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## Evidence-Based Promulgation: The Rulemaking Process for Rules of Professional Conduct

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# EVIDENCE-BASED PROMULGATION: RECONSIDERING THE RULEMAKING PROCESS FOR RULES OF PROFESSIONAL CONDUCT

*Emily S. Taylor Poppe\**

Annika asked anxiously, . . . “isn’t there any mother or father here?”

“No, not one,” said Pippi cheerfully.

“But who tells you to go to bed at night and things like that?” asked Annika.

“I do,” said Pippi. “First I tell myself once, very nicely, and if I don’t obey, then I tell myself again, very sternly, and if I still don’t obey, then it’s time for a spanking, of course.”

—Astrid Lindgren, *Pippi Longstocking*<sup>1</sup>

## INTRODUCTION

Much like the indomitable Pippi Longstocking, the legal profession has succeeded for decades in asserting its right to self-regulate.<sup>2</sup> Judges play a key role in this regulatory regime, serving as both rulemakers and enforcers.<sup>3</sup> Indeed, prompted by the efforts of the organized bar,<sup>4</sup> the judiciary claims the inherent—and exclusive—right to regulate the practice of law on the

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1. ASTRID LINDGREN, *PIPPY LONGSTOCKING* 19 (Tiina Nunnally trans., Viking Press 2007) (1945).

2. Indeed, self-regulation is one of the defining characteristics of the professions. See Abraham Flexner, *Is Social Work a Profession?*, 42 NAT’L CONF. CHARITIES & CORR. 576, 581 (1915), reprinted in 11 RSCH. ON SOC. WORK PRAC. 152, 156 (2001) (noting that professions “tend to self-organization”).

3. See, e.g., Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 152–53 (2010) (noting judges’ multiple roles in regulating the legal profession).

4. Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—the Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 68–69 (2009) (describing the role of the organized bar in shaping the basis for professional self-regulation).

basis of the separation of powers doctrine.<sup>5</sup> This claimed right includes establishing the boundaries of what constitutes the practice of law, thus effectively maintaining the profession's monopoly over the provision of legal services.<sup>6</sup>

Yet this arrangement is under attack on several fronts. Lawyers increasingly face regulation from other quarters.<sup>7</sup> Much of this regulation is federal, occurring through the application of substantive federal law and the regulation of lawyers appearing before certain federal agencies.<sup>8</sup> Indeed, the multijurisdictional nature of modern practice has led to calls to move beyond this piecemeal encroachment in favor of the federalization of professional regulation.<sup>9</sup> However, there are also other sources of authority that shape lawyers' behavior, including malpractice insurers,<sup>10</sup> title insurers,<sup>11</sup> and professional organizations.<sup>12</sup> In addition, international jurisdictions also impose obligations on lawyers and exert further pressure on the existing U.S. regulatory system through the adoption of innovative regulations.<sup>13</sup>

Meanwhile, the profession's ongoing failure to address inequalities in access to justice provokes further opposition to the existing regulatory regime. Decades of empirical research documents the public's limited use of lawyers to address civil legal problems.<sup>14</sup> Building on this evidence, many

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5. Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—the Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 14–16 (1989) (describing courts' use of the negative inherent-powers doctrine to exert exclusive control over the legal profession). The premise that the judiciary possesses the exclusive authority to regulate the legal profession is challenged in theory and practice. See Wald, *supra* note 3, at 155.

6. Wolfram, *supra* note 5, at 15–16.

7. See, e.g., Wald, *supra* note 3, at 156; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 803 (1992).

8. Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 128, 132 (2011).

9. See Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 531 (2011) (proposing national practice rules but with the reservation of state control over other aspects of professional regulation); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 379–80 (1994) (offering an early prediction of this shift and advocating for the federalization of legal ethics).

10. Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 210 (1996); Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 595 (2016) (finding evidence of insurance having a modest impact on insured lawyers' conduct).

11. Levin, *supra* note 10, at 604–08 (describing ways in which lawyers' behavior is shaped by requirements governing title agents).

12. Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873, 891 (2002) (noting, for example, protocols for lawyer behavior issued by the American College of Trusts and Estates Counsel and the American Bar Association Business Law Section).

13. Coquillette & McMorrow, *supra* note 8, at 146–47 (“Competition from international firms for a worldwide market for legal services also pressures U.S. regulatory structures to consider alternate models being adopted abroad.”).

14. See, e.g., Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 546 (1980); see also REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS

access to justice scholars and practitioners advocate a move away from exclusive reliance on traditional lawyer- and court-centric approaches to equalizing access to justice.<sup>15</sup> These proposals are buttressed by a growing body of empirical evidence documenting the benefits offered by nonlawyer legal service providers<sup>16</sup> and the dearth of evidence that consumers are harmed by alternative sources of legal assistance.<sup>17</sup>

Among these alternative sources of legal assistance are various forms of legal technology. As these technologies become more sophisticated, moving from the delivery of static legal information to drafting legal documents and answering legal questions, they veer closer to the practice of law. However, some see these technologies as having the potential to expand access to justice, either by obviating the need for recourse to a lawyer<sup>18</sup> or by making lawyers more efficient such that latent markets can be economically served.<sup>19</sup> This potential makes it more politically difficult to constrain their

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FROM THE COMMUNITY NEEDS AND SERVICES STUDY 12 (2014), [http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf) [<https://perma.cc/64KQ-82J8>] (documenting the very limited use of lawyers, despite the prevalence of civil legal problems, among a sample of residents in a midwestern city). This finding is consistent with studies in other countries. See OECD & OPEN SOC'Y FOUNDS., LEGAL NEEDS SURVEYS AND ACCESS TO JUSTICE 33–34 (2019), <https://www.oecd-ilibrary.org/docserver/g2g9a36c-en.pdf?expires=1609961717&id=id&accname=guest&checksum=90B0AB10172D2814D16E431BB2756C65> [<https://perma.cc/SFZ8-V4S6>] (noting similar findings in a number of foreign jurisdictions); see also LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/HP5C-W3DW>] (“86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.”).

15. See, e.g., Pascoe Pleasence & Nigel J. Balmer, *Justice & the Capability to Function in Society*, DÆDALUS, Winter 2019, at 140, 141; Rebecca L. Sandefur, *Access to What?*, DÆDALUS, Winter 2019, at 49, 49–50 (2019).

16. See, e.g., REBECCA L. SANDEFUR & THOMAS M. CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT 4 (2016) [http://www.americanbarfoundation.org/uploads/cms/documents/new\\_york\\_city\\_court\\_navigators\\_report\\_final\\_with\\_final\\_links\\_december\\_2016.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_report_final_with_final_links_december_2016.pdf) [<https://perma.cc/79ZZ-A92U>] (reporting results of an evaluation analysis of multiple nonlawyer legal intervention programs and finding “evidence that assistance from appropriately trained and supervised individuals without formal legal training is associated with changes in a range of outcomes, including both legal and real-life outcomes”).

17. See, e.g., Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209, 214–15 (1990). The existence of randomized control studies that fail to find that individuals who receive an offer of legal assistance achieve more favorable outcomes further fuels the debate. See, e.g., James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2118 (2012).

