *supra* note 192, at 189-90; *see generally* Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22 (1988).

[200] *See* note 11 and accompanying text *supra*.

[201] Likewise, the ABA drafters are in a position similar to that of the drafters of uniform state laws such as the Uniform Commercial Code, which has been adopted in almost every state. Although the drafters' comments are often given some weight by courts interpreting ambiguous provisions of the Uniform Commercial Code, it is generally recognized that "the comments are not entitled to as much weight as ordinary legislative history," since they do not reflect the intent of the state legislatures that enacted the law. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 13 (3d ed. 1988) (citing Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597).

[202] *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

[203] *See, e.g.*, Grievance Committee for the Hartford-New Britain Judicial District v. Trantolo, 192 Conn. 15, 17, 470 A.2d 228, 232 (1984).

eral, rather than state, court. In *Doe* the only body whose intent might be controlling — as opposed to merely persuasive —is the group of federal district court judges who, pursuant to their rule-making authority, adopted the rule governing the discipline of attorneys in the District of Connecticut. The disciplinary rules applied by the federal courts are federal law.[204] If they are viewed as legislation, like other rules of court,[205] then the principle that rules should be interpreted in accordance with the intent of those who enacted them would require a court to look to the intent of the district court judges who enacted the local rule, not that of the ABA drafters. The judges were free to adopt the Connecticut version of the Code, the ABA's version of the Code (to the extent it differed), or any other set of disciplinary rules, including rules entirely of their own creation.[206] Whether the district judges adopt disciplinary rules by explicit enumeration or, as in the District of Connecticut, by reference, it should ordinarily be the judges' intent that is controlling — both as to what the rules mean and as to how those rules should be interpreted.[207]

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[204] *In re* Snyder, 472 U.S. 634, 645 n.6 (1985); Theard v. United States, 354 U.S. 278 (1957); United States v. Miller, 624 F.2d 1198, 1200 (3d Cir. 1980).

[205] *See generally* Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976).

[206] *See, e.g., In re* Abrams, 521 F.2d 1094, 1101 (3d Cir. 1975) (recognizing that, as a general rule, a district court has "absolute and unfettered power . . . to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures" of the state courts and the federal court of appeals). Of course, any rules adopted by the district court would be subject to limits established by the Constitution or by federal legislation. *Cf. In re* Snyder, 472 U.S. at 642-47.

[207] When federal law incorporates state law by reference, federal courts do not have to interpret that state law precisely as it would be interpreted by the state courts. *See generally* United States v. Kimbell Foods, 440 U.S. 715 (1979). Thus, in cases in which the adoption of a particular state-law interpretation would be contrary to the policy of the underlying federal legislation, federal courts have occasionally interpreted the federal legislation in a manner which is consistent with congressional intent but inconsistent with the state court interpretations of the state law to which the federal statute referred. *See* United States v. Nardello, 393 U.S. 286 (1969); *see generally* H. HART & H WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 566-67 (3d ed. 1988). At least in theory, there is consequently no reason why a provision of the Connecticut Code of Professional Responsibility, as incorporated into the local rules of the federal court, must be interpreted in precisely the same way as it would be interpreted by the superior court. Insofar as a court could discern an intention on the part of the federal district judges to apply a rule differently from the way in which it would be applied by the Connecticut Superior Court, a federal court could, and indeed should, interpret the rule in light of the intent of the federal judges.

If the rules were to be viewed as legislation and interpreted in light of the district judges' intent, then the court of appeals ordinarily would not interpret a disciplinary rule de novo, but would be required to give deference to an interpretation by the district court. As a general matter, an appellate court gives some deference to an interpretation of law made by a court that has particular familiarity with that law. Thus, the Supreme Court generally defers to a decision of a federal court of appeals that interprets the law of a state within the circuit.[208] Similarly, the Second Circuit has observed that "a court of appeals should give considerable weight to state law rulings made by district judges, within the circuit, who possess familiarity with the law of the state in which their district is located."[209] If deference is owed to a federal district judge's interpretation of the law of his state, then deference is certainly owed to a federal district judge's interpretation of rules adopted by the judge's own court.[210]

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[208] *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 346 (1976); MacGregor v. State Mutual Life Assurance Co., 315 U.S. 280 (1942); *cf.* Haring v. Prosise, 462 U.S. 306, 314 n.8 (1983).

