

November 2011

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Recommended Citation

Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 Fordham L. Rev. 1965 (2011).
Available at: <https://ir.lawnet.fordham.edu/flr/vol79/iss5/5>

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THE PARALLEL LAW OF LAWYERING IN CIVIL LITIGATION

*Andrew Perlman**

INTRODUCTION

Civil litigators are increasingly governed by a body of law that is similar, but not identical, to existing rules of professional conduct. For example, Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure and Rule 4.4(b) of the Model Rules of Professional Conduct both address a lawyer's obligations upon receiving an inadvertently disclosed privileged document. Model Rule 4.4(b), however, only requires the receiving lawyer to notify the sender of the mistake,¹ whereas the civil procedure rule imposes additional obligations, including a duty to return the inadvertently disclosed document.² Scholars,³ as well as the Model Rules themselves,⁴ recognize that parallel law of the sort contained in Federal Rule 26(b)(5)(B) now increasingly governs lawyers' conduct.

This Article contends that the parallel law in the civil litigation context does not merely supplement or complement rules of professional conduct; it is increasingly in tension with the ethics rules, causing several problems. First, this tension has created confusion for lawyers who seek to conform their conduct to the relevant standard. For example, because courts do not always disqualify lawyers who have a conflict of interest under the relevant ethics rules or, conversely, do disqualify lawyers who have *not* violated the applicable conflicts rules,⁵ lawyers have trouble determining how to proceed in the face of a possible conflict of interest. Second, because of this type of confusion, the bar tends not to discipline lawyers for violations of the rules of professional conduct when the parallel law differs in content or application. Finally, these developments threaten to diminish the

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1. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2011).

2. FED. R. CIV. P. 26(b)(5)(B).

3. See, e.g., John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959 (2009); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

4. MODEL RULES OF PROF'L CONDUCT Scope [15] (The Scope section of the Model Rules expressly acknowledges that other law regulates lawyer behavior, explaining that "[t]he Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.").

5. See *infra* Part II.A.

authority of the Model Rules of Professional Conduct by transforming disciplinary rules into toothless provisions that lack enforceable law-like status. This Article concludes that to address these problems, the Model Rules must have more modest ambitions with regard to the regulation of lawyers and should cede responsibility for regulating lawyer conduct when a Model Rule does not serve as a basis for discipline and is in tension with parallel authorities.

Part I of this Article examines three areas in which the Model Rules of Professional Conduct are in tension with parallel law in the civil litigation context: (1) conflicts of interests, (2) frivolous pleadings and discovery contentions, and (3) the inadvertent disclosure of privileged information. In each of these areas, courts frequently ignore the seemingly applicable ethics rules and instead apply other law, such as rules of civil procedure or the common law on disqualification.

Part II offers two reasons for this development. First, in some cases, the development of a parallel rule of civil procedure has rendered the applicable rule of professional conduct largely obsolete. For example, the adoption of Federal Rules of Civil Procedure 11 (governing frivolous legal contentions)⁶ and 26(b)(5)(B) (regarding inadvertent disclosures)⁷ have made the parallel rules of professional conduct⁸ effectively meaningless in federal litigation and in state cases governed by analogous rules of civil procedure. Second, in other areas, the competing parallel law has developed because judges have refused to apply the relevant rules of professional conduct as the governing standard. For example, many courts have denied motions to disqualify despite the existence of a conflict of interest under the applicable rules of professional conduct.⁹ Conversely, courts have granted motions to disqualify even when a law firm has complied with the plain language of the governing ethics rule.¹⁰

Part III examines ways in which the Model Rules of Professional Conduct could be amended in response to these trends. One possibility is to adopt the approach of the California Bar, which recently proposed a rule that omits any reference to conflicts screening.¹¹ The California Bar reasoned that the effectiveness of screens was an unsettled area of law and was best left to the courts to resolve on a case-by-case basis.¹² This proposal is intriguing—and potentially attractive—because it does not create confusion about the relevant standard that lawyers should follow. In

6. FED. R. CIV. P. 11.

7. *Id.* 26(b)(5)(B).

8. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1, R. 4.4(b).

9. *See, e.g.*, Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 74–78 (1996).

10. *See, e.g.*, *Norfolk S. Ry. Co. v. Reading Blue Mountain & N. R.R. Co.*, 397 F. Supp. 2d 551 (M.D. Pa. 2005).

11. *See* STATE BAR OF CALIF. COMM'N FOR THE REVISION OF THE RULES OF PROF'L CONDUCT, PROPOSED RULE 1.10 IMPUTATION OF CONFLICTS: GENERAL RULE (April 2010), available at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=qKcQ8vAQg2E%3d&tabid=2161>.

12. *Id.* at 4.

particular, it avoids a situation where lawyers are subject to one standard as a matter of ethics and a competing standard as a matter of disqualification law. The California approach also acknowledges that certain areas of attorney regulation are more properly handled outside of the rules of professional conduct. In the case of screening, for example, the approach recognizes that other authorities (in this case, the courts) are in a better position to determine whether a screen should be permitted to avoid the imputation of a conflict in a particular case.¹³

Part IV locates this development in two broader contexts. First, recent articles have examined the extent to which other law now governs attorney behavior.¹⁴ Whereas those articles have focused on the growth of this parallel law more generally, this Article focuses on the civil litigation context specifically and the tension between the ethics rules and the parallel law in that context.

Second, this Article places the discussion in historical context and contends that the ethics rules are not nearly as law-like as they once were or have been imagined to be. In a widely-cited article from 1989,¹⁵ Professor Nancy J. Moore explained that the legal profession's ethics codes have undergone a fairly typical evolution from aspirational standards under the Ethical Canons, to the mix of aspirational norms and law-like rules under the Model Code of Professional Responsibility, to their final law-like status under the current Model Rules of Professional Conduct.¹⁶ The growing tension between parallel law and the applicable ethics rules, however, has reversed this evolutionary process and caused a devolution of the Model Rules from law-like status to the more complicated and lamentable mix of rules and aspirational norms that too often lack disciplinary bite. To reverse this trend, this Article contends that the profession needs to evolve once more, but in a new and unexpected direction. It needs to develop a clearer sense of which categories of lawyer conduct should be regulated by other legal authorities (e.g., the Federal Rules of Civil Procedure, case law) and revise rules of professional conduct so that they are more consonant with the achievement of law-like status. This goal may be accomplished by deleting certain provisions, like the screening provision in Model Rule 1.10,¹⁷ that are now governed by contrary parallel law and are not being used as a basis for discipline.