18. See Benjamin H. Barton, *Technology Can Solve Much of America’s Access to Justice Problem, If We Let It*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 444, 445 (Samuel Estreicher & Joy Radice eds., 2016).

19. See Albert H. Yoon, *The Post-modern Lawyer: Technology and the Democratization of Legal Representation*, 66 U. TORONTO L.J. 456, 470–71 (2016).

development.<sup>20</sup> Whether this techno-optimism is justified is debatable,<sup>21</sup> but it has nevertheless inspired calls for regulatory reform to enable these access to justice developments.<sup>22</sup>

Finally, the U.S. Supreme Court's decision in *North Carolina Board of Dental Examiners v. FTC*<sup>23</sup> raises the specter of antitrust actions against the current regulatory scheme actors.<sup>24</sup> In that case, the Supreme Court held that the North Carolina state dental board, which included a controlling number of active market participants, was not entitled to automatic state-action immunity from antitrust investigation.<sup>25</sup> There has long been criticism that self-interest motivates the regulation of the legal profession;<sup>26</sup> the holding in *North Carolina Board of Dental Examiners* has the potential to give consequence to these concerns.<sup>27</sup>

Reflecting these pressures, the American Bar Association (ABA) passed Resolution 115 in February 2020, after substantial debate.<sup>28</sup> The resolution

20. See, e.g., STATE BAR OF CAL. TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS., FINAL REPORT AND RECOMMENDATIONS 3 (2020), <http://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Final-Report.pdf> [<https://perma.cc/7UV8-EFQD>] (“The work of [the Task Force on Access Through Innovation of Legal Services] was animated by the inescapable conclusion that nearly all Californians are facing severe challenges in obtaining access to legal services for commonly encountered legal problems.”).

21. See REBECCA L. SANDEFUR ET AL., LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES 14–16 (2019), [http://www.americanbarfoundation.org/uploads/cms/documents/report\\_us\\_digital\\_legal\\_tech\\_for\\_nonlawyers.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf) [<https://perma.cc/5U72-D2FU>] (noting the limitations of existing legal technology aimed at expanding access to justice); Tanina Rostain, *Techno-optimism & Access to the Legal System*, DÆDALUS, Winter 2019, at 93, 94 (cautioning against unsubstantiated techno-optimism).

22. See, e.g., Barton, *supra* note 18, at 445 (noting that “[t]he greatest danger to the power of technology [to expand access to civil justice] is the beneficiaries of the status quo”).

23. 574 U.S. 494 (2015).

24. Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 309 (2019) (noting that the case “signaled the end of [the] laissez-faire approach to professional self-regulation”).

25. *N.C. Bd. of Dental Exam’rs*, 574 U.S. at 515 (“The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants . . .”).

26. See, e.g., Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1118 (2000) (noting the evolving but consistently self-interested bases for regulations preventing lawyers’ association with nonlawyers); Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT’L & COMPAR. L. REV. 111, 114–15 (2016). Scholars have long recognized the inherent potential for self-interest in self-regulatory regimes more generally. See, e.g., Flexner, *supra* note 2, at 156 (“There is, of course, always danger that the interests of [a professional] organization may conflict with those of the body politic.”).

27. See Chambliss, *supra* note 24, at 300–01; Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 CHAP. L. REV. 267, 280 (2017).

28. Matt Reynolds, *To Increase Access to Justice, Regulatory Innovation Should Be Considered*, ABA House Says, ABA J. (Feb. 17, 2020), <https://www.abajournal.com/news/article/resolution-115> [<https://perma.cc/LT6D-YZYW>] (reporting on the resolution’s passage). Similar debates occurred in response to ABA Resolution 105, which adopted the ABA Model Regulatory Objectives for the Provision of Legal Services. See Chambliss, *supra* note 24, at 315.

“encourages U.S. jurisdictions to consider regulatory innovations” to address the access to justice crisis.<sup>29</sup> Although the adopted resolution provides that nothing in it “should be construed as recommending any changes to any of the ABA Model Rules of Professional Conduct,”<sup>30</sup> this compromise language belies the pressure for reform indicated by the resolution as a whole.<sup>31</sup> After decades of being encouraged to achieve uniformity in professional regulation, state regulators face increasing pressure to chart their own paths.

As they do so, ABA Resolution 115 “encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after their adoption.”<sup>32</sup> Scholars have also called for a shift toward evidence-based regulation, noting its potential to counter challenges to the current regulatory regime.<sup>33</sup> This shift mirrors trends in access to justice<sup>34</sup> and the law more broadly.<sup>35</sup> Yet these proposals have generally been limited to the *substance* of professional regulation. In this Article, I propose an additional shift—one toward evidence-based *promulgation*.

State supreme courts have long been criticized for their work in promulgating rules of professional conduct. In particular, they are accused of abdicating their responsibility by delegating the work of drafting to the organized bar, which is seen as evidence of self-interested action and in-group bias in favor of lawyers.<sup>36</sup> On these grounds, multiple institutional analyses have concluded that other institutions are better suited to the task of regulating the legal profession.<sup>37</sup> However, these analyses have generally presumed the current formulation of judicial regulation in their analyses.<sup>38</sup>

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29. AM. BAR ASS'N, REVISED RESOLUTION 115 AND REPORT (2020) [hereinafter ABA RESOLUTION 115], <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/r115resandreport.pdf> [<https://perma.cc/3LCS-9VGL>] (providing the revised resolution and final report).

30. *Id.*

31. Reynolds, *supra* note 28.

32. ABA RESOLUTION 115, *supra* note 29, at 1.

33. Chambliss, *supra* note 24, at 304 (arguing that evidence-based regulation provides the most prudent response to challenges to self-regulation, including the growing body of evidence supporting the value of nonlawyer legal service providers).

34. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 103 (noting the increasing interest in access to justice research and calling for empirical investigation that could lead to more effective interventions).

35. See, e.g., Shari Seidman Diamond, *Empirical Legal Scholarship: Observations on Moving Forward*, 113 NW. U. L. REV. 1229, 1229–31 (2019) (tracking the growth of empirical legal scholarship).

36. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1208 (2003) (“State supreme courts have satisfied their own and lawyers’ interests by delegating virtually all of their regulatory authority under the vaunted system of ‘lawyer self-regulation.’”).

37. *Id.* at 1172–73 (arguing that Congress or state legislatures are better positioned to regulate lawyers); see also Wilkins, *supra* note 7, at 875–76 (performing an institutional analysis focused on enforcement of disciplinary rules).

38. See Wald, *supra* note 3, at 158–60; Zacharias, *supra* note 9, at 338 (“My conclusion that the federalization of legal ethics may be inevitable rests largely on states’ failure to

In this Article, I ask how empirical evidence could be harnessed to reform the rule promulgation process and whether doing so might overcome objections to the current model.<sup>39</sup>

I begin by considering states' current processes for promulgating rules. I identify many overlapping sources of legal authority that can inform promulgation and describe some of the key dimensions on which promulgation processes vary.<sup>40</sup> Importantly, I also note that, despite the framework of authority that surrounds the promulgation process, it remains one that is largely discretionary.

