Legal Process Scholarship and the Regulation of Lawyers Special Issue: Institutional Choices in the Regulation of Lawyers: Foreword

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Institutional Choices in the Regulation of Lawyers: Foreword

Professor of Law, University of Arizone College of Law and 1995 Chair of the Section on Professional Responsibility of the Association of American Law Schools ("AALS")
SCHOLARS are renewing their interest in the proper allocation of regulatory authority, an issue of central concern in the "legal process" literature that first became prominent in the 1950s. Legal process scholarship examines the competence of various institutions to perform regulatory tasks. Recent legal process work often relies on social science concepts to explain or predict institutional behavior. It also posits that an institution's strengths and weaknesses should not be judged in isolation. Because no institution performs any important regulatory task perfectly, and because many tasks could conceivably be reassigned, the proper research question is often one of comparative competence. A legal process scholar might argue that a certain institution, because of its relative ability to gather pertinent informa-

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3. The use of concepts from economics and public choice theory and the insistence on institutional comparisons are prominent in Neil Komesar's work. *See* Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 3-10 (1994). Professor Komesar criticizes legal scholars who draw conclusions about the decision-making competence of a given institution without considering the strengths and weaknesses of alternative institutions. For example, he criticizes John Hart Ely's argument that the courts must closely scrutinize the constitutionality of statutes that significantly affect legislatively underrepresented minorities; Ely takes no account of the possibility that minorities might fare worse at the hands of unelected judges than they fare in legislatures. *Id.* at 198-230.
tion, should perform a regulatory task.\textsuperscript{4} Or, she might explain through institutional comparison why certain institutions have come to perform a given task.\textsuperscript{5}

Legal process studies have their most immediate value to policy makers when the studies focus on specific tasks and institutions. Comparing the general pros and cons of legislatures, administrative agencies, and self-regulating organizations as regulators of occupations is an interesting exercise, but one less likely to influence policy than asking what role Congress, the Securities and Exchange Commission ("SEC"), and the New York Stock Exchange should play in making rules to govern the trading practices of securities broker-dealers. Regulatory institutions now vary so much in structure and operation that if policy makers are to assign tasks wisely, they often need more finely grained comparisons than broad categories allow.\textsuperscript{6} Nowhere is this need clearer than with respect to the issue that inspires this Symposium: Who should regulate lawyers?

In 1992, Professor David Wilkins posed that question in a pioneering article that views lawyer regulation through a legal process lens. \textit{Who Should Regulate Lawyers?}\textsuperscript{7} develops an intriguing framework for explaining and evaluating the allocation of regulatory authority. The

\textsuperscript{4} In my own work on the regulation of lawyers, for example, I have argued that law firms are sometimes better than disciplinary agencies at getting to the bottom of a possible ethics violation within their walls. \textit{See} Ted Schneyer, \textit{Professional Discipline for Law Firms?}, 77 Cornell L. Rev. 1, 28-29 (1991) [hereinafter Schneyer, \textit{Professional Discipline}]. For this and other reasons, I propose that law firms, and not just individual lawyers, be subject to professional discipline. \textit{Id.} at 8-11. If no individual has been disciplined in a bar proceeding, but "a disciplined firm . . . [considers] it important to assign individual blame for the underlying infraction, [the firm can] do so on the basis of its own internal investigation." \textit{Id.} at 28 (emphasis omitted); cf. John C. Coffee, Jr., \textit{"No Soul to Damn; No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment}, 79 Mich. L. Rev. 386, 408 (1981) (arguing that corporations are in a better position than the state to detect and punish crimes by their employees, partly because their use of internal sanctions is not subject to due process control).

\textsuperscript{5} I have argued, for example, that, partly because of their institutional limitations, the state disciplinary agencies responsible for enforcing ethics rules were unable to play any role in the recent and massive legal response to the alleged wrongdoing of the large-firm lawyers who represented banks and thrift institutions shortly before the savings-and-loan crisis. \textit{See} Ted Schneyer, \textit{From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers}, 35 S. Tex. L. Rev. 639, 643-50 (1994) (discussing in particular the lack of disciplinary authority to proceed against law firms as entities, to provide structural relief or substantial money sanctions, or to debar lawyers from specialized fields of practice). For another scholar's institutional explanation for the virtual nonuse of legal ethics rules and professional discipline to regulate lawyers representing clients in business negotiations, see Charles W. Wolf-ram, \textit{Modern Legal Ethics} 714 (student ed. 1986) (pointing out that such negotiations can be conducted by the parties themselves or by lay agents, who would not be constrained by disciplinary rules addressed solely to lawyers).

\textsuperscript{6} Professor Rubin has made the same point. \textit{See} Rubin, \textit{Institutional Analysis}, \textit{supra} note 1, at 472-73.

executive committee of the AALS's Section on Professional Responsibility thought that framework deserved their attention because, as Professor Wilkins notes, a bewildering array of institutions now have often-overlapping claims to regulatory authority in our field. Hoping to encourage more scholarship in the area, we asked five scholars to present papers at the AALS’s 1996 Annual Meeting which treat the Wilkins article as a backdrop to their work, and we invited five more to respond to those papers. This Symposium presents the work we commissioned, with an Afterword by Professor Wilkins.

Though each article and accompanying response can be read on their own, this Foreword is designed to set the stage for readers who have an interest in the Symposium as a whole. Part I offers an overview of the tasks and institutions involved in regulating lawyers. Part II argues that the field contains fertile soil for legal process analysis. Part III introduces the Wilkins framework, explains its potential value, and criticizes it in four respects. Part IV introduces the Symposium articles and responses, highlighting the points most relevant to the growth of legal process literature on lawyer regulation.

I. The Complexities of Lawyer Regulation

A. The Multiplicity of Institutions

Lawyer regulation is a complex system involving many institutions. These institutions sometimes work in tandem, as when a disciplinary agency uses evidence gathered in an SEC investigation to discipline a lawyer in his home state. But because no czar of lawyer regulation exists to coordinate their efforts, these institutions also compete for authority, and sometimes ignore each other. One might divide the relevant institutions into three classes. One class consists of legal institutions with broad missions that include some incidental regulation of lawyers. Judges and juries regulate lawyers through their decisions in legal malpractice and fee-dispute cases. Congress regulates lawyers, primarily through antitrust and consumer protection laws, through fee caps and fee-shifting statutes, and by imposing condi-

8. Id. at 803.
9. See Florida Bar v. Calvo, 630 So. 2d 548 (Fla. 1993) (holding that evidence gathered in SEC investigation is admissible, though not dispositive, in local disbarment proceeding).
10. See John Leubsdorf, Legal Malpractice and Professional Responsibility, 48 Rutgers L. Rev. 101, 102 (1995) (asserting that legal malpractice law should now be viewed as “part of the system of lawyer regulation”). For evidence that malpractice claims against lawyers are more frequent and more evenly spread over the profession than is commonly supposed, see Manuel R. Ramos, Legal Malpractice: The Profession's Dirty Little Secret, 47 Vand. L. Rev. 1657 (1994).
11. See Wolfram, supra note 5, at 38-45.
12. Id. at 522-24.
13. Id. at 929-30.
tions on the delivery of subsidized legal services.\textsuperscript{14} Trial courts regulate litigators through their powers to disqualify counsel, cite for contempt, impose sanctions for procedural violations, and exclude evidence improperly obtained.\textsuperscript{15} To varying degrees, the agencies that administer the federal tax, patent, immigration, banking, and securities laws regulate lawyers who practice before them.\textsuperscript{16}

A second set of institutions comes into focus only if one defines "regulating" in the broad sense of exerting significant influence, even if not in order to effectuate public policy. By that definition, a number of private institutions regulate lawyers. The legal services market "regulates" insofar as clients monitor their lawyers and take reputation and fees into account in selecting them. Law firms "regulate" their partners and associates through internal policies and procedures.\textsuperscript{17} Watchdog journalists "regulate" lawyers by writing about them in \textit{The American Lawyer} and the \textit{National Law Journal}. And, as Anthony Davis argues in the Symposium, liability insurers may be said to "regulate" lawyers by imposing conditions and limits on malpractice coverage.\textsuperscript{18}

These institutions are part of the gravitational field in which lawyers operate. To fully understand lawyer regulation, one must keep them in mind, if only because they have some potential to complement, interfere with, or substitute for institutions that regulate in the strict sense. As Charles Silver puts the point:

To improve the quality of lawyering, one must change the institutional structures in which lawyers operate, . . . the incentives and monitoring arrangements lawyers work under on a daily basis. A good incentive structure . . . is worth a pick-up load of . . . disciplinary rules. . . . [and] it matters little whether an insurance company,

\textsuperscript{14} Id. at 936-39.
\textsuperscript{15} Restatement of the Law Governing Lawyers § 6 (Preliminary Draft No. 12, 1996) (enumerating the judicial remedies available to redress lawyer wrongs).
\textsuperscript{17} See, e.g., Harvey L. Pitt et al., \textit{Law Firm Policies Regarding Insider Trading and Confidentiality}, 47 Bus. Law. 235, 238-40 (1991) (reporting that 33 of 40 surveyed firms maintained policies and procedures to prevent illegal insider trading by their lawyers and employees, and noting that these policies were developed in response to federal legislation that authorizes the imposition of administrative sanctions on firms whose partners or employees engage in insider trading).
a bar association, or a lawyer and client bargaining together is responsible for a particular structural arrangement.19

The third set of relevant institutions consists of bar organizations, or more precisely, the specialized institutions of professional self-regulation, which have both public and private features. Self-regulatory institutions have a firmer hold in law than in most occupations.20 The American Bar Association ("ABA") develops legal ethics codes, most recently the Model Rules of Professional Conduct, and interprets code rules in advisory ethics opinions.21 The American Law Institute ("ALI") is developing a Restatement of the Law Governing Lawyers, which is likely to be influential in the courts.22 Bar agencies certify lawyers as specialists in certain fields.23 In most states, the organized bar, under state supreme court supervision, maintains agencies to license lawyers and discipline those who violate ethics rules.24

Lawyer regulation is complicated by the existence of parallel institutions at the state and federal levels. Though lawyers are still licensed by states, the growth in federal practice is moving federal institutions closer to the center of the system.25 The interstate operations of large law firms and their business clients, coupled with local variations in the law of lawyering, increasingly produce choice-of-law problems: the itinerant lawyer must divine whose rules govern her conduct in any given matter, and courts and agencies must decide whose rules apply before they can process charges of lawyer wrongdoing.26 The same factors create pressure to federalize regulation, which

20. See Wolfram, supra note 5, at 20-21; Nancy J. Moore, The Usefulness of Ethical Codes, 1989 Ann. Surv. Am. L. 7, 14-16 (noting that only the legal profession has had its ethics codes adopted as law).
23. See Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) (upholding lawyer's right to advertise his certification as trial advocate by private board); Wolfram, supra note 5, at 201-02 (referring to state bar administered certification programs).
could not only shift authority away from the states, but also from the judiciary to the other branches.27

B. The Multiplicity of Tasks

Lawyer regulation is not a unitary task. For one thing, the pressures and temptations lawyers face vary so much with role, specialty, practice setting, and clientele that one could make a case for separating or “contextualizing” regulation along any of these lines.28 But even if one assumes, with apologies to Gertrude Stein, that a lawyer is a lawyer, one must still divide regulation into sub-tasks for the sake of clarity. The basic sub-tasks are: (1) making rules for law practice; (2) interpreting rules; (3) detecting rule violations; (4) determining “guilt” when lawyers are charged with violations; (5) designing remedies or sanctions; and (6) imposing them in specific cases.