I. THE INCREASING DISREGARD FOR THE RULES OF PROFESSIONAL CONDUCT IN CIVIL LITIGATION

Three areas illustrate the development of civil litigation's parallel law of lawyering: (1) conflicts of interest and disqualification, (2) frivolous pleadings and discovery contentions, and (3) inadvertently disclosed privileged documents. In each of these contexts, litigators rely on legal

13. *See generally* Green, *supra* note 9.

14. *See, e.g.*, Leubsdorf, *supra* note 3; Zacharias, *supra* note 3.

15. Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 15.

16. *Id.*

17. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2011).

authorities other than the applicable rules of professional conduct to determine the propriety of their behavior.

A. Conflicts of Interest and Disqualification

The Model Rules of Professional Conduct describe whether a lawyer has a conflict of interest.¹⁸ Although these conflicts rules were originally designed to provide a standard for disqualification,¹⁹ courts have developed their own law on disqualification. This law often fails to track the conflicts rules or expressly declines to consider disqualification to be an issue governed by the relevant rules of professional conduct.²⁰ The law on disqualification, therefore, operates as a form of parallel authority that resembles the law on conflicts, but differs from it in numerous material respects.

Consider, for example, the recent and illustrative California decision in *Kirk v. First American Title Insurance Co.*²¹ The underlying case involved several related class actions against the First American Title Insurance Company (First American) and affiliated entities.²² During the litigation, the plaintiffs' lawyers contacted Gary Cohen, who was both the general counsel of the California Department of Insurance and the chief counsel for Fireman's Fund Insurance Company, about the possibility of hiring him as a litigation consultant.²³ During a seventeen-minute telephone conversation with Mr. Cohen, the plaintiffs' lawyers disclosed confidential information, including their theories of the case against First American.²⁴ After the conversation, Mr. Cohen determined that the Fireman's Fund might be obligated to provide insurance coverage for a First American entity involved in the case, so Mr. Cohen declined to be the plaintiffs' consultant.²⁵

About one year later, Mr. Cohen joined the law firm of Sonnenschein Nath & Rosenthal as a partner in the firm's San Francisco office.²⁶ Shortly thereafter, the team of lawyers who represented First American in the class action litigation for which Mr. Cohen had previously been consulted moved to Sonnenschein's St. Louis and Los Angeles offices.²⁷ Those lawyers did

18. *Id.* R. 1.7–1.12.

19. Green, *supra* note 9, at 77.

20. *See id.*; *see also In re DataTreasury Corp.*, No. 2010-M928, 2010 WL 3074395, at *1–2 (Fed. Cir. Aug. 5, 2010); *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127 (2d Cir. 2005); *Silicon Graphics, Inc. v. ATI Techs., Inc.*, No. 06-cv-611-bbc, 2010 WL 3860374, at *11 (W.D. Wis. Oct. 5, 2010); *Intelli-Check, Inc. v. Tricom Card Tech., Inc.*, No. 03 CV 3706 (DLI) (ETB), 2008 WL 4682433, at *1–2 (E.D.N.Y. Oct. 21, 2008); *Kirk v. First Am. Title Ins. Co.*, 108 Cal. Rptr. 3d 620, 631–45 (Ct. App. 2010); *Laprise v. Paul*, No. 5100775, 2007 WL 4636533, at *4 (Conn. Super. Ct. Dec. 7, 2007); *Milne v. Ryea*, No. CV010811597S, 2004 WL 423117, at *1 (Conn. Super. Ct. Jan. 26, 2004).

21. 108 Cal. Rptr. 3d at 620.

22. *Id.* at 625.

23. *Id.* at 626.

24. *Id.*

25. *Id.* at 626–27.

26. *Id.* at 626.

27. *Id.* at 627.

not know about Mr. Cohen's previous conversations with plaintiffs' counsel,²⁸ but shortly after Sonnenschein was substituted as counsel in the case, the plaintiffs filed an objection to Sonnenschein's representation of First American, pointing out their prior conversation with Mr. Cohen.²⁹ Sonnenschein immediately erected a screen around Mr. Cohen, which included a variety of procedures designed to prevent Mr. Cohen from sharing any information about the matter with any lawyers or other personnel at the firm.³⁰ The plaintiffs nevertheless sought to disqualify Sonnenschein from the case because of Mr. Cohen's presence in the firm.³¹

The California trial court granted the motion.³² The court acknowledged that in doing so, First American might have to spend millions of dollars to educate new counsel about the long-pending and highly complex matter.³³ Nevertheless, the court concluded that Mr. Cohen's conflict of interest was imputed to the rest of the law firm.³⁴

The California Court of Appeal reversed.³⁵ The court reasoned that although the California Rules of Professional Conduct do not authorize screens (and do not even address vicarious conflicts),³⁶ the law on disqualification does not necessarily turn on what the California Rules of Professional Conduct state or require.³⁷ The court thoroughly canvassed the existing case law in California and elsewhere³⁸ before concluding that firms should be permitted to employ screens to avoid the imputation of certain types of conflicts of interest.³⁹ The court then offered a variety of policy arguments supporting this conclusion,⁴⁰ sketched out the requirements of an effective screen,⁴¹ and held that the screen employed in this particular case satisfied those requirements and was sufficient to prevent the firm's disqualification.⁴² In sum, the court held that the Rules of Professional Conduct provide a basis for discipline, but the Rules do not necessarily bind the court's analysis of disqualification motions.⁴³ Numerous other cases have reached a similar conclusion, even in

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 628–29.

32. *Id.* at 629.

33. *See id.*

34. *Id.*

35. *Id.* at 651.

36. *Id.* at 631.

37. *Id.* The court also examined the deliberations of the State Bar of California Commission for the Revision of the Rules of Professional Conduct. *Id.* at 640–41. Although the Commission ultimately did not endorse any view of screening, the court noted that a majority of the Commission appeared to favor screening, at least in certain circumstances. *Id.* at 641.