Building on these insights, I consider how states might use empirical evidence to reform rule promulgation.<sup>41</sup> This includes drawing on best practices developed in other rulemaking contexts, developing mechanisms for integrating external expertise, formalizing consumer protections, and considering the composition of rulemakers. Together, these insights may inform the creation of standardized promulgation processes designed to improve the regulation of the profession.

In arguing for a shift to evidence-based promulgation, I extend the existing call for evidence-based regulation.<sup>42</sup> I suggest that this shift offers a potential way forward for the regulation of the profession, addressing the alleged hypocrisy and inefficacy of the existing scheme without resorting to more radical alternatives. However, reflecting on the profession's history of self-regulation, I also acknowledge the barriers to adopting evidence-based promulgation. Even if these barriers are overcome, I also recognize that the implementation of these processes may fail to address other underlying problems with the current regulatory regime.

This Article proceeds in three parts. Part I considers variation in the rule promulgation process across the states. Part II identifies ways in which the promulgation process might be reformed on the basis of empirical evidence. Part III considers the potential benefits and limitations to this approach and is followed by a brief conclusion.

## I. THE PROMULGATION PROCESS

Although the highest court in each state is responsible for adopting rules of professional conduct, these courts have historically delegated much of their responsibility to the organized bar in that state.<sup>43</sup> This delegation is

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address the problems I identify and on my sense that states will not address those problems aggressively in the future.”).

39. In doing so, I take seriously the suggestion that we examine the judicial role in the rulemaking process. Wald, *supra* note 3, at 161 (advocating that “the public should not take judicial promulgation of rules of conduct for granted, but instead subject it to close scrutiny”); *see also* Barton, *supra* note 36, at 1171 n.14 (“Given a problematic regulatory outcome, administrative law scholars suggest a close analysis of the regulatory process to determine what changes, if any, might improve the regulatory output.”).

40. *See infra* Part I.

41. *See infra* Part II.

42. *See infra* Part III.

43. Green, *supra* note 26, at 1136.

illustrated most clearly by the role of the ABA in drafting the model rules of conduct that have been adopted in most states.<sup>44</sup> The ABA also facilitates a comment period on proposed revisions and offers states a guide to implement the model rules.<sup>45</sup> Through these activities the ABA determines the timing and substance of reforms and also oversees the national discourse on professional regulation.

The outsized role of the ABA and general structural similarities across state promulgation processes have tended to overshadow procedural variation among the states. These processes are regulated by multiple overlapping sources of authority, including state constitutions, statutory provisions governing occupational licensure and government transparency, court rules adopted by the states' highest courts, and—if any rulemaking authority is delegated to the state bar—bylaws of the state bar associations.<sup>46</sup> Layered on top of these binding provisions are customary practices that may be applied consistently or on an ad hoc basis.

The multiple sources of authority that govern the promulgation process in Maryland illustrate well the multifaceted regulation of professional conduct rulemaking. Maryland's constitution establishes the rulemaking authority of the state's highest court, providing that “[t]he Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State.”<sup>47</sup> A state statutory provision authorizes the court to delegate its rulemaking authority: “To aid in the exercise of its rulemaking powers, the Court of Appeals may appoint a standing committee of lawyers, judges, and other persons competent in judicial practice, procedure or administration.”<sup>48</sup> Such a committee, the Standing Committee on Rules of Practice and Procedure, has been in place pursuant to court of appeals appointment since 1946.<sup>49</sup> The Standing Committee may, in turn, delegate some of its responsibilities to subcommittees, although these are “not public bodies, (not having been created by statute or Rule).”<sup>50</sup>

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44. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules) [<https://perma.cc/9MQF-PT6N>].

45. See *Policy & Initiatives*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/policy](https://www.americanbar.org/groups/professional_responsibility/policy) [<https://perma.cc/W5HX-ES27>] (last visited Jan. 27, 2021) (“The Center Policy Implementation Committee provides assistance to jurisdictions on the review and implementation of adopted policy . . .”).

46. See Appendix (identifying examples, by state, of legal authority controlling the promulgation process and descriptions of the promulgation process).

47. MD. CONST. art. IV, § 18(a).

48. MD. CODE ANN., CTS. & JUD. PROC. § 13-301 (LexisNexis 2020).

49. *Standing Committee on Rules of Practice and Procedure*, MD. CTS., <https://www.mdcourts.gov/rules> [<https://perma.cc/7977-S9HC>] (last visited Jan. 27, 2021) (noting that this committee replaced an ad hoc committee established in 1940).

50. MD. STANDING COMM. ON RULES AND PROC., 205TH REPORT TO THE COURT OF APPEALS: NOTICE OF PROPOSED RULES CHANGES 3 (2020), <https://www.mdcourts.gov/sites/default/files/rules/reports/205threport.pdf> [<https://perma.cc/3MMS-FQY5>].

The composition of the Standing Committee is directed by court rule, which provides that the committee

shall consist of one incumbent judge of the Court of Special Appeals, three incumbent circuit court judges, three incumbent judges of the District Court, one member of the State Senate, one member of the House of Delegates, one clerk of a circuit court, and such other individuals determined by the Court of Appeals.<sup>51</sup>

Court rules also govern the terms for which these committee members serve.<sup>52</sup>

Other rules adopted by the state's highest court require that the Standing Committee post notice of all its meetings on the judiciary's website and that all meetings must be open to the public.<sup>53</sup> Because it is a public body, the Standing Committee is also subject to the state's Open Meetings Act,<sup>54</sup> which similarly requires public notice of meetings,<sup>55</sup> posting of meeting agendas,<sup>56</sup> and open attendance.<sup>57</sup> Together, these provisions effectively require that proposed amendments to the state's rules of professional conduct are subject to public notice, although there is no rule requiring a formal notice and comment period.

Notably, the Maryland State Bar Association is not formally incorporated into this process. The Maryland State Bar Association maintains a Committee on Rules of Practice, the "principal function" of which "is to follow the proceedings of the Maryland Court of Appeals' Rules Committee and to serve as the liaison between the MSBA and the Court's Rules Committee."<sup>58</sup> However, this bar association committee exists outside of the formal promulgation process laid out by state law and rules.

Thus, the Maryland promulgation process remains under the auspices of the state supreme court, is largely carried out by a committee of judges and legislators appointed by that court, and does not explicitly involve the state bar. In many ways, the process is quite formalized, at least in terms of the parties involved and the requirements regarding public notice. At the same time, despite the formalization of this process, the court retains discretion. For example, court rules provide that, "[u]nless the Court of Appeals determines otherwise, every suggestion made to it for the adoption, amendment, or rescission of a Maryland Rule shall be referred to the Rules

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51. MD. CT. R. 16-701(b). For the current composition of the Standing Committee, see *Court of Appeals Committees: Standing Committee on Rules of Practice and Procedure*, MD. MANUAL ON-LINE (Nov. 13, 2020), <https://msa.maryland.gov/msa/mdmanual/29ap/html/rules.html> [<https://perma.cc/3XN9-RDKP>].