There is no one-to-one correspondence between tasks and institutions. Some tasks are shared, as when the ABA writes ethics codes and state supreme courts give them legal effect, perhaps amending them in the process. Many institutions participate in more than one task. For example, the state supreme courts adopt conduct rules in

ethical obligations that confront lawyers who represent clients in multistate transactions).

27. See generally Stephen B. Burbank, State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform, 19 Fordham Urb. L.J. 969 (1992) (analyzing the conflict posed by state ethical codes in federal practice and suggestions for reform); Fred C. Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335 (1994) (analyzing sympathetically the case for national rules of professional responsibility that would be promulgated by Congress). An issue receiving great attention at the moment is whose ethics rules should govern lawyers practicing in the federal courts and, if there are to be uniform federal rules, who should formulate them? See, e.g., Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Local Rules Regulating Attorney Conduct in the Federal Courts, Report on Local Rules Regulating Attorney Conduct, July 5, 1995 (Daniel R. Coquillette, reporter) (documenting the great variation in local district court rules and discussing possible responses); Bruce A. Green, Whose Rules of Professional Conduct Should Govern Lawyers and How Should They Be Created?, 64 Geo. Wash. L. Rev. (forthcoming 1995) (proposing that the Judicial Conference of the United States develop a comprehensive and detailed code of ethics for lawyers practicing before all federal courts). One aspect of the problem is whether to promote uniformity throughout the federal court system at the expense of uniformity between federal district courts and the courts of the states in which they sit.

28. Professor Wilkins has supported “contextualized” regulation for lawyers in several specialty fields. See David B. Wilkins, Legal Realism for Lawyers, 104 Harv. L. Rev. 469, 519-23 (1990) (explaining why tax practice calls for contextualized rules); David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye, Scholer, 66 S. Cal. L. Rev. 1145, 1217-18 (1993) [hereinafter Wilkins, Making Context Count] (same for banking practice); see also Stanley Sporkin, The Need for Separate Codes of Professional Conduct for the Various Specialties, 7 Geo. J. Legal Ethics 149, 149-50 (1993) (calling for separate ethics codes for various specialties such as securities practice). Unfortunately, Judge Sporkin does not consider who should draft and enforce these codes. For the legal process scholar, those would be crucial issues in evaluating his proposal. Moreover, Judge Sporkin offers no guidance for deciding which specialties are the best candidates for separate codes.
the form of ethics codes; hear disciplinary cases in which lawyers are charged with serious violations; adopt a set of disciplinary sanctions; and choose the sanction to impose in specific cases. The factors that bear on their competence to make conduct rules, compared perhaps to legislators, differ entirely from those that bear on their competence to determine a lawyer’s “guilt” under the rules, compared, say, to juries, or their competence to sanction violators appropriately. In assessing the competence of a multi-task institution, one must take care to specify the tasks under review. One should also consider whether the institution is falling down at one task, not because it is ill-designed for the job, but because the job conflicts with another task.

Take as an example the work of the ABA Committee on Ethics and Professional Responsibility (“CEPR”). CEPR’s main task is to interpret the Model Rules of Professional Conduct in advisory ethics opinions. Because the Model Rules address the entire bar, they contain very general standards, e.g., “fees must be reasonable.” For that reason, interpretation is an important sub-task in lawyer regulation and CEPR is an important interpreter, as evidenced by the fact that Professor Lester Brickman devotes his entire Symposium article to criticizing a CEPR opinion that refuses to declare unreasonable the practice of charging a “standard” contingent fee for cases with varying prospects for success.

But CEPR has a second task as well. It is expected to recommend Model Rules changes to the ABA “legislature,” the House of Delegates, which may reject its recommendations. According to commentators, some CEPR opinions lack any tenable rationale under the ethics rules they claim to interpret. If this is indeed the case, one wonders whether CEPR’s rulemaking duties could be a source of the problem; CEPR might be using some opinions as shortcuts to desired, but politically unattainable, rule changes, or simply devoting too much time to its legislative agenda. Either way, the ABA might consider

32. Id. at 146; Lawrence Hellman, When “Ethics” Rules Don’t Mean What They Say: The Implications of Strained ABA Ethics Opinions 11-35 (June 14, 1996) (unpublished manuscript, on file with the Fordham Law Review).
33. In 1990-91, CEPR was dragged into a long and bitter ABA debate, initiated by the ABA Litigation Section, about whether to amend the Model Rules to ban lawyers from owning and operating businesses that provide services, such as environmental or trade consulting, which are “ancillary” to legal services. For an account of the debate, see Ted Schneyer, Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study, 35 Ariz. L. Rev. 363 (1993). One member protested that the Litigation Section’s crusade against ancillary businesses “has distracted
dropping or reassigning CEPR’s legislative role in hopes of improving its ethics opinions.\textsuperscript{34}

C. Institutional Quirks in the Regulation of Lawyers

Having identified the institutions and tasks involved in lawyer regulation, one must grapple with the field’s rulemaking quirks. Legislatures or consumer protection agencies make the rules governing funeral directors, debt collectors—including lawyers \textit{qua} collectors,\textsuperscript{35} and many other service providers. When market forces and contracts alone cannot efficiently govern an occupation or profession, then it seems wise for elected legislatures or politically accountable agencies to develop the conduct rules that are needed. After all, the task involves political trade-offs between the interests of providers, clients, and third-parties. Yet, when it comes to rulemaking for law practice, where similar trade-offs are surely involved, judges and bar associations have the greatest influence.\textsuperscript{36} The Judicial Conference of the United States writes the rules of procedure that govern lawyers in the federal courts.\textsuperscript{37} The state supreme courts adopt ethics rules to govern the lawyers in their jurisdictions and may strike down on separa-

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\footnotesize34. See Hellman, \textit{supra} note 32, at 38-42 (recommending that CEPR’s responsibilities be limited to writing interpretive opinions). To assess this proposal properly from a comparative institutional standpoint, one would want to know what other body would take over CEPR’s legislative duties and how competent that body would be at that task. Even if CEPR’s legislative role does compromise its performance as rule interpreter, it does not necessarily follow that reassigning the role would improve things overall. CEPR’s familiarity with ethics rules makes it attractive as an institution to study and propose amendments.


36. Wolfram, \textit{supra} note 5, at 20. This is much less true for services such as lobbying, debt collecting, and preparing tax returns or patent applications, which are performed by lawyers and nonlawyers alike.

37. For a rich account of the process by which the Judicial Conference’s Advisory Committee on Civil Rules, comprised mostly of judges, drafted a recent round of amendments to the Federal Rules of Civil Procedure, see Linda S. Mullenix, \textit{Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking}, 69 N.C. L. Rev. 795, 830-50 (1991). Professor Mullenix suggests that the Committee’s process has become such a magnet for interest groups hoping through procedural amendments to tilt litigation in their favor, that congressional committees may increasingly take over the rulemaking function. She stated:

If the Committee does not truly open its processes and meet the concerns of partisan petitioners, it seems destined to be displaced in the rulemaking function by Congress. . . . But if the Advisory Committee does capitulate to
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tion-of-powers grounds any conflicting rules that state legislatures or executive agencies address to lawyers.\textsuperscript{38} In adopting ethics rules, these courts draw heavily on the ABA’s model codes.\textsuperscript{39} None of these bodies develops standards for law practice through the broad political process that, say, Congress might use. Predictably, critics complain that rulemaking for law practice is a classic case of “the fox guarding the henhouse,” and thus unacceptable.\textsuperscript{40} They have a point—until they get to “thus.” Bar-made and court-approved rules may, of course, be biased toward protecting lawyers’ interests at the expense of clients or client interests at the expense of others. From a comparative institutional standpoint, however, the fox-and-henhouse critique is no conversation-stopper. The view that legislatures and executive-branch agencies are better occupational rulemakers than either the judiciary or a peak professional association, however sound as a generalization, is not necessarily sound when it comes to setting standards for law practice. The judiciary’s expertise, its interest in the integrity of the legal process, and its legitimate need for independence from the “political” branches must be considered.\textsuperscript{41} Likewise, the ABA’s interest as the nation’s peak bar association in being seen as a body with public duties to speak to lawyers as well as for them, its interest in promoting respect for lawyers, and its capacity to mobilize lawyers of all kinds to participate in its debates might, on balance, justify its legislative role, even though nonlawyers are not directly represented there.\textsuperscript{42}

\textsuperscript{38} See infra note 41.

\textsuperscript{39} By 1972, only two years after the ABA issued its Model Code of Professional Responsibility, most of the state supreme courts had adopted the Code, often verbatim, to govern lawyers in their jurisdictions. Report of the ABA Special Commission to Secure Adoption of the Code of Professional Responsibility, 97 A.B.A. Rep. 268 (1972). The Model Rules of Professional Conduct, which the ABA adopted in 1983, have been adopted in over 40 states as the basis for their lawyer codes. ABA/BNA Law. Manual on Prof. Conduct § 01:3 (1995).

\textsuperscript{40} See, e.g., Jethro K. Lieberman, Crisis at the Bar: Lawyers’ Unethical Ethics and What to Do About It 218 (1978) (criticizing the legal profession’s ethical system); Philip M. Stern, Lawyers on Trial 209 (1980) (exploring the legal profession’s shortcomings).

\textsuperscript{41} At the state level, the courts have long relied on these considerations not only to justify their own rulemaking, but to strike down legislative and executive agency rules governing law practice—even outside the courts—as violations of the separation-of-powers principle of state constitutional law. Wolfram, supra note 5, at 27-31. Because no comparably broad principle exists in federal constitutional law, id. at 33, one might infer that, to the extent regulatory authority shifts from state to federal government in the future, it will also shift away from courts.

\textsuperscript{42} I have so argued elsewhere. See Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 Law & Soc. Inquiry 677, 678 (1989) [hereinafter Schneyer, Bar Politics] (describing the ABA’s production of the Model Rules as “the most sustained and democratic debate about professional
II. THE RATIONALE FOR LEGAL PROCESS ANALYSIS OF LAWYER REGULATION

Given the complexities of the field, why should scholars go through the trouble of studying issues in lawyer regulation from a legal process standpoint, as our Symposiasts do? Three reasons come to mind. First, legal decision makers often act on their own assumptions about institutional competence. In doing so, they affect the allocation of regulatory authority. Scholars can isolate this folklore and assess its validity.

Consider two examples. The first involves the task of designing remedies or sanctions for lawyer misconduct. In *Imbler v. Pachtman*, the Supreme Court closed one remedial avenue on the assumption that another was adequate. The Court held that a prosecutor is absolutely immune from liability to criminal defendants under § 1983 of the federal civil rights laws for his conduct in initiating a prosecution and presenting the state’s case. Lest anyone fear that this immunity leaves prosecutors unaccountable for misconduct that infringes on defendants’ rights, the Court stressed that the prosecutor is “unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”

In other words, *Imbler* assumes that professional discipline plays a meaningful role in regulating prosecutors. Yet scholars have found that prosecutors are almost never disciplined, though they surely commit their share of disciplinable offenses. Perhaps disciplinary bodies treat prosecutors less as lawyers than as officials accountable to the public through the political process. Maybe they think prosecutors are adequately policed through still other techniques, such as dismissal of charges, reversal of convictions, or exclusion of ill-gotten evidence. Either way, the rarity of prosecutorial discipline throws the validity of the Court’s argument for civil immunity into doubt.