38. *Id.* at 631–40.

39. *Id.* at 638.

40. *Id.* at 643–45.

41. *Id.* at 645–49.

42. *See id.* at 649.

43. *Id.* at 631.

jurisdictions that have a clear rule on the imputation of conflicts and that do not authorize a screen to avoid imputation.⁴⁴

Several cases stand for the converse proposition: disqualification of a law firm is proper despite the firm's compliance with all of the relevant rules of professional conduct.⁴⁵ For example, in *Norfolk Southern Railway Co. v. Reading Blue Mountain & Northern Railroad Co.*,⁴⁶ the District Court for the Middle District of Pennsylvania disqualified a law firm that had complied with the screening procedures identified in Pennsylvania Rule of Professional Conduct 1.10.⁴⁷ The court explained that it disqualified the firm in light of several additional factors that do not appear in the Rule, including: "1. [t]he substantiality of the relationship between the attorney and the former client[;] 2. the time lapse between the matters in dispute[;] 3. the size of the firm and the number of disqualified attorneys[;] 4. the nature of the disqualified attorney's involvement[;] [and] 5. the timing of the wall."⁴⁸

The court applied these factors and concluded that insufficient time had elapsed between the laterally-hired lawyer's representation of his former client and his arrival at the new firm.⁴⁹ Moreover, the court noted that the laterally-hired lawyer had a substantial relationship with his former client and that he worked directly on the very matter pending in his new firm.⁵⁰ Finally, the court explained that the law firm at issue was relatively small (ten attorneys in the office in question), which made a screen more problematic.⁵¹ Although Pennsylvania's Rule 1.10⁵² does not mention any of these factors, the court nevertheless granted the motion to disqualify based on an application of those factors to the case.⁵³

Cases like *Norfolk Southern* are less common than cases like *Kirk*, but the disproportionately small number of cases like *Norfolk Southern* is probably due to the relatively small number of states that permit the kind of broad screening that exists in Pennsylvania.⁵⁴ For this reason, cases like *Norfolk Southern* are likely to increase as the trend towards more expansive screening provisions accelerates. Indeed, Model Rule 1.10's newly adopted Comment [7] clearly anticipates this very development, warning lawyers

44. See Green, *supra* note 9, at 74–78 (discussing cases).

45. See, e.g., *Burgess-Lester v. Ford Motor Co.*, 643 F. Supp. 2d 811, 815–16 (N.D. W. Va. 2008); *Norfolk S. Ry. Co. v. Reading Blue Mountain & N. R.R. Co.*, 397 F. Supp. 2d 551, 553–57 (M.D. Pa. 2005); *Crudele v. N.Y. City Police Dep't*, No. 97 Civ. 6687 (RCC), 2001 U.S. Dist. LEXIS 13779 (S.D.N.Y. Sept. 7, 2001); *James v. Teleflex, Inc.*, No. CIV. A. 97–1206, 1999 WL 98559, at *3 (E.D. Pa. Feb. 24, 1999).

46. 397 F. Supp. 2d 551.

47. PA. RULES OF PROF'L CONDUCT R. 1.10 (2008); *Norfolk S. Ry. Co.*, 397 F. Supp. 2d at 554.

48. *Norfolk S. Ry. Co.*, 397 F. Supp. 2d at 554.

49. *Id.* at 554–55.

50. *Id.*

51. *Id.* at 555.

52. PA. RULES OF PROF'L CONDUCT R. 1.10.

53. *Norfolk S. Ry. Co.*, 397 F. Supp. 2d at 555–57.

54. STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS 149–52 (2011 ed.).

that they “should be aware . . . that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.”⁵⁵

Although *Kirk* and *Norfolk Southern* are both screening cases, it is important to remember that there are a considerable number of conflicts cases outside of the screening context where courts have reached a disqualification decision that is at odds with the relevant ethics rules.⁵⁶ All of these cases illustrate that the law on disqualification does not necessarily turn on whether there is a conflict of interest under the rules of professional conduct. Rather, parallel law increasingly governs the area. In fact, some scholars have argued that parallel law—the law on disqualification—*should* govern this area given that the courts (not the rules) are best equipped to determine when disqualification is appropriate.⁵⁷

This development would not be especially problematic if the conflicts rules served the function that courts and lawyers typically assume they have: offering a basis for discipline.⁵⁸ In reality, however, a law firm’s use of an unauthorized screen by itself is almost never the basis for discipline.⁵⁹ These two trends—the development of a separate body of disqualification law and the rarity of discipline for violations of the conflicts rules alone—suggest that the rule has become less law-like and no longer supplies lawyers with adequate guidance regarding their conduct.⁶⁰

B. Frivolous Pleadings, Delaying Litigation, and Improper Discovery Behavior

The diminution of the Model Rules’ law-like status is further evidenced by the near-obsolescence of Model Rules 3.1, 3.2, and 3.4(d), which govern frivolous pleadings, litigation-delaying tactics, and discovery misconduct, respectively.⁶¹ Despite the pervasive role that pleadings and discovery play in litigators’ lives, litigators and judges rarely need to refer to these rules. The reason is simple: Rules 11 and 26 of the Federal Rules of Civil

55. MODEL RULES OF PROF’L CONDUCT R. 1.10 cmt. [7] (2011).

56. See generally Green, *supra* note 9, at 77–78 (noting criminal cases and discussing how rules are often ignored).

57. *Id.* at 99 (arguing “the conflict rules should not serve as the appropriate standard for deciding disqualification motions”); *id.* at 110–11.

58. *Kirk v. First Am. Title Ins. Co.*, 108 Cal. Rptr. 3d 620, 631 (Ct. App. 2010) (explaining that “[g]enerally speaking, the Rules of Professional Conduct govern attorney discipline; they do not create standards for disqualification in the courts”).

59. Of course, discipline is warranted when lawyers have breached a screen and shared confidential information, but there are separate ethics provisions, such as Rule 1.6, that deal with that issue and which can serve as a basis for discipline. MODEL RULES OF PROF’L CONDUCT R. 1.6. There is rarely, if ever, discipline for the mere deployment of a screen in the lateral attorney context, even when such a screen is found not to be authorized by the relevant conflicts rule.