52. MD. CT. R. 16-701(d).

53. *Id.* r. 16-701(f).

54. MD. CODE ANN., GEN. PROV. § 3-301–501 (LexisNexis 2020).

55. *Id.* § 3-302.

56. *Id.* § 3-302.1.

57. *Id.* § 3-303.

58. *MBSA Committee: Rules of Practice*, MD. STATE BAR ASS'N, <https://www.msba.org/for-members/committees/rules-of-practice> [<https://perma.cc/DXP9-3GTT>] (last visited Jan. 27, 2021).

Committee for consideration.”<sup>59</sup> Thus, despite the fact that the court of appeals is permitted to delegate its rulemaking authority and has done so in the past, it is not legally bound to do so in the future.

The promulgation processes in many other states are not as highly formalized and often differ in the roles assigned to various parties.<sup>60</sup> In some states, rulemaking authority is delegated to the state bar; in California, for example, the California Supreme Court retains authority to approve rules of professional conduct but the State Bar of California is charged with promulgating them.<sup>61</sup> In other states, there may be multiple committees to which rulemaking authority is delegated, such as in South Carolina, where the state uses both a state bar association Professional Responsibility Committee<sup>62</sup> and a Commission on the Profession<sup>63</sup> established by the judiciary.<sup>64</sup> The roles of the judiciary and the legislature in regulating the process can also vary. Here again, California offers an interesting example. There, the state bar is regulated by legislation—the State Bar Act<sup>65</sup>—as opposed to rules promulgated by the state’s highest court. Mandatory sunset provisions, in which professional regulatory agencies are automatically terminated unless reauthorized, are another way in which judicial and legislative oversight of the legal profession may interact.<sup>66</sup>

We lack both a theoretical framework for cataloging this variation and empirical analysis of its influence in practice,<sup>67</sup> making this an area ripe for further investigation. What is clear, however, is that variation in the regulation and practice of the rule promulgation process can substantially affect who the decision makers are, the extent to which members of the bar or the public are able to intervene, and the transparency with which the promulgation process is carried out. These factors may be consequential for the substance of regulations governing the legal profession.<sup>68</sup> Moreover, in states where the process is less formalized, there is an opportunity for

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59. MD. CT. R. 16-701(g) (emphasis added).

60. See sources cited *infra* Appendix.

61. CAL. BUS. & PROF. CODE §§ 6076–77 (West 2020).

62. *Professional Responsibility Committee*, S.C. BAR, [https://www.scbbar.org/lawyers/sections-committees-divisions/committees/professional-responsibility-committee/?edit\\_off=true](https://www.scbbar.org/lawyers/sections-committees-divisions/committees/professional-responsibility-committee/?edit_off=true) [https://perma.cc/8D3S-24BN] (last visited Jan. 27, 2021) (explaining that the committee is charged with reviewing “laws and rules regulating the practice of law”).

63. S.C. APP. CT. R. 420 (establishing the Chief Justice’s Commission on the Profession and providing guidelines controlling its composition).

64. See, e.g., Email from Elizabeth Chambliss, Professor, Univ. of South Carolina Sch. of L. to Harrison Weimer (Sept. 3, 2020) (on file with author) (describing the rule promulgation process in South Carolina).

65. CAL. BUS. & PROF. CODE §§ 6600–43.

66. See, e.g., Robert J. Derocher, *State Bar of Texas’ Sunset Review: A Validation, and a Challenge*, BAR LEADER, July–Aug. 2002, at 6, 6 (describing a sunset review of the Texas bar).

67. But see John S. Dzienkowski & John M. Golden, *Reasoned Decisionmaking for Legal Ethics Regulation*, 89 FORDHAM L. REV. 1125, 1148–49 (2021); Leslie C. Levin, *The Politics of Lawyer Regulation: The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS 969, 973 (2020) (using case studies investigating variation in state requirements regarding malpractice insurance to consider how and when states will adopt “public-regarding” laws).

68. Levin, *supra* note 67, at 978–80.

variation over time and across substantive proposals; while this provides opportunities to customize the process according to the scope and content of particular proposals, it also suggests that there is little consideration of universal evidence-based best practices.

## II. TOWARD EVIDENCE-BASED PROMULGATION

In this part, I consider how empirical evidence might enhance the design of state rule promulgation processes for rules of professional conduct. Specifically, I consider best practices for rulemaking adopted from other contexts, ways to integrate external expertise, mechanisms for formalizing consumer protection, and the importance of directing attention to the composition of rulemaking bodies.

### A. *Best Practices for Rulemaking*

To a large extent, the issues involved in developing regulations for the legal profession parallel those that arise in administrative rulemaking more broadly. The Administrative Procedures Act<sup>69</sup> (APA) outlines several core tenets that undergird the administrative rulemaking process at the federal level.<sup>70</sup> These include advance notice of proposed rulemaking, a period for comments from the public, and dissemination of the final rule.<sup>71</sup> In some cases, the APA also requires that agencies offer evidence in support of the adopted rule.<sup>72</sup>

Many of these elements are apparent in the rulemaking process adopted by the ABA, where much of the debate regarding proposed rules is centered. Some aspects have also been adopted at the state level. However, there is no similar set of prescribed practices that has been broadly accepted in the context of the professional regulation of lawyers. Not surprisingly, debates have emerged on key issues, such as how the evidentiary burden supporting the adoption of new rules should be allocated.<sup>73</sup>

The ABA has opined on best practices for administrative rulemaking.<sup>74</sup> It could draw on this expertise to support states seeking to enhance the processes through which state rules of professional conduct are generated and adopted.<sup>75</sup> Other bar associations, academics, and interested parties could also address the need for evidence-based best practices.

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69. 5 U.S.C. §§ 551–59, 701–06.

70. See Richard J. Pierce Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. REV. 185, 186 (1996).

71. *Id.* at 186–87.

72. *Id.* at 187.

73. Green, *supra* note 26, at 1117–18.

74. See, e.g., Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) (summarizing ABA recommendations for updates to the APA).

75. See Dzienkowski & Golden, *supra* note 67, at 1148.

*B. Integration of External Expertise*

In addition to general best practices for rulemaking, a second issue facing states seeking to enhance their promulgation processes is whether and how to incorporate external expertise. Currently, many states overcome any deficits in their substantive expertise by relying heavily on the organized bar. But this approach raises questions about the organized bar's ability to look beyond its own interests in support of regulations that serve the public interest.

Several alternatives exist that could allow for the integration of external expertise into the promulgation process. Professor Eli Wald suggests that the Conference of Chief Justices could generate drafts of model rules, thus displacing the organized bar as the primary source of regulation.<sup>76</sup> The Institute for the Advancement of the American Legal System advocates the role of a third-party regulator.<sup>77</sup> Professor Andrew Kaufman has suggested additional roles for the National Center for State Courts and the Administrative Office of the U.S. Courts.<sup>78</sup> Each of these approaches offers a mechanism for incorporating expertise from sources other than the ABA and state bar associations.