[209] Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 281 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) (citing 1A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.309(2), at 3125 n.28 (1989)). In *Factors Etc.*, the court relied on these principles in holding that a court of appeals must give deference to a decision made by a court of appeals of another circuit on the law of a state within that circuit. The court made clear that this did not mean that the other court's interpretation was binding. To the contrary, because

> [t]he ultimate source for state law adjudication . . . is the law as established by the constitution, statutes, or authoritative court decisions of the state[, a] federal court in another circuit would be obliged to disregard a state law holding by the pertinent court of appeals if persuaded that the holding had been superceded by a later pronouncement from state legislative or judicial sources, . . . or that prior state court decisions had been inadvertently overlooked by the pertinent court of appeals.

Id. at 283 (citations omitted).

[210] *See, e.g.*, Matter of Thalheim, 853 F.2d 383, 391 (5th Cir. 1988) (Smith, J., concurring in part and dissenting in part); John v. Louisiana Board of Trustees, 757 F.2d 698, 707 (5th Cir. 1985); Matter of Adams, 734 F.2d 1094, 1102 (5th Cir. 1984) ("Courts have broad discretion in interpreting and applying their own local rules . . ."); Smith v. Ford Motor Co., 626 F.2d 784, 796 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981); Martinez v. Thrift Drug & Discount Co., 593 F.2d 992 (10th Cir. 1979); *cf.* Nevitt v. United States, 828 F.2d 1405, 1406-07 (9th Cir. 1987) ("The interpretation of statutes and regulations by an agency charged with their administration is entitled to due deference and should be accepted unless demonstrably irrational or clearly contrary to plain meaning.").

A duty to give some deference to a district judge's interpretation of a disciplinary provision would be troubling, in part, because it would limit the appellate court's authority to issue definitive interpretations of federal disciplinary provisions, but primarily be-

The *Doe* panel apparently ascribed no significance to the district judges' intent as to the meaning of DR 7-102(B)(2). This is not entirely surprising, given that the district court judges did not adopt their own set of disciplinary provisions, but simply incorporated a set of preexisting provisions by reference. A persuasive argument can be made that Judge Daly's interpretation of one of those provisions is not entitled to deference because when the judges of the district court adopted the court rule governing professional responsibility, they had no particular understanding concerning the reach of DR 7-102(B)(2). The judges did not discuss the particular provisions or even think about them. Therefore, a district judge would not have a superior basis for any real insight into his fellow judges' understanding of a particular provision of the Code.[211] The court of appeals would be in just as good a position as Judge Daly to decipher the district judges' understanding of the disciplinary provision.[212]

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cause it might lead to the further balkanization of disciplinary law. If the decisions of each of the half dozen-or-so district judges in Connecticut are entitled to deference, then there is a risk of irresolvable conflict, not only among the decisions of the state and federal courts, but also among the decisions within the district itself. A lawyer practicing within the district might not be entitled to view any particular court's decision as a definitive ruling as to the reach of the disciplinary rules. For example, a decision of the court of appeals that deferred to a lower court's interpretation might not be definitive; another federal district judge might remain free to interpret the disciplinary rule differently, just as the judge would if a fellow district judge's decision had not been reviewed on appeal. Only if the district judges sat en banc — or provided clarification by amending their court rules — could a definitive decision be issued. *Cf.* Dondi Properties Corp. v. Commerce Savings & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (adopting standards of conduct to be observed in civil litigation); *In re* Caruso, 414 F. Supp. 43 (D.N.J. 1984) (en banc) (disbarring attorney following conviction in state court).

[211] *Cf.* United States v. Abel, 469 U.S. 45, 49 (1984) ("Although we are nominally the promulgators of the [Federal] Rules [of Evidence], and should in theory need only to consult our collective memories to analyze the situation properly, we are in truth merely a conduit when we deal with an undertaking as substantial as the preparation of the Federal Rules of Evidence.").