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ethics in the history of the American bar’’); *id.* at 695-97 (describing the ABA’s sensitivity to press coverage in the early stages of the Model Rules process).


44. *Id.* at 431.

45. *Id.* at 429. More recently, the Court cut back on the supervisory power of the federal courts to reverse convictions on grounds of prosecutorial misconduct. *See United States v. Hasting*, *461 U.S. 499* (1983). The Court again noted the availability of professional discipline as well as internal discipline by the Justice Department as alternative and “more narrowly tailored” techniques for controlling prosecutorial misconduct. *Id.* at 506 & n.5.

The second example involves the task of making conduct rules. Debates during the ABA's drafting of the Model Rules of Professional Conduct were studded with assumptions about the competence of other rulemakers. The ABA Business Law Section pressed for certain rules concerning lawyers' duties to corporate clients which it hoped would forestall the SEC from writing its own standards for securities practice. The Section considered SEC rules too likely, given that agency's enforcement mission, to turn securities lawyers into unwelcome compliance monitors and whistle-blowers on their corporate clients. The ABA adopted the Section's proposals, and the SEC never made its own rules.  

Similarly, after the ABA approved a Model Rule that bars lawyers from whistle-blowing on clients who they know through confidences are about to commit frauds, Senator Arlen Specter tried to amend the federal mail fraud laws to require disclosure. The ABA lobbied successfully against the Specter bill on grounds of institutional competence. They argued that Congress, as a matter of policy, should leave even this non-litigation aspect of law practice to the governance of the state supreme courts, which could be expected to show more deference than Congress to the ABA rule. On the other hand, where the alternative rulemaker was a judicial body, it was the ABA that deferred. In addressing the problem of abusive litigation tactics, the Model Rules simply track or incorporate the judge-made rules of civil procedure.

Because assumptions about the relative competence of the ABA and other standard setters play a vital role in ABA rulemaking, in turn affecting who makes the rules and thus rule content, scholars should try to assess their validity. One might ask, for example, what

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47. See Schneyer, Bar Politics, supra note 42, at 706.
48. See id. at 713.
49. See id. at 729-31.
50. Id. at 729-30.
51. Id. at 730.
52. One sign of the ABA's hostility to legislative or executive branch rulemaking for lawyers was a provision in the comments to Model Rule 1.6. According to the comments lawyers are ethically entitled to disclose confidential client information when other law requires disclosure. Whether any particular disclosure law (such as a child-abuse reporting act) requires disclosure and therefore supersedes the lawyer's duty of confidentiality under Rule 1.6 "is a matter of interpretation," the comment states, "but a presumption should exist against such a supersession." Model Rules, supra note 29, Rule 1.6 cmt. ¶ 20. What, one wonders, is the ABA's justification for commending this canon of statutory construction to judges and other legal decision makers? For other evidence of the ABA's views on the competence of executive or legislative bodies to regulate lawyers, see ABA Resolution 103 (Feb. 7, 1989) (resolving that the ABA opposes the regulation of law practice "by executive or legislative bodies, whether national, state or local").
53. For a close examination of the discrepancy between the organized bar's and the "state's" understanding of the relationship between ethics rules and certain administrative regulations and statutes that may be inconsistent with those rules but are
features of Congressional and ABA, or state supreme court, rulemaking bear on their relative competence to make the trade-offs between protecting client secrets and preventing client frauds that are involved in formulating lawyers' confidentiality and disclosure duties.

A second rationale for legal process work on lawyer regulation is that turf wars have broken out on several regulatory fronts lately. Scholars who understand the strengths and weaknesses of the parties fighting for jurisdiction can steer them toward a new equilibrium.54 Two articles commissioned for this Symposium try to intervene in these turf wars. Professor Rory Little discusses the Justice Department's ongoing battle with the ABA and the state supreme courts for control over vital aspects of the work of federal prosecutors.55 Professor Richard Painter imagines a contractual regime in which federal administrative agencies like the SEC could influence law practice in their fields while avoiding confrontations with the bar,56 which routinely criticizes any agency rulemaking that might override local ethics rules.

A third and closely related rationale for legal process scholarship is that the roles of many pertinent institutions are presently in flux, so that authority is "up for grabs" as never before and decision makers will be in the market for relevant policy analysis.57 Take recent developments in the organized bar and in disciplinary bodies. Within the bar, the ALI is for the first time developing a Restatement of the Law Governing Lawyers.58 This poses a challenge to the ABA's rulemak-

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54. For one scholar's effort to "mediate" such a dispute, see Nancy J. Moore, Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities, 53 U. Pitt. L. Rev. 515 (1992).
57. One can draw an instructive contrast between the current situation, in which many institutions regulate lawyers, and the situation early in the century, when the specialized machinery of professional self-regulation—ethics codes, ethics committees, and disciplinary bodies—were first developing. Early bar leaders such as Herbert Harley of the American Judicature Society argued that those self-regulatory institutions were needed to fill a regulatory vacuum created by judicial and legislative indifference. "Harley wrote: 'There must be somewhere in the state or society power to establish standards of professional conduct with responsibility for enforcing them. It is easy to understand the practical failure of the courts in this field. And it is too delicate a matter for legislative control.'" Theodore J. Schneyer, The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case, Am. B. Found. Res. J. 1, 18 n.96 (1983) (quoting Herbert Harley, Group Organizations Among Lawyers, Annals, May 1922, at 33).
ing primacy; some Restatement positions conflict with the ABA Model Rules as adopted in many states. Presumably, the ALI is entering the field because conduct rules are increasingly shaped and applied in fee litigation, damage suits against lawyers, and disqualification proceedings. Restatements are addressed to the common-law judges who preside in those matters. ABA ethics codes purport to address disciplinary authorities. For years, however, judges have given the ABA codes considerable weight as a source of standards in fee-dispute, malpractice, and disqualification cases. In some cases, judges will now be in a position to choose between conflicting ALI and ABA standards, or to reject both. In making such choices, judges may fall back on assessments of the relative trustworthiness of the ALI and ABA as a source of standards.

Let me illustrate the potential value of comparative institutional analysis to the judges who make these choices. State supreme courts have adopted Model Rule 1.10(a) as a disciplinary rule. Under that rule, when one lawyer is barred from representing a new client against his former client because the matters are related and the former client has not consented, then others in his firm are barred too, even if the former representation took place at another firm. On the other hand, section 204(2) of the Restatement would permit the lawyer’s colleagues to represent the new client in certain cases if the disqualified lawyer is screened from participating. Suppose a trial judge in a state whose supreme court has adopted Rule 1.10(a) is asked to disqualify the colleagues of a lawyer who may be properly screened within the meaning of section 204. The judge would have discretion to choose either conduct rule, unless the state supreme court had indicated that Rule 1.10(a) should apply for non-disciplinary as well as disciplinary purposes. If the judge does not clearly prefer either rule on the merits, then she might choose between them on the basis of the relative competence of the ABA and ALI to balance the interests at stake.

Here in a nutshell is what comparative institutional analysis might tell the judge. In deciding whether to permit screening, a rulemaker

59. For example, the Model Rules bar lawyers from advancing loans for personal expenses to clients they represent in litigation. Model Rules, supra note 29, Rule 1.8(e). But the Restatement authorizes such loans as needed to “enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case.” Restatement of the Law Governing Lawyers § 48(2)(b) (Proposed Final Draft No. 1, Mar. 29, 1996, as approved June 1996) [hereinafter Restatement]. For one court’s effort to grapple with the inconsistency, see Oklahoma Bar Ass’n v. Smolen, 837 P.2d 894 (Okla. 1992).

60. See Restatement, supra note 59, § 204(2).

61. See Towne Dev. of Chandler, Inc. v. Superior Court, 842 P.2d 1377, 1381-82 (Ariz. Ct. App. 1992) (reversing trial court’s denial of disqualification motion and holding that the matter is governed by Model Rule 1.10 as adopted by the state supreme court, not by the “countervailing line of thought” that has emerged in the Restatement).
must strike a balance between two values: protecting former clients from the danger that their confidences will slip through a screen and be used against them and protecting lawyer mobility by allowing conflict-carrying lawyers to change firms without “infecting” their new colleagues. Screening bans disproportionately impair mobility between larger law firms, which nowadays rely heavily on extensive lateral hiring. Therefore, large-firm lawyers have some bias toward undervaluing the risks that screening poses for former clients. Elite lawyers from large firms are more powerful in the ALI, which is highly selective in choosing members. The ABA is, therefore, the more competent policy maker on the issue.62

With law practice ever more specialized, specialty bars also stand to gain rulemaking or interpretive influence. Thus, the American College of Trust and Estate Counsel (“ACTEC”) recently published “commentaries” on the ABA Model Rules of Professional Conduct.63 These commentaries may influence trusts-and-estates practice more than the Model Rules do, because a code addressed to lawyers of every stripe cannot address trusts-and-estates lawyers with much specificity. Therefore, projects such as ACTEC’s may shift some regulatory authority from the general-purpose ABA to a specialty bar. Is such a shift desirable? Can a specialty bar comment as disinterestedly as CEPR on the meaning of general conduct rules in its own field? Is a specialty bar more competent because its members have a deeper understanding of the field? Such questions invite comparative institutional analysis.

Next, consider the potential impact on the allocation of regulatory authority of recent developments in professional discipline. Funding improvements and the professionalization of disciplinary counsel have produced a shift in disciplinary dockets and sanctioning patterns. Before 1970, professional discipline did little more than disbar convicted felons.64 It is now used to deter less egregious offenses and to educate wayward lawyers on ethics rules and office-management skills, as well as to remove bad apples.65 One might conclude that disciplinary agencies now have the capacity to deal as well as any legislatively created, consumer-protection agency with low-level “con-
sumer” problems. Such a finding may stave off the occasional efforts of the Federal Trade Commission and similar state agencies to expand their roles in lawyer regulation.

Responding to the growth in large law firms, the New York courts recently announced a major innovation in disciplinary authority: they will now treat law firms and not just lawyers as potential disciplinary targets. The aim is to encourage firms to maintain policies and supervisory procedures that prevent individual misconduct. Coupled with potential reforms in disciplinary sanctions, such as authorizing disciplinary agencies to impose fines and corrective orders on firms, this development could enhance the role of professional discipline in regulating the corporate bar. State disciplinary bodies have never exerted much control over the larger-firm lawyers who predominate in corporate practice. Instead, those lawyers have been governed by client monitoring, disqualification, trial court sanctions, civil liability, and enforcement actions by federal agencies. Are those techniques adequate to the task? Or should we try to redesign disciplinary institutions to give them a piece of the action?

How the changing balance of power in the bar, the growing sophistication of disciplinary agencies, or other institutional changes will affect the regulatory mix is unclear. But change is in the wind. The question is whether it will be haphazard, or informed by comparative institutional analysis.

66. See ABA Report of the Commission on Evaluation of Disciplinary Enforcement, Report to the House of Delegates 3-4 (May 1991) (concluding on the basis of survey of lay participants in the disciplinary process for lawyers that legislatively created agencies are no more effective than the bar and judicial agencies in regulating professions).


68. Id.

69. See Stephen G. Bene, Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions, 43 Stan. L. Rev. 907, 937-38 (1991) (arguing for the use of fines as a disciplinary sanction). For a critique of the traditional argument against disciplinary fines, namely that their use would require disciplinary bodies to give respondents all the protections of criminal procedure, see Schneyer, Professional Discipline, supra note 4, at 31-33 (pointing out that civil courts and administrative agencies impose money sanctions on lawyers). The use of potentially substantial fines as a disciplinary sanction has been under consideration for several years in California. See infra note 107.

70. During one period in the 1980s, 80 percent of the lawyers disciplined in California, Illinois, and the District of Columbia practiced alone, and none was in a firm with more than seven lawyers. Richard L. Abel, American Lawyers 145 (1989). In those jurisdictions, however, a substantial percentage of the bar practices in large firms.

71. See, e.g., William B. Glaberson et al., A Question of Integrity at Blue-Chip Law Firms: Once Unthinkable, Charges of Foul Play are Hitting Prestigious Partnerships, Bus. Wk., Apr. 7, 1986, at 76 (noting the surprising frequency with which charges of wrongdoing are nowadays leveled at large law firms in non-disciplinary forums).
III. PROFESSOR WILKINS'S FRAMEWORK

A. The Framework Described

Who Should Regulate Lawyers? treats lawyer regulation as a complex system. Even so, it does not address every regulatory sub-task. Rather, it provides a framework for explaining and evaluating our institutional arrangements for enforcing standards. Enforcement involves the sub-tasks of detecting possible violations, adjudicating "guilt," and designing and imposing sanctions. Because Professor Wilkins is only concerned with enforcement—with maximizing lawyer compliance while minimizing the cost of producing it—he puts aside issues of rulemaking competence and simply assumes that all enforcers take the ABA codes as the rules to be enforced.\(^{72}\)

Professor Wilkins distinguishes between four enforcement systems or models, which he calls disciplinary, liability, institutional, and legislative controls.\(^{73}\) His models roughly correspond to existing institutions. Judicial agencies or bar associations under judicial supervision exercise disciplinary control. These agencies rarely use proactive enforcement techniques such as random audits or inspections. As a result, they rarely detect wrongdoing on their own. Instead, they rely on complaints, mostly from aggrieved clients. The agencies rely on client complaints even though some ethics rules seem designed to protect non-clients, while others, such as the ban on commingling lawyers' and clients' funds, are prophylactic rules whose violation does not in

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72. Wilkins, supra note 7, at 810. To isolate the question of enforcement competence, he writes:

[It is necessary to assume a single set of rules that will be . . . applied by all enforcement officials. Because the ABA's Model Rules of Professional Conduct and Model Code of Professional Responsibility continue to constitute the most influential sources of professional norms, I assume that all enforcement officials agree that lawyers can only be sanctioned for conduct proscribed in one of these two documents.

Id. Professor Wilkins considers this assumption "exaggerated," but "not completely unrealistic," and notes that even the SEC, which has shown some interest in making rules to govern securities lawyers, has "shied away" from rules that contradict the lawyer's duties under the ABA codes. Id. at 810 n.36. Two SEC lawyers recently urged that some way be found to make the ethics rules governing securities lawyers uniform, but they expressed no preference for SEC rulemaking as a solution. Paul Gonson & John W. Avery, Practicing Securities Law: A Search for Uniformity of Professional Standards, in ALI/ABA Committee on Continuing Professional Education, Reforming Legal Ethics in a Regulated Environment 489, 495-97 (Dec. 10, 1993) (discussing several potential sources of uniform rules, some of which would still rely on the organized bar). If the SEC were to adopt its own ethics rules for securities lawyers, it would presumably have to become more involved in ethics enforcement, perhaps an unwanted task in a time of great budget constraints. Cf. Little, Federal Prosecutors, supra note 55, at 415, 418-19 (suggesting that one reason the Attorney General is unlikely to promulgate a comprehensive ethics code for federal prosecutors is that the Justice Department would have to raise the enforcement budget of its own Office of Professional Responsibility).

73. Wilkins, supra note 7, at 805-09.
“Guilt” is usually adjudicated in an administrative proceeding that costs much less than a trial and is funded through a tax on lawyers. Sanctions range from private admonition to disbarment, but do not include fines or damages, though some lawyers must make restitution of client funds. Like criminal sanctions, discipline is meant to deter, incapacitate, or even rehabilitate, but does little to remedy a victim’s loss.

Liability controls also operate ex post and at the initiative of victims. They function by allowing injured parties to sue lawyers under a variety of statutory and common law theories, including professional malpractice. Judge and jury adjudicate “guilt” in a trial. Compensatory damages are the key remedy, though punitive damages are sometimes available.

Institutional controls are exercised by the legal forum before which a lawyer “appears” for a client. The judge who cites a lawyer for contempt, or sanctions a lawyer for filing a frivolous claim or abusing the discovery process, exercises institutional control, as does the SEC when it sanctions a lawyer in an administrative enforcement action for preparing false disclosure documents for the client to file with the agency. The court or agency in which a lawyer appears or makes filings can often detect lawyer wrongdoing on its own, or with the help of opposing counsel, and has an incentive to do so to protect its own processes. Forums using institutional controls sometimes impose sanctions on their own initiative. They can also provide ex ante remedies for the breach of prophylactic rules, as when a trial court grants a pretrial motion to disqualify a lawyer from a case in which he has a potential conflict.

Finally, legislative controls could be exercised by a legislatively created agency with authority to investigate and prosecute lawyer misconduct. State medical and accounting boards are not the only possible models. The agency could be a more proactive enforcer like the Occupational Safety and Health Administration—using audits, inspections, and reporting requirements to detect violations even of pro-

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74. See Model Rules, supra note 29, Rule 1.15(a) (prohibiting the commingling of lawyer and client funds). Commingling is prohibited not because it is harmful in itself but because it tempts lawyers to convert client funds to their own use. Any prophylactic rule that is enforced ex ante—before harm occurs—is apt to be enforced in a non-disciplinary forum, as when a trial court grants a pre-trial motion to disqualify counsel who is unethically exposing her client to a risk that the lawyer will become embroiled at trial in a conflict of interest. See, e.g., Timeo v. Kelly, 870 F.2d 854, 856-58 (2d Cir. 1989) (upholding disqualification where criminal defense lawyer might have to cross-examine a former client who was to testify for prosecution).

75. See Wilkins, supra note 7, at 805-06.

76. See id. at 806-07.

77. See id. at 807-08.

78. See id. at 807-08 & n.30.
phylactic rules.\textsuperscript{79} Compared to disciplinary controls, such a proactive agency might be very expensive, although the more misconduct it deterred the fewer cases it would have to investigate and prosecute.\textsuperscript{80} If legislative appropriations were used to fund the agency, then some expense might be externalized to taxpayers who do not use legal services, though surely all taxpayers have a stake in the administration of justice. A proactive agency might be so intrusive as to demoralize lawyers, force them into wastefully defensive practices, or chill desirable behavior that does not violate the prevailing conduct rules. These subtle kinds of compliance costs could perhaps be mitigated if the agency, unlike the SEC or IRS, had no agenda other than to regulate lawyers.

Using two basic distinctions, Professor Wilkins next develops a typology of lawyer misconduct. First, he distinguishes breaches of duty to clients from breaches of duty to third parties or the legal system. In law-and-economics terms, these are “agency” and “externality” problems, respectively.\textsuperscript{81} According to Professor Wilkins, agency problems include overbilling and neglecting to file a client’s claim on time, while externality problems include filing frivolous claims at a client’s insistence, allowing clients to commit perjury, or helping clients prepare false tax returns.\textsuperscript{82}

Professor Wilkins also distinguishes between misconduct that occurs in representing corporate clients and the misconduct that occurs in representing individuals. He does so on the basis of studies showing that most lawyers represent one class or the other and that these two “hemispheres” of the bar practice under different pressures. Because sophisticated corporate clients have advantages in selecting, motivating, and monitoring their lawyers, Professor Wilkins argues, lawyers who represent corporate clients are relatively likely to create externality rather than agency problems.\textsuperscript{83}

Together, the two distinctions produce four problem sets: corporate client/agency problems; corporate client/externality problems; individual client/agency problems; and individual client/externality problems.\textsuperscript{84} Professor Wilkins’s final step is to compare the strengths and weaknesses of the four enforcement systems in dealing with misconduct in each problem set.\textsuperscript{85} Enforcers might use his comparisons

\textsuperscript{79} See id. at 808-09, 847. For a brief account of how such a federal agency might evolve in the future, see Ted Schneyer, Professional Discipline in 2050: A Look Back, 60 Fordham L. Rev. 125 (1991).

\textsuperscript{80} See Wilkins, supra note 7, at 847-48.

\textsuperscript{81} Id. at 819-20.

\textsuperscript{82} Id. at 820.

\textsuperscript{83} See id. at 816-20 for a discussion of agency and externality problems.

\textsuperscript{84} Id. at 819-20.

\textsuperscript{85} Id. at 822-47.
to recognize and play to their own strengths, to identify types of misconduct better left to others, to steer that misconduct to the best alternative enforcer, or to identify internal reforms that might overcome their weaknesses.

Professor Wilkins thinks no enforcement system can best control all lawyer misconduct: each system has the advantage in some context, and an optimal enforcement strategy would combine them. He thinks disciplinary controls deal better than liability controls with the low-level agency problems that tend to plague individual clients—e.g., failures to communicate with the client or to return unearned fees. He thinks that the agency problems corporate clients encounter most are conflicts of interest in litigation, and that such conflicts are best controlled through disqualification, an *ex ante* institutional control. He thinks disciplinary controls are ill-equipped to deal in any serious way with externality problems. Clients have no reason to complain about misconduct that may help them. Third-party victims are less likely than clients to observe misconduct or realize they have been harmed. Opposing counsel are reluctant to file stigmatizing disciplinary charges against fellow lawyers. Disciplinary bodies do little to

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86. For example, the Fifth Circuit has relied on Professor Wilkins's view that institutional controls deal more effectively than disciplinary controls with litigation conflicts. In *In re American Airlines*, 972 F.2d 605 (5th Cir. 1992), the court disqualified a litigator for violating conflict-of-interest standards, even though the conflict would not taint the trial. The court declined to leave the problem for possible *ex post* enforcement by a disciplinary agency. *Id.* at 610-11. For discussion of the case, see Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 75-79 (1996) [hereinafter Green, *The Judicial Role*].


88. *Id.* at 874 (“[I]ndividual clients complaining about inattention, low-level negligence, overpayment, or conversion of trust funds will often be better served by the kind of flexible, informal, and relatively inexpensive procedures found in many disciplinary agencies than they would be by malpractice suits.”). Professor Wilkins concludes that disciplinary agencies should continue to give priority to controlling individual agency problems, but should become more proactive enforcers, using random audits of trust accounts and office procedures, for example, in view of the difficulty that unsophisticated clients face in detecting agency problems. *Id.* at 874 & n.323. Professor Wilkins is surely right about the advantages of disciplinary controls over liability controls in this problem cell, but he neglects to mention that disciplinary controls have only recently become significant in the area. *See supra* text accompanying notes 65-66. In other words, Professor Wilkins's disciplinary control model is not a timeless ideal-type; it is historically contingent. If disciplinary controls have changed substantially since 1970, there is no reason why they cannot change again over the next quarter-century.

89. Wilkins, *supra* note 7, at 827-28, 832 (arguing that the prospect of disqualification has done much more to encourage large firms to develop effective conflict avoidance procedures than has the prospect of professional discipline). However, large firms become embroiled in conflicts not only in litigation, but also in transactional work, where no institutional controls may apply.

90. *Id.* at 822-24.
ferret out misconduct on their own. And they offer no useful remedy to non-clients.\textsuperscript{91}

Professor Wilkins thinks institutional controls are often the best approach to externality problems because the forum in which a lawyer is working can detect such problems on its own, or with opposing counsel's help, and has an incentive to do so in order to protect its own processes.\textsuperscript{92} He thinks liability controls, with their promise of damages, are the best device for dealing with agency problems that impose large and provable losses on individual clients.\textsuperscript{93} He also thinks liability controls deal better than disciplinary controls with externality problems, including those that arise in corporate practice.\textsuperscript{94} He appears to think there is systemic underenforcement in that area, and would favor legislation and judicial decisions that expand the rights of third parties to sue lawyers for damages.\textsuperscript{95}

Thus, by breaking lawyer misconduct into sub-categories, Professor Wilkins is able to reach a number of reasoned conclusions about the strengths and weaknesses of his four enforcement systems. To the extent his systems correspond to today's institutions, his framework also helps explain why those institutions play the limited roles they do—why, for example, disciplinary agencies mostly protect individual clients with small-stakes claims.

\textsuperscript{91} Id. at 834.

\textsuperscript{92} Id. at 835-38. On the other hand, Professor Wilkins worries that institutional controls may sometimes over-deter conduct that is entirely proper. He argues, for example, that Rule 11 of the Federal Rules of Civil Procedure has too often been used to sanction resource-starved lawyers for civil rights plaintiffs, who are in no position to exhaustively review the merits of the complaints they file. \textit{Id.} at 839-41. He also suggests that the SEC, anxious to enlist private securities lawyers as watchdogs on their own clients, has at times engaged "in what appears . . . to be overzealous enforcement" through its own institutional controls. \textit{Id.} at 836.

\textsuperscript{93} Id. at 830-32. These clients can afford access to the malpractice system thanks to the contingent fee. Of course, liability controls cannot effectively deter lawyers who know at the time of their misconduct that they are likely to be judgment-proof if they are caught. They could also encourage lawyers to engage in too much "defensive lawyering." Although Professor Wilkins recognizes that clients sometimes file unmeritorious malpractice claims against their insured lawyers in order to capitalize on the considerable nuisance value of those suits, he sees little reason for concern that liability controls produce undue enforcement costs in the form of wastefully defensive lawyering. Id. at 831-32 n.132. And he thinks corporate clients monitor their lawyers closely enough to keep defensive lawyering, such as taking endless depositions to avoid charges of negligence, to a minimum. \textit{Id.} at 833.

\textsuperscript{94} See id. at 833-35, 869-72. Professor Wilkins's most explicit statement on the point is ambiguous. Liability controls, he writes, "appear likely to address a broad range of [externality problems] that . . . fall outside the present disciplinary system." \textit{Id.} at 835. "Likely to address" is not the same as "likely to deal with better;" the cure could be worse than the disease. Nonetheless, Professor Wilkins's sympathy for efforts to expand third-party liability is clear from the tenor of the passages cited.

\textsuperscript{95} Id. at 830-35. In common-law malpractice cases, courts have traditionally used the privity barrier to keep many third-party claims out of court, although they increasingly recognize a third-party right to sue for negligent misrepresentation. Wolfram, \textit{supra} note 5, at 223-26.
B. The Framework Criticized

Professor Wilkins’s analysis of who should regulate lawyers is open to four general criticisms. First, even if one accepts his enforcement “rankings,” as I shall, one wonders how useful they can be to the decision makers whose choices affect the regulatory mix. The general observation that one enforcement system is better suited than another to deal with a category of problems hardly shows that it deals better with all aspects of all cases in the category, that the superior system’s role should be increased, or that the inferior system’s role should be decreased. Thus, even if liability controls do prevent, detect, and remedy vastly more misconduct than disciplinary controls in the corporate-externality area, disciplinary controls still do a better job of imposing the sometimes indispensable sanction of disbarment on lawyers who are caught helping corporate clients defraud investors. After all, only disciplinary authorities can disbar. Moreover, the advantages of liability controls in deterring, detecting, and remedying corporate externality problems do not imply that courts should expand lawyers’ liabilities to third-party victims, unless one can show that the courts have limited third-party liability on the mistaken assumption that disciplinary controls deal effectively with externality problems. Nor do those advantages imply that the lawyers’ disciplinary agency in New York City should reduce the percentage of its budget that goes to investigating and prosecuting misconduct in the corporate externality sphere.

Second, Professor Wilkins’s misconduct categories are not always helpful. The agency/externality distinction makes little sense as applied to some problems. As Professor Little suggests, it is difficult to label most prosecutorial misconduct in these terms. One cannot say whether overzealous prosecution or abuse of a defendant’s rights is only an externality problem, harming the defendant and perhaps the criminal process, or is also an agency problem because the prosecutor owes a duty to his client, the people, to protect the defendant’s rights. However one labels prosecutorial misconduct, the key point is that prosecutors’ clients are unlikely to trigger any of Professor Wilkins’s enforcement systems. Likewise, as Professor Bruce Green points out, one could treat certain conflicts of interest as externality problems, but Professor Wilkins treats them solely as agency problems. The lawyer who abuses a former client’s confidences in

96. Little, Federal Prosecutors, supra note 55, at 416.
97. See Model Rules, supra note 29, Rule 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice...”). Perhaps due to this complication, Professor Wilkins has nothing to say about who should enforce conduct rules addressed to prosecutors. See Little, Federal Prosecutors, supra note 55, at 357-58.
98. Green, The Judicial Role, supra note 86, at 88-89; Wilkins, supra note 7, at 88-89.
order to zealously represent his current client is betraying a former client, an agency problem. But the lawyer is also harming a present non-client in order to serve a client's needs—an externality problem.

Similarly, the distinction between lawyers who represent individuals and those who represent companies masks some differences among lawyers even as it highlights others. Professor Wilkins admits, for example, that a one-shot lawyer for a "mom and pop" company is apt to behave more like an individual-client lawyer than a lawyer for General Motors,99 and conversely, that "the relationship between dethroned investment banking czar Michael Milken and his principal lawyer Arthur Liman . . . probably more closely resembles interactions between Drexel Burnham and its lawyers than [it resembles] the experience of most individual criminal defendants."100

These category problems, though real, should not be overemphasized. Analysis requires categories, and endlessly subdividing one's categories does not necessarily enhance their policymaking or explanatory value. In his empirical study of white-collar criminal defense work in New York,101 Kenneth Mann shows that lawyers for white-collar defendants like Michael Milken do indeed face different incentives than their street-crime counterparts.102 But, although he tries to draw policy implications from this,103 Mann suggests no ways in which white-collar defense lawyers should be regulated differently; his subcategories are too refined for that.

My third criticism of Professor Wilkins’s analysis is that he sometimes treats one enforcement system as if it were immutable, another as evolving or at least open to change. It is all too easy to "fudge" the calculus of advantage between two enforcement systems by imagining plausible changes in one but not the other. Thus, in discussing the role of liability controls in dealing with externality problems, Professor Wilkins imagines and even seems to anticipate that courts will expand third-party rights to sue lawyers.104 But in discussing the role of disciplinary controls, he cannot conceive of comparable adaptations. Instead, he treats the very reforms that could beef up disciplinary controls to deal with externality problems as features of a proactive, and non-existent, system of legislative controls.

In fact, however, where corporate-practice externalities are concerned, liability controls have arguably contracted since Professor

99. See Wilkins, supra note 7, at 819 n.83.
100. Id. at 819.
102. Id. at 4-5.
103. Id. at 243-50.
104. Wilkins, supra note 7, at 834 (arguing that, because “blue-chip” law firms are “usually involved in the kind of transactions that pose a significant risk of harming large numbers of consumers or investors, the volume of third party actions involving leading law firms appears destined to increase”).
Wilkins's article appeared. California, once generous in allowing third-party victims to recover for professional negligence, has become more restrictive. The Supreme Court recently terminated an important liability control on securities lawyers, holding that the antifraud provisions of the federal securities laws do not entitle investors to bring secondary liability, e.g., aiding and abetting, claims against lawyers who assist corporate clients in securities frauds. And many of the firms that represent corporate clients have reorganized as limited liability entities so that partners will not be vicariously liable when one member of the firm incurs liability.

At the same time, disciplinary controls are gaining power to proceed against law firms as entities and to impose fines as a disciplinary sanction. Perhaps they also could develop more proactive detection techniques and structural remedies, which would further expand their capacity as corporate-externality problem enforcers. Of course, I am not holding my breath. But the point remains that disciplinary or self-regulatory controls are not inherently unable to deal with externality problems in corporate practice. Consider analogies from other professions. The American Institute of Certified Public Accountants maintains a system for overseeing the practices of accounting firms in conducting audits, and self-regulating stock exchanges deal with both externality and agency problems in the securities business.

My final criticism is that Professor Wilkins's sharp separation of enforcement from rulemaking distorts our understanding of some insti-

105. See Bily v. Arthur Young & Co., 834 P.2d 745, 761 (Cal. 1992) (declining to permit all merely foreseeable third-party users of audit reports to sue the accounting firm that performed the audit on a theory of professional negligence).
106. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1455 (1994). Professor Wilkins would presumably decry the Central Bank decision on grounds of enforcement policy, though he does express some concern that secondary liability might induce securities lawyers to overinvest in preventing client fraud, thereby driving up fees, or to refuse to represent the less reputable businesses that might be most in need of legitimate services. See Wilkins, supra note 7, at 835.
107. See, e.g., Leubsdorf, supra note 10, at 142 (stating that in the wake of the savings and loan crisis "[s] many firms have taken advantage of professional corporation and similar statutes, that little may soon remain of vicarious liability in practice.").
108. See supra note 67 (discussing the authorization of law-firm discipline in New York); see also Disciplined Lawyers Ordered to Pay Costs of Proceedings to the Bar, Cal. St. B.J., Mar. 1994, at 26 (indicating that California State Bar recently came out in favor of reforms authorizing the imposition of fines up to $5000 per violation and $50,000 per proceeding as a disciplinary sanction in certain cases).
109. For an account of how the lack of these powers contributed to the inability of state disciplinary authorities to respond to the alleged misconduct of the large law firms who had represented thrift institutions such as Lincoln Savings before they failed, see Schneyer, supra note 5, at 643-50.
110. A.A. Sommer, The Accounting Profession's Peer Review Program, 20 U. Tol. L. Rev. 375, 376-77 (1989). Because third-party lenders and investors often rely on audits, the danger that poor audits will produce externality problems is substantial.
tutional choices. In one instance, it impels Professor Wilkins to analyze a decision that arguably chooses between rulemakers as a choice between enforcers. In *Barker v. Henderson, Franklin, Starnes & Holt,* the Seventh Circuit held that a law firm was not secondarily liable under the antifraud provisions of the securities laws for failing to warn investors when the firm learned that its former client was perpetrating a fraud in connection with a securities issue briefly worked on by the firm. Finding no ethics rule or fiduciary standard that imposed a duty to warn, the court asserted that the securities laws “must lag behind changes in ethical and fiduciary standards,” and that “an award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards.”

Professor Wilkins criticizes *Barker,* arguing that the court failed to recognize that liability controls are essential for corporate-practice externality problems. This argument assumes that the defendant law firm breached a conduct rule. But the court’s point was that no such rule exists and that the court should not invent one by reading it into the securities laws. To the extent that *Barker* makes an institutional choice, it is a choice between rulemakers for securities practice, not enforcers.

Professor Wilkins senses that although the sub-tasks involved in lawyer regulation are analytically separable, they can be very “sticky” in reality. He puts the twin tasks of adjudicating guilt and sanctioning violators under one “enforcement” heading for the good reason that guilt-adjudicating institutions normally mete out sanctions as well. Professor Wilkins also has no trouble recommending institutional controls for litigation conflicts without showing that they are better than disciplinary controls at the sub-task of adjudicating guilt; for him it is enough that disqualification is superior to disciplinary sanctions.

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112. 797 F.2d 490 (7th Cir. 1986).
113. *Id.* at 497. Recently, the Supreme Court held that investors have no right to recover damages from a law firm for aiding and abetting a client’s violation of the antifraud provisions of the securities laws. *Central Bank v. First Interstate Bank,* 114 S. Ct. 1439, 1455 (1994).
114. *Barker,* 797 F.2d at 497.
115. *Id.*
116. See Wilkins, *supra* note 7, at 850 (“[F]rom the perspective of enforcing the rules of professional conduct, it is a mistake to place additional obstacles in the path of this kind of third party enforcement system.” (footnote omitted)).
117. Wilkins invokes the “widely acknowledged professional norm” that lawyers should “refuse to participate in fraudulent conduct even when they are not at liberty to disclose the wrongdoing.” *Id.* at 849. This is a fair restatement of the ban on assisting a client in conduct the lawyer knows is criminal or fraudulent. Model Rules, *supra* note 29, Rule 1.2(d). But Wilkins never explains how the defendant law firm “participated in” or knowingly “assisted” fraud. The rule seems inapplicable to the facts of the case.
118. See Wilkins, *supra* note 7, at 828 n.113. Reasons for enforcing conflicts rules *ex ante* through disqualification include the trial court’s interest in the integrity of its own processes, the value of remedying a conflict before it taints a trial, and perhaps
Yet he completely detaches the rulemaking and enforcement tasks and focuses on enforcement alone. This not only leaves him speechless on issues of rulemaking competence; it leaves him unable to account for situations where an institution may take on enforcement duties, not because it is a better enforcer per se, but because it has perceived rulemaking advantages and will have to enforce its rules on its own.\footnote{119}

Conduct rules vary not only in content but in specificity. Some institutions are good at general rules but weak at specification. As Professor Fred Zacharias has argued,\footnote{120} ABA ethics codes addressed to the entire bar are weak at specifying rules for specialized fields of practice.\footnote{121} When the need for specificity becomes acute, rulemaking authority may shift from the ABA and the state supreme courts to an institution better suited to develop specific rules or "protocols." Some shift in enforcement may occur as a result.

Consider the regulatory response to the law firms that represented Lincoln Savings shortly before it failed. Federal banking authorities sought huge recoveries from Jones, Day, Reavis & Pogue and Kaye, Scholer, Fierman, Hays & Handler for their alleged misconduct in representing Lincoln Savings. The government claimed that lawyers at the firms violated a number of ethical duties, not just arcane banking regulations.\footnote{122} Discretion being the better part of valor, the law firms settled for millions of dollars,\footnote{123} even though the government's the difficulty of later assessing the harm caused by a conflict in an \textit{ex post} malpractice suit. For reasons why disqualification may sometimes be an unsuitable response to litigation conflicts, see Green, \textit{The Judicial Role, supra} note 86, at 84-95.

119. A good example, discussed in this Symposium by Professor Little, is the Attorney General's recent promulgation of a preemptive regulation governing the authority of federal prosecutors to contact defendants or investigative targets who are represented by counsel and whose lawyers do not consent to the contact. See 59 Fed. Reg. 39,910 (1994) (to be codified at 28 C.F.R. § 77) (final rule regarding Communications with Represented Persons). The rule reflects the Justice Department's assessment that the ABA, local bar authorities, and some federal courts were interpreting rules such as Rule 4.2 of the Model Rules of Professional Conduct inconsistently and in a way that hampered legitimate law enforcement techniques. The rule not only sets standards more acceptable to the Department, it also vests interpretive and enforcement authority in the Department itself (through its Office of Professional Responsibility) and ousts local disciplinary authorities and the federal courts themselves as enforcers of Rule 4.2. See Little, \textit{Federal Prosecutors, supra} note 55, at 375-77.


121. See id. at 224-25.

122. \textit{See In re American Continental Corp./Lincoln Savings & Loan Sec. Litig.}, 794 F. Supp. 1424 (D. Ariz. 1992) (denying defendant law firm's motion for summary judgment and suggesting that a law firm may have to inform its client when it learns that the client is breaking the law and may be required to withdraw if the conduct persists); \textit{In re Fishbein}, OTS AP-92-19 (Mar. 1, 1992) (Notice of Charges and of Hearing for Cease and Desist Orders to Direct Restitution and Other Appropriate Relief) (listing 10 claims brought against Kaye, Scholer).

123. See Steve France, \textit{Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability}, 7 Geo. J. Legal Ethics 725, 726 (1994). All told, the government insti-
novel and controversial reading of ethical norms might well have been rejected if litigated. The very general tenor of ethics rules made the allegations plausible enough to bring the law firms and their insurers to their knees.125

When the in terrorem effects of vague ethical norms become great, as they did in the government’s liability suits and enforcement actions, lawyers and regulators alike become interested in creating “protocols” that put lawyers on clear notice of their duties and function as “safe harbors” for those who comply.126 Thus, in settling their cases, the law firms agreed to abide by such protocols in future banking work.127 The federal banking agencies could turn those protocols—i.e., prophylactic rules too banking-specific to ever make their way into an ABA ethics code—into conduct rules for all lawyers engaged in banking practice.128 If that should happen, then the agencies would presumably enforce those rules in their own administrative proceedings.

124. A special ABA task force sharply contested the regulators’ interpretations of lawyers ethical obligations under the Model Rules. ABA Working Group on Lawyers’ Representation of Regulated Clients, Laborers in Different Vineyards?: The Banking Regulators and the Legal Profession 141-213 (Discussion Draft Jan. 1993) [hereinafter Working Group Representation]. The task force went so far as to urge the banking agencies to submit “novel or non-traditional interpretations of professional codes” to the ABA or to state bars for “authoritative rulings” before acting on those interpretations. Id. at 12 (Recommendation 9).

125. See Schneyer, Professional Discipline, supra note 5, at 650-65 (demonstrating the indeterminacy of the Model Rules as they bear on the validity of the regulators’ charges); Howell E. Jackson, Reflections on Kaye, Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions, 66 S. Cal. L. Rev. 1019, 1029 (1993) (“The substantial ambiguity inherent in current standards of professional conduct makes it all but impossible to resolve retrospectively the disputes between the government and defenders of the private bar.” (footnote omitted)).

126. For an economist’s explanation of how the heavy and uncertain liabilities associated with ex post regulation can prompt regulators and regulatees to accept an alternative regime of specific prophylactic rules and ex ante monitoring for compliance, see Donald Wittman, Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring, 6 J. Legal Stud. 193, 196-97 (1977). Wittman notes, for example, that society, being unwilling to accept the costs of regulating automobile driving solely by imposing liability on drivers after they “negligently” or “recklessly” cause accidents, imposes speed limits and enforces them in cases where no accident has occurred. Id.

127. For example, Kaye, Scholer accepted the following protocols, among others, for its future banking work: Kaye, Scholer must review the finances of every new banking client and come to a written understanding with each banking client about the scope of its engagement. In re Fishbein, OTS AP-92-24 ¶¶ 4, 11 (Mar. 11, 1992) (Order to Cease and Desist for Affirmative Relief from Kaye, Scholer, Fierman, Hays & Handler). Any legal opinions concerning a banking client’s compliance with federal banking law must be prepared under the supervision of a partner with at least 10 years of experience in the field and must be approved by a second banking partner. Id.

128. At times, the OTS has indicated that it considers the agreed-upon protocols with Kaye, Scholer and other firms to be “general principles” that the OTS expects
FOREWORD

IV. An Introduction to the Symposium Articles and Responses

One measure of the value of *Who Should Regulate Lawyers?* is its capacity, amply demonstrated in this Symposium, to stimulate other scholars to search for legal process insights in their work on the law of lawyering. I want now to introduce those Articles and Responses, tying them to Professor Wilkins's analysis.

A. Green on Institutional Control of Litigation Conflicts

Professor Green’s article, *Conflicts of Interest in Litigation: The Judicial Role*, rethinks the role of the trial courts in regulating the conflicts of interest that arise in litigation. Professor Green agrees with Professor Wilkins that such conflicts tend to arise in corporate litigation, that disciplinary agencies play no real role in policing them, and that institutional controls by the trial courts themselves are likely to be more effective. At the same time, he challenges Professor Wilkins’s analysis in several respects.

Professor Wilkins rests his case for institutional controls on the superiority of disqualification over the traditional disciplinary sanctions. But this lumps sanctions, which are meant to deter or punish misconduct, with remedies, which also deter, but are designed to redress or avert the harm that misconduct causes. Professor Green thinks disqualification is an appropriate remedy for some litigation conflicts, but never appropriate as a pure sanction. After all, the chief burdens of disqualification are likely to fall on the disqualified lawyer’s client, who will have to start over with new counsel, and on the court, because of the resulting delays. If the party moving for disqualification cannot show substantial harm, Professor Green argues, there is no good reason to burden these innocent parties.

On these grounds, Professor Green criticizes a much-discussed decision that disqualified a law firm five years into the litigation. The disqualified firm was proceeding against IBM, allegedly without its consent and while representing IBM in unrelated matters. Ethics rules generally forbid lawyers to represent one client against another current client without the latter’s consent, even when the matters the firm is handling for that client are unrelated to the case at hand.

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130. See Wilkins, *supra* note 7, at 828.
132. *Id.* at 90-91.
133. See IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978).
134. See Green, *The Judicial Role*, supra note 86, at 83-84.
135. See Model Rules, *supra* note 29, Rule 1.7(a). Texas has rejected this broad prohibition, presumably on the theory that where the representations are unrelated
The court made no finding that IBM was harmed or likely to be harmed as a result of this conflict, or that the conflict would “taint” the litigation. In Professor Green’s view, the court unwisely disqualified the firm as a sanction, not a remedy.

If disqualification should only be used as a remedy—e.g., to avoid the risk that a former client’s confidences will be used against it—and if the case for institutional controls rests on the supposed value of disqualification as a sanction, then one might expect Professor Green to reject the broad use of institutional controls to regulate litigation conflicts. Yet Professor Green still favors institutional controls. Even when disqualification is unnecessary to redress or avert harm, or undesirable because the burdens of disqualification on the innocent client and the court would outweigh the harm to the moving party from continued representation, Professor Green would still have the courts impose “pure” sanctions, such as public censure or Rule 11-type fines, rather than relegate the problem to disciplinary controls. This would require little judicial effort beyond the disqualification hearing that would already have been held, and would teach lawyers that a refusal to disqualify does not imply approval of their conduct.

Finally, Professor Green thinks one cannot disregard the making of conduct rules when one tries to define the proper role of trial judges in policing litigation conflicts. Unlike Professor Wilkins, he sees a close link between the tasks of making and enforcing rules in this area. He regards ethics rules governing conflicts as largely prophylactic rules, rules whose violation need not imply harm. Because disqualification is appropriate only where present or future harm is shown, those rules should be rejected in favor of balancing tests developed by courts and applied on case-by-case basis.

Professor Green rejects the use of ethics rules as disqualification standards because those rules are largely addressed, not to the courts, but to the lawyer who must decide whether to accept a new client. The lawyer’s natural bias in favor of accepting new business calls for


136. Levin, 579 F.2d at 283 (indicating that no specific injury to the moving party had been shown).

137. Id. at 90-91. Interestingly, while Professor Green treats money sanctions under Federal Rule of Civil Procedure 11 as a model for his proposal, recent amendments to Rule 11 are likely to result in more trial courts referring Rule 11 violations to disciplinary authorities rather than imposing sanctions themselves. See Jeffrey A. Parness, Disciplinary Referrals Under New Federal Civil Rule 11, 61 Tenn. L. Rev. 37 (1993).


139. Id. at 71-73.

140. Id. at 129.
conduct rules that, if anything, err on the side of discouraging representation, because the cost to a would-be client of having to go elsewhere is often minimal. Disqualification standards, by contrast, are addressed to disinterested judges and applied after the litigation client and the court have become invested to some degree in the lawyer's participation in the case.\textsuperscript{142}

As Professor Susan Martyn comments,\textsuperscript{143} Professor Green wants to "bifurcate" the judicial scrutiny of an alleged litigation conflict into two phases—an inquiry into whether to disqualify under judge-made standards and, if disqualification is rejected on the insufficient-harm principle, an inquiry into whether to impose personal sanctions for ethics-rule violations.\textsuperscript{144} Professor Martyn worries that this will confuse lawyers or encourage unsavory strategic behavior. Because Professor Green's proposal would reduce disqualifications and would result in serious personal sanctions only when a lawyer had deliberately flouted the ethics rules, a cynical litigator might forgo conflicts checks in choosing new clients and hope that any personal sanctions later incurred would be minimal.\textsuperscript{145}

Professor Martyn would continue to use disqualification broadly and would encourage the courts to impose more fee forfeitures as an institutional control on litigation conflicts as well.\textsuperscript{146} She also questions Professor Green's distinction between harmful and harmless conflicts:\textsuperscript{147} even in Professor Green's "paradigmatic" no-harm case, she thinks IBM was at least arguably harmed, because the law firm deprived the company of its right to withhold consent or, in the alternative, to consent but monitor the firm's unrelated work on its behalf more closely in light of the conflict.\textsuperscript{148}

\begin{itemize}
\item \textsuperscript{142} Id. at 110-11.
\item \textsuperscript{143} Susan R. Martyn, Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green, 65 Fordham L. Rev. 131 (1996) [hereinafter Martyn, Response to Green].
\item \textsuperscript{144} Id. at 133-34.
\item \textsuperscript{145} Id. at 137.
\item \textsuperscript{146} Id. at 147.
\item \textsuperscript{147} Id. at 140. Professor Martyn casts Professor Green's distinction between harmful and harmless conflicts as a distinction between actual and potential conflicts. \textit{Id.} at 139. I disagree. Professor Green recognizes that disqualification may be warranted when the court finds a significant risk of future harm (such as through impaired representation or misused confidences), even if no harm has yet occurred. But he rejects the notion that all litigation conflicts prohibited by the ethics rules are harmful per se or carry a serious risk of harm. Green, The Judicial Role, supra note 86, at 99-103. He does not regard the moving client's mere perception that the lawyer has been disloyal in taking on the new client as tangible enough to qualify as significant harm. \textit{Id.} at 104-09.
\item \textsuperscript{148} See Martyn, Developing the Judicial Role, supra note 143, at 134-35.
\end{itemize}
Many federal agencies have authority to discipline lawyers who practice before them, but they rarely exercise these institutional controls. From time to time, however, one agency or another has briefly tried to develop an activist regime that would not only discipline lawyers for violating the ethics rules that prevail in their home states, but would impose and enforce the agency’s own conduct rules or own interpretation of the state rules. Agency rules or interpretations have arguably been inconsistent with ABA or home-state ethics rules, and, to make matters worse, agencies have tried at times to enforce them without first promulgating them as rules or policy statements. The SEC showed signs of developing such a regime in the 1970s and 1980s. Federal banking agencies, notably the OTS, did the same in the wake of the savings and loan crisis. In each instance, the agencies met with sharp resistance by the organized bar, which questioned the agencies’ authority to create such a regime. This agency approach, Professor Painter argues, may doom regulators to an “indefinite struggle with a recalcitrant bar.”

Professor Painter’s ambitious and highly theoretical project is to deploy the insights of game theory and Coasian economics, not just to understand these agency-bar disputes, but to learn how to avoid them, while at the same time improving agency regulation of business through institutional controls on lawyer behavior. Professor Painter starts with three premises. One is that lawyers who deal repeatedly with an agency like the SEC have much to gain by cultivating a reputation for being cooperative and trustworthy. The second is that society stands to gain by promoting cooperation between regulators and regulated businesses rather than evasion by business and har-

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149. For example, from the Federal Communications Commission’s inception in 1934 until 1991, it has had only two disciplinary hearings. Painter, Game Theoretic, supra note 56, at 170 n.73.

150. To my knowledge the only agencies that have their own ethics codes for the practitioners who appear before them are agencies before which non-lawyers as well as lawyers practice “law.” These include the Internal Revenue Service and the Patent and Trademark Office. See Practice Before the Internal Revenue Service, 31 C.F.R. § 10 (1995) (promulgating rules of practice before the IRS); Practice Before the Patent and Trademark Office, 37 C.F.R. § 10 (1995) (promulgating rules of practice before the PTO).

151. For a brief treatment, see Painter, Game Theoretic, supra note 56, at 181-83. See id. at 186-84.

152. For the harsh response of the ABA Business Law Section to SEC moves in the direction of making conduct rules for lawyers, see Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance By Clients with Laws Administered by the Securities and Exchange Commission, 31 Bus. Law. 543 (1975). For the ABA response to the OTS’s efforts, see ABA Working Group on Lawyers’ Representation of Regulated Clients, supra note 122.

153. See id. at 1-2.

154. Painter, Game Theoretic, supra note 56, at 186-87.
assment by government. The third is that lawyers' reputational interests can be used to promote such cooperation.\textsuperscript{156}

Professor Painter proposes that individual law firms enter into enforceable contracts with agencies to abide by mutually agreeable conduct rules, rather than being obliged to follow an "immutable set of standards" imposed on all lawyers from above.\textsuperscript{157} By negotiating tailored rules, law-firms could differentiate themselves from other firms and earn firm-specific reputations.

"Tailored" standards negotiated \textit{ex ante}—before representation—would be clearer than the one-size-fits-all standards found in an ABA or state ethics code. Because they are negotiated, they would not force lawyers to disobey ethics rules in their home states. One law firm might practice before the SEC under a commitment to resign or blow the whistle on a law-breaking client, while another might operate on the understanding that its lips would remain sealed. If a law firm committed itself to higher-than-minimum diligence and disclosure, which would signal that its clients were committed to cooperating with the agency, the agency would commit itself to mutual cooperation. Indeed, the firm's clients would receive "favorable regulatory treatment."\textsuperscript{158}

Some negotiated rules might resemble the protocols that Kaye, Scholer negotiated with the OTS in the consent agreement that settled the government claims against the firm arising from the Lincoln Savings failure.\textsuperscript{159} The firm might agree, for example, that two experienced partners would sign off on any legal opinion the firm rendered as to whether the client was in compliance with agency rules. These protocols would simply supplement or elaborate upon general ethical norms. Other negotiated rules, such as a commitment to whistle-blow, might be at odds with current duties of loyalty or confidentiality. But, Professor Painter insists, lawyers must be permitted to "contract out of" ethics rules that "unduly narrow" their ability to police a client's commitment to cooperate with the agency.\textsuperscript{160} The agency would enforce the law firm's commitments in its own disciplinary proceedings, using a range of sanctions, including warnings, thereby not relying only on the "big sticks" of huge monetary sanctions and debarment from all agency work.\textsuperscript{161}

Many questions spring to mind about the feasibility and desirability of Professor Painter's intriguing scheme. One wonders, for example, just how a law firm or its clients will enforce the agency's commitment

\textsuperscript{156} See id. at 150.
\textsuperscript{157} Id. at 152.
\textsuperscript{158} Id. at 188.
\textsuperscript{159} See id. at 188-89. For discussion of those protocols, see supra note 127 & accompanying text.
\textsuperscript{160} Painter, \textit{Game Theoretic}, supra note 56, at 187-88.
\textsuperscript{161} Id. at 193-200.
to provide “favorable treatment” to the clients of a law firm whose
tailored rules call for above-minimum diligence and disclosure.
Would not the agency’s commitment also have to be spelled out in
clear understandings? May an agency promise “most-favored-regu-
latee” status to the clients of some lawyers but not others, or would
that violate principles of administrative fairness? Would each client
have to consent to representation in light of its law firm’s commit-
ments to the agency? Can a client effectively consent in advance to
representation that waives some of its rights to loyalty and confidenti-
ality? If such waivers are not permissible under current ethics rules,
then presumably those rules would have to be amended to turn pres-
ently indefeasible rights into default rules, waivable by agreement be-
tween lawyer, client, and agency.

Responding to Professor Painter’s Article, Professor Ian Ayres,
whose own applications of game theory to regulation was an inspira-
tion for Professor Painter’s project, raises some of these questions. In
particular, Professor Ayres wonders whether clients would have to
consent to their lawyer’s following conduct rules negotiated between
the lawyer and the agency. Somewhat ironically, Professor Ayres
also questions the need for Professor Painter to use formal game the-
ory to develop his ideas. Nevertheless, he thinks Professor Painter
has made “more than a prima facie case” for further application of
game theory to issues in legal ethics. If Professor Ayres is right,
then Professor Painter’s lucid tutorial on game theory and its applica-
tion has done many of us in the field a service.

C. Davis on the Regulatory Role of Liability Insurers

As Professor Wilkins makes clear, liability controls are a major cog
in the machine of lawyer regulation. But the mechanisms by which
liability controls influence lawyers are not well understood. The role
of liability insurance is a particular mystery, especially for anyone in-
terested in the institutions of lawyer regulation. On the one hand, in-
surance bolsters the effects of liability controls by assuring that
relatively few law firms will be judgment-proof and, therefore, beyond
the threat of liability. Premium differentials may also send lawyers
valuable signals about the riskiness of certain behavior. On the other
hand, the very fact that it is insured may embolden a firm to take
undue risks, especially if premiums are not geared to its loss
experience.

162. The Model Rules permit lawyers, with client consent, to impose limitations on
the representation, but not to the point where clients surrender their fundamental
rights to effective representation. Model Rules, supra note 29, Rule 1.2(c) & cmt. 5.
164. Id. at 202-05.
165. Id. at 208.
The Symposium article by Anthony Davis, a legal ethics teacher as well as a lawyer who "audits" law firms for malpractice insurers, analyzes one aspect of the liability insurer's influence on law practice. It is well understood that malpractice insurers help their insureds avoid liability by providing expert risk-management advice. Some commentators have also recognized that with the growing exposure of law firms to civil liability, some insurers have begun to try to influence the development of conduct rules for lawyers. But we have almost no understanding of whether or how much insurers influence law practice through the limits and conditions they write into their policies. This is Davis's subject.

Davis argues that insurers use exclusions to discourage their insureds from engaging in some forms of risky conduct, including conduct that is permitted by conduct rules but might nonetheless generate costly-to-defend lawsuits with at least some nuisance value. Citing language from current policies, Davis points in particular to exclusions for claims arising from conflicts of interest that would be permitted under prevailing ethics rules. These examples demonstrate, he believes, that insurers have determined that codes of professional responsibility are inadequate to prevent lawyers from engaging in conduct likely to harm clients and thus lead to claims. By excluding coverage in these instances, insurers are forcing the legal profession to "confront the fact" that lawyers should not engage in representations involving even some permissible conflicts or must at least "assume the entire risk of the consequences." Davis goes so far as to predict that "Insurers will accomplish what decades of drafting and redrafting ethics codes have failed to achieve, namely the effective elimination of conflicts of interest from the practice of law."

Responding to Davis's Article, Professor Charles Silver doubts whether policy exclusions are imposed in a conscious effort to influence lawyer behavior in directions suggested by public policy. He acknowledges, though, that the crucial question from the standpoint of understanding the insurer's role in the regulatory universe is whether policy exclusions affect lawyer conduct, whatever may be the

166. Davis, Insurers as Regulators, supra note 18.
167. See, e.g., Robert E. O'Malley, Preventing Legal Malpractice in Large Law Firms, 20 U. Tol. L. Rev. 325, 347, 364 (1989) (discussing the loss prevention program maintained by the Attorney's Liability Assurance Society ("ALAS"), which is owned by the nearly 400 large law firms it insures).
169. Davis, Insurers as Regulators, supra note 18, at 213-14.
170. Id. at 212-13.
171. Id. at 214.
172. Id. at 226. Of course, public policy may be disserved by eliminating all conflicts, including those that sophisticated clients are willing to consent to.
173. Silver, Response to Davis, supra note 19, at 234-35.
insurers’ motives for using them.\textsuperscript{174} On that point, he thinks the evidence is ambiguous.\textsuperscript{175} In certain cases, exclusions are highly unlikely to affect behavior. For example, when a law firm accepts a policy that excludes coverage for claims arising out of any partner’s conduct as the director of a corporation, it may do so precisely because it expects none of its partners to serve as directors and does not want to pay for useless coverage. If, subsequently, no partners do serve as directors, the policy exclusion will not be the reason.\textsuperscript{176}

D. Brickman on CEPR’s Interpretation of the Model Rules as They Bear on “Standard” Contingent Fees

The next Article in the Symposium, by Professor Brickman, is a critique of a recent opinion published by the ABA ethics committee.\textsuperscript{177} ABA Formal Opinion 94-389 responds to questions posed to CEPR by Professor Brickman and others. The Opinion refuses to declare unethical the practice of charging a routine or standard contingent fee to all of one’s personal injury clients even though the risk of receiving no recovery may vary considerably from client to client, in some cases approaching zero.\textsuperscript{178} Professor Brickman applies to CEPR’s Opinion the tools of legal analysis which scholars normally reserve for judicial opinions. And why not? The Opinion purports to be an interpretation of Model Rule 1.5(a)—“a lawyer’s fee shall be reasonable”—which has become legally binding on lawyers in most states.\textsuperscript{179} Professor Brickman finds the analysis in Opinion 94-389 seriously deficient. But he does not stop there. True to the legal process theme of the Symposium, he tries to identify the institutional features of CEPR and the ABA that may account for the Opinion’s weaknesses. What he finds lurking behind the Opinion is the self-interest not only of the plaintiffs’ personal injury lawyers who benefit from charging standard contingent fees but of insurance defense counsel as well. Defense lawyers, far from operating as a countervailing political force to the plaintiffs’ bar, are in league with it.\textsuperscript{180}

\textsuperscript{174} Id. at 235.
\textsuperscript{175} Id. at 234-41.
\textsuperscript{176} Id. at 240-41.
\textsuperscript{177} See Brickman, Contingency Fees, supra note 30.
\textsuperscript{179} Model Rules, supra note 29, Rule 1.5(a).
\textsuperscript{180} Brickman, Contingency Fees, supra note 30, at 257-58. He states: As plaintiff lawyers’ effective hourly rates of return increase, defendants seeking to retain comparable quality levels of counsel must thus raise the rates they pay to counsel. Accordingly, opinions such as 94-389, which ratify substantial increases in contingency fee incomes by insulating these fees from ethical restraints, do in fact favor the financial interests of both plaintiff and defense lawyers.

\textit{Id.} (footnote omitted). Indeed, Professor Brickman suggests that the ABA may be less reliable as a rulemaker and rule interpreter on the subject of contingent fees than
Like Professor Susan Koniak, \textsuperscript{181} I have several reservations about Professor Brickman's analysis. First, if CEPR's interpretation of Model Rule 1.5 as it applies to contingent fees was hopelessly "biased" by considerations of professional self-interest—Professor Brickman never pinpoints any mechanism by which plaintiffs' and defense lawyers influenced the Opinion—then I see no reason to think that the ABA House of Delegates was any less "biased" when it adopted Rule 1.5(a) in the first place. Surely the composition of the ABA membership did not dramatically change from 1983, when the Model Rules were adopted, to 1994, when CEPR penned its Opinion. Yet, on this analysis, Professor Brickman's problem would not be that CEPR misread legislative intent, but that it refused to amend bad legislation \textit{sub silentio}. Is Professor Brickman not faulting CEPR for refusing to usurp the legislative role of another institution, the House of Delegates? Is that an appropriate criticism of CEPR when it is supposed to be wearing its interpretive hat?

Second, if Professor Brickman's broader point is that the ABA should not be entrusted with the tasks of making and interpreting ethics rules as they bear on contingent fees, \textsuperscript{182} then he is arguably committing the sin of drawing conclusions about the proper allocation of regulatory authority on the basis of a single-institutional analysis rather than the more appropriate comparative analysis. \textsuperscript{183} One wonders what alternative institution Professor Brickman would look to as a source of better rules on contingent fee practices. Even public referenda have not proven to be a fruitful avenue for contingent fee reform, in part, no doubt, because of aggressive advertising against the referenda by trial lawyers' associations. \textsuperscript{184}

\section*{E. Little on Regulating Federal Prosecutors}

For a decade, the United States Department of Justice ("DOJ") has fought with the private bar and the state supreme courts for regula-
Drawing on his considerable experience in the DOJ, Professor Little considers the DOJ’s legal authority to adopt and enforce its own rules for prosecutors and to preempt state ethics rules and override federal court rules in the process. Concluding that the DOJ has such authority, Professor Little goes on to address a question more central to the legal process theme of this Symposium—whether or when the DOJ should, as a matter of policy, exercise this authority.

The war has featured two skirmishes over ethics rules. To avoid unwarranted “intrusions” into relations between defense lawyers and their clients, the ABA, along with some state supreme courts, adopted rules requiring prosecutors to gain judicial approval in an adversary proceeding before subpoenaing a criminal defense lawyer to appear before a grand jury. On similar grounds, the ABA, some local bars, and some federal courts interpreted the “anti-contact” provisions of Model Rule 4.2 to ban most prosecutorial contacts with defendants or targets of criminal investigations without their lawyers’ consent. The DOJ responded in 1994 by promulgating its own more lenient anti-contact regulation and preempting the enforcement of more restrictive local rules. The DOJ intends to interpret and enforce the regulation in its Office of Professional Responsibility.

By Professor Little’s account, Attorney General Reno had strong policy reasons for issuing her anti-contact rule; Rule 4.2 was being interpreted inconsistently, leaving federal prosecutors uncertain of their exposure to discipline and chilling their use of investigative techniques such as ex parte interviews with the employees of a represented corporate target. Because those justifications concern rule content and interpretation rather than rule enforcement, Professor Little argues that the Wilkins framework cannot account for the “Reno rule.” Nevertheless, Professor Little believes the DOJ should not go further and promulgate a comprehensive set of preemptive ethics rules for federal prosecutors, because its enforcement costs would more than offset the benefits of nationwide uniformity. Indeed, now that the Attorney General has demonstrated her will and authority to make preemptive rules in the face of a “crisis,” Professor Little would wel-

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187. See id. at 411-27.
188. See Model Rules of Professional Conduct Rule 3.8(f) (1991). The Rule was amended in 1995 to delete this requirement.
190. See id. at 376.
191. See supra note 117.
192. Little, Federal Prosecutors, supra note 55, at 369-75.
193. Id. at 413-14.
194. Id. at 88, 415, 418-19.
come negotiations between the DOJ and the chief justices of the state supreme courts to hammer out a mutually acceptable version of Model Rule 4.2, with enforcement authority reverting to the states and federal district courts. \(^\text{195}\)

Responding to Professor Little’s analysis, Professor Zacharias argues that the Attorney General’s authority to promulgate a preemptive anti-contact rule for federal prosecutors is far from clear. \(^\text{196}\) He also criticizes Professor Little’s “somewhat too narrow,” “two-dimensional” approach to the question of who should make ethics rules for federal prosecutors. \(^\text{197}\) Professor Zacharias points out that anti-subpoena and anti-contact rules affect the balance of power between defense and prosecution in criminal cases. \(^\text{198}\) He fears that both the ABA and the Justice Department have interests too parochial to make them trustworthy as rulemakers on such subjects. \(^\text{199}\) The ABA and state bars have been too dominated by the defense bar to give adequate weight to the prosecutor’s perspective. Moreover, in the terminology of institutional economist Albert Hirschman, \(^\text{200}\) the DOJ, having failed to gain an adequate “voice” in the private bar, responded with a predictable “exit” strategy making its own prosecution-biased anti-contact rule and resisting enforcement of the bar’s anti-subpoena rule.

Professor Zacharias thinks the anti-subpoena and anti-contact issues must be resolved in one of two ways: a dynamic process of ABA thesis, DOJ antithesis, and jointly negotiated synthesis; or the eventual intervention of Congress, which could broker an appropriate compromise. \(^\text{201}\) The ABA has been persuaded to drop its anti-subpoena rule, but no such “synthesis” has occurred in the anti-contact debate. If the impasse continues, Professor Zacharias hopes and

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195. Id. at 426-27.
197. Id. at 462.
198. Id. at 449.
199. Id. Nor are the courts satisfactory arbiters of the dispute; they have their own institutional axes to grind. Id. at 425-54. If the ABA is an unreliable maker of conduct rules for prosecutors because it is institutionally biased toward the defense lawyer’s point of view, one wonders how reliable a rulemaker it can be on many other subjects on which its rules affect interests, such as consumer interests, that are not directly represented in the ABA. Professor Zacharias offers no guidelines for judgment on the point. As Professor Brickman points out, the fact that plaintiffs’ personal injury lawyers and insurance defense lawyers are both well represented in the ABA does not necessarily imply that ABA rules or ethics opinions on subjects such as the contingent fee will be appropriately balanced. Brickman, Contingency Fees, supra note 30, at 257-59. Professor Brickman views ABA rules and ethics opinions on such subjects as more or less the product of a conspiracy between two branches of the profession.
201. Zacharias, Response to Little, supra note 196, at 460-61.
predicts that Congress will intervene.\textsuperscript{202} And he welcomes DOJ’s anti-contact rule, not because DOJ is less biased than the ABA—it is not—but because DOJ’s response is a precondition to getting Congress, the superior rulemaker, to intervene.\textsuperscript{203}

CONCLUSION

This Symposium is not designed to provide definitive answers to the question: Who should regulate lawyers? The very meaning of institutional “competence” to perform regulatory tasks is too controverted to allow for many definitive answers. Instead, these Articles and Responses were designed to be speculative, to take risks, to play with new ideas, and to provoke. We do hope, however, that the Symposium will serve as an effective promotion for the application of legal process insights to issues in the regulation of lawyers. The field of lawyer regulation is now rife with problems of institutional choice. We need a richer body of scholarship to address the problems at hand.

\textsuperscript{202} Id. at 455, 461.
\textsuperscript{203} Id.