60. The conflicts rules are frequently cited as a basis for legal malpractice. But here again, the rules are not supposed to set a standard for malpractice, and so the rules do not have law-like status in this context either. MODEL RULES OF PROF’L CONDUCT Scope [20].

61. *Id.* R. 3.1, 3.2, 3.4(d).

Procedure⁶² (or their state equivalents) as well as 28 U.S.C. § 1927 (in federal cases)⁶³ establish the relevant standards in these areas. Lawyers and judges look to these authorities for guidance rather than to the relevant rules of professional conduct. The point is similar to the previously discussed split between disqualification law and the conflicts rules: the relevant rules of professional conduct have been largely supplanted by other authority. In this case, the supplanting, parallel authority is the rules of civil procedure and related statutes.

It is surprising that the Model Rules fail to acknowledge this development. For example, Model Rule 3.1 governs frivolous pleadings, and Comment [3] observes that a “lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.”⁶⁴ Notably absent from the Comment is any recognition (such as exists in Rule 1.10⁶⁵) that a lawyer’s obligation may be different under the federal or state rules of civil procedure or other applicable statutory law. The failure to acknowledge that law other than constitutional law governs this area is a surprising omission given the widespread understanding that other law, such as rules of civil procedure, has effectively taken over this area of regulation.

Like Model Rule 3.1, Model Rule 3.4(d) fails to acknowledge that most jurisdictions have rules of civil procedure that govern precisely the same topic. Model Rule 3.4(d) states that a lawyer shall not, “in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”⁶⁶ But Rules 26(g)(3) and 37 of the Federal Rules of Civil Procedure (and their state equivalents) already provide for sanctions under these circumstances.⁶⁷

Model Rule 3.2 raises similar issues. It states that “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”⁶⁸ In federal court, judges have no need to refer to Model Rule 3.2, because a statute governs this area.⁶⁹ It provides that “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”⁷⁰ And in state courts that have no statutory provision similar to

62. FED. R. CIV. P. 11, 26.

63. 28 U.S.C. § 1927 (2006); *see infra* text accompanying note 70.

64. MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. [3].

65. *Compare id.*, with *id.* R. 1.10 cmt. [7].

66. *Id.* R. 3.4.

67. FED. R. CIV. P. 23(g)(3), 37; *see* GILLERS, SIMON & PERLMAN, *supra* note 54, at 264 (explaining “[v]arious provisions of the rules of procedure penalize the kinds of behavior condemned in Rule 3.4”).

68. MODEL RULES OF PROF’L CONDUCT R. 3.2.

69. 28 U.S.C. § 1927 (2006).

70. *Id.*

28 U.S.C. § 1927, the behavior described in the Model Rule is tacitly accepted by lawyers and the courts. Indeed, a comment to the Model Rule explicitly acknowledges that the bench and bar often condone this behavior.⁷¹ That concession raises a question that cuts across Model Rules 3.1, 3.2, and 3.4(d): if the civil procedure rules and related statutes regulate the conduct in these areas and if any other conduct covered by these Rules is condoned, what purpose do these Model Rules serve?

There are two plausible answers. One possibility is that these Model Rules supply a form of aspirational guidance that is not intended to be enforced. This view, however, is inconsistent with the widespread understanding of the Model Rules as black letter, enforceable norms of conduct.⁷² Moreover, such a view would make redundant various efforts to draft professionalism codes that are supposed to supply unenforceable standards of conduct.⁷³ Finally, the very idea of professionalism codes is controversial,⁷⁴ and it would be made even more so if it is done surreptitiously under the cover of the Model Rules.

A second and more plausible answer is that these Rules are supposed to be used for attorney discipline, not court-imposed sanctions. But as is the case in the conflicts context, there is little evidence that lawyers are actually disciplined for violating these provisions in the absence of a corresponding violation of the civil procedure rules. Moreover, it is not clear why separate rules of professional conduct should even be necessary to discipline lawyers who run afoul of—and are sanctioned for—violations of the rules of civil procedure or related statutes. After all, Model Rule 3.4(c) already provides that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal.”⁷⁵ Thus, Model Rule 3.4(c) supplies an adequate basis for discipline. Finally, the existence of parallel authority can generate confusion about the relevant standard or, worse, lead lawyers to conclude that they can ignore the rules of professional conduct without consequence. For all of these reasons, the Model Rules in these areas do not appear to serve any useful purpose; if anything, they generate confusion and undermine the law-like status of the Model Rules as a whole.

C. Inadvertent Disclosures

A third area where the ethics rules have diverged from the law governing lawyers in civil litigation is in the context of inadvertently disclosed privileged documents. Until recently, the Model Rules of Professional Conduct did not instruct lawyers how to respond to the receipt of such

71. MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt. [1].

72. See, e.g., Moore, *supra* note 15, at 7–11.

73. See Professionalism Codes, A.B.A., <http://www.abanet.org/cpr/professionalism/profcodes.html> (last visited Mar. 23, 2011) (listing state professionalism codes).

74. See, e.g., Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

75. MODEL RULES OF PROF'L CONDUCT R. 3.4(c).

information.⁷⁶ Instead, an American Bar Association (ABA) ethics opinion advised lawyers to refrain from examining inadvertently disclosed documents, to notify the sender of the error, and to comply with the sender's instructions—which usually required returning the document to the sender.⁷⁷ Many states produced ethics opinions that reached the same conclusion.⁷⁸

In 2002, the ABA added a new Model Rule, Rule 4.4(b), which elevates the law in this area to Model Rule status.⁷⁹ The substance of the guidance, however, differs from the earlier ABA opinion. Instead of requiring lawyers to return the inadvertently sent documents upon request, the new Model Rule simply imposes a duty to notify the sending attorney of the mistake. It provides that “[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”⁸⁰

In 2006, shortly after the adoption of Model Rule 4.4(b), Rule 26 of the Federal Rules of Civil Procedure was amended.⁸¹ Rule 26(b)(5)(B) now provides as follows:

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party *must promptly return, sequester, or destroy the specified information and any copies it has*; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.⁸²

As a result of this amendment, a lawyer’s refusal to return an inadvertently disclosed privileged document would be permissible under Model Rule 4.4(b) but would violate Federal Rule 26(b)(5)(B). Thus, this is yet another area where litigators have to comply with legal authority parallel to, but nevertheless distinct from, the applicable rule of professional conduct, at least in federal cases and in states that have adopted analogous provisions.⁸³

76. See Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 781 (2005).

77. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

78. Perlman, *supra* note 76, at 783–85.

79. MODEL RULES OF PROF'L CONDUCT R. 4.4(b).

80. *Id.*

81. Obviously, to the extent that states adopt this provision in their rules of civil procedure, the ethics rule would be supplanted in state court litigation as well. See, e.g., FLA. R. CIV. P. 1.285 (2011).