[212] This argument, which is generally persuasive, may be somewhat less persuasive in the context of DR 7-102(B)(2). At the time of the relevant events in *Doe*, the district court was governed by local rules which had been adopted in 1983, effective January 1, 1984. At the time that the district judges adopted the local rules, the opinion of Judge Zampano in United States v. Grasso, 413 F. Supp. 166 (D. Conn. 1976), *aff'd*, 552 F.2d 46 (2d Cir. 1977), provided an indication of the understanding of at least one district judge as to the meaning of the provision. In *Grasso*, the district court granted a mistrial sua sponte after defense counsel informed the court that a government witness had recanted his trial testimony, claiming that his testimony was the product of government threats and coercion. In opposition to the defendant's subsequent claim that a retrial would be barred by the double jeopardy clause, the government argued that defense counsel had

Even if one accepts, as one probably must, that the district judges who enacted the court rule had no particular understanding of DR 7-102(B)(2), it does not follow that the district judges' intent is irrelevant. The judges' adoption of the ABA Code "as approved by the judges of the Connecticut Superior Court," did not necessarily signal their intent to give either the state court or the ABA the last word on how lawyers should conduct themselves in federal proceedings. Although the district judges probably did not have a collective understanding of what any particular disciplinary rule meant, they may well have had intent as to how the Code as a body of law should be interpreted. In particular, it is quite likely that they intended to exercise considerable discretion in interpreting the disciplinary rules.[213] At the time

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improperly engaged in "conduct calculated to abort the trial." Judge Zampano rejected this argument, noting that defense counsel had acted in accordance with his ethical obligation:

> As an officer of the court and a lawyer for the defendant, [counsel] had the affirmative duty to notify the trial judge that a witness had recanted his sworn testimony. Probable perjurious testimony must, of course, be immediately reported to the presiding judge in the interests of justice and to preserve the integrity of the judicial process.

Id. at 171. This pronouncement reflected a far broader view of a lawyer's responsibility to disclose a third party's fraud on the court than the view adopted by the *Doe* panel. Since the *Grasso* decision was part of the law of the district at the time it adopted the court rule governing attorney conduct, it probably would have been entitled to some weight as an expression of the district judges' conception of a trial lawyer's duty to disclose perjurious testimony.

The *Doe* panel was undoubtedly aware of the *Grasso* decision for two reasons. First, the court had engaged in "exhaustive research." 847 F.2d at 62. Second, *Grasso* was one of only two decisions cited by the annotated Code in its discussion of DR 7-102(B)(2). *See* AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 327 (1979). The *Doe* panel consulted and relied on the annotated Code in reaching its decision. *See* 847 F.2d at 62 n.3. Although its failure to refer to *Grasso* might have reflected an affirmative, but tacit (and probably erroneous) determination that the district judges' understanding of the disciplinary rule is not important, or a (somewhat questionable) determination that *Grasso* casts no light at all on the district judges' understanding of DR 7-102(B)(2), most likely this omission simply reflected the court's complete failure to consider the possible significance of the district judges' intent.

[213] *See, e.g.*, Black v. State, 492 F. Supp. 848 (W.D. Mo. 1980). In *Black*, the district court was asked to rule on a motion to disqualify an attorney based on a conflict of interest. The district court's local rules incorporated by reference the disciplinary code which had been adopted by the Missouri Supreme Court, which in turn included most of the provisions of the ABA Code of Professional Responsibility. *Id.* at 860 & n.8 (citing Rule 43.4(B) of the Local Rules of Procedure for the United States District Court for the Western District of Missouri). The federal district court concluded, however, that it was not bound to apply the disciplinary rules in precisely the same manner that they would be applied by either the state courts or the ABA. The district court explained that its

the local rule was adopted, that was the prevailing method of interpretation in the circuit as well as the method that is most consistent with the federal courts' traditional authority to regulate the practice of attorneys who come before them. This approach would have permitted the continued development of an independent body of disciplinary law in the federal district court, albeit a body of law that took as its point of departure the provisions of the Code of Professional Responsibility that were adopted by the state court.[214]

A far less likely view of the district court judges' intent is that when they "recognize[d] the authority of" the Code "as approved by the judges of the Connecticut Superior Court," the federal judges intended not only to adopt the Code provisions themselves, but also to be bound by the authoritative state court interpretations of the Code. In other words, the judges wanted the Code to mean the same thing in federal as in state court, thereby achieving uniformity between state and federal court interpretations of disciplinary law. Accepting this view, a federal district judge who was faced with an ambiguous provision of the Code would be required to accept a definitive state court interpretation of that provision. In the absence of a definitive interpretation, the district judge would have to endeavor to determine how the superior court would have resolved the

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interpretation of the disciplinary provisions was an "exercise of its supervision over attorneys conducting proceedings before it." *Id.* at 875. Therefore, the court considered, but ultimately rejected, an interpretation of the state disciplinary rules that had been issued by an advisory committee of the state bar. *Id.* at 874-75. Similarly, while seeking guidance in "the canonized principles of the Code," *id.* at 860-61, the district court placed equal importance on an independent evaluation of the interests implicated by the relevant rules in light of the court's own " 'ethical experience.' " *Id.* at 861 (quoting Arkansas v. Dean Food Prod. Co., 605 F.2d 380, 383 (8th Cir. 1979)).