Relatedly, a shift toward evidence-based regulation requires greater engagement with empirical data and analysis. This is a task for which state supreme courts are not necessarily well suited. Although focused on the substance of regulation, scholars have offered several suggestions for how to enhance the availability of relevant empirical data and analysis. Professor Carole Silver proposes that the American Bar Foundation could take on the task of aggregating and analyzing data or alternatively, suggests greater collaboration with empirical scholars directly to meet this need.<sup>79</sup> Professor Elizabeth Chambliss also suggests a role for academics, in addition to pointing out the utility of task forces and independent program evaluators.<sup>80</sup>

To move toward evidence-based promulgation, state supreme courts could benefit from accessing external expertise. Additional attention is needed to define the processes through which they do so.

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76. Wald, *supra* note 3, at 157–58.

77. GILLIAN HADFIELD & LUCY RICCA, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INDEPENDENT REGULATOR OF LEGAL SERVICES POLICY OUTLINE iv (2019), [https://iaals.du.edu/sites/default/files/documents/publications/iaals\\_independent\\_regulator\\_of\\_legal\\_services\\_policy\\_outline.pdf](https://iaals.du.edu/sites/default/files/documents/publications/iaals_independent_regulator_of_legal_services_policy_outline.pdf) [<https://perma.cc/L5U7-L5EH>].

78. Andrew L. Kaufman, *Ethics 2000—Some Heretical Thoughts*, 2001 J. PRO. LAW. (SYMP. ISSUE) 1, 5–6.

79. Carole Silver, *What We Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009, 1074–75 (2010).

80. Chambliss, *supra* note 24, at 336, 338–39, 345.

### C. Formalizing Consumer Protection

The current promulgation process for disciplinary rules is dominated by lawyers and includes an outsized role for the organized bar.<sup>81</sup> Much of the critique of this process—and the rules adopted through it—is that professed concerns for consumer protection cloak naked self-interest. The call for empirical evidence of the effects of substantive reforms is designed, in part, to force the profession to more objectively analyze consumer protection issues. In this section, I consider how the promulgation process might be reformed to enhance consideration of consumer perspectives.

Requirements for the inclusion of nonlawyers within the bodies charged with generating or reviewing proposed reforms to the rules of professional conduct is one way to promote consumers' interests (as well as to help counter antitrust concerns). However, the mechanisms through which such individuals join rulemaking bodies and the processes through which their advice is given and documented could affect the extent to which consumer protection is prioritized.

Similar concerns about responsiveness to consumer needs are addressed by the Internal Revenue Service through its Taxpayer Advocate Service. The service is an independent organization within the agency devoted to protecting taxpayers' rights.<sup>82</sup> The agency maintains offices in every state to engage with taxpayers who have problems and it presents an annual report to Congress identifying systemic issues.<sup>83</sup> This institutionalizes a voice for consumer concerns and generates a supporting evidentiary record.

Formalizing consumer representation within the promulgation process for rules of professional conduct presents an alternative to relying on members of the bar to overcome their conflicts of interest and protect the consumer interest, assuming judges will appoint individuals who can represent the public interest on an ad hoc basis, or counting on consumer-focused entities to mobilize in response to proposed reforms.

### D. Composition of Rulemakers

Finally, empirical evidence could facilitate greater consideration of the composition of rulemaking bodies. This could include identifying the characteristics of those individuals involved in the promulgation process, as well as incorporating evidence-based approaches to ensure these bodies are populated such that they are capable of representing the interests of the profession and the public.

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81. See Green, *supra* note 26, at 1156 (“The [disciplinary] rules are drafted by bar associations, promulgated by courts, enforced by disciplinary or grievance committees, and interpreted by both courts and bar committees. These institutions are dominated by lawyers.”); Wolfram, *supra* note 5, at 16–18.

82. See *We're Your Voice at the IRS*, TAXPAYER ADVOC. SERV., <https://taxpayeradvocate.irs.gov> [https://perma.cc/924R-3B2V] (last visited Jan. 27, 2021).

83. See *Who We Are*, TAXPAYER ADVOC. SERV., <https://www.taxpayeradvocate.irs.gov/about-us> [https://perma.cc/AP8D-LTNS] (last visited Jan. 27, 2021).

Because state supreme court justices are ultimately responsible for the promulgation of rules of professional conduct, such questions are logically directed to them. Understanding their characteristics—including how they are selected and how they retain their positions, their political ideologies and formative professional experiences, and their individual attributes—may help to inform decisions about the extent to which they should carry out their responsibilities independently, with input from additional advisors, or through delegation.

Many state judges are elected through a process that has become increasingly politicized in some places.<sup>84</sup> Institutional analyses of professional regulation note that elections, while often criticized as limiting judges' independence, may enhance justices' accountability to the public.<sup>85</sup> Future analysis might investigate the relationship between the methods for selecting judges and the types of procedures they use in assessing reforms to professional rules, with implications for ongoing debates about the optimal approach to judicial selection.

The role of political ideology, while emphasized in the context of judicial adjudication, is also relevant in the context of rulemaking.<sup>86</sup> Finally, in light of criticisms that professional regulations are increasingly disconnected from the realities of modern legal practice,<sup>87</sup> consideration of justices' professional experiences prior to joining the bench may also be relevant. Understanding the representativeness of justices might influence the types of procedures that are most likely to result in professional regulation that serves the needs of lawyers and the public interest.

In addition, rulemakers' individual characteristics are also relevant. Professor Brooke Coleman has recently written about the importance of racial, ethnic, and gender diversity on the committee charged with overseeing the Federal Rules of Civil Procedure.<sup>88</sup> She argues that greater diversity would result in better rules<sup>89</sup> and it is essential to ameliorate our history of exclusion.<sup>90</sup> Similar arguments could be made in the context of professional regulatory rulemaking. State courts are dominated by white men.<sup>91</sup> While the level of racial, ethnic, and gender representation on state courts varies

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84. HERBERT M. KRITZER, JUSTICES ON THE BALLOT: CONTINUITY AND CHANGE IN STATE SUPREME COURT ELECTIONS 200–01 (2015).

85. Barton, *supra* note 36, at 1185–86.

86. See Brooke D. Coleman, #Sowhitemale: *Federal Civil Rulemaking*, 113 NW. U. L. REV. ONLINE 407, 409 (2019).

87. See, e.g., Jessica K. Steinberg et al., *Judges and the Deregulation of Legal Services*, 89 FORDHAM L. REV. 1315, 1318–24 (2021); Wald, *supra* note 3, at 158.

88. See Coleman, *supra* note 86, at 424.

89. *Id.* at 427 (noting that “in a context like federal civil rulemaking, diverse decision-making bodies are ‘smarter’”).

90. *Id.* at 429.

91. Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1907 fig.7, 1908 tbl.5 (2017) (comparing white men's representation in the state judiciary to their representation in the population and noting the racial and gender composition of appellate state courts).

across states, in no state is the state judiciary as diverse as the state population on these dimensions.<sup>92</sup>

Together, these considerations may militate in favor of a process in which state supreme courts delegate at least a portion of their rulemaking authority. Future work could identify best practices for populating these subsidiary bodies or for otherwise ensuring that diverse perspectives are incorporated into the rule promulgation process.