82. FED. R. CIV. P. 26(b)(5)(B) (emphasis added).

83. See, e.g., FLA. R. CIV. P. 1.285.

As in the case of conflicts screening, a comment after the new Model Rule anticipates the existence of this sort of parallel authority. Comment [2] states that “[w]hether the lawyer is required to take additional steps [upon receiving an inadvertently disclosed document], such as returning the original document, is a matter of law beyond the scope of these Rules.”⁸⁴

Comment [2] is simultaneously perplexing and useful. The Comment is perplexing because it is not clear why this particular Model Rule acknowledges other authority while other Model Rules that regularly co-exist with parallel law (such as Model Rule 3.1’s provision on frivolous pleadings) do not. The Comment, however, is useful because it anticipates the very problem that this Article is highlighting: other law may supplant the Model Rules and the Model Rules should be revised to reflect this reality. Although the details of how a particular Model Rule should address these realities will differ,⁸⁵ acknowledging civil litigation’s parallel law of lawyering in Model Rule 4.4(b) is a relatively recent, but useful, step in the right direction.

II. EXPLAINING THE RIFT BETWEEN THE PROFESSIONAL CONDUCT RULES AND THE APPLICABLE STANDARDS IN CIVIL LITIGATION

Before examining how the Model Rules should be revised in light of the existence of parallel law, it is important to understand why the parallel law exists in the first place. There are at least two distinct and conflicting reasons for the development.

First, some rules have become the victims of their own success. For example, the standards contained in Model Rules 3.1, 3.2, and 3.4(d) are so well-established that they have been codified elsewhere, such as in the rules of civil procedure or in statutes.⁸⁶ As a result of this codification, there are now parallel sources of authority for precisely the same conduct.

In contrast, other parallel law has developed because of disagreements concerning the applicable ethics rules. For example, the law on disqualification has parted ways from the black letter law governing conflicts of interest⁸⁷ because courts have concluded that the conflicts rules do not reflect the right balance of policy interests for disqualification purposes. This development is particularly interesting given that the conflicts rules were originally intended to serve as a standard for disqualification.⁸⁸ Comment [7] to Model Rule 1.10, which was revised in 2009, now reflects this divergence, providing that “[l]awyers should be aware . . . that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.”⁸⁹ In sum, this split reflects substantive disagreement over the appropriate standard to be applied.

84. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) cmt. [2].

85. *See infra* Part III.

86. *See, e.g.*, 28 U.S.C. § 1927 (2006); FED. R. CIV. P. 11, 26(b)(5)(B).

87. *See supra* Part II.A.

88. Green, *supra* note 9, at 77.

89. MODEL RULES OF PROF’L CONDUCT R. 1.10 cmt. [7] (2011).

III. BRIDGING THE DIVIDE BY LIMITING THE SCOPE OF THE RULES OF PROFESSIONAL CONDUCT

The parallel law governing lawyers in the civil litigation context has developed for different reasons, and any proposed change to the Model Rules needs to account for these differences. When the applicable parallel law is in tension with the Model Rules because of a substantive disagreement and the Model Rule does not serve any disciplinary function, the Model Rule should be deleted. In those circumstances, lawyers should simply be instructed to consult with the other law that governs the subject. The proposal below regarding the screening provision in Rule 1.10 illustrates this approach.

In other cases, where the parallel law does not necessarily conflict with a Model Rule and is merely a codification of the Model Rule's basic approach, the scope of the Model Rule may simply need to be clarified. For example, the divergence between the civil procedure rules on frivolous pleadings and Model Rule 3.1's treatment of the same topic is less problematic than the discrepancy between Model Rule 1.10's screening provision and the law on disqualification, because Model Rule 3.1 and the relevant civil procedure rules do not conflict. In this sort of situation, the solution may simply be to update the Model Rule so that it accurately reflects the existing legal authority.

A. *Eliminating the Conflicts Screening Provision in Rule 1.10*

The subject of screening has generated considerable commentary, with scholars and lawyers closely divided as to its merits.⁹⁰ Those who believe that screening should be permissible argue that Rule 1.10 should authorize screening,⁹¹ while those who oppose screening argue against such a provision.⁹² The parallel law on disqualification suggests the conventional debate overlooks a third possible approach: eliminate the screening provision from the rule and encourage courts to continue developing disqualification law in this area.

This approach would prevent some existing sources of confusion. At present, lawyers can comply with the screening provision in Rule 1.10, yet be disqualified. Conversely, lawyers can fail to comply with the screening provision in Rule 1.10, yet avoid disqualification. The latter scenario is especially troubling because it not only causes confusion, but it tends to undermine the legal authority of the rules of professional conduct. In

90. For an overview of the contentious legislative history of Rule 1.10, see GILLERS, SIMON & PERLMAN, *supra* note 54, at 145–49.

91. See A.B.A. STANDING COMM. ON ETHICS & PROF. RESP., SECTION OF LITIG., STANDING COMM. ON PROFESSIONALISM, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 2, available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/report109rule.authcheckdam.pdf> (compiling statements in support of and proposing the addition of a screening provision to Model Rule 1.10).

92. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 10.20 (3d ed. 2004).

particular, it gives lawyers the impression that their failure to comply with the ethics rule has no consequences.⁹³

Choice of law considerations create a separate and additional source of confusion. Imagine that a law firm hires a lawyer, Lawyer A, in a state that permits screening. Lawyer A's presence in the firm creates a conflict for another of the firm's lawyers, Lawyer B, who is located in a state that does *not* permit screening. And now, imagine that Lawyer B's conflict has arisen in a case that Lawyer B is litigating in yet another state, which may or may not permit screening. Can the law firm ethically employ a screen around Lawyer A to prevent Lawyer B's disqualification? Model Rule 8.5(b) addresses a variety of choice of law issues,⁹⁴ but many questions of this sort remain unanswered and cause considerable confusion when law firms try to comply with their ethical obligations.⁹⁵

All of this confusion might be acceptable if the screening provision in the current version of Rule 1.10 served a purpose other than supplying the governing standard for disqualification, such as providing a basis for discipline. No lawyer or law firm, however, has ever been disciplined for the mere fact of erecting a screen. Of course, lawyers are disciplined for *violating* a screen (e.g., sharing confidential information), but there are separate rules of professional conduct, such as Rule 1.6, that forbid such conduct and serve as a basis for discipline.⁹⁶ Put simply, the screening provision in Model Rule 1.10 has caused confusion regarding the applicable disqualification standard even in the absence of any choice of law complications, and the screening provision does not appear to serve any other useful function.

For these reasons, there is a powerful argument to be made in favor of the California Bar's recent proposal to delete the screening provision in Model Rule 1.10 and to replace it with a comment that delegates the issue of screening to the courts to resolve. To the extent that states might want to offer any ethical guidance, they could explain how clients and former clients should be notified in the event that a law firm erects a screen, such as the procedures described in the current version of Model Rule

93. See Green, *supra* note 9, at 96–97. Professor Bruce A. Green argues that, if a court finds a conflict but nevertheless denies a disqualification motion, the court should impose a personal sanction against the lawyer. *Id.* Professor Green contends that the personal sanction will ensure that a lawyer does not misconstrue the disqualification decision as a tacit endorsement of the lawyer's decision to proceed in light of the conflict. *Id.* at 96. Another way to handle the same problem, at least in the screening context, is to make clear that screening of the sort described in Model Rule 1.10(a) is not a matter of ethics at all and is to be left to the courts to resolve.

94. See MODEL RULES OF PROF'L CONDUCT R. 8.5(b).

95. For this reason, in 2009, the American Bar Association's (ABA) Commission on Ethics 20/20 created a Working Group on Uniformity, Choice of Law, and Conflicts of Interest to try to resolve this common source of confusion. See *generally* ABA COMM'N ON ETHICS 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Mar. 23, 2011).

96. MODEL RULES OF PROF'L CONDUCT R. 1.6.

1.10(a)(2)(i)–(iii).⁹⁷ These revisions could take the following form (the italicized portions are proposed; deleted portions are crossed out):

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless ~~(4)~~ the prohibition is based upon a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.~~5~~~~6~~

(2b) If the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, a firm can erect a screen around the disqualified lawyer. Whether this screen will be effective to avoid the firm's disqualification or other court sanction is a matter beyond the scope of these Rules. If a firm erects a screen, however, it shall ensure that:

~~(1)~~ the disqualified lawyer is timely screened from any participation in the matter, and is apportioned no part of the fee therefrom;

~~(2)~~ written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

~~(3)~~ certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Moreover, a new Comment [7] could replace existing Comment [7] as follows:

[7] Courts often examine many factors when deciding whether a screen suffices to prevent a law firm's disqualification under the circumstances described in paragraph (b). Those factors include the likelihood that the screen will be effective and the type of information that the disqualified lawyer acquired. Because of the fact-bound nature of this inquiry and because the relevant factors are generally ill-suited to black letter treatment, paragraph (b) does not describe the disqualification standard that should apply in this context. Rather, lawyers should consult the substantial case law on this issue. Although paragraph (b) does not supply the disqualification standard, law firms that erect a screen must employ a screen in the manner prescribed by Rule 1.10(b)(1)–(3).

97. *Id.* R. 1.10(a)(2)(i)–(iii).

Although the current version of Comment [7] alludes to the discrepancy between the Model Rule and the law on disqualification,⁹⁸ the proposed version makes the point more clearly and elevates the point from a Comment to the Model Rule itself, making confusion less likely. (It is worth noting that only approximately one-third of states have adopted the Comments,⁹⁹ so this relocation is not simply a matter of giving the point greater prominence. In some states, it would make the point visible when it otherwise would not be.) Moreover, the proposed approach eliminates any possible implication or inference that the Model Rule supplies (or should supply)¹⁰⁰ the relevant disqualification standard or that screening could be the basis for bar discipline when, in fact, that is not the case.

B. Amending Model Rules 3.1 and 3.4(d)

In cases without a clear conflict between the parallel law and the Model Rule or where the Model Rule serves some independent disciplinary function, more modest amendments may be desirable. Consider Model Rules 3.1 and 3.4(d). If these Model Rules are intended to supply a mirror image of the civil procedure rules that govern frivolous pleadings¹⁰¹ and frivolous discovery requests and objections,¹⁰² they are unnecessary. Rule 3.4(c) provides that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal,”¹⁰³ so Rule 3.4(c) already gives bar counsel adequate grounds for seeking discipline against lawyers who run afoul of the rules of civil procedure concerning pleadings and discovery.¹⁰⁴ That said, if the obligations imposed by Model Rules 3.1 and 3.4(d) merely complement the extant law, there is no harm in leaving them intact, because they can serve as a reminder that discipline is possible in this context.

To the extent these Model Rules are intended to impose greater obligations than the civil procedure rules, however, they are more problematic. For example, it is not at all clear why a lawyer should be subject to discipline under Model Rule 3.1 if the lawyer complies with all relevant rules of civil procedure regarding frivolous pleadings. Such a discrepancy could create considerable confusion of the sort described above in the context of the screening provision in Rule 1.10: a lawyer might comply with the relevant law, yet still be disciplined. In sum, if Model

98. *Id.* R. 1.10 cmt. [7].

99. GILLERS, SIMON & PERLMAN, *supra* note 54, at 3.

100. Green, *supra* note 9, at 99 (making a similar point and arguing the conflict rules should not supply the standard for resolving disqualification motions).

101. FED. R. CIV. P. 11.

102. *Id.* 26(g)(3), 37.

103. MODEL RULES OF PROF'L CONDUCT R. 3.4(c).

104. In 1999, the ABA approved Civil Discovery Standards to help courts and lawyers deal with discovery issues that frequently occur in civil litigation but often fall outside the scope of the statutes and court rules governing civil discovery. The Standards, which were developed by the ABA Section of Litigation and were updated in 2004, relate to ABA Model Rule 3.4(d). See A.B.A., AMENDMENTS TO CIVIL DISCOVERY STANDARDS (August 2004), available at http://www.americanbar.org/content/dam/aba/migrated/litigation/standards/docs/103b_standards.authcheckdam.pdf. Thus, to the extent that lawyers need guidance beyond what the existing civil procedure rules supply, that guidance already exists.

Rules 3.1 and 3.4(d) are merely redundant, their continued existence is not problematic, though their utility is questionable. If, however, Model Rules 3.1 and 3.4(d) supply a basis for discipline in circumstances that do not violate the relevant civil procedure rules, any benefit from such supplemental regulation may be outweighed by the confusion such a discrepancy may cause. In that case, these Model Rules provisions also may be good candidates for deletion.

C. A Model for the Future: Model Rule 4.4(b)

Model Rule 4.4 comes closest to dealing appropriately with the sort of problem identified in this Article. Although Model Rule 4.4(b) only requires the recipient of an inadvertent disclosure to notify the sending attorney of the error, Comment [2] states that “[w]hether the lawyer is required to take additional steps [upon receiving an inadvertently disclosed document], such as returning the original document, is a matter of law beyond the scope of these Rules.”¹⁰⁵ The Comment recognizes that there is ample and growing parallel law in this area and that lawyers need to consult that legal authority in order to determine the extent of their obligations.

In this sense, Comment [2] takes the same approach as Comment [7] to Model Rule 1.10—both acknowledge that parallel law exists. There are, however, two important distinctions that make Model Rule 4.4(b)’s approach more appropriate than the seemingly similar approach in Model Rule 1.10. First, not every jurisdiction has parallel law on how a lawyer should respond to the receipt of inadvertently disclosed information.¹⁰⁶ A Federal Rule of Civil Procedure imposes additional requirements beyond Model Rule 4.4(b),¹⁰⁷ but few other state civil procedure rules currently do the same. As a result, lawyers in most states still need guidance about how to proceed, and Model Rule 4.4(b) provides that needed guidance by instructing them that they must notify the sender. In contrast, lawyers who seek guidance about the effectiveness of screens can refer to an ample body of case law that will provide a clearer indication of the likelihood of disqualification than the rules of professional conduct. Thus, the screening provision causes greater confusion and potential tension with the existing law than is the case with Model Rule 4.4(b).

Second, no jurisdiction or court has concluded that a lawyer is free not to notify the sender of an inadvertent disclosure. Thus, Rule 4.4(b)’s prescription to notify does not conflict with any existing parallel law on the subject. In contrast, many courts have rejected screening, so Rule 1.10’s screening provision is in tension with the parallel law in this area. Put another way, a lawyer’s compliance with Rule 4.4(b) will not generate problems as long as the lawyer looks to other law (as the Comment

105. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) cmt. [2]. The point is that the wording of Model Rules 3.1, 3.2, and 3.4 suggests that those rules are supposed to govern the conduct of litigators when, in fact, litigators are governed in these areas by other authority (in this case, the relevant rules of civil procedure).

106. Perlman, *supra* note 76, at 783–84.

107. FED. R. CIV. P. 26(b)(5)(B).

instructs) to ensure that the lawyer has no additional obligations. In contrast, a law firm can comply with the screening provision in Rule 1.10 and nevertheless be disqualified.¹⁰⁸ Rule 1.10 and its existing Comment, therefore, do more harm than Rule 4.4(b), even though parallel law exists with regard to both Rules.

In sum, because the duty to notify under Rule 4.4(b) does not conflict with any existing parallel law, the Rule need not be deleted; it appropriately reminds lawyers to consult with other law to determine if any additional obligations exist.¹⁰⁹

IV. THE IMPLICATIONS FOR THE MODEL RULES OF PROFESSIONAL CONDUCT AND THEORIES OF PROFESSIONAL REGULATION

In 1989, Professor Moore offered a helpful and widely cited description of how the legal ethics rules have evolved:

Viewed in stages of development, the legal profession has attained a very advanced stage among professions. Indeed, codes themselves have been distinguished according to their stage of development. Typically, they begin as a simple set of ideals to which adherents aspire, then move to a “second-level” code, which contains more stringent language and is designed to be enforced, and finally advance to a “third-level,” in which the standards for proper practice are so clearly laid out that “[w]hat is left is little more than a quasi-criminal code enforced by a professional society rather than a constitutional government.” With the adoption and enactment of the Model Rules, the legal profession may be the first to achieve a true “third-level” code. (Indeed, given their unique legal status, the Model Rules might be fairly characterized as initiating a new “fourth-level” status, perhaps unattainable by any other professional code.)¹¹⁰

This passage suggests that, although many rules are only enforced in “egregious cases,”¹¹¹ the Model Rules have a law-like character.

The increasing prevalence of parallel law in the civil litigation realm suggests the Model Rules may not be as law-like as they once were or have been imagined to be. They may no longer constitute a third (or fourth) level ethics code and may function more like a “second-level” ethics code, containing a mix of disciplinary rules and aspirational norms.

One normative question is whether this development is problematic. After all, the Model Rules have long had aspirational provisions that were not likely to be enforced, and there is nothing wrong with giving lawyers

108. This can happen not only to lawyers practicing in states like Pennsylvania, where courts employ additional factors beyond the screening rule, but also to lawyers who comply with their own state’s version of Rule 1.10 only to find themselves litigating in another state that does not permit screening.

109. The same reasoning applies to Model Rule 3.2’s provision regarding the expediting of litigation. To the extent states have not adopted the equivalent of 28 U.S.C. § 1927, Model Rule 3.2 can be helpful and may be worth retaining, though the existence of other law should be more clearly stated in the Rule’s comments.

110. Moore, *supra* note 15, at 15 (quoting L.B. Cebik, *Ethical Trilemmas*, in 1 *ETHICAL PROBLEMS IN ENGINEERING* 17, 18 (Albert Flores ed., 2d ed. 1980)).

111. *Id.* at 16.

guidance, even though the provisions are only enforced in egregious cases. Indeed, the Model Rules themselves anticipate that they will be used, at least in part, to provide “a just basis for a lawyer’s self-assessment.”¹¹² Moreover, the Model Rules always have anticipated that other substantive law governs lawyer behavior.¹¹³

The problem is that the percentage of rules that are aspirational or merely for “self-assessment” appears to be increasing. Moreover, and more importantly, the problem extends beyond non-enforcement or the existence of parallel sources of authority. The problem now is that parallel law increasingly *conflicts* with rules of professional conduct. Put another way, the profession has seen the confluence of three forces—two pre-existing and one relatively new—that are undermining the law-like status of rules of professional conduct. The two pre-existing forces are that the ethics rules are only enforced in egregious cases and that there is substantial substantive law outside of the ethics rules governing lawyer behavior. These two forces by themselves are not necessarily problematic. The problem is the addition of the new force: the development of parallel law that is in tension with, and in some instances directly contradicts, the Model Rules of Professional Conduct. Together, these three forces have created confusion and are undermining the law-like status of the Model Rules.

Recent scholarship has identified some of these forces and called for the profession to more openly acknowledge the existence of parallel authorities.¹¹⁴ For example, in one of his last published articles, Professor Fred C. Zacharias argued that the profession has bought into a “myth of self-regulation” and that a significant body of other law now governs lawyer behavior.¹¹⁵ Other scholars have examined the important and related question of who should regulate lawyers’ conduct in light of the existence of numerous institutional actors in this area.¹¹⁶ For instance, in an important article published in 1992, Professor David B. Wilkins developed a framework for determining which institutional actors should regulate particular areas of lawyer conduct.¹¹⁷

This Article makes two supplemental points. First, it highlights the third force—the extent to which the different sources of law are in tension with each other. In other words, it is important to acknowledge the existence of overlapping law and the presence of different institutional actors, but it is also important to document the extent to which this overlapping law is in tension with rules of professional conduct.¹¹⁸

112. MODEL RULES OF PROF’L CONDUCT Scope [20].

113. *Id.* at [15].

114. Leubsdorf, *supra* note 3, at 959–62; Zacharias, *supra* note 3, at 1148–51.

115. *See generally* Zacharias, *supra* note 3.

116. *See, e.g.*, Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996).

117. *See generally* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 822–46 (1992).

118. Professor Green notes this tension, Green, *supra* note 9, at 112, but he quickly (perhaps too quickly) dismisses it by saying that the Rules are simply different from disqualification and that the existence of other law does not diminish the Rules’ importance.

Second, this Article starts from the premise that, as a practical matter, the decision concerning who should regulate a particular type of lawyer conduct is often not an affirmative choice. The decision is typically made by other institutional actors, such as courts, and rule drafters must determine how to respond to that reality. For example, courts have decided that they will not be bound by rules of professional conduct when determining whether a screen should defeat a disqualification motion. The question, therefore, is not who should regulate this area; the question is how rulemakers should respond to the courts' development of authority that is at odds with the rules. This Article suggests that rulemakers should accept that rules of professional conduct will not supply the disqualification standard in certain instances, such as in the screening context, and that the relevant rules of professional conduct should be revised to reflect this reality, especially when the rules are not serving some other useful function, such as supplying a basis for discipline or giving lawyers helpful guidance.

Of course, this approach does not necessarily resolve the conceptual question of who *should* regulate this conduct. For example, one might argue that courts should apply rules of professional conduct when making disqualification decisions and should not develop their own law in this area. The extant literature addresses this question in detail, and the present article is not intended to duplicate it. Rather, it addresses the more practical question of how an institutional actor, such as the ABA, should react given that other institutional actors have asserted their authority in certain areas. The answer suggested here is that the Model Rules should be revised in the ways described in Part III in order to ensure that they more accurately reflect the development of parallel law and to prevent the further erosion of their law-like status.

CONCLUSION

The conventional wisdom is that the legal profession's code of ethics has evolved from a set of aspirational provisions into a legal document capable of enforcement through a variety of regulatory mechanisms.¹¹⁹ Civil litigation's parallel law governing lawyers, however, suggests that the Model Rules of Professional Conduct are increasingly in tension with other law. As a result, many Model Rules have lost their law-like status and are either being ignored or causing confusion about the applicable governing standard.

For these reasons, the Model Rules need to evolve yet again. The Model Rules must reflect the increasing relevance of other law, such as the parallel

He cites the Preamble to the Model Rules, including this very distinction between disqualification and conflict rules that is mentioned there. *Id.* & n.157 (citing MODEL RULES OF PROF'L CONDUCT Preamble). The Preamble, however, assumes that the Rules serve some purpose, such as "self-assessment," or are being enforced, at least in egregious cases. *See generally* MODEL RULES OF PROF'L CONDUCT Preamble. The reality, however, is that some rules, such as the screening provision, are not serving these alternative possible purposes and are thus causing confusion in light of the tension with the existing "parallel" law.

119. Moore, *supra* note 15, at 15.

law of lawyering in the civil litigation context and accept a more modest role in regulating lawyer behavior. The recent revisions to Comment [7] to Model Rule 1.10 and to Comment [2] to Model Rule 4.4 reflect one useful step in that direction, because they both recognize that other law now governs important questions previously resolved under the ethics rules. Nevertheless, Rule 1.10's Comment does not go far enough because of the extent to which the screening provision is in tension with existing law. A more aggressive, and arguably more appropriate, approach is to omit ethics provisions that are not enforced as a matter of discipline, are in conflict with other sources of law, and are causing confusion about the applicable governing standards. Such an approach would not only help to avoid creating confusion about the applicable standards that apply in civil litigation, but would also help to protect the law-like status of the Model Rules and preserve at least some of the Bar's role in regulating lawyer conduct.