[214] The district judges' intention to adopt this approach is also suggested by other provisions of the rule governing the discipline of attorneys. In particular, the provisions governing disciplinary proceedings permit the imposition of sanctions for any "attorney misconduct relating to any matter within the jurisdiction of" the district court, rather than only that misconduct which violates specific provisions of the Code. If the district court judges left themselves latitude to develop a body of disciplinary law outside the specific proscriptions of the Code, as this provision suggests, then it is likely that they also intended to allow themselves latitude to interpret specific Code provisions in a manner inconsistent with the understandings of the state court and the ABA. Since the court's interpretation would be a product, in part, of the court's traditionally broad discretionary authority to regulate attorneys, it would be entitled to deference from the court of appeals.

ambiguity.[215] In his 1975 opinion for the court in *International Electronics Corp.*, Judge Gurfein pointedly rejected this approach.[216] The *Doe* panel did not adopt it either.[217]

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[215] *See, e.g.*, United States v. Miller, 624 F.2d 1198, 1200 (3d Cir. 1980). In *Miller*, the Third Circuit agreed with the lower court that the New Jersey district court's local rule governing the conduct of attorneys adopted the state ethical rules as interpreted by the state courts. The court of appeals reasoned, in part, that the district judge's interpretation of the local rules of his own court was entitled to substantial deference. *See* note 220 *infra*. The court of appeals also explained, however, that there were two legitimate reasons for the New Jersey district judges to have incorporated the entire body of New Jersey State disciplinary law, including the judicial interpretations of the state court: "It allows the district court to use the possibly greater facilities of the state to investigate the ethical standards and problems of local practitioners. It also avoids the detriment to the public's confidence in the integrity of the bar that might result from courts in the same state enforcing different ethical norms." 624 F.2d at 1200; *see also In re* Abrams, 521 F.2d 1094 (3d Cir.), *cert. denied*, 423 U.S. 1038 (1975); Petition of Merry Queen Transfer Corp., 269 F. Supp. 812, 813 (E.D.N.Y. 1967) (Weinstein, J.).

The New Jersey district court's local rule was amended several years after the *Miller* decision to provide that "[t]he Rules of Professional Conduct . . . shall govern the conduct of . . . members of the bar admitted to practice in this Court." D.N.J. GEN. R. 6. Federal district judges in New Jersey have concluded that, as amended, the local rule no longer adopts New Jersey decisional law concerning the interpretation of the disciplinary rules. *See* United States v. Walsh, 699 F. Supp. 469, 471-73 (D.N.J. 1988); Richards v. Badaracco, No. 88-836 (D.N.J. June 27, 1988) (LEXIS, Genfed library, Dist file). In *Walsh*, for example, the district court opined that a responsibility to defer to state court interpretations of the disciplinary rules would be inconsistent with the responsibility of federal courts to supervise the conduct of attorneys who practice before them. 699 F. Supp. at 473. *Cf.* Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F. Supp. 1445, 1449-50 (D.P.R. 1985) ("Although reference to how the supreme court, of a district where the federal court sits, is helpful, the resolution of [conflict-of-interest problems] which may arise in a federal case is a matter of federal law entrusted to the discretion of the federal district court.") (citations omitted).

[216] International Elec. Corp. v. Flanzer, 527 F.2d 1288, 1293 (2d Cir. 1975). The court expressly noted that, although DR 5-101(B)(4) of the ABA's Model Code contained an exception to the attorney-witness disqualification rule in cases in which the replacement of counsel would "work a substantial hardship on the client," the Connecticut Superior Court had repealed this exception in order to reinstate the stricter rule that formerly had been applied in Connecticut. *Id.* However, the panel did not consider itself bound to apply the disciplinary rule strictly as it would be applied by the Connecticut court.

[217] If it had been seeking to interpret the disciplinary rule in accordance with the intent of the Connecticut Superior Court, the panel would probably have noted that, among other things, any indication of how the superior court understood DR 7-102(B)(2) was missing. Moreover, rather than looking for the "drafters' intent," the panel would have considered how the superior court would analyze an ambiguous disciplinary provision. The intent of the ABA drafters may or may not be the touchstone of the state court's analysis.

In addition, the appellate court would have owed some deference to the district court's interpretation. As noted earlier, it is customary for a federal court of appeals to give some deference to a district judge's interpretation of the law of the state in which he

There is a third possible view of the federal judges' intent: By "recogniz[ing] the authority of the 'Code of Professional Responsibility of the American Bar Association,' " the court may have intended to make the ABA drafters' intent controlling. This is the only view that would have justified the *Doe* panel's decision to place paramount importance on the intent of the drafters, without even considering the intent of either the federal district judges or the state superior court judges.[218] Yet there is no reason for the *Doe* panel to have decided that the district judges meant to abdicate their traditional authority to regulate the conduct of attorneys, much less to have decided this in 1988 without any explanation.[219] Moreover, insofar as the district court interpreted the local rule differently, so as to preserve the traditional discretion of the district judge to define proper attorney conduct, that interpretation was entitled to deference from the court of appeals.[220]

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is sitting. *See* note 215 *supra*. *See also* C. WRIGHT, FEDERAL COURTS § 58, at 271 (3d ed. 1976):

> As a general proposition, a federal court judge who sits in a particular state and has practiced before its courts may be better able to resolve complex questions about the law of that state than is some other federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts have frequently voiced reluctance to substitute their own view of the state law for that of the federal judge.

Id. Unless the district judge overlooked important evidence of the state court's intent or the state court issued a relevant decision while the appeal was pending, it would not have been appropriate for the appellate court to take an entirely fresh look at the state law.

[218] This is also the only view that would have justified the court of appeals in undertaking a de novo determination of the meaning of the disciplinary rule, without any deference to the district judge's interpretation: The district judge's interpretation would not be entitled to any weight because the district judge is no more familiar than is the appellate court with the evidence of the drafters' intent.

[219] *Cf.* Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982) (presumption that legislation was not intended to withdraw the courts' traditional equitable discretion).

[220] *See* United States v. Miller, 624 F.2d 1198, 1200 (3d Cir. 1980), discussed in note 215 *supra*. The court of appeals in *Miller* affirmed a district court's order disqualifying a law firm, one of whose partners had formerly worked in the United States Attorney's office while it was investigating the case. The trial judge had invoked a local rule which provided that "[t]he Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association as amended by the Supreme Court of New Jersey . . . shall govern the conduct of . . . the members of the Bar admitted to practice in this Court." D.N.J. GEN. R. 6. The trial judge interpreted the local rule "to incorporate not only New Jersey's published set of disciplinary rules but also New Jersey law on the interpretation of those rules." 624 F.2d at 1200. For that reason, the trial judge relied on an interpretation of the Code that was contained in an advisory opinion issued by the New Jersey

It is less likely that the *Doe* panel actually had a conception of the district judges' theory of interpretation, or even that the panel itself gave much thought to the appropriate theory of interpretation, than that the court employed principles of statutory construction reflexively. It is scarcely surprising that the court would do so. The role of federal common law has become increasingly unimportant as compared with federal statutes, rules, and regulations. Particularly when confronted with disciplinary rules that look very much like statutes or regulations, the court's natural response is likely to be to seek the drafters' intent. Yet the law of attorney discipline is a reserve in which federal courts can and should continue to exercise greater discretion.

VI. The Final Analysis: How Should the Case Have Been Decided?

The principal concern of this Article has not been with whether the *Doe* panel was ultimately correct in determining that Doe had acted properly and that DR 7-102(B)(2) requires "actual knowledge," but with the more important and far-reaching question whether the court made its determination in an appropriate fashion. Nevertheless, I conclude with three tentative thoughts regarding the narrower question: First, even if Doe's conduct violated the disciplinary rule, he should not have been sanctioned because he lacked fair notice of the scope of that rule. Second, a lawyer in Doe's position should not be obligated to make immediate disclosure to the court. Third, an "actual knowledge" requirement is both unsound and unnecessary.

A. *The Imposition of Sanctions*

Even assuming that Doe violated DR 7-102(B)(2) by failing

Supreme Court. *Id.* at 1199-1200. On appeal, a panel of the Third Circuit found "no error in the district court's reading of" the local rule and noted that "[a] court of appeals will grant substantial deference to a district court in the interpretation and application of local district court rules." *Id.* at 1200. *See also In re* Abrams, 521 F.2d 1094, 1108 n.5 (3d Cir.) (Adams, J., concurring and dissenting) ("[T]he interpretation of local rules is primarily committed to the district court that promulgates them."), *cert. denied*, 423 U.S. 1038 (1975).

Interestingly, the Second Circuit panel in *Doe* was aware of the *Miller* decision, having cited it for the proposition that lower court interpretations of the Code are subject to plenary review. 840 F.2d at 61 (citing *Miller*, 624 F.2d at 1201).

to apprise Judge Zampano of information establishing perjury on the part of a deposition witness, it does not follow that Doe should have been suspended for six months or, indeed, sanctioned at all. An attorney should not be punished for violating a disciplinary provision that is as ambiguous as this one. The Second Circuit recently recognized the need for fair notice in *United States v. Hammad.*[221] In that case, the court found that a prosecutor had violated DR 7-104(A)(1)[222] by sending an informant, armed with a bogus subpoena, to converse with the represented target of a federal grand jury investigation. While believing that the suppression of statements made by the target to the informant would ordinarily be an appropriate remedy for the misconduct, the court concluded that, in this case, "the government should not have its case prejudiced by suppression of its evidence when the law was previously unsettled in this area."[223]

If fair notice is necessary before the government's evidence is suppressed, fair notice is certainly necessary before an attorney is punished personally for a disciplinary violation.[224] One might quibble, of course, over what *is* fair notice. According to Professor Wolfram, most courts seem to believe that "lawyers should be aware from an innate sense that certain conduct is wrongful."[225] Even if that is so, Doe's conduct did not fall into the category of conduct that one should innately know to be improper, as the grievance committee's decision and the ethics professor's testimony demonstrate.

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[221] 858 F.2d 834 (2d Cir. 1988).

[222] DR 7-104(A)(1) provides that a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1).

[223] 858 F.2d at 842.

[224] *But see* United States v. Kelly, 543 F. Supp. 1303, 1313-14 (D. Mass. 1982) (Discipline of prosecutor personally is more appropriate penalty for prosecutorial misconduct than one which undermines the government's ability to try the case.); Burkoff, *Ethics Violations and the Exclusionary Rule*, 4 CRIM. JUST. 33, 35 (1989).

[225] Wolfram, *supra* note 68, at 86 & n.46 (identifying, but not approving, "[t]he prevailing, although not uniform, judicial attitude"); *see also* Howell v. State Bar, 843 F.2d 205, 207 (1988); *but see In re* Nicholson, 243 Ga. 803, 257 S.E.2d 195 (1979).

B. *The Duty to Disclose*

I would tend to agree with the *Doe* court that the attorney should not have been obliged to make disclosure in this case. The principal interest underlying the duty of disclosure is the interest in the reliability and integrity of the court's judgments. This interest would not have been strongly served by immediately alerting the court to evidence that a witness had lied in a deposition, since counsel for the intended victim of the deceit already knew of the evidence and could therefore use it to the benefit of his client if the case went to trial. Because the intended victim was aware of the evidence sufficiently in advance to make use of it, the reliability and integrity of the court's ultimate judgment was not at risk. The court's interest in the integrity of its judgment would have been outweighed by the interest of Doe's client in preserving the secrecy of his information until it could be used to best advantage on cross-examination.[226]

My view might be different, however, if the evidence had come to the attention of counsel for the intended beneficiary of the perjury, particularly if the false testimony had been given at trial. Suppose, for example, that a witness testified for the defendant at a civil trial. Before the trial ended, the defendant told his attorney that minutes after leaving the stand, the witness admitted that his testimony was false. In addition, the witness's trial testimony about the relevant events was contrary to statements made by others who had witnessed or participated in the same events. In such a case, the only way to protect the integrity of the court's judgment[227] would be to expose the fraud — even though the attorney's information fell short of "actual knowledge," as the *Doe* panel understood the term.[228]

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[226] *Cf.* Lynch, *supra* note 89, at 523-27 (arguing that victims have no moral duty to report crime).

[227] This assumes, of course, the inefficacy of opposing counsel's cross-examination.

[228] Rule 3.3(a)(4) of the Model Rules of Professional Conduct would require a lawyer to make disclosure in this situation only if the lawyer *knew* that the witness's testimony was false. That rule provides, in part, that "[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4). When the false evidence is discovered during trial, so that it is too late for the lawyer to withdraw from the representation, "the only possible remedial measure is to inform the court of the situation." W. HAZARD & G. HODES, *supra* note 105, at 360.3 (1986 Supp.); see ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987), *reprinted in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 901:101. This provision was

There is a second interest protected by the duty of disclosure: the interest in the integrity of the judicial process. This interest is reflected in the various perjury and obstruction of justice statutes. The court has an interest in protecting its processes from fraudulent conduct even when the conduct does not succeed in affecting the court's judgment. This interest was implicated in *Doe* to some extent — indeed, it influenced Judge Zampano initially to undertake a collateral inquiry into the veracity of the deposition witness's testimony. Nevertheless, this interest was not implicated to a sufficient extent to compel disclosure.

My view might again be different if the evidence of fraud had been stronger. Suppose, for example, that Doe's information established the witness's perjury not only clearly, but so conclusively that a federal prosecutor would have easily obtained a conviction based on that information. In such a case, disclosure of the information would have enabled the court to vindicate the integrity of its process by referring the information to the United States Attorney for prosecution.[229] Similarly, my view might be different if the fraudulent conduct had been more serious.[230] Suppose, for example, that Doe had received information that the defendant's witness had been bribing and threatening other potential witnesses as well as destroying and falsifying relevant documents. Although it may have been in the interest of Doe's client to delay disclosure of this information until it could be used advantageously at trial or as a bargaining chip in settlement negotiations, the court's interest in the integrity of its process would be so great that prompt disclosure probably should be required.[231] In contrast, a single witness's false deposition tes-

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designed to resolve the ambiguity in the Code concerning the lawyer's duty upon learning that he has elicited false testimony. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3, model code comparison.

[229] In the absence of extremely compelling evidence, a federal prosecutor's office will generally be reluctant to investigate allegations of perjury in an ongoing civil lawsuit. *Cf.* United States ex rel. Vuitton et Fils S.A. v. Klayminc, 780 F.2d 179, 182 (2d Cir. 1985), *rev'd*, 481 U.S. 787 (1987) (District court appointed a member of the private bar to investigate and prosecute alleged violation of the preliminary injunction after the United States Attorney's Office expressed its lack of interest.).

[230] *Cf.* Lynch, *supra* note 89, at 532-35 (Moral disapproval of informing on others varies with the severity of the misconduct that is reported.).

[231] The use of the information would, of course, be limited by other disciplinary provisions, such as DR 7-105(A), which provides that "[a] lawyer shall not . . . threaten

timony does not sufficiently implicate the integrity of the court's process to warrant a response except, perhaps, when the falsity is particularly egregious or the evidence particularly compelling.[232]

C. *The "Actual Knowledge" Requirement*

I do not agree with the *Doe* court that "actual knowledge" should be required before a lawyer is compelled to disclose evidence of a fraud on the court. Whether "actual knowledge" refers to virtually conclusive evidence or to direct, first-hand evidence, the requirement is both unsound and unnecessary. The requirement that the information "clearly establish" a fraud is a sufficiently high hurdle to protect the court's interest in judicial economy, while a more exacting standard would not adequately protect the integrity of the court's judgments and processes. The *Doe* case, of course, presents an example in which these judicial interests are extremely weak. But consider a case in which they are extremely strong. Suppose that just before a lawyer is about to deliver a summation, the lawyer receives nonprivileged evidence clearly establishing that the client's employee, without the client's approval, had bribed jurors, suborned perjury by force and destroyed relevant documents. The opposing counsel does not know of this and is unlikely to learn of it. It seems to me that, in such a case, immediate disclosure of the evidence should be required even if it falls short of "actual knowledge" as long is it "clearly establishes" the fraud.[233]

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to present criminal charges solely to obtain an advantage in a civil matter." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105(A).

[232] The *Doe* panel is probably correct in its tacit assumption that perjury in civil proceedings is so common — or, at least, that evidence of perjury in civil proceedings is so prevalent — that trial courts cannot afford to become concerned with such deceitful conduct. *See* 847 F.2d at 63. One might consider, however, the Second Circuit's earlier observation:

> Almost every party to a civil lawsuit (and his agents) is suspect of stretching the truth for his own cause, and to the most cynical, the very service of the complaint is a prelude to perjury. When we deal with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct.

