

## REASONED DECISION-MAKING FOR LEGAL ETHICS REGULATION

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*Many lawyers and scholars have criticized the ethics rules developed by the organized legal profession to regulate the practice of law. Complaints about processes for generating new ethics rules and ethics opinions interpreting ethics rules commonly reflect concerns about failures to engage in reasoned decision-making. Rationales for the proposed rules or the opinions proffered by bar associations, courts, or agencies are often incomplete or inadequately supported, and one must imagine that the quality of resulting rules or their interpretations often suffers. We argue that administrative law provides a model for how courts can address such concerns—a model that courts, both federal and state, already follow in demanding and encouraging reasoned decision-making by administrative agencies. This Article examines two principal administrative law approaches that courts should adopt. First, even in areas where courts are manifestly inexpert relative to administrative agencies, they have insisted on giving agency rules a “hard look” for confirmation that the agency properly justified the rules at the time of issuance, that the agency issued the rules through a process that gave interested parties a meaningful opportunity to comment and make suggestions, and that the agency properly considered such inputs as well as the whole of the evidence before it. Second, courts have often accorded weight to agency opinions on questions such as statutory interpretation, with the weight accorded dependent on the nature of the agency’s process in generating such an interpretation. In the ethics context, courts can act similarly to promote reasoned decision-making by (1) giving an analog of “hard look” review to rules proffered by bar associations before adopting them and (2) giving bar associations’ ethics opinions only a*

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*degree of weight that they merit through high quality process and on-the-record reasoning. By adopting these two approaches to considering the adoption and interpretation of ethics rules, courts can help bring about significant improvements to processes for drafting, adopting, and interpreting ethics rules.*

#### INTRODUCTION

The American legal profession relies on a system for drafting, considering, and adopting ethics rules for lawyers that has both centralized and decentralized aspects. The American Bar Association (ABA) has positioned itself as a centralized promulgator of model ethics codes for over one hundred years.<sup>1</sup> Despite criticism of the ABA's work, the organization's ethics codes are highly influential in setting the agendas for federal and state courts and agencies.<sup>2</sup> Once model codes are adopted by the ABA House of Delegates, many state and federal courts and agencies engage in decentralized processes of considering the codes' formal adoption in their jurisdictions. Moreover, once a model code is adopted as law, federal and state authorities often rely on opinion-writing committees of the ABA or state professional associations for interpretive guidance.

Complaints about processes for generating new ethics rules or ethics opinions interpreting ethics rules commonly reflect concerns about failures to engage in reasoned decision-making. Rationales for the proposed rules or the opinions proffered by bar associations can sometimes be incomplete or based on inadequate research or information, and one must imagine that the quality of resulting rules or their interpretations at least sometimes suffers. We argue that administrative law provides a model for how courts can address such concerns—a model that courts, both federal and state, already follow in demanding and encouraging reasoned decision-making by administrative agencies.

We propose that, in considering the adoption and interpretation of ethics rules, courts adopt two approaches to rulemaking already used in the administrative law context. First, even in areas where courts are manifestly inexpert relative to administrative agencies, they have insisted on giving agency rules a “hard look” for confirmation that the agency properly justified the rules at the time of issuance,<sup>3</sup> that the agency issued the rules through a process that gave interested parties a meaningful opportunity to comment and

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1. *See, e.g.*, CANONS OF PRO. ETHICS (AM. BAR ASS'N 1908); MODEL CODE OF PRO. RESP. (AM. BAR ASS'N 1980); MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

2. Over time, from the Canons of Professional Ethics, to the Model Code of Professional Responsibility, to the Model Rules of Professional Conduct, states have introduced more variations from ABA language in their local versions. One can speculate that such variations arise because local practice has diverged from the national norm and because states value their judgments over the goal of national uniformity.

3. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that, even under the deferential “‘arbitrary and capricious’ standard” of review, an “agency must examine the relevant data and articulate a satisfactory explanation for its action”).

make suggestions,<sup>4</sup> and that the agency properly considered such inputs as well as the whole of the evidence before it.<sup>5</sup> Second, courts often accord weight to agency opinions on questions such as statutory interpretation, with the weight accorded reflecting aspects of the quality of the agency's process in generating such an interpretation.<sup>6</sup> In considering the adoption and interpretation of rules of ethics, courts can act similarly by (1) giving an analog of "hard look" review to rules proffered by bar associations before adopting them or perhaps even after their initial adoption and (2) giving bar associations' ethics opinions only the degree of weight that they merit through high quality process and on-the-record reasoning.

Part I provides an overview of the nature of legal ethics rulemaking and its history in the United States. Because this overview may suggest the desirability of more radical reforms, a caveat regarding limitations of our analysis in Parts III and IV is in order. In these parts, we generally assume that processes of ethics rule drafting and opinion writing will continue to be performed by bar associations or court-appointed committees, with ultimate and definitive approval of association-proposed rules or positions coming through the courts. We focus on how this judiciary-plus-association process may be improved.

Despite substantial reasons to suspect the wisdom of entrusting a variant of self-regulatory responsibility to the bar in having it effectively draft rules for itself,<sup>7</sup> we believe that (1) this approach has some immediate advantages<sup>8</sup>

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4. See, e.g., *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (requiring disclosure of data on which the agency relied in order to permit "meaningful comment" in response to notice of rulemaking); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1363–64 ("[T]he judicial requirement that an agency's final rule be a 'logical outgrowth' of its proposed rule is designed to ensure the proper functioning and integrity of the notice-and-comment process.").

5. See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 318 (2010) (describing "'hard look' review" as "demand[ing] that agencies offer thorough justifications for the rules that they promulgate, including responses to any meaningful objections or alternatives aired during the comment period").

6. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.").

7. See, e.g., Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 257–58 (1996) (noting the potential collusion of the plaintiff's and defense bars in relation to ABA ethics opinions, as "[t]he financial benefits flowing from expansion of the tort system do not redound exclusively to the benefit of plaintiff attorneys"); see also Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1175 (2003) (arguing that legislative bodies would "more likely produce public-minded regulation and limit lawyer rent-seeking").

8. See, e.g., Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 467 (1996) (concluding that there is "substantial wisdom to the tradition of disinterested judicial regulation of the bar" compared to regulation by administrative agencies, who tend to have their own, pro-government interests); Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33, 41 (1996) ("The view that legislatures and executive-branch agencies are better occupational rulemakers than either the judiciary or a

and (2) its current entrenchment means that it makes sense to consider how to improve it, at least as a provisional measure, rather than simply skipping to questions of what might best replace it. Also, rule drafting and approval and opinion writing at the ABA may benefit from a recognition that ABA rules and opinions will be considered under processes and scrutiny used in the administrative law context.<sup>9</sup> We also recognize that in recent years, the ABA's inability to adopt rules in certain areas has forced the states to consider such topics on their own. In such circumstances, the consideration of issues by the decentralized authorities of federal and state courts and agencies may benefit from our proposal.

### I. BAR-MEDIATED PROCESSES FOR ETHICS RULEMAKING

Early lawyer codes in the United States were a product of guild efforts to protect the image of the profession and establish self-regulation of its members.<sup>10</sup> In 1887, the Alabama State Bar issued a code of ethics relying on leading nineteenth-century concepts of the duties of lawyers.<sup>11</sup> The ABA, formed by elite lawyers, followed the guild approach of professions to adopt the 1908 Canons of Professional Ethics, largely based on the Alabama code.<sup>12</sup> The ABA's view that it should produce model rules for the states to adopt continues to dominate the origin of ethics rules adopted in the states even today.

The promulgation of codes was only a part of the efforts to design a regulatory system beholden to the guidance of the ABA. An aspect of the ABA view was a decentralized approach to lawyer regulation, with each state giving a substantial role to its local bar.<sup>13</sup> By advocating for each state to create a bar agency to implement the day-to-day regulation of lawyers, it standardized its model throughout the United States and facilitated the

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peak professional association, however sound as a generalization, is not necessarily sound when it comes to setting standards for law practice.”)

9. When the ABA undertakes a comprehensive review of its model ethics codes, the commissions often use committees, reports, hearings, and comment processes, but such procedural steps and review are often omitted or significantly limited when the ABA is making incremental modifications to certain rules. *See, e.g., About the Model Rules*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct) [<https://perma.cc/84N6-32GT>] (last visited Jan. 27, 2021) (detailing the most recent changes to the Model Rules). Also, the ABA's Standing Committee on Ethics and Professional Responsibility, the committee with authority to issue opinions on codes of ethics for lawyers and judges, generally does not use notice-and-comment processes in its opinion-writing process. Its opinions vary in their scope and reliance on authority.

10. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 96, 303–05 (2d ed. 1985) (detailing the public's resentment against lawyers in the early colonial period).

11. *See generally* CAROL RICE ANDREWS ET AL., *GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION* (2003).

12. The writings of Judge George Sharswood of Pennsylvania and Baltimore lawyer and teacher, David Hoffman, were significant influences on the ABA's adoption of the 1908 Canons. *See* Thomas L. Shaffer, *David Hoffman's Law School Lectures, 1822–1833*, 32 J. LEGAL EDUC. 127, 128 (1982).

13. *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules*, 59 TEX. L. REV. 639, 651 (1981).

dependence of the local judiciary on the state bar.<sup>14</sup> The ABA realized that judges had significant authority over the practice of law and that, by assisting them to create an agency to handle the regulation of the profession, the ABA could facilitate its regulatory agenda.<sup>15</sup> Further, the vesting of regulatory power in the judiciary would discourage other government entities from becoming involved in the regulation of lawyers.<sup>16</sup> We use the term “bar-mediated process” to refer to the process that the ABA favored in adopting rules of ethics throughout the country—state court deference to bar associations and appointed committees dominated by lawyers for the drafting processes, with the ultimate authority for approval residing in the high court in the state.

In the ABA, development of major rule revisions has been delegated to a commission formed for that purpose, whereas narrow rule changes often come from the various sections of the organization.<sup>17</sup> The commissions tasked with major revisions have often held hearings, published working papers, and proposed drafts.<sup>18</sup> Ultimately, the adoption of the change must receive an affirmative vote from the House of Delegates, a body including lawyers and judges from across the country that has a wide array of practice experiences.<sup>19</sup> Although this diversity can give the House the benefit of a wide range of opinions, it can also be a significant obstacle to major reform.<sup>20</sup> Often, outside professional groups of lawyers have promoted changes consistent with their groups’ interests, and in some cases, these groups have successfully influenced ABA action.<sup>21</sup> In some cases, reform has resulted

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14. One might have thought that advocating for a national bar would be more effective in regulating the legal profession, but decentralization gives the ABA a key role as a centralizing force with stronger coordination, staffing, and funding relative to states than would likely be the case relative to a federal-government-regulated bar.

15. See RICHARD L. ABEL, *AMERICAN LAWYERS* 46 (1989) (examining the ABA support for integrated bar associations).

16. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799, 810 n.36 (1992).

17. 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/4FK7-FKJ3>] (last visited Jan. 27, 2021) (listing changes to the Model Rules and documents relating to their background).

18. See generally James Podgers, *Come the Evolution: Ethics 20/20 Proposals Seek to Adapt Existing Professional Conduct Rules*, 98 *A.B.A. J.* 26 (2012) (detailing the Commission on Ethics 20/20’s revisions in light of recent trends in technology and globalization).

19. See *FAQS: The House of Delegates*, AM. BAR ASS’N (2019), [https://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/house-publications/hod-faqs-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/house-publications/hod-faqs-2019.pdf) [<https://perma.cc/8X9D-44R6>].

20. See generally John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 *HOFSTRA L. REV.* 55 (2013). The ABA has been unable to deal with nonlawyer involvement in the practice of law and in globalization of the practice of law. *Id.* at 88–90.

21. In 1980, the Roscoe Pound American Trial Lawyers Foundation formed a commission to draft an alternative to the ABA Kutak Commission’s drafts that eventually became the Model Rules. See Monroe H. Freedman, *The Influence of the American Lawyers’ Code of Conduct on ABA Rules and Standards*, 38 *HOFSTRA L. REV.* 927, 927 (2010). In 2014, the Association of Professional Responsibility Lawyers (APRL) formed a committee to study disciplinary violations involving lawyer advertising in the states and developed proposals for an amended set of rules. See *Association of Professional Responsibility Lawyers Applauds ABA’s Changes to Lawyer Advertising Rules*, APRL (Aug. 8, 2018),

from pressure from Congress in a time of crisis, with the ABA's reform efforts serving to limit external regulatory intrusion into the rulemaking process. Initially, the ABA codes focused on preserving the status of lawyers in representing clients and as substantially self-regulating actors in the legal system, but when courts began to use ethics codes for disqualification, sanctions, and standards of conduct in malpractice, the ABA had to change its focus to understand the new role of its model rules in the practice of law.<sup>22</sup>

In most states, the state constitution or the inherent power of the judiciary places the control of the legal profession in the high court.<sup>23</sup> Thus, those courts remain an important source for designing and implementing rules of ethics.<sup>24</sup> Judges are called on to supervise the drafting, consideration, and adoption of ethics rules used in court and disciplinary proceedings, as well as to guide lawyers in representing clients in litigation and nonlitigation matters.<sup>25</sup> Of course, judges have other work to do, and the ABA's centralized nature and national reach have given it a significant capacity to set the agenda for states through the ABA model codes.<sup>26</sup> Moreover, the ABA expends significant resources lobbying states to follow its lead and tracking its progress.<sup>27</sup> In most states, the ABA models are the starting point

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<https://aprl.net/association-of-professional-responsibility-lawyers-applauds-abas-changes-to-lawyer-advertising-rules> [<https://perma.cc/R5CK-P7XN>]. The APRL proposals examined an area previously addressed by the ABA through minor changes over the years, and this effort pushed the ABA to adopt more systemic changes for regulation of lawyer advertising and solicitation. *Id.*

22. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 688–89 (1989). For a view praising the ABA's efforts to help courts and lawmakers and thereby benefit the rule of law, see Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365 (2013).

23. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2.3 (1986) (describing the inherent powers doctrine).

24. See Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 154–57 (2010) (examining the authority of judges to promulgate rules of conduct).

25. Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—the Modern Era* (pt. 2), 15 GEO. J. LEGAL ETHICS 205, 207 (2002) (“The regulatory apparatus is both supported by and moved forward through a system of administrative and judicial rulemaking . . .”).

26. Many states only consider amendments to the rules when the ABA amends its model codes. See Amon Burton, *The Legacy of Ethics 2000: Progress Toward Greater Uniformity in State Ethics Rules*, 55 ADVOC. (TEX.) 24, 25 (2011) (noting that forty-five states revised their ethics rules in response to the ABA's Ethics 2000 Commission effort). Other states, such as Florida and New York, consider amendments to their rules in light of supreme court and bar interest outside of any ABA amendments. See, e.g., *Proposed Changes to Florida Bar Rules*, SUNETHICS, <http://www.sunethics.com/proposed-amendments-to-rpc.html> [<https://perma.cc/NQY8-ETSM>] (last visited Jan. 27, 2021) (listing annual proposals to amend the Florida Rules of Professional Conduct); *Preface to the 2020–2021 Edition* of ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED, Westlaw (database updated Dec. 2020) (describing significant changes in New York professional responsibility codes).

27. See *Policy & Initiatives*, *supra* note 17 (describing the ABA's Center for Professional Responsibility Policy Implementation Committee as “provid[ing] assistance to jurisdictions on the review and implementation of adopted policy, promot[ing] of policy to the bar and the public, and maintain[ing] a national clearinghouse of information on implementation efforts”).

for analysis, but in some states, local practices and laws receive more attention.<sup>28</sup> There is some variation in the processes for drafting, considering, and adopting these rules. For example, the Supreme Court of Texas submits major changes to a referendum vote of the state's lawyers, but minor changes are implemented by the high court directly.<sup>29</sup> By contrast, in most states, the highest courts exercise their inherent authority and directly adopt their codes of conduct.

Further, most state courts appoint one or more committees to make a proposal to the court.<sup>30</sup> In states with unified or mandatory bar associations, the court may use state bar committees to consider the adoption of ethics rules.<sup>31</sup> In states with voluntary bar associations, the court may rely on an agency responsible for regulating the practice of law or appoint committees as part of its inherent power to regulate the practice of law.<sup>32</sup> Ultimately, the limited resources and personnel of high courts constrain the processes that can be undertaken in the adoption process. In rare circumstances in some states, the legislatures intrude on the regulation of lawyers, either through sunset review of the state bar agency or through legislation applied to lawyers.<sup>33</sup> Sometimes laws are directed at lawyer conduct, and other times

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28. One example in which state variations continue to dominate is the lawyer's duty of confidentiality to clients. See Att'ys' Liab. Assurance Soc'y, Inc., *Disclosure of Client Confidences* (2019), reprinted in THOMAS D. MORGAN, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS 133 app. A (2020). In part, this is because the duty to disclose client confidences may be derived from case law authority and in part because individual states have made policy decisions that preventing bodily crimes is more important than protecting attorney-client confidences.

29. See *Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct*, STATE BAR OF TEX. [https://www.texasbar.com/AM/PrinterTemplate.cfm?Section=Grievance\\_Info\\_and\\_Ethics\\_Helpline&Template=/CM/HTMLDisplay.cfm&ContentID=11291&FuseFlag=1](https://www.texasbar.com/AM/PrinterTemplate.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/HTMLDisplay.cfm&ContentID=11291&FuseFlag=1) [<https://perma.cc/D6U7-H4HR>] (last visited Jan. 27, 2021) (describing the process for consideration of rule amendments); see also Order Amending Comments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure (Tex. Mar. 22, 2016), <http://www.txcourts.gov/media/1332594/169032.pdf> [<https://perma.cc/ATD9-UY9T>].

30. For an example of state supreme court consideration of ethics rules through the commission process, see *Rules Revision*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/Rules-Revision> [<https://perma.cc/LUW9-U4DG>] (last visited Jan. 27, 2021) (discussing California commissions used to draft, debate, and propose rule changes).

31. A majority of states have unified or mandatory bar associations to which lawyers licensed to practice in the state must belong. See Kevin J. Robinson, *President's Page: A Unified Front: The Need for Mandatory Bar Associations*, W. VA. LAW., July–Sept. 2014, at 6, 6 (noting that thirty-three jurisdictions have a mandatory bar association); see also Terry Radtke, Note, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934–1956*, 81 MARQ. L. REV. 1001 (1998) (examining the politics of the unified bar movement in the United States). These bar associations blend a number of regulatory and lawyer support functions under one organization.

32. For example, in 2018, California split the bar functions into a mandatory regulatory authority, a redefined State Bar of California, and a voluntary authority called the California Lawyers Association. See *About CLA*, CAL. LAWS. ASS'N, <https://calawyers.org/cla/about-cla> [<https://perma.cc/8BJ9-PHC4>] (last visited Jan. 27, 2021).

33. See, e.g., Joe B. Cannon, *Sunset and the State Bar*, 41 TEX. BAR J. 807 (1978) (describing the legislatively enacted sunset review of the Texas bar's authority).

the general laws are intended to apply to the legal profession.<sup>34</sup> The interaction of statutes and bar regulations is often piecemeal and uncoordinated.<sup>35</sup>

In the federal system, courts tend to defer either to the state in which the court sits or to the ABA rules.<sup>36</sup> Efforts to create a federal set of ethics rules have failed.<sup>37</sup> One might have expected that the federal courts would use the Judicial Conference of the United States to lead an effort to create ethics rules. Instead, the different circuits have created their own interpretations of rules on conflicts, confidentiality, and candor.<sup>38</sup> Some provisions with federal and constitutional implications have made their way into federal codes of procedure and evidence.<sup>39</sup> Likewise, the U.S. Supreme Court has weighed in on lawyer conduct issues in the criminal area because of the constitutional implications.<sup>40</sup> Congress has chosen to regulate lawyers acting in areas of federal interest,<sup>41</sup> and federal agencies have often exercised their authority to regulate those who practice before them, with the Supremacy Clause overriding state regulatory provisions in such contexts. But even at the federal administrative level, there is significant deference to the ABA and the state ethics codes.

This brief survey of the manner in which ethics rules are drafted, considered, and enacted demonstrates weaknesses in these processes that result in a less than socially optimal set of ethics rules for lawyers.<sup>42</sup> The ABA, as a professional organization, can naturally be expected to protect the interests of its members and the profession.<sup>43</sup> Drafting and adoption

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34. In some cases, a state statute on consumer protection or arbitration might be applied to the practice of law. Alternatively, a state legislature may enact a law explicitly designed to regulate lawyers. California, in its Business and Professions Code, exemplifies extensive legislative regulation of the practice of law. *See* CAL. BUS. & PROF. CODE §§ 6067–6228 (West 2020).

35. But one could ask whether legislatures should take a more active role in regulating lawyers. *See* Barton, *supra* note 7, at 1221; Wald, *supra* note 24, at 158.

36. *See* Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 6 (2005).

37. *See* McMorrow, *supra* note 36, at 10–19 (2005); Note, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARV. L. REV. 2063, 2072 (1998).

38. *See* H. Geoffrey Moulton Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 97–98 (1997).

39. *See, e.g.*, FED. R. CIV. P. 11 (setting the standard for attorney filings in federal court); *id.* r. 26(b) (defining the work product doctrine for lawyers); FED. R. CRIM. P. 44(c)(2) (requiring a court to inquire into conflicts in multiple client representation in criminal cases).

40. Lawyers who represent criminal defendants must meet the Sixth Amendment's requirement of effective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668 (1984) (setting the standard for ineffective assistance of counsel claims).

41. *See generally* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (examining the manner in which Congress could choose to federalize the ethics rules in the United States).

42. *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 959–61 (2009) (identifying five trends resulting from the fragmentation of the law governing lawyers).

43. *See* MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 9–63 (1977); MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 11–356 (Max Rheinstein ed., Edward Shils trans., 1954) (1925). Specific institutional goals have changed over time, influencing the drafting agenda for code reforms. For example, in some



processes can lead to overregulation to protect certain segments of the bar and underregulation in areas in which agreement is difficult to reach. The results have sometimes included rules that promote lawyers' interests over the interests of the justice system or clients;<sup>44</sup> rules that embrace lawyer-centric concepts, such as zealous advocacy, that may be inconsistent with modern norms of dispute resolution;<sup>45</sup> and rules that protect the profession's reliance on hourly and contingent fee billing for law firm profits.<sup>46</sup> Resulting rules can also be less clear than is socially desirable, in part to enable lawyers to shoehorn preexisting conduct into a rule's allowances.<sup>47</sup> Further, the processes for drafting and adopting rules may not be transparent and may not include the input of a sufficiently representative array of affected individuals and entities. Moreover, the rules may be based on beliefs and norms that have not withstood the scrutiny of empirical analysis and data collection.<sup>48</sup>

One might view the independence of the judiciary as a possible check on the system, but courts have naturally tended to focus on adjudication of disputes rather than ethics rulemaking. Judicial involvement in the promulgation of rules of conduct is largely supervisory and nominal.<sup>49</sup> Parts III and IV will explore how state judiciaries can improve their supervision of rulemaking and encourage better quality contributions by bar associations to rule interpretation. But this part's discussion—understood in the context of the judiciary's comparatively limited resources, expertise, and interest,<sup>50</sup> along with the difficulties state courts face in offering uniform and widespread standards—may suggest more radical reform, involving significantly more federal involvement in the coordination and oversight of the development of general legal ethics rules. The suggestion for following

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years, ABA presidents have focused rules reform efforts on globalization of the profession, and in others, they have focused such efforts on the increased use of technology. *See* Podgers, *supra* note 18, at 26–27.

44. Gillers, *supra* note 22, at 377–87 (examining early cases of the bar placing lawyers' interests over the interests of the justice system or clients).

45. *See generally* John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45 (1996) (examining the effect of the adversary model on dispute resolution).

46. For example, Model Rule 1.5(c) permits a law firm to calculate the contingent fee before deducting the expenses advanced by the firm as long as it is clearly stated in the written agreement. MODEL RULES OF PRO. CONDUCT r. 1.5(c) (AM. BAR ASS'N 2020). The effort to protect attorneys' fees is understandable given the economic pressures that lawyers face from increased competition. *See* THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 207–13 (2010); *see also* MODEL RULES OF PRO. CONDUCT r. 1.5(c).

47. For example, Model Rule 1.9's "substantially related" test for deciding whether a lawyer can accept a new representation against the interests of a former client is vague and subject to many different interpretations. MODEL RULES OF PRO. CONDUCT r. 1.9.

48. In considering the involvement of nonlawyers in the practice of law, the ABA has not conducted empirical research on the jurisdictions that permit limited nonlawyer involvement in law practice to determine what problems, if any, these practices have imposed on clients and the system of justice.

49. *See* Wald, *supra* note 24, at 155 (describing the role of judges as nominal despite the rhetoric that judges have the exclusive power to regulate lawyers).

50. *See* *Holland v. Florida*, 560 U.S. 631, 670 (2010) (Scalia, J., dissenting) (noting that legal ethics was the "least analytically rigorous and hence most subjective of law-school subjects").

an administrative law model—and in large part a federal administrative law model—for the review of new ethics rules and the assignment of weight to bar associations’ ethics opinions might be viewed as an intermediate step to consideration of such broader reform that could open the way to a significantly more effective system for designing ethics rules for the legal profession.<sup>51</sup>

## II. REASONING DEFICIENCIES IN ETHICS RULEMAKING

Part I described processes for developing rules of legal ethics that in many ways seem to be throwbacks to an earlier era of self-regulatory guilds<sup>52</sup>: Lawyers who are members of state or national bar associations draft and pass rules for their regulation and contribute substantially to existing rules’ interpretation through separately generated ethics opinions. Of course, the process in the legal ethics context differs from true self-regulation in that mechanisms for the enforcement of ethics rules are generally in government hands, and the rules and opinions drafted and issued by bar associations generally only have binding effect to the extent they are embraced by government actors such as state supreme courts.<sup>53</sup> The fact that lawyer regulation is, in fact, commonly implemented by government actors can, however, only make the general bar-mediated approach to lawyer regulation seem more antiquated.<sup>54</sup>

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51. See John S. Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 TEX. L. REV. 451, 454 (1989) (book review) (suggesting that the legal profession could use lessons from a regulated industries perspective in drafting its rules).

52. See John C. Coffee Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1316 (2003) (“The blunt truth is that private self-regulation of attorneys through bar associations means the continued government of the guild, by the guild, and for the guild.”).

53. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1147 (2009) (observing that attorneys “are governed by professional rules, usually adopted and enforced by state supreme courts”); *id.* at 1153 (observing that “the power to discipline layers has shifted from bar organizations to state judiciaries”); see also Schneyer, *supra* note 8, at 38 (noting the common sequence in which “the ABA writes ethics codes and state supreme courts give them legal effect, perhaps amending them in the process”).

54. A parallel situation recently arose in the regulation of tax practitioners by the U.S. Department of the Treasury and the Internal Revenue Service (IRS) and its Office of Professional Responsibility. Treasury and the IRS have exercised their inherent powers to regulate lawyers, accountants, enrolled agents, and tax return preparers through regulations and rulemakings. 31 U.S.C. § 330; 31 C.F.R. §§ 10.0–10.97 (2020); *The Office of Professional Responsibility (OPR) At-a-Glance*, IRS (July 23, 2020), <https://www.irs.gov/tax-professionals/the-office-of-professional-responsibility-opr-at-a-glance> [https://perma.cc/67NL-LNDF]. Though the executive branch and its captive agency have argued that they have an inherent right to regulate those who practice before it, the U.S. Court of Appeals for the D.C. Circuit held that Congress had not authorized Treasury and the IRS to regulate tax preparers. See *Loving v. IRS*, 742 F.3d 1013, 1017 (D.C. Cir. 2014) (holding a “tax preparer” was not a tax “representative” under 31 U.S.C. § 330(a)(1)). These developments are one aspect of a more general application of the Administrative Procedure Act and administrative law to tax rulemaking, despite claims of tax exceptionalism. See generally Kristen E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007); Kristen E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013).

Even though state supreme courts typically preside over their states' systems for lawyer regulation, these systems often seem to be relics from a pre-Administrative Procedure Act<sup>55</sup> (APA) world, more resonant of the cooperative industrial codes of the long defunct National Industrial Recovery Act<sup>56</sup> (NIRA) than the systems of court-supervised reasoned decision-making by administrative agencies that have become characteristic of modern regulatory regimes.<sup>57</sup> The NIRA's allowance of "self-regulatory" codes of "fair competition" approved by the president after drafting by industry players perhaps all too predictably led to price-fixing and other anticompetitive behavior that served the interests of industry incumbents but often worked against the interests of the public at large.<sup>58</sup> Likewise, perhaps all too predictably, the reliance on outdated approaches to judicial supervision of the cooperative "self-regulation" of lawyers perpetuates rules based on professional protectionism and anticompetition, as well as outdated rules that simply do not comport with modern practice.<sup>59</sup> Even when judges consider adopting new guidance for modern problems in the practice of law, such as the use of advances in technology in lawyer advertising, the failure to demand a process of reasoned decision-making like that generally required under standard administrative law leads to inadequate or suboptimal regulation.

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55. 5 U.S.C. §§ 551–559, 701–706.

56. Pub. L. No. 73-67, 48 Stat. 195 (1933), *invalidated* by A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 664–65 (2004) (describing competitor cooperation under the NIRA and public disenchantment "as consumers realized the effects of allowing firms to cooperate through codes"); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of Second Best*, 80 CORNELL L. REV. 1, 32 (1994) (describing a provision of the NIRA that "allowed the President to approve 'codes of fair competition'—essentially cartel agreements promulgated by industry groups and then enforced by the government" (quoting *Schechter*, 295 U.S. at 521–22)).

57. *See* David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENV'T L. REV. 1, 2 (2010) (describing "the two primary elements of judicial review" under the APA framework as "ensuring that agency action is authorized by law and is neither arbitrary nor capricious"); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 944 (2000) ("The Administrative Procedure Act's safeguards promote agency accountability and reasoned decision-making by providing a more regular and effective role for both the public and the judiciary.").

58. *See* Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 500 (2006) ("In implementation . . . the [National Recovery Administration] Codes of Fair Competition were rapidly captured by multiple concentrated industry groups, industry by industry, under cover of the self-regulatory ideology promoted by big-business interests."); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 718 n.17 (1986) ("Roosevelt's great New Deal initiative, the National Industrial Recovery Act of 1933 (NIRA), sanctioned codes of 'fair competition' throughout the economy that were in practice often highly anticompetitive."); Note, *Cooperative Buying of Gasoline as Sherman Act Violation*, 49 YALE L.J. 761, 766 (1940) ("'Cooperation' as a mask for self-interest attained full bloom with the advent of the [National Recovery Administration].").

59. Judges can possess the most altruistic motives in their work on codes of conduct, but many rules are based on norms that were developed decades ago in a different practice setting and continue to apply to lawyer conduct half a century later.

Even with state actors tending to handle the major mechanisms of case-by-case rule enforcement,<sup>60</sup> lawyers play an outsize role in developing and interpreting the rules that govern their profession.<sup>61</sup> The ABA develops and issues the Model Rules of Professional Conduct through a quasi-legislative process, in which the ABA's Standing Committee on Ethics and Professional Responsibility (CEPR) "recommend[s] Model Rules changes to the ABA 'legislature,' the House of Delegates."<sup>62</sup> The CEPR even more regularly issues advisory opinions that interpret the Model Rules.<sup>63</sup> State bar associations do similar work in drafting rules and instructive opinions interpreting rules.<sup>64</sup> The work of the various professional associations on these fronts has a very substantial influence on the regulatory regimes officially developed and implemented by state courts, whether by providing rules, or interpretations thereof, that the courts adopt<sup>65</sup> or, even without authoritative adoption by the courts, by effectively determining how lawyers, in their day-to-day work, understand and seek to comply with applicable rules.<sup>66</sup>

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60. Cf. Schneyer, *supra* note 8, at 35 (noting that "a bewildering array of institutions now have often-overlapping claims to regulatory authority in [the legal] field").

61. Zacharias, *supra* note 53, at 1150 ("[B]ecause lawyers participate heavily in producing the governing professional rules and the broader external law that affects the bar, lawyers in some respects are distinct among regulated professionals.").

62. Schneyer, *supra* note 8, at 39.

63. See *id.* ("CEPR's main task is to interpret the Model Rules of Professional Conduct in advisory ethics opinions."); see also Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 317 (1996) ("The ABA Standing Committee on Ethics and Professional Responsibility regularly issues formal opinions which expound upon the 'proper' interpretation and application of the ABA models upon which the states' rules are based.").

64. Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 317 (2002) ("Academics have . . . underestimated the importance of state and local ethics opinions to practicing lawyers and judges.").

65. See Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425, 425 (2011) ("The state supreme courts . . . have typically delegated the bulk of the actual regulatory work to their state bar associations and, ultimately, to certain state bar committees."); Edward C. Brewer III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the "Appearance of Impropriety" Disappear*, 39 IDAHO L. REV. 321, 321 (2003) (describing "two initial stages [in the development of ethics rules]: the American Bar Association's and other organizations' creation of model provisions, and the states' or courts' promulgation of codes or rules having the effect of law"); Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 71 (1981) (observing that ABA ethics opinions "are frequently cited by courts and other Code enforcement tribunals, by state and local ethics committees, and in treatises and law school casebooks"); Green, *supra* note 8, at 463 ("[I]n judicial proceedings within a particular state, lawyers' conduct is typically governed by a set of rules adopted by that state's judiciary based on a version of either the ABA *Model Rules of Professional Conduct* ('ABA Model Rules') or the predecessor ABA *Model Code of Professional Responsibility* ('ABA Model Code').").

66. See Joy, *supra* note 64, at 313 (observing that, with respect to "many everyday ethical questions," "a prudent lawyer . . . must look to the ethics opinions in her jurisdiction for guidance").

To illustrate the crucial role that state bar associations can play in the development of legal ethics rules, one can consult Professor Lynn Baker's account of the process for and results of amendments to a Texas ethics rule in 2005.<sup>67</sup> The rule in question concerned lawyer fee sharing, and the rule amendments, fortified by a slew of new "formal comments," substantially limited the scope of authorized fee-sharing arrangements and imposed more burdensome requirements of disclosure and client consent.<sup>68</sup> The changes not only dramatically altered the substance of Texas rules with respect to fee-sharing arrangements<sup>69</sup> but also evidently reflected a fundamental rejection of the pre-2005 rule's general philosophy "that client disclosure and consent were needed only in situations in which the splitting of fees would 'result in a further disclosure of client confidences and have a financial impact on a client.'"<sup>70</sup>

How did these rules and associated comments come to be adopted by the Supreme Court of Texas? In 2003, the Supreme Court proposed a new rule capping referral fees and then, in response to an overwhelmingly negative response to the proposed rule, backpedaled, withdrawing the proposal and calling for a state bar task force to look into new rules to regulate referral fees.<sup>71</sup> By the end of June 2004, a task force issued a report with recommendations, and the State Bar of Texas Board of Directors unanimously agreed to the task force's proposed amendments.<sup>72</sup> The Supreme Court oversaw a two-month public comment period on the proposed changes and then ordered a state bar referendum on the proposals, in which about 40 percent of state bar members voted by a 54 percent to 45 percent margin in favor of the changes.<sup>73</sup> In January 2005, the Supreme Court issued an order making the rules effective on March 1, 2005.<sup>74</sup> The entirety of the Supreme Court's reasoning was as follows:

The Court has considered the petition of the State Bar of Texas requesting an order promulgating the amendments to the Texas Disciplinary Rules of Professional Conduct, and, based on the results of the Referendum held November 5, 2004, to December 20, 2004, as certified by the Executive Director of the State Bar of Texas and the Clerk of the Supreme Court of Texas, the Court finds that all issues submitted to the lawyers of Texas in this referendum were approved by a majority vote.<sup>75</sup>

One might hope that the task force's report proposing these changes would have included reasoning adequate to support them. But this would start as a

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67. *See generally* Baker, *supra* note 65.

68. *See id.* at 426–30.

69. *Cf. id.* at 426 ("From January 1, 1990 until March 1, 2005, the Texas ethics rule governing fee sharing between lawyers was one of the least restrictive in the country.")

70. *Id.* at 431 (quoting TEX. DISCIPLINARY PRO. CONDUCT R. 1.04 cmt.10 (1989) (amended 2005)).

71. *See id.* at 432.

72. *See id.* at 433.

73. *See id.* at 433–34.

74. Order Promulgating Amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct (Tex. Jan. 28, 2005).

75. *Id.* at 1.

relatively slim hope, given that the report preceded any public comments on the proposals. Further, Baker has detailed how the report: (1) failed anywhere to “discuss what policy concerns do or should underlie client disclosure and consent requirements in the context of fee sharing,”<sup>76</sup> (2) did not more particularly say “why the Task Force thought it necessary to mandate a more burdensome form of disclosure and consent,”<sup>77</sup> and (3) “provide[d] no information regarding . . . why the benefits of the changes were expected to exceed the costs.”<sup>78</sup> Moreover, the task force’s report generally endorsed the view that Texas’s rules on referral fees should “be in the mainstream, because Texas practitioners will then have some guidance in interpreting any new referral fee rule from other jurisdictions, commentators, the [American Law Institute]’s Restatement, and the ABA’s relevant Model Rules.”<sup>79</sup> But in some tension with this,<sup>80</sup> the task force elsewhere acknowledged that “[t]he disclosures required under [the proposed amendments] exceed those mandated by the ABA.”<sup>81</sup> Baker separately emphasized that in fact

[n]o other state’s rules, nor the ABA Model Rules: (1) explicitly require that client consent [to fee sharing] be obtained prior to the time of the association or referral proposed; (2) explicitly preclude waiver by clients of their right to disclosure and consent prior to the time their signing attorney enters into a fee-sharing arrangement at that attorney’s own expense; or (3) impose such potentially draconian financial penalties on attorneys who do not comply with the rule’s disclosure and consent requirements.<sup>82</sup>

In light of identified deficiencies in the reasoning behind the rule and comment changes, Baker recommended a variety of reforms. For example, she called for requiring better explanation of the aims of such changes<sup>83</sup> and an analysis of the costs and benefits expected to result.<sup>84</sup> Baker even more specifically recommended that whatever committee or task force drafted the changes “undertake an independent investigation of the problem it is charged to remedy,” with this investigation to include

(a) the systematic gathering of views of the members of each sector of the profession represented on the committee regarding any proposed rule changes; (b) an analysis by each committee member of the expected costs and benefits of each proposed rule change to the clients serviced by the

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76. Baker, *supra* note 65, at 435.

77. *Id.* at 436.

78. *Id.* at 438.

79. STATE BAR OF TEX. REFERRAL FEE TASK FORCE, FINAL REPORT AND RECOMMENDATIONS 25 (2004).

80. *See* Baker, *supra* note 65, at 439 (explaining the rationale for Texas to be in the mainstream).

81. STATE BAR OF TEX. REFERRAL FEE TASK FORCE, *supra* note 79, at 3.

82. Baker, *supra* note 65, at 438.

83. *Id.* at 447 (“Any proposed change to a state’s ethics rules should include . . . a statement of the existing problem sought to be remedied.”).

84. *Id.* (“Any proposed change to a state’s ethics rules should include . . . an analysis of why the benefits are predicted to exceed the costs.”); *see also id.* at 450.

sector of the legal profession that the committee member represents; and (c) a comprehensive survey of what rule(s) and formal comments, if any, every other state and the ABA have adopted to address the problem at issue.<sup>85</sup>

Aware of concerns that this committee or task force might itself not be properly representative of affected sectors of the profession, Baker additionally suggested that the criteria for selecting these members “be clearly and publicly articulated” and that, “[w]hatever goal of representation is chosen, the sector of the profession that each member represents . . . be identified, as well as the proportion of the profession included in that sector.<sup>86</sup>

This example illustrates the court’s deference to a bar committee process that resulted in a change to the Texas practice on referral fees and to implementation of a more onerous disclosure standard than is required in other jurisdictions. No one disputes the authority of the court to adopt this rule, but the process led to a rule that could easily subject a lawyer to discipline or loss of a fee without explaining the reasoning underlying the rule’s unusually burdensome demands. This is just one example, but it highlights the commonly undisciplined nature of ethics code rulemaking.

Another example of judicial rulemaking involves the Washington State Supreme Court’s decision to rescind the state’s Limited License Legal Technician (LLLT) program. In 2012, the state of Washington led the country in developing a licensure system for nonlawyers to provide legal services in specific areas of practice.<sup>87</sup> This was viewed as expanding access to legal services for individuals of limited means who might need help in areas as fundamental as family law.<sup>88</sup> The pilot program was to provide a trial of whether nonlawyers could competently deliver basic services to the public under the supervision of the courts.

In 2020, during the COVID-19 pandemic, changes in the composition of the Washington State Supreme Court led to a vote to sunset the LLLT program with little notice and with no formal study of the experiment.<sup>89</sup> At the time of the court’s decision, LLLT regulators had proposed expanding the program to other areas of the law.<sup>90</sup> Nonetheless, without notice and reasoning, the court ended the experiment without assessing its value to the general public, lawyers in the areas served by LLLTs, or the individuals who had begun the process of becoming licensed to practice under the program.<sup>91</sup> This action led supporters of the LLLT program to proclaim that the court

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85. *Id.*

86. *Id.* at 448.

87. See Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 611–12 (2014).

88. *Id.* at 612–13.

89. 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/LRM4-JGCR>].

90. *Id.*

91. *Id.*

had engaged in anticompetitive behavior supporting lawyer protectionism without regard to benefit to the public.<sup>92</sup>

The Texas and Washington State examples demonstrate cause for concerns about the quality of reasoning and representation—of logic and fairness—in ethics rulemaking. Moreover, these concerns resonate with similar concerns about bar associations' separate processes for generating ethics opinions.<sup>93</sup> Such opinions are guidance documents that characteristically provide bar-association-sanctioned interpretations of ethics rules in specific hypothetical contexts.<sup>94</sup> In theory, such opinions interpret the ethics codes, but in more recent times, opinion-writing committees have addressed issues that the codes do not cover. Thus, in a sense, these committees are filling a void in guidance in many new areas because of the difficulty that the courts experience in promulgating new rules.<sup>95</sup> Multiple commentators have criticized some of these opinions as poorly—arguably, not even plausibly—reasoned, thereby echoing Baker's concerns with the quality of reasoning in processes for adopting binding ethics rules.<sup>96</sup>

Of course, opinions only become generally applicable law to the extent that they are adopted through a binding rulemaking process or by courts in precedent-setting adjudication. Although professional associations' opinions are influential, it is not rare for their interpretations to be rejected by state courts or other authorities.<sup>97</sup> Thus, one might hope, for example, that any

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92. *Id.*

93. Two examples of ethics opinions issued in Texas illustrate the problems. In 2014, the Professional Ethics Committee of the State Bar of Texas issued Ethics Opinion 642, which prohibited law firms from giving a nonlawyer the title of chief technology officer. The opinion was revised one year later to reverse this position. *See* State Bar of Tex. Pro. Ethics Comm., Ethics Op. 642 (2015) (revised). In 2014, the committee issued an opinion that applied conflicts law and full imputation to law students who worked in legal positions during the summer. *See* State Bar of Tex. Pro. Ethics Comm., Ethics Op. 644 (2014). The Texas Supreme Court amended comments to the ethics rules to reverse this decision, which created serious issues for law students obtaining employment. *See* Order Amending Comments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, *supra* note 29.

94. *See* Hellman, *supra* note 63, at 324–25 (describing CEPR ethics opinions as “interpretations of the Model Rules and Model Code [set forth] by applying their provisions to concrete factual situations posed as hypothetical problems”).

95. In general, an ethics opinion committee is intended to offer guidance on how adopted rules apply to certain fact patterns. These committees have typically not been created to offer advice on topics completely outside of the adopted rules. The composition of many ethics committees does not provide the committee with expertise in all legal areas. Moreover, the committees commonly do not have research staff or experience in drafting ethics codes. Given such limitations, it is not surprising to see the committees issue opinions that are incomplete or that fail to take account of important aspects of various areas of practice.

96. *See* Hellman, *supra* note 63, at 317 (“[B]esides fomenting uncertainty regarding specific issues, the cavalier approach to interpretation employed over time by the ABA Ethics Committee threatens to undercut the Bar’s respect for the legitimacy of the ‘ethics rules’ as binding constraints on the practice of law.”); Schneyer, *supra* note 8, at 39 (“According to commentators, some CEPR opinions lack any tenable rationale under the ethics rules they claim to interpret.”).

97. *See* Hellman, *supra* note 63, at 329 (“In fact, it is not at all unusual for state authorities to adopt interpretations that conflict with ABA Ethics opinions addressing the very same language.”).



defects in professional associations' opinion-making processes are remedied by careful, independent consideration of relevant interpretive questions in the courts. But here commentators have raised concern that appropriately careful and thorough consideration is too frequently lacking—and indeed perhaps not generally to be expected in case-by-case adjudication by generalist judges seeking to interpret rules that govern a wide variety of lawyer conduct.<sup>98</sup>

Although the ABA has been instrumental in drafting codes and in advocating for judicial and bar association regulation of the practice of law, it has not provided formal guidance for states to adopt processes for considering, drafting, and adopting ethics rules or for state opinion-writing processes. The ABA has primarily focused on advocating for state adoption of its ethics codes without modification, a goal that the states' development of independent best practices for consideration of ethics rules and their interpretation might undermine. Without central coordination on processes for the promulgation or interpretation of rules, the states have adopted a wide diversity of approaches.<sup>99</sup> Moreover, in many states, processes for rulemaking are substantially opaque and inaccessible for many important stakeholders until a final, formally noticed process for review of new rules by the high court, a stage that comes after much of the most significant work has been done.

Nonetheless, a number of states have adopted reforms that, despite the bar's continued role in self-regulation, buck historical exclusion of nonlawyers from the provision of legal services and make relevant rulemaking processes more transparent and inclusive.<sup>100</sup> As discussed above,<sup>101</sup> the Washington State Supreme Court permitted nonlawyers to deliver routine legal services in certain basic areas of law to improve access to justice through its LLLT program.<sup>102</sup> Similarly, in 2019, the Utah Supreme Court created an Office of Legal Services Innovation to oversee a regulatory sandbox in which nonlawyer participants can apply to offer legal

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98. See Brewer, *supra* note 65, at 338 (describing rulemaking's advantages, relative to adjudication, in enabling "careful scrutiny by all concerned, . . . identification of better alternatives," and buy-in by broader legal and client communities); Green, *supra* note 8, at 467–68 ("[B]ecause judicial decision-making in adjudication lacks the openness and deliberateness that is characteristic of rulemaking, rulings concerning lawyer conduct are unlikely to be fully considered and, consequently, unlikely to command respect within the legal profession."); *id.* at 491 ("In adjudication, courts tend to overlook relevant considerations and to provide unsatisfactory explanations for the choices they make, thereby undermining confidence that they have adopted the most appropriate standards of professional conduct.").

99. See Emily S. Taylor Poppe, *Evidence-Based Promulgation: Reconsidering the Rulemaking Process for Disciplinary Rules*, 89 FORDHAM L. REV. 1275, 1290 app. (2021).

100. See, e.g., Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 90 (2013) (noting that, although Washington State's groundbreaking LLLT rule "originated within the [Washington State Bar Association], . . . a substantial portion of the [Washington bar] strongly and publicly opposed the LLLT Rule, including the [bar's] Board of Governors").

101. See *supra* note 87 and accompanying text.

102. See Holland, *supra* note 100, at 77 (describing the Washington State Supreme Court's adoption of the LLLT rule in 2012).

services to the public in a pilot program.<sup>103</sup> A few other states are also considering experimentation in nonlawyer involvement in legal services, and such proposals are following a model of transparency and stakeholder input.<sup>104</sup>

Individual high courts and state bars have also adopted best practices for consideration of ethics rules. Arizona maintains a portal for rulemaking and lawyer regulation and invites comments and proposals about court rules.<sup>105</sup> Colorado's state bar rules committee features participation by a variety of stakeholders, including judges, and documents its process and decision-making in detail.<sup>106</sup> Many state ethics opinion-writing committees have implemented notice-and-comment processes and have apparently sought to incorporate diverse viewpoints through committee membership.<sup>107</sup> Each of these advances offers promise, but best practices have not yet been adopted in a majority of states.<sup>108</sup>

In sum, there is a general concern that, in developing proposed rules or rule interpretations, bar associations, the courts, or other government actors who consume the associations' work too often fail to exhibit a process of reasoned decision-making that provides confidence that ethics rules, as adopted and understood, are well suited to their ends. Such concern with promoting appropriately reasoned decision-making by unelected actors is a primary focus of administrative law. Thus, Part III describes how modern administrative law shows a path for courts to insist on filling the reasoned decision-making deficit that is all too common in ethics rulemakings.

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103. Lyle Moran, *Utah Embraces Nonlawyer Ownership of Law Firms as Part of Its Broad Access-to-Justice Reforms*, ABA J. (Aug. 14, 2020), <https://www.abajournal.com/web/article/utah-embraces-nonlawyer-ownership-of-law-firms-as-part-of-broad-reforms> [<https://perma.cc/DW7X-62BX>].

104. *See, e.g.*, Admin. Order No. 2020-173 (Ariz. Nov. 4, 2020) (providing for Arizona's alternative business structure certification).

105. *See Rules Review Committee*, STATE BAR OF ARIZ., <https://www.azbar.org/about-us/board-of-governors/board-committees/rules-review-committee> [<https://perma.cc/NE4V-HPWT>] (last visited Jan. 27, 2021).

106. *See Rules of Professional Conduct Standing Committee*, COLO. JUD. BRANCH, [https://www.courts.state.co.us/Courts/Supreme\\_Court/Committees/Committee.cfm?Committee\\_ID=24&showHistory=false](https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24&showHistory=false) [<https://perma.cc/K62U-TXCZ>] (last visited Jan. 27, 2021) ("The Committee is comprised of members of varying backgrounds, including trial-level judges, appellate judges, law school professors, disciplinary prosecutors, and attorneys in private practice in a broad range of practice areas.").

107. In 2020, the Professional Ethics Committee of the State Bar of Texas implemented a notice-and-comment process for opinions under consideration. *See* Pro. Ethics Comm., *Public Comment: Docketed Requests*, STATE BAR OF TEX., <https://www.texasbar.com/AM/Template.cfm?Section=pec&Template=/pec/vendor/comment.cfm> [<https://perma.cc/4A9W-MJXE>] (last visited Jan. 27, 2021) (detailing the online process for notice and comment).

108. A compendium of best practices of the rulemaking and opinion-writing processes would be beneficial for consideration by the high courts of the states and state bars.

### III. ADMINISTRATIVE LAW'S REASONED DECISION-MAKING REQUIREMENT AS A SALVE FOR LEGAL ETHICS REGULATION

In the context of the rulemaking and opinion-writing work of administrative agencies, courts have long enforced requirements of fair play and reasoned decision-making. For an agency's issuance of binding substantive rules, this enforcement has generally involved (1) policing basic requirements of notice-and-comment rulemaking<sup>109</sup> and (2) demanding contemporaneous and appropriate justification by the agency of the new rules.<sup>110</sup> For the provision of nonbinding guidance in the nature of professional associations' ethics opinions, specific procedural demands may be very limited.<sup>111</sup> Nonetheless, the courts can prod agencies toward better procedure by making the weight that the court gives to agency guidance depend not only on the quality of an agency's reasoning but also on the procedure that the agency employed in developing that reasoning, including the thoroughness of the agency's decision-making process.<sup>112</sup>

Likewise, state courts can have difficulty directly attacking problems with ethics rulemaking at its roots. The role of the ABA in promulgating ethics rules that serve as the baseline for federal and state consideration of ethics rules complicates reform of the process because specific state courts generally lack direct control or jurisdiction over ABA processes. Thus, the focus of any reform must be state and federal processes for adopting ethics rules and interpreting them over time.

This part contends that the courts' enforcement of reasoned decision-making requirements through "hard looks" at agencies' work<sup>113</sup> provides a model for how the courts can better police the fairness and quality of ethics rulemaking. Ethics rules have significance for clients and the broader public, as well as the bar. Thus, courts should not blithely give their approval to new ethics rules that win the support of a majority of bar members who participate in a referendum. Nor should courts give professional associations' ethics

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109. *See infra* Part III.A; *see also* 5 U.S.C. § 553(b)–(c).

110. *See infra* Part III.A; *see also* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (proclaiming the "simple but fundamental rule of administrative law" that courts are to review an agency decision based on the "grounds invoked by the agency" at the time of the decision).

111. *See* 5 U.S.C. § 553(b) (exempting "interpretive rules" and "general statements of policy" from general notice-and-comment requirements). Even though ethics opinions are not considered binding, state courts have often taken the effort to withdraw or overrule opinions that are considered incorrectly decided, a practice presumably reflecting the fact that lawyers find it difficult to disregard such ethics opinions, as they often are the only guidance in a particular area.

112. *Cf.* United States v. Mead Corp., 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (footnotes and citation omitted)).

113. *See* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 168 (2007) (discussing courts' capacity to take "a 'hard look' at agency actions emanating from informal rulemaking proceedings and other agency actions based on less than full trial-type records").

opinions more weight than the procedures and reasoning evident in their production merit. By tying the weight of such opinions to indicators of quality, courts can encourage professional associations to follow best practices without rigidly demanding high-cost investments in efforts to provide plausible, even if imperfect, guidance to bar associations' members.<sup>114</sup>

The contention here is not that judicial "hard look" review of ethics rules and opinions is a panacea. No one would contend that such review is perfect and unproblematic even in administrative law contexts where it has long been deployed. The point is that hard-look review for reasoned decision-making is something that courts already do regularly and that such review seems well designed to help with many of the defects in current ethics rulemaking highlighted in Parts II and III.

#### A. *Judicial Policing of Procedure and Substance in Rulemaking*

Consider the courts' treatment of the generation of binding substantive rules. When administrative agencies issue such rules, both federal and state courts commonly enforce requirements of notice-and-comment rulemaking that are meant to give interested constituencies—regulated parties, public interest groups, concerned citizens, other government bodies, and politicians—a meaningful opportunity to respond to a proposal for new rules, including by suggesting alternatives. Even without insisting that all constituency groups have seats at the drafting table—which we will assume, for purposes here, to have seats populated by members of the bar—their capacity to make comments on proposed rules can have a significant role in shaping the rules, the provision of justifications for them, or the rules' later invalidation. In the agency context, courts have policed the meaningfulness of notice-and-comment rulemaking not only through enforcing bar requirements that members of the public have an opportunity to comment on a proposal for rulemaking but also by demanding that any agency's notice of proposed rulemaking place the public fairly on notice of the potential content of the rules under consideration.<sup>115</sup> Courts also require that an agency respond satisfactorily to relevant comments, either by tailoring ultimately issued rules accordingly or by providing a reasonable explanation by the time of rule issuance of why, for example, the agency found a critique to be unconvincing.<sup>116</sup>

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114. To the extent courts fail to follow the recommendations set forth in such guidance in situations where attorneys might have reasonably relied on it, courts can mitigate the effects for potentially surprised members of the bar by limiting the consequences for past violations of a previously unclear rule.

115. See Richard J. Pierce Jr., *Waiting for Vermont Yankee III, IV, and V?: A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 903 (2007) (noting "the two requirements that a final rule must be a logical outgrowth of the rulemaking process, and that an agency must disclose, in its notice of proposed rulemaking, any studies or other data sources on which the agency proposes to rely when it issues its final rule").

116. See *id.* at 907 (noting how hard look review can result in reversal of agency action "because [the agency] did not adequately consider one or more of the scores of decisional

These demands for a meaningful opportunity to comment and for contemporary responsiveness to comments can help substitute for assembling all relevant interest groups at the drafting table *ex ante*. Indeed, in combination with the requirement of fair notice, these requirements can help ensure that relevant interest groups are in fact canvassed, even in advance of a rulemaking proposal, to help avoid undue surprise in reaction to the ultimate form that a rule takes after any rejiggering in light of comments.<sup>117</sup> Moreover, such interactions and those that occur during the later comment period itself can effectively substitute for the actual provision of a seat at the drafting table by leading the formal drafters to shape or reshape the relevant rules in ways suggested by interested persons' feedback. This provision for a substantial and enforceable channel by which outside parties can influence the rulemaking process can help answer the criticism that having bar associations draft ethics rules "is a classic case of 'the fox guarding the henhouse,' and thus unacceptable."<sup>118</sup> Although the answer is no doubt imperfect, judicial insistence on such reasoned responsiveness can help ensure that advantages of expertise and efficiency gained from using a professional association as a formal rule drafter do not entirely swamp concerns about the association members' potential biases. To the extent such concerns remain substantial, courts may properly insist on adequate representation of distinct, relevant sectors of the bar in the drafting process and, as Baker has suggested, should insist at a minimum on transparency regarding the interests and expertise of those with seats at the drafting table.<sup>119</sup>

Of course, the requirement that the rulemaker respond contemporaneously, either through tailoring of a draft rule or through explanation of the failure to tailor, is crucial to helping ensure that this virtuous cycle of seeking input

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factors, critiques contained in comments, data gaps or inconsistencies, or plausible alternatives to its proposed rule").

117. Federal administrative law provides a formal statutory route for such canvassing—indeed for seeking consensus among diverse interests on a draft rule—through its provisions for so-called "negotiated rulemaking," a process in which an agency "form[s] a stakeholder committee . . . and then employ[s] the stakeholders' consensus-based rule (if a consensus is formed) as the proposed rule on which the public comments." Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J.L. & POL'Y 207, 219 (2017); see also 5 U.S.C. §§ 561–570a (setting forth "a framework for the conduct of negotiated rulemaking"). Negotiated rulemaking has not escaped controversy. See William Funk, *The Future of Progressive Regulatory Reform—a Review and Critique of Two Proposals*, 94 CHI.-KENT L. REV. 707, 723–24 (2019) ("Ever since the Administrative Conference of the United States (ACUS) adopted a recommendation favoring the use of negotiated rulemaking in certain circumstances, there has been a lively literature extolling the benefits of such rulemaking or doubting its benefits."). Nonetheless, experience with negotiated rulemaking's pluses and minuses might productively inform how a rule drafting process for legal ethics could seek to actively involve people beyond bar association members in early stages of discussion and drafting.

118. Schneyer, *supra* note 8, at 41.

119. *Cf. Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) ("Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public . . .").

and properly responding to it in fact occurs. Hence, it makes sense for courts to demand that such responses indeed occur contemporaneously: courts generally demand that agency action be justified based on the agency record at the time of the rule's issuance, rather than through post hoc reasoning or evidence.<sup>120</sup>

In the ethics context, a demand for a professional association rulemaker to engage in a notice-and-comment process and then to respond satisfactorily and contemporaneously to comments might substitute for a more specific demand for cost-benefit analysis along the lines of that advised by Baker. In some contexts, cost-benefit analysis might not be a particularly promising or enlightening way to assess the advisability of a new rule. In contexts where cost-benefit analysis is feasible, relevant, and enlightening, commentators who have concerns about a proposed rule might be expected to suggest that it fails such analysis. The rulemaker's duty to respond satisfactorily can then provide a context-dependent trigger for it to engage in such analysis responsively, rather than requiring that the rulemaker engage in cost-benefit analysis in all contexts and in the first instance, even when unpromising.

A further check on the quality of ethics rulemaking would come through courts' engagement in hard look review of final rules for reasoned justification in the rulemaking record. Particularly where a court or professional association has flagged the purposes of a proposed rule in advance, the prospect of such review should act as a force, independent of a need to respond to comments, that encourages the rulemaker to affirmatively develop a record of quality evidence and reasoning in support of ultimately issued rules. In reviewing agency rules to check that they are not arbitrary or capricious, state—as well as federal—courts commonly give the rules a “hard”—even though deferential—look, checking “that the agency considered all the factors relevant to the objectives of the agency's delegated rulemaking authority, and engaged in reasoned decisionmaking.”<sup>121</sup> Furthermore, courts are to consider an agency to have acted arbitrarily if it: “(1) omits from its consideration a factor that the Legislature intended the agency to consider in the circumstances; (2) includes in its consideration an irrelevant factor; or (3) reaches a completely unreasonable result after weighing only relevant factors.”<sup>122</sup> A failure to explain the rejection of plausible alternatives that were contemplated at the time can provide grounds for a conclusion that the agency acted arbitrarily or capriciously.<sup>123</sup>

Such hard look review for reasoned decision-making can thus help ensure a baseline level of quality in the contemporaneous evidence and reasoning for a rulemaking result, even aside from particular feedback received through a notice-and-comment procedure. It can even help encourage a professional

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120. See, e.g., *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (holding that “courts may not accept appellate counsel's *post hoc* rationalizations for agency action”).

121. *Reliant Energy, Inc. v. Pub. Util. Comm'n*, 62 S.W.3d 833, 841 (Tex. App. 2001).

122. *Id.*

123. See *State Farm*, 463 U.S. at 46.

committee to use the notice-and-comment procedure to help flush out potential criticisms and gather further supporting evidence and argument, thereby rendering a bar association's ultimate rule proposal more robust against a later hard look by a state supreme court. In the ethics rulemaking context, such review could also provide a further, circumstance-specific means of effectively requiring cost-benefit analysis by a rule drafter where it is apt—for example, because the charge to the rule drafter by a state's supreme court or relevant professional association itself demanded explicitly or implicitly, through emphasis on the economic sensibility of any rule adopted, that such an analysis be done.

One objection to this hard look proposal for new legal ethics rules could be that when large rules packages are at issue, the demands on the judiciary for ex ante hard look review of all proposed rules before their adoption may be too demanding. Of course, this concern about the resource limitations of the judiciary—in particular, state supreme courts—brings back to mind Part I's suggestion that more radical reform to processes of ethics rulemaking may be desirable.<sup>124</sup> In the meantime, however, one possibility for state judiciaries in such situations could be to permit challenges to new rules for some reasonable time after what might be viewed as their provisional adoption. The courts could then rule on the validity of specific ethics provisions challenged by parties before them in what amount to discrete actions, returning judicial officers to a zone of greater comfort in which they rule on questions of process and, with appropriate deference, on matters of substance, in response to disputes brought before them by outside parties.

#### *B. Giving Weight to Opinions in Accordance with Evidence of Quality*

In relation to ethics opinions as opposed to proposed rules, the question is the extent to which those opinions should have influence on a court's later decision in an individual case. Here, the courts can give weight to these opinions in a way that at least encourages professional associations to use best practices in producing and justifying them. The U.S. Supreme Court's discussion of the weight to give an agency's interpretation of a statute in *Skidmore v. Swift & Co.*<sup>125</sup> provides a model for how a court can calibrate the weight, or degree of deference, that it gives to such an opinion in a way that effectively rewards indicia of opinion quality. In *Skidmore*, the Court explained that, when an agency interpreted a statute for which it had special responsibility, the Court would treat the agency's opinion as “constitut[ing] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>126</sup> But the Court emphasized that “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its

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124. *See supra* Part I.

125. 323 U.S. 134 (1944).

126. *Id.* at 141.

consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”<sup>127</sup>

*Skidmore*'s multifactor analysis and sliding scale of deference have drawn fire in administrative law for failing to provide enough advance clarity about the weight to be accorded agency interpretations. But such an approach seems, if anything, more appropriate and defensible for a situation in which a court might be the first government actor to make a definitive judgment on the meaning of a particular ethics rule and the weight to be accorded a private professional association's opinion—or, perhaps even more specifically, the opinion of a committee of a private professional association—about the rule's proper interpretation. In the ethics context, there seems no basis for substantial doubt that a court needs to make its own judgment about the rule's meaning. But as with expert testimony that might be presented to a court on other issues, a professional association's ethics opinion may provide useful guidance and, to the extent it reflects reasoned and well-informed deliberation, may well merit substantial weight. Moreover, as indicated above, by making clear that the weight accorded such an opinion depends on the quality of the process and reasoning that generated it, a court can help promote the production of well-reasoned ethics opinions in the future.

#### CONCLUSION

The basics of the modern system for the regulation of American lawyers have been in place for over a century—this system is fundamentally decentralized, relying on the separate work of high courts of the states and their local bar associations. Historically, it seemed natural to vest in high court judges the power to regulate the practice of law. However, the rapidly changing nature of lawyering has placed much stress on the system of decentralized self-regulation that has resulted. This system of bar-mediated rulemaking has failed to produce ethics rules that properly address the complexities of modern law practice. In combination with procedural failings of the processes for developing and interpreting ethics rules, these substantive failings cause various aspects of present-day ethics rules to appear either arbitrary or capricious, or at the very least, ill-suited to promoting the sort of healthy legal profession that society needs.

Administrative law points to ways to address this problem by providing guidance on how courts can promote reasoned decision-making in ethics rulemaking and opinion issuing. Courts have long deployed approaches to enforcing requirements of reasoned decision-making on administrative agencies. They should adapt these techniques and experience to help police the quality of regulation meant to demand and encourage ethical behavior by lawyers, while also helping ensure societal access to critical legal services.

Courts responsible for the adoption of ethics rules can help ensure reasoned decision-making in these rules' development by applying approaches that the courts already deploy in reviewing administrative agency

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127. *Id.*



rulemaking to the consideration of bar-drafted rules. In so doing, courts can demand that the drafters provide notice of proposed rules to interested stakeholders and give them a chance to comment on relevant topics. Perhaps courts can even borrow from administrative law the concept of permitting interested persons to file a petition for rulemaking, thereby allowing interested stakeholders to ask a relevant rule drafting body for consideration of new issues facing the legal profession.<sup>128</sup> Courts might then have a mechanism to review a failure of the rule drafting body to respond positively to such a petition.<sup>129</sup> State rulemaking bodies might thereby become more responsive to the interests of members and even nonmembers in the bodies' addressing of legal developments not reflected in the content of the ABA's Model Rules.<sup>130</sup>

Judicial demand for reasoned decision-making would likely push participants in ethics rulemaking to conduct studies, research, and hearings in order to provide reasoned justifications for rulemaking. Notice and comment would aid in information gathering, as well as in giving interested stakeholders an opportunity to raise new questions. By conditioning the weight accorded to ethics opinions on the quality of processes used to produce them, courts can similarly encourage ethics opinion committees to adopt best practices, especially in issuing broad-based guidance that predictably has effects comparable to those of a rule amendment itself.

Judicial review of administrative decisions provides a framework for ensuring that legitimizing procedures are followed and that substantive decisions are justified by the evidence. Extension of relevant aspects of the standard administrative law framework to judicial oversight of ethics rulemaking can provide incentives for relevant actors to improve the state-bar-mediated processes for rulemaking for the legal profession.

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128. *See* 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”); *id.* § 555(e) (“Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.”).

129. Administrative law's reasoned decision-making requirement can be applied both to a denial to take up a petitioned-for rulemaking and to any explanation (or lack of explanation) for such a denial. *See, e.g.,* Massachusetts v. EPA, 549 U.S. 497, 533 (2007) (emphasizing that “once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute”).

130. An example of such an area is alternative litigation financing. In the last twenty years, non-law firm entities have sought to become investors in litigation by providing financial support to clients by covering expenses or expenses and attorneys' fees. These alternative finance transactions raise many ethics questions involving confidentiality, attorney-client privilege, control of the litigation, and conflicts of interest. *See generally* Bradley W. Wendel, *A Legal Ethics Perspective on Alternative Litigation Financing*, 55 CAN. BUS. L. J. 133 (2014). Although some state courts and state ethics opinions have addressed some of these issues, the ABA has not considered this topic in its ethics codes.