### III. EVIDENCE-BASED PROMULGATION IN PRACTICE

Proponents suggest that the adoption of evidence-based substantive regulation will not only enhance the quality of professional regulation but serves to counter challenges to the profession's right to self-regulate.<sup>93</sup> A similar argument can be made with regard to evidence-based promulgation; enhancing the rule promulgation process could address criticism of professional regulation while also improving substantive regulation by elevating the process through which it is proposed, reviewed, and adopted.

However, it is important to recognize that changes to the promulgation process may not result in dramatic changes to the substance of regulations; even if they do, they may not address the underlying concerns motivating calls for reform. For example, the Washington State Supreme Court announced in the summer of 2020 that the Limited License Legal Technicians program, once heralded as the “way of the future of law,”<sup>94</sup> will sunset.<sup>95</sup> Although this program was a function of more than simply the state's rules of professional conduct, its rise and fall illustrate how innovations made possible through such reforms face additional hurdles—cultural, economic, or practical—in successfully altering the legal profession.<sup>96</sup>

Moreover, it is possible that a move toward evidence-based promulgation is simply not feasible under the current state-based approach to professional regulation. Attempts to undertake structural reforms in the context of

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92. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC'Y, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS* tbl.A-14 (2016), <https://gavelgap.org/pdf/gavel-gap-report.pdf> [<https://perma.cc/PBL4-FLA7>].

93. See Chambliss, *supra* note 24, at 318.

94. Mary Jeutten, *The Limited License Legal Technician Is the Way of the Future of Law*, ABA J. (Dec. 8, 2017, 8:30 AM), <https://www.abajournal.com/news/article/the-limited-license-legal-technician-story-start-with-why> [<https://perma.cc/C2GA-6D63>].

95. Letter from Debra L. Stephens, C.J., Wash. State Sup. Ct., to Stephen R. Crossland, Chair, Ltd. License Legal Technician Bd., Terra Nevitt, Interim Exec. Dir., Wash. State Bar Ass'n & Rajeev Majumdar, President, Wash. State Bar Ass'n (June 5, 2020), [https://www.abajournal.com/files/Stephens\\_LLLT\\_letter.pdf](https://www.abajournal.com/files/Stephens_LLLT_letter.pdf) [<https://perma.cc/JS3Q-AJRK>].

96. See Lyle Moran, *How the Washington Supreme Court's LLLT Program Met Its Demise*, ABA J. (July 9, 2020), <https://www.abajournal.com/web/article/how-washingtons-limited-license-legal-technician-program-met-its-demise> [<https://perma.cc/A67E-3KVH>] (describing how the Limited License Legal Technicians program was barred from expanding into practice areas beyond family law and struggled to attract enough applicants to achieve self-sufficiency).

professional regulation have not always been successful,<sup>97</sup> for a variety of reasons.<sup>98</sup> In contrast to the states-as-laboratories ethos proposed by the ABA, a more centralized approach to regulating the profession might actually be more likely to incorporate the types of best practices advocated in this Article.

#### CONCLUSION

The legal profession is not inclined toward change. As Professor Wald writes, the drag of history and tradition are particularly strong barriers to change for a profession “that builds on respect for authority, established rules, hierarchical systems, and history, as well as on precedent.”<sup>99</sup> Yet threats to the profession’s claim to self-regulation may overcome this inertia. Acknowledging this pressure, ABA Resolution 115 embraces the idea of states as laboratories and encourages them to undertake forays into new forms of professional regulation that expand access to legal services.<sup>100</sup> Through its emphasis on evidence-based regulations, it also envisions an iterative process in which reforms are evaluated on an ongoing basis.

The process through which such reforms will be generated, evaluated, and adopted has received less attention. While scholars and the organized bar have recognized the need for additional empirical investigation on the effects of regulatory reforms and on topics that serve as the basis for the substance of potential reforms, these arguments have generally not been extended to the rule promulgation process. In this Article, I advocate a parallel shift toward evidence-based promulgation. The hope is that such a shift might justify the profession’s long claim to self-regulation by enhancing the substance of professional regulation.

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97. See, e.g., John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio’s Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 82 (1999) (recounting the failures of an attempt to reform Ohio’s disciplinary process).

98. Bruce A. Green, *ABA Ethics Reform from “MDP” to “20/20”*: *Some Cautionary Reflections*, 2009 J. PRO. LAW. (SYMP. ISSUE) 1, 11.

99. Wald, *supra* note 9, at 523.

100. Given the controversy and compromise revisions to the resolution, one could debate the depth of the organized bar’s devotion to these ideas.

## APPENDIX

*Sources of Authority for Rule Promulgation by State*

State	Authority for Rule Promulgation
<i>Alabama</i>	ALA. PRO. CONDUCT. R.
<i>Alaska</i>	ALASKA CONST. art. IV, § 15; ALASKA BAR R. 62.
<i>Arizona</i>	ARIZ. SUP. CT. R. 28.
<i>Arkansas</i>	ARK. CODE ANN. § 16-11-116 (2020); <i>Committee on Civil Practice</i> , ARK. JUDICIARY, <a href="https://www.arcourts.gov/administration/boards-committees/committee-civil-practice">https://www.arcourts.gov/administration/boards-committees/committee-civil-practice</a> [ <a href="https://perma.cc/MSQ3-KJ94">https://perma.cc/MSQ3-KJ94</a> ] (last visited Jan. 27, 2021); <i>In re</i> Ark. Bar Ass'n Petition to Amend Rules 1.2, 4.2 & 4.3 of the Ark. Rules of Pro. Conduct, No. CV-16-187 (Ark. May 12, 2016).
<i>California</i>	CAL. BUS. & PRO. CODE §§ 6011-15, 6076-77 (West 2020); <i>2020-21 Board of Trustees</i> , STATE BAR OF CAL., <a href="https://www.calbar.ca.gov/About-Us/Who-We-Are/Board-of-Trustees/Roster">https://www.calbar.ca.gov/About-Us/Who-We-Are/Board-of-Trustees/Roster</a> [ <a href="https://perma.cc/HU6B-W7ZD">https://perma.cc/HU6B-W7ZD</a> ] (last visited Jan. 27, 2021).
<i>Colorado</i>	COLO. REV. STAT. § 13-2-110 (2020); Order Establishing the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct (Colo. June 24, 2003); <i>Rules of Professional Conduct Standing Committee</i> , COLO. JUD. BRANCH, <a href="https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24">https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24</a> [ <a href="https://perma.cc/5625-P3LL">https://perma.cc/5625-P3LL</a> ] (last visited Jan. 27, 2021).
<i>Connecticut</i>	Wesley W. Horton et al., <i>Preface</i> to 1 CONNECTICUT PRACTICE SERIES, SUPERIOR COURT CIVIL RULES (2020 ed.); Edward L. Johnson Jr., <i>Connecticut Bar Association History: 1975-2000</i> , 75 CONN. BAR J. 185, 194-95 (2001).
<i>Delaware</i>	DEL. CODE ANN. tit. 10, § 161; (2020) DEL. SUP. CT. R. 96.
<i>Florida</i>	FLA. BAR R. 1-12.1(a), (f); 1-1.21(f), (g).
<i>Georgia</i>	GA. BAR R. 5-101; Bob Ambrogi, <i>Georgia Moves Closer to Adopting Duty of Technology Competence</i> , LAWSITES (Nov. 4, 2019), <a href="https://www.lawsitesblog.com/2019/11/georgia-moves-closer-to-adopting-duty-of-technology-competence.html">https://www.lawsitesblog.com/2019/11/georgia-moves-closer-to-adopting-duty-of-technology-competence.html</a> [ <a href="https://perma.cc/RR5E-L7LS">https://perma.cc/RR5E-L7LS</a> ].
<i>Hawai'i</i>	HAW. SUP. CT. R. 17(b); HAW. PRO. CONDUCT R. (HAW. SUP. CT. COMM'N ON PROFESSIONALISM, Proposed Amendments Draft Sept. 26, 2019).
<i>Idaho</i>	IDAHO BAR COMM'N R. 906.
<i>Illinois</i>	ILL. SUP. CT. R. 3.

<i>Indiana</i>	Order Amending Indiana Rules of Court (Ind. Dec. 19, 2019); <i>Proposed Rule Amendments</i> , IND. CTS., <a href="https://www.in.gov/judiciary/2685.htm">https://www.in.gov/judiciary/2685.htm</a> [ <a href="https://perma.cc/F5GB-2P7N">https://perma.cc/F5GB-2P7N</a> ] (last visited Jan. 27, 2021).
<i>Iowa</i>	Order: Request for Public Comment on Proposed Amendments to Chapter 32, Iowa Rules of Professional Conduct (Iowa Aug. 1, 2019).
<i>Kansas</i>	<i>Proposed Rule 241: Rules Relating to the Lawyers' Fund for Client Protection</i> , KAN. SUP. CT., <a href="https://www.kscourts.org/KSCourts/media/KsCourts/Rules_Open_Comment/Proposed-Rule-241.pdf?ext=.pdf">https://www.kscourts.org/KSCourts/media/KsCourts/Rules_Open_Comment/Proposed-Rule-241.pdf?ext=.pdf</a> [ <a href="https://perma.cc/J6GZ-VPSU">https://perma.cc/J6GZ-VPSU</a> ] (last visited Jan. 27, 2021).
<i>Kentucky</i>	KY. CONST. § 116; <i>KBA Ethics 2000 Committee Report</i> , KY. BAR ASS'N, <a href="https://www.kybar.org/page/KBAEthics2000Rpt">https://www.kybar.org/page/KBAEthics2000Rpt</a> [ <a href="https://perma.cc/S9GL-D3PS">https://perma.cc/S9GL-D3PS</a> ] (last visited Jan. 27, 2021).
<i>Louisiana</i>	Dane S. Ciolino, <i>Introductory Materials: Historical Background of Louisiana Rules of Professional Conduct</i> , LA. LEGAL ETHICS, <a href="https://lalegaethics.org/louisiana-rules-of-professional-conduct/introductory-materials">https://lalegaethics.org/louisiana-rules-of-professional-conduct/introductory-materials</a> [ <a href="https://perma.cc/5TJ3-Y9UB">https://perma.cc/5TJ3-Y9UB</a> ] (last visited Jan. 27, 2021).
<i>Maine</i>	<i>Advisory Committee on Judicial Ethics</i> , STATE OF ME. JUD. BRANCH (May 6, 2019), <a href="https://www.courts.maine.gov/about/committees/judic-ethics.html">https://www.courts.maine.gov/about/committees/judic-ethics.html</a> [ <a href="https://perma.cc/WN2M-QCNS">https://perma.cc/WN2M-QCNS</a> ].
<i>Maryland</i>	MD. CONST. art. IV, § 18(a); MD. CODE ANN. CTS. & JUD. PROC. § 13-301 (LexisNexis 2020); <i>Standing Committee on Rules of Practice and Procedure</i> , MD. CTS., <a href="https://www.mdcourts.gov/rules">https://www.mdcourts.gov/rules</a> [ <a href="https://perma.cc/L8KH-WMA6">https://perma.cc/L8KH-WMA6</a> ] (last visited Jan. 27, 2021).
<i>Massachusetts</i>	Mass Sup. Jud. Ct, <i>Rule Changes and Invitations to Comment on Proposed Rules and Amendments</i> , MASS.GOV, <a href="https://www.mass.gov/service-details/rule-changes-and-invitations-to-comment-on-proposed-rules-and-amendments">https://www.mass.gov/service-details/rule-changes-and-invitations-to-comment-on-proposed-rules-and-amendments</a> [ <a href="https://perma.cc/6JXE-THWK">https://perma.cc/6JXE-THWK</a> ] (last visited Jan. 27, 2021); Mass. Sup. Jud. Ct., <i>Standing Advisory Committee on the Rules of Professional Conduct</i> , MASS.GOV, <a href="https://www.mass.gov/service-details/standing-advisory-committee-on-the-rules-of-professional-conduct">https://www.mass.gov/service-details/standing-advisory-committee-on-the-rules-of-professional-conduct</a> [ <a href="https://perma.cc/H5SV-VUDR">https://perma.cc/H5SV-VUDR</a> ] (last visited Jan. 27, 2021).
<i>Michigan</i>	Marcia L. Proctor, <i>The Michigan Professional Regulatory System</i> , 74 MICH. BAR J. 144 (1995); Pro. Ethics Comm., <i>Rule of the Committee</i> , STATE BAR OF MICH. (Jan. 27, 2012), <a href="http://www.michbar.org/file/generalinfo/committee_pdfs/pec_rules.pdf">http://www.michbar.org/file/generalinfo/committee_pdfs/pec_rules.pdf</a> [ <a href="https://perma.cc/B3BM-T8DX">https://perma.cc/B3BM-T8DX</a> ].
<i>Minnesota</i>	37 DUNNELL MINNESOTA DIGEST <i>Courts</i> § 13.06 (6th ed. Supp. 2020).

<i>Mississippi</i>	<i>Rules for Comment</i> , STATE OF MISS. JUDICIARY, <a href="https://courts.ms.gov/research/rules/rulesforcomment/rulesforcomment.php">https://courts.ms.gov/research/rules/rulesforcomment/rulesforcomment.php</a> [ <a href="https://perma.cc/2ULT-E2L3">https://perma.cc/2ULT-E2L3</a> ] (last visited Jan. 27, 2021).
<i>Missouri</i>	MO. SUP. CT. R. 7.06; <i>id.</i> r. 5.3(d).
<i>Montana</i>	<i>Extensive Updates to Montana Rules of Professional Conduct Adopted Effective Jan. 1, 2020</i> , STATE BAR OF MONT. (Dec. 19, 2020), <a href="https://www.montanabar.org/news/443124/Extensive-updates-to-Montana-Rules-of-Professional-Conduct-adopted-effective-Jan.-1-2020.htm">https://www.montanabar.org/news/443124/Extensive-updates-to-Montana-Rules-of-Professional-Conduct-adopted-effective-Jan.-1-2020.htm</a> [ <a href="https://perma.cc/CZK4-APJD">https://perma.cc/CZK4-APJD</a> ]
<i>Nebraska</i>	NEB. SUP. CT. R. § 1-103.
<i>Nevada</i>	Order Repealing Rules 150-203.5 of the Supreme Court Rules and Adopting the Nevada Rules Of Professional Conduct (Nev. Feb. 6, 2006).
<i>New Hampshire</i>	Order Adopting Amendments to Court Rules (N.H. July 15, 2019); <i>Committees—Advisory Committee on Rules</i> , N.H. JUD. BRANCH, <a href="https://www.courts.state.nh.us/committees/adviscommrules/index.htm">https://www.courts.state.nh.us/committees/adviscommrules/index.htm</a> [ <a href="https://perma.cc/ZW82-H62A">https://perma.cc/ZW82-H62A</a> ] (last visited Jan. 27, 2021).
<i>New Jersey</i>	N.J. SUP. CT., ADMINISTRATIVE DETERMINATIONS BY THE SUPREME COURT ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON ATTORNEY ETHICS AND ADMISSIONS (2016), <a href="https://www.njcourts.gov/notices/2016/n160414a.pdf">https://www.njcourts.gov/notices/2016/n160414a.pdf</a> [ <a href="https://perma.cc/ZK58-ZJ6X">https://perma.cc/ZK58-ZJ6X</a> ].
<i>New Mexico</i>	N.M. SUP. CT. GEN. R. 23-106.1.
<i>New York</i>	ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED § 8.251, Westlaw (database updated Dec. 2020).
<i>North Carolina</i>	N.C. GEN. STAT. § 84-23 (2020); <i>Proposed Amendments to the Rules of Professional Conduct</i> , N.C. STATE BAR, <a href="https://www.ncbar.gov/for-lawyers/ethics/proposed-amendments-to-the-rules-of-professional-conduct">https://www.ncbar.gov/for-lawyers/ethics/proposed-amendments-to-the-rules-of-professional-conduct</a> [ <a href="https://perma.cc/W42K-EXAQ">https://perma.cc/W42K-EXAQ</a> ] (last visited Jan. 27, 2021).
<i>North Dakota</i>	N.D. SUP. CT. R. 3.1-5; <i>Joint Committee on Attorney Standards</i> , STATE OF N.D. CTS., <a href="https://www.ndcourts.gov/supreme-court/committees/joint-committee-on-attorney-standards">https://www.ndcourts.gov/supreme-court/committees/joint-committee-on-attorney-standards</a> [ <a href="https://perma.cc/D8BR-65XZ">https://perma.cc/D8BR-65XZ</a> ] (last visited Jan. 27, 2021).
<i>Ohio</i>	OH. CONST. art. IV, § 2(B)(1)(g).
<i>Oklahoma</i>	OKLA. STAT. tit. 5, § 13 (2021); <i>Policy Regarding Submission of Rule Changes</i> , OKLA. BAR ASS'N (Apr. 24, 2009), <a href="https://www.okbar.org/wp-content/uploads/2018/05/judicial-rule-changes1.pdf">https://www.okbar.org/wp-content/uploads/2018/05/judicial-rule-changes1.pdf</a> [ <a href="https://perma.cc/GKT4-59GG">https://perma.cc/GKT4-59GG</a> ].
<i>Oregon</i>	OR. REV. STAT. § 9.490 (2020).
<i>Pennsylvania</i>	1 PA. CONS. STAT. §§ 7.1-10 (2020).
<i>Rhode Island</i>	Order <i>In re</i> Proposed Rhode Island Rules of Professional Conduct with Proposed Comments (R.I. Sept. 13, 2006).

<i>South Carolina</i>	S.C. APP. CT. R. 401 (establishing the South Carolina Bar); <i>id.</i> r. 420; <i>Professional Responsibility Committee</i> , S.C. BAR, <a href="https://www.sctbar.org/lawyers/sections-committees-divisions/committees/professional-responsibility-committee/?edit_off=true">https://www.sctbar.org/lawyers/sections-committees-divisions/committees/professional-responsibility-committee/?edit_off=true</a> [ <a href="https://perma.cc/FSL5-LA88">https://perma.cc/FSL5-LA88</a> ] (last visited Jan. 27, 2021).
<i>South Dakota</i>	S.D. CODIFIED LAWS § 16-17-3.1A (2020); Letter from David Gilbertson, C.J., Sup. Ct. of South Dakota, to All Members of the State Bar (Mar. 9, 2020), <a href="https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf">https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf</a> [ <a href="https://perma.cc/45TQ-Q2FC">https://perma.cc/45TQ-Q2FC</a> ].
<i>Tennessee</i>	<i>Learn About the Development of Rules of Professional Conduct</i> , TENN. BAR ASS'N, <a href="https://www.tba.org/index.cfm?pg=Development-of-Rules-Professional-Conduct">https://www.tba.org/index.cfm?pg=Development-of-Rules-Professional-Conduct</a> [ <a href="https://perma.cc/DP2N-5EC4">https://perma.cc/DP2N-5EC4</a> ] (last visited Jan. 27, 2021).
<i>Texas</i>	TEX. GOV. CODE ANN. §§ 81.0871–94 (West 2020).
<i>Utah</i>	UTAH SUP. CT. PRO. PRAC. R., ch. 11, art. 1.
<i>Vermont</i>	<i>Professional Responsibility Board</i> , VT. JUDICIARY, <a href="https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/professional-responsibility">https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/professional-responsibility</a> [ <a href="https://perma.cc/G8W9-6M9M">https://perma.cc/G8W9-6M9M</a> ] (last visited Jan. 27, 2021).
<i>Virginia</i>	VA. CODE ANN. § 17.1-700 (2020); JUD. COUNCIL OF VA., 2018 REPORT TO THE GENERAL ASSEMBLY AND SUPREME COURT OF VIRGINIA 7 (2019), <a href="http://www.courts.state.va.us/courtadmin/judpolicies/2018_jcv_report.pdf">http://www.courts.state.va.us/courtadmin/judpolicies/2018_jcv_report.pdf</a> [ <a href="https://perma.cc/PM77-RTLK">https://perma.cc/PM77-RTLK</a> ].
<i>Washington</i>	<i>GR 9—Supreme Court Rulemaking and Schedule for Review</i> , WASH. CTS., <a href="https://www.courts.wa.gov/court_rules/?fa=court_rules.gr9summary">https://www.courts.wa.gov/court_rules/?fa=court_rules.gr9summary</a> [ <a href="https://perma.cc/U2H7-W8WX">https://perma.cc/U2H7-W8WX</a> ] (last visited Jan. 27, 2021).
<i>West Virginia</i>	W.V. CONST. art. VIII, § 3 (highlighting the rule-making authority of the state's supreme court); Rules Order (W. Va. Sept. 29, 2014).
<i>Wisconsin</i>	WIS. SUP. CT. I.O.P. IV–V.
<i>Wyoming</i>	Order Amending the Rules of Professional Conduct for Attorneys at Law (Wyo. June 25, 2019).