International Elec. Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975). By the same token, a cynical lack of faith in our institutions should not become a categorical basis for *accepting* otherwise *un*ethical conduct.

[233] *Cf.* Lynch, *supra* note 89, at 539, 546 ("[A] narrowly drawn reporting require-

As interpreted by the *Doe* panel, an attorney's responsibility under DR 7-102(B)(2) does not exceed the attorney's traditional social responsibility as a citizen to report felonies that are known to have been committed.[234] Perjury and other fraudulent conduct directed at a court is a serious crime.[235] Any citizen would, therefore, have a social, if not a legal, obligation to disclose perjury that is *known* to have occurred. Ordinarily, an attorney ought to have a greater responsibility to protect the integrity of judicial proceedings by reporting evidence of frauds on the court when committed by someone other than the attorney's own client.[236]

CONCLUSION

Courts have often recognized that attorney discipline is unique in a procedural sense: disciplinary proceedings are neither criminal nor civil, but fall somewhere between. However, courts have given inadequate recognition to the unique substantive character of attorney discipline. The standards of professional conduct that are drafted by the ABA and adopted by state and federal courts are more than codifications or restate-

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ment could require a lawyer to inform [on another lawyer] whenever he has 'reason to believe' that another lawyer has engaged in [a limited number of specified types of serious misconduct]. Such a formulation would relieve the potential informer of the burden of judging another lawyer's conduct in absolute terms and would eliminate the potential for confusion or evasion that the Code's formulation presents.").

[234] *See generally* Roberts v. United States, 445 U.S. 552, 557-58 (1980) (recognizing the "deeply rooted social obligation" to "report known criminal behavior"); Branzburg v. Hayes, 408 U.S. 665, 696-97 (1972) ("[C]oncealment of crime and agreements to do so are not looked upon with favor."). At common law, a failure to report a crime was itself punishable as a "misprison of felony." The federal "misprison of felony" statute, 18 U.S.C. § 4 (1982), applies only when someone "having knowledge of the actual commission of a felony" not only fails to report it "as soon as possible" to a judge or other appropriate authority but also takes steps to conceal it. Like its state counterparts, the federal statute is rarely invoked. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 600-01 (2[D] ed. 1986). *But see* Lynch, *supra* note 89, at 517-21 (In most jurisdictions in this country, there has never been a legally enforceable obligation of citizens to report crimes that come to their attention.).

[235] *See, e.g.*, 18 U.S.C. §§ 1621 & 1622 (1982) (Perjury and subornation of perjury are punishable by up to five years' imprisonment.); *id.* § 1622 (Making false statements or using materials containing false statements in a federal judicial proceeding is punishable by up to five years' imprisonment.).

[236] *Cf.* Nix v. Whiteside, 475 U.S. 157, 169 (1986) ("Th[e] special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice.").

ments of common law; courts are not entirely free to ignore the disciplinary rules and engage in common-law analysis. But at the same time, the disciplinary rules are less than statutes. Courts are not obliged to interpret unclear rules so as to carry out the intent of either the ABA members who drafted them or the judges who subsequently adopted them. Consistent with their traditional authority to regulate the bar, courts can and should act as policy-makers when they interpret ambiguous provisions of the *Code of Professional Responsibility*.

In *Doe* the Second Circuit panel conceived of its role in a far more narrow fashion. Although DR 7-102(B)(2), as it applied in the context of the *Doe* case, was ambiguous in at least a half dozen ways, and although this uncertainty about the scope of the rule is likely to discourage future attorneys from invoking it, the panel chose to shed light on only one uncertain provision, and did so in language that itself was unclear, thereby leaving attorneys almost completely in the dark about their responsibilities under the rule. Moreover, the panel sought to interpret the rule as if it were a statute, so as to carry out the will of the ABA drafters. This analysis was an unnecessary and unjustified departure from earlier Second Circuit decisions which recognized the court's broad "common-law" authority to interpret ambiguous disciplinary provisions, in the words of Judge Gurfein, "in the interests of justice to all concerned." Any possible benefit to the *Doe* panel's alternative approach is entirely illusory. The panel's approach sacrifices flexibility without any corresponding gain in certainty, inasmuch as the ABA drafters' "intent" is generally difficult to discern by recourse to the traditional tools of statutory construction.