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OUR HOUSE, OUR RULES: THE NEED FOR A UNIFORM CODE OF BANKRUPTCY ETHICS.*

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A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.

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Recently, the National Bankruptcy Review Commission ("NBRC") promulgated its final recommendations to Congress.² Two recommendations related to bankruptcy ethics. Recommendation No. 3.3.3 relaxed—slightly—the "disinterestedness" requirement for counsel for the estate.³ Recommendation No. 3.3.4 suggested the nationwide admission of bankruptcy counsel: provided that an attorney was admitted in one United States District Court, the attorney could practice in any other bankruptcy court without the need for a *pro hac vice* admission.⁴ Whether or not these two proposals—or, in fact, any of the NBRC's proposals—ever make it into law,⁵ they raise an interesting question: is it time for us to scrap the current patchwork system and create a federal law of bankruptcy ethics?⁶

I think that the time *has* come. I've gone on record before to claim that state ethics codes provide little guidance to bankruptcy lawyers on such subjects as conflicts of interest⁷ and duties of lawyers toward their "official entity"⁸ clients in bankruptcy cases.⁹ Acceptable ethical behavior *outside* the realm of bankruptcy often doesn't work *inside* the realm of bankruptcy,¹⁰ and vice versa.¹¹ The lack of "fit" of state ethics codes isn't, by itself, a sufficient reason to justify a separate bankruptcy ethics code, but it's an important factor.¹² Another factor is that we've spent a long time skirting difficult decisions on certain key bankruptcy concepts, such as the relationship of the debtor-in-possession ("DIP") to the estate¹³ (which, in turn, affects discussions of "disinterestedness," among other things).¹⁴ It's time to think about pinning these concepts down, and thinking about them in an ethics context may clarify the problems in a way that simply rehashing the substantive bankruptcy law won't.

That last statement is pretty bold: that we can fix substantive bankruptcy law by fixing bankruptcy ethics rules. It's even more bold when you consider that, generally speaking, ethics codes are state codes. I'm actually suggesting that we step on the states' toes here and take over the regulation of bankruptcy attorneys ourselves—not on the basis of accidents of geography, but on the basis of relevant differences in practice areas.

States have the primary responsibility for regulating the admission, licensing, and discipline of attorneys practicing within their boundaries. Lately, though, there has been a push towards certain specialized codes of attorney ethics.¹⁵ In part, that push comes from a sense that the one-size-fits-all model of state ethics codes simply doesn't fit the reality of modern legal practice.¹⁶ The difficulty, of course, is that multiple sets of balkanized ethics codes might give attorneys *too* much leeway: somehow, attorneys could fall through the gaps in ethics regulation, and their subsequent unregulated behavior could cause untold disasters.¹⁷ In this article, I suggest that the opposite is true. Specialized ethics codes offer more coverage precisely because they fit the particular practice area better.

Bankruptcy needs its own ethics code.¹⁸ For one thing, because bankruptcy practice is a hybrid, combining transactional and adversarial aspects, the most common ethics codes—the Model Code of Professional

Responsibility¹⁹ and the Model Rules of Professional Conduct²⁰—don't give bankruptcy lawyers the appropriate ethical guidance.²¹ As bankruptcy lawyers scramble for ethics advice that the current system makes almost impossible to discern, they spend time on ethics that could be better spent on substantive bankruptcy law issues.²² And there's another reason: because bankruptcy law is federal law, bankruptcy is a good candidate for a²³ uniform, federal, specialized code of ethics.

In Part I of this article, I'll address the problems that arise when lawyers face multiple and overlapping layers of ethics regulation: the federal vs. state overlaps, and the "state 1" vs. "state 2" overlaps. I'll also discuss the influence that David Wilkins has had in arguing that "context"—the type of lawyering in which an attorney is engaged at a given time—should determine how best to regulate attorney ethics, and I'll describe some examples of current context-based ethics codes. In Part II, I'll develop a set of generalized rules for determining when a practice area should have its own ethics code, and I'll make the case for having a specialized code of bankruptcy ethics based on the peculiarities of bankruptcy law itself. Part III will review the obstacles inherent in creating a specialized code of bankruptcy ethics, and Part IV will take a first cut at suggesting what should go into that specialized code.²⁴

I. THINKING THE UNTHINKABLE: PROPOSING EVEN MORE SPECIALIZED ETHICS RULES

I'll be the first to say that my idea of a federalized ethics code is far from original. Professor Fred Zacharias (among others) has thought about the implications of such a code, and I'm only too happy to jump on his bandwagon.²⁵ Zacharias has recognized that lawyers often cross state boundaries in representing clients, both in transactional work and in litigation, and that various overlapping layers of regulation make it difficult for the lawyer—not to mention the client—to understand what the lawyer is permitted to do in a particular situation.²⁶

As a matter of fact, the problem isn't the *lack* of any federal ethics rules. The problem (or at least one part of the problem) is that the federal ethics rules simply add an overlay to the state ethics rules that may already govern the situation. Let's assume that I am appearing in the United States Bankruptcy Court for the Southern District of Calypso.²⁷ I'm certainly subject to the ethics rules of the state(s) in which I'm licensed. I may also be subject to any particular ethics rules that the United States District Court for the Southern District of Calypso has enacted, if the District Court has chosen not to apply the state ethics rules.²⁸ To make matters worse, it's possible that I may be subject to any local rules that the Bankruptcy Court in that district has enacted.²⁹ These rules may all be in sync on some issues, but they may also conflict.³⁰ When they conflict, which one governs my conduct?³¹ If the problem were only that bankruptcy lawyers were over-regulated by a multitude of different—and conflicting—ethics codes, that would be bad enough. But there's another problem: the absence of bankruptcy-specific rules that govern bankruptcy-specific problems. One example, which I've described *ad nauseam*, is the problem of shifting conflicts of interest.³² Professor Cynthia Baker points out another anomaly of bankruptcy law; because the general unsecured creditors pay the estate's legal expenses (the general unsecured creditors are much lower in priority of payment than are the estate's legal fees),³³ the estate's lawyers have very little incentive to perform a thorough cost-benefit analysis before performing legal services for the estate.³⁴ Under state ethics codes, lawyers are required to refrain from gouging fees.³⁵ Apparently, many lawyers for the estate have forgotten that requirement, and the Bankruptcy Code encourages, to a certain degree, their profligacy.³⁶ At some point, we need some way of sifting through the ethics rules and finding ones that *work* for bankruptcy lawyers.³⁷

A. Why taking context into account is a better solution than assuming that, in ethics, one size fits all.

Right now, we presume that generalized ethics rules make sense unless there's a powerful reason to carve out specialized ethics rules.³⁸ States like to regulate the lawyers practicing within their boundaries,³⁹ and they have a legitimate fear that losing their tight control might cause the overall quality of legal ethics to decrease. The states' fear takes two distinct forms: that bad lawyers will slip through the cracks if non-states interfere with attorney regulation, and that the non-states' ethics rules will be too lax. But the quality of legal ethics isn't improved by the uncertainty that our one-size-fits-all rules create.

In a series of influential articles, Professor David Wilkins constructed a theory of ethics that, as he put it, took context into account.⁴⁰ Wilkins's theory rejected the traditional notion that all of the roles that a lawyer had could be subsumed under one general paradigm,⁴¹ and he argued that the one-size-fits-all ethics rules created some improper incentives.

For example, he criticized what he termed the "boundary claim"—"the command that lawyers should zealously represent their clients' interests 'within the bounds of the law.'"⁴² He listed the three underpinnings of the boundary claim—that we can identify the "external constraints on lawyer conduct"; that we can apply those constraints consistently; and that the constraints were democratically derived⁴³—and he argued that, in fact, none of these underpinnings leads to a neutral application of the boundary claim. Instead, the vagaries associated with the boundary claim will inevitably force lawyers, when they must choose between loyalty to the client and loyalty to the system, to prefer loyalty to the client.⁴⁴

When the boundary claim—one of the central tenets of our ethics system—is itself indeterminate, what does that do to our confidence in the ethics rules? For me, it means that all of the harmonizing and compromising that we've done in order to develop rules reflecting the "floor" of acceptable conduct is our way of scrambling to piece together something that's been broken, and it means that the unitary rules aren't carved in stone. Those rules simply aren't sacrosanct, and lawyers shouldn't blindly assume that they all share a common background that can rest on one unitary ethics code.⁴⁵

Wilkins, however, isn't satisfied with using the community norms of each specialty to create separate codes of ethics. Some of those norms may well be dysfunctional and self-serving.⁴⁶ Instead, he advocates a context-based approach to regulating attorney ethics. He describes it better than I ever could:

A vast number of differences among lawyers might be considered relevant to the task of developing middle-level [context-based] rules. These factors can loosely be grouped into five broad categories. The first three—task (for example, litigation versus counseling), subject matter (for example, civil versus criminal), and status (for example, plaintiff versus defendant)—highlight differences in the roles that lawyers play and the procedural and substantive contexts in which they are asked to play them. The final two—lawyer (for example, sole practitioner versus large firm) and client (for example, individual versus corporate)—refer to differences among those performing and consuming legal services. Each of these broad categories appears relevant to the task of constructing middle-level rules of professional conduct.⁴⁷

Let's take that context-based, factor-driven approach and apply it to bankruptcy. "Task," at least in the context of a chapter 11, could involve everything from advising the debtor-in-possession as to its fiduciary duties (counseling), to hammering out a cash collateral stipulation (negotiation), to seeking to recover preferences (litigation), to preparing the schedules (accounting), to drafting the disclosure statement and the plan of reorganization (business planning and consulting and, sometimes, creative writing), to suing the former CEO—the one who hired you to represent the estate in the first place—for breach of fiduciary duty (depending on whom you ask, this is either the necessary protection of parties in interest or it's back-stabbing).⁴⁸ Bankruptcy practice is extremely task-specific.

In terms of "subject matter," most of bankruptcy is civil law, as opposed to criminal law, even though bankruptcy crimes do exist.⁴⁹ "Status" is more difficult to determine, given that parties swap roles in bankruptcy depending on the particular task at hand.⁵⁰ "Type of lawyer," in bankruptcy, really relates to "type of client": bankruptcy lawyers who represent consumer debtors often practice in smaller firms or as solos, given the financial constraints that their clients necessarily have.⁵¹ Although there *are* small boutique firms who practice commercial bankruptcy, as well as bankruptcy departments of larger firms, these commercial bankruptcy lawyers can be grouped together as lawyers whose work style is like other "big firm" lawyers: e.g., hourly rates, more time with each individual case. If we were to redesign the Model Rules along the lines that Wilkins has proposed, it's possible that bankruptcy lawyers would be better able to determine exactly how they should be behaving at a given time, based on the context of what they're doing. But it's also possible that,

because Wilkins's five factors collapse into four in terms of bankruptcy practice, we might need to spell the context out in our own, separate rules.

Wilkins himself has criticized his theory because, among other things, there's no easy way to draw lines that tell us *which* segments of legal practice to group together and there's no easy way to deal with the possibility that these specialized ethics rules will have their own overlaps and, hence, their own conflicts.⁵² And yet Wilkins was able to apply his theory in the context (no pun intended) of the Kaye, Scholer/Lincoln Savings thrift disaster.⁵³ His context-based approach is a good way to start thinking about specialized ethics codes.

B. Counting context in other systems: examples of specialized codes.

There are several actual and proposed ethics codes, all developed out of a sense that the current unitary code is outmoded and ineffective.⁵⁴ Maritime law has its own code,⁵⁵ much of which seems to impose general standards of good lawyering rather than dealing with particular maritime-related issues.⁵⁶ Tax lawyers, on the other hand, have specialized rules of conduct dealing explicitly with certain tax-related dilemmas.⁵⁷ The tensions faced by tax lawyers—and by other lawyers practicing before government agencies, such as the INS⁵⁸—tend to be of the type that forces a lawyer to choose between her duty to advocate for her client and her duty to be forthright with the government agency. The INS regulations are especially clear about which of those duties is paramount. Attorneys who try to pull the wool over the INS can find themselves barred from appearing before the agency (or worse).⁵⁹

There are numerous examples of actual and proposed codes,⁶⁰ but I want to spend time discussing four different practice areas in which specialized codes have come to the fore: federal prosecutors, military lawyers, family lawyers, and environmental lawyers.

1. Federal prosecutors

Federal prosecutors had, for several years, grumbled about a particular state ethics rule, the no-contact rule, which prohibited attorneys from communicating directly with represented persons absent the consent of the represented person's attorney.⁶¹ In general, the rationale of the no-contact rule ranged from the inherent sanctity of the attorney-client relationship to the protection of a represented person from the opposing side's manipulation in the absence of counsel.⁶² In terms of private lawsuits, the no-contact rule was an accepted⁶³ part of lawyer behavior. When it came to criminal actions, though, prosecutors—especially federal prosecutors—claimed that the no-contact rule unnecessarily interfered with their ability to investigate crimes. Federal prosecutors feared that their need to question witnesses (who might eventually become defendants) was chilled by the very real possibility of being disciplined by state ethics tribunals for making such unauthorized contacts.⁶⁴

Fed up with frustration over the conflicting overlay of ethics rules governing federal prosecutors, the Attorney General (well, actually, two of them—Thornburgh and Reno) decided to override state ethics rules in the area of pre-charge contacts with potential defendants.⁶⁵

[B]y the early 1990s, Department of Justice prosecutors who often must act in more than one state, and Assistant U.S. Attorneys, who, while based in one state are often members of a different state's bar, suddenly faced the prospect of personal bar licensing discipline for actions taken in pursuit of their official duties and authorized by their employer, the effect of which could not be predictably evaluated in advance. This situation was seen as having a concrete, adverse effect on the enforcement of federal criminal law, because reasonable prosecutors, if faced with the uncertain prospect of personal licensing discipline if they act, will forego even valid contacts with criminal suspects. Thus, when promulgating the final contacts rule in 1994, the Attorney General expressly noted "the chilling effect on prosecutors" that disciplinary uncertainty "has created," to the detriment of "legitimate investigative activities." She explained that a uniform regulation was necessary to "eliminate the uncertainty and confusion arising from the variety of interpretations of state rules."⁶⁶

In the view of the Department of Justice, these problems seemed to call out for federalization of federal prosecutors' ethics, at least with respect to the no-contact rule. According to the DOJ, prosecutors appeared in federal, not state, courts; they were not tied to a particular state's bar; and they needed consistent standards in order to do their jobs well. Nonetheless, many scholars questioned the wisdom of regulating prosecutorial contacts through the medium of a DOJ order. ⁶⁷

There's still quite a hubbub over the Attorney General's move, ⁶⁸ and the question remains whether the Attorney General or Congress should regulate the ethics of those who practice in federal courts. ⁶⁹ The most interesting development is the response from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, which favored, instead of the Thornburgh-Reno rule, the drafting of a local model rule to handle the prosecutors' dilemma. What was remarkable was that the Committee on Rules of Practice and Procedure preferred a local model rule to any proposed "uniform rule promulgated under the Rules Enabling Act." ⁷⁰

At first glance, there are many similarities between federal prosecutors' practice and the practice of commercial bankruptcy lawyers. Commercial bankruptcy lawyers spend the bulk of their court time in federal court, where the Federal Rules of Civil Procedure and Evidence converge with tailor-made Bankruptcy Rules. Commercial bankruptcy lawyers are often not tied to a particular bankruptcy court or even to a particular state. The big-firm lawyers have cases located everywhere from California to Georgia. Most of these lawyers aren't admitted in several different jurisdictions but appear *pro hac vice* in individual cases.

But there are also striking differences between the two types of practice. One obvious one is the difference between civil and criminal law. The DOJ's rules have Sixth Amendment implications that are well beyond the scope of this article. ⁷¹ And the difference between what the Attorney General did with respect to the no-contact rule and what I'm proposing ⁷² is that the AG didn't try to resolve all of the problems associated with multiple overlays of ethics rules. Instead of proposing ethics rules that govern all federal prosecutors in all situations, the AG focused on a task-specific problem (the no-contacts rule).

2. Military lawyers

In contrast to the AG's single-task approach, the Judge Advocate General of the Army has also promulgated special ethics rules, "generally based on the ABA Model Rules, with several changes to accommodate peculiarities of military practice." ⁷³ The need for a specialized code for military lawyers was clear and, by now, a familiar refrain: even though the lawyers in the military were being instructed to follow the precepts of the Model Code, many of them were also trying to follow their own licensing state's rules, and the conflicts among various ethics codes were creating a "damned if you do, damned if you don't" dilemma. ⁷⁴ The military was uncomfortable with the blurred, one-size-fits-all notion of an attorney's role and the Army Rules were designed to reflect the more multifaceted practice of military attorneys. ⁷⁵ Two types of lawyers could be covered by the military rules: those who were serving as military personnel, and those who were civilian lawyers affiliated with the military. Although it's easy to see the Judge Advocate General's authority as covering those who are "true" military, there doesn't seem to have been any major objection to the JAG's control over civilian lawyers who are military-affiliated. ⁷⁶ My guess is that the relief over having one set of rules eclipsed any resentment about *which* set of rules was adopted. ⁷⁷

When it comes to bankruptcy lawyers, how do we deal with the question of who has authority to regulate their conduct? We don't have a system in place like the military, where everything from food, shelter, and clothing to choice of domicile for tax purposes is regulated. ⁷⁸ For various reasons, we're willing to leave military personnel in their own separate, parallel world. But bankruptcy lawyers live in the world of state-regulated ethics. In order to regulate bankruptcy ethics, then, we're going to have to agree to supersede at least some of the states' power to regulate ethics. ⁷⁹

3. Lawyers practicing family law

I've said before that family law's conflicts of interest problems are the closest in kind to bankruptcy law's conflicts problems.⁸⁰ Both areas of law involve constantly shifting alliances: parties are bedfellows⁸¹ one minute and archenemies the next, only to be bedfellows again later.⁸² In addition, both bankruptcy law and family raise the dilemma of protecting third-party interests. Take, for example, the lawyer who represents a divorcing parent with a minor child. The client is the *parent*, not the child, and the client may want to treat the soon-to-be-ex-spouse in a heavy-handed manner. But the lawyer knows that mistreating the non-client spouse is likely to affect the child adversely.

Although it's possible, under current ethics rules,⁸³ for the lawyer to advise the client to be kinder to the non-client spouse for the sake of the child, some lawyers will interpret their ethical duty as requiring them to follow the client's initial retributive instincts.

Let's take another common situation in family law. Assume that several siblings hire a lawyer to help them draw up appropriate documents to care for an elderly parent. Perhaps the parent needs to be placed in a nursing home because of physical (not mental) infirmities. The siblings are the lawyer's clients; the parent is not. Assume everyone, even the parent, agrees on the nursing home outcome, so the sibling/client's interests are the same as the third-party/parent's interests. A few years later, things turn Dickensian, and one of the siblings wants to force the parent to change his will. Now the interests have realigned: the in-the-will siblings will side with the lawyer, and the odd-sibling-out's interests conflict. Obviously, the lawyer who helped with the nursing home documents will have serious problems taking on this new representation. And if, years later, the parent feels his mental facilities slipping and wants to give the odd-sibling-out the power of attorney,⁸⁴ then the parent and the odd-sibling-out are then aligned (possibly against the in-the-will siblings). Because family law and bankruptcy law have so much in common, it's comforting to me to see that family law is also seeking to create a specialized code of ethics,⁸⁵ and for the same reason: when it comes to family law, the one-size-fits-all model is a particularly poor fit.⁸⁶ And if family law, which is

primarily a state law practice, can consider having its own ethics code,⁸⁷ then certainly bankruptcy law, which is primarily federal,⁸⁸ should consider having its own ethics code as well.

4. Environmental law

If the realm of family law differs from the traditional advocacy model because family law practitioners must deal with their clients' often-shifting alliances⁸⁹ and with the interests of third-parties (e.g., the children), the realm of environmental law differs from the traditional advocacy model because environmental law—if it is to work well—requires parties to balance their personal needs with that of the environment as a whole.⁹⁰ In arguing that the "whole law" approach that the Office of Thrift Supervision urged in the *Kaye, Scholer* case⁹¹ should apply in environmental law, Professor Futrell reiterated that the traditional advocacy model couldn't—and shouldn't—apply to environmental law:

[T]he practice of environmental law demands even stronger regard for the public interest than does securities or banking practice. Environmental statutes are motivated by a broad need to protect the public, often from harms that may not be immediate but are far-reaching in their ability to disrupt and destroy Observance of ongoing reporting requirements is essential to the effective administration of these laws and regulations; strict liability for nondisclosure is common.

Environmental law cannot protect society unless environmental lawyers ensure that it does so. Guidance on how to resolve the conflicting demands of client advocacy and protection of the public interest in environmental protection will benefit not only the legal profession, but society as a whole.⁹²

As with bankruptcy law,⁹³ environmental law is based on a policy that requires parties to act cooperatively.⁹⁴ The traditional model of zealous representation—the boundary claim⁹⁵—doesn't fit environmental law well at all. But, then, it doesn't fit very many types of law well.

II. DECIDING WHEN A GENERALIZED ETHICS CODE ISN'T APPROPRIATE ⁹⁶

We can't set up a system in which commercial bankruptcy lawyers who practice primarily in the area of restaurant bankruptcies have their own set of ethics rules, commercial bankruptcy lawyers who practice primarily in the area of single-asset real estate have their own set of rules, and so on. The community of lawyers is simultaneously a single community (we're all lawyers) and a collection of smaller communities (we don't all do the same thing, even though we're all lawyers). Instead, we need to add to the analysis of people like Wilkins and Zacharias to determine when it makes sense to depart from the traditional generalist model. I've come up with one baseline question: does the substantive area of law have a poor "fit" with the generalist model of ethics? If the fit is good, then there's no point in taking the inquiry any farther. If, however, the fit is poor, then a series of second-order questions ⁹⁷ will help clarify whether changing to a specialized code would help. ⁹⁸

A. Baseline question: is there a poor "fit" with the generalist model?

There are a lot of reasons to favor the generalist model: lawyers across the practice spectrum share core values, and lawyers shouldn't have to memorize countless different ethics rules, all of which stem from the same basic sources. There would be little incentive to reject the generalist model if the assumptions underlying the generalist model were actually present in a given practice area. But where the assumptions aren't present, the problems of the generalist model far outweigh the advantages. In a system where lawyers are told to be zealous advocates, how can those lawyers balance the interests of related parties (e.g., in family law) or of the public good (environmental law)? In a system that is used to parties staying put and not switching sides, how can lawyers deal with dormant and temporary conflicts ⁹⁹ that may occur, on and off, during the course of a single representation? ¹⁰⁰ When the experts throw up their hands and decide *not* to resolve ethics issues specific to a practice area, ¹⁰¹ that's a sign that *something* has to give.

In previous articles, I've suggested that bankruptcy law doesn't fit the generalist model at all well. ¹⁰² As I've mentioned above, ¹⁰³ bankruptcy law involves a mishmash of tasks along the continuum from counseling skills to adversarial skills. ¹⁰⁴ If that were its only distinction, bankruptcy law wouldn't be much different from other types of law: lots of practice areas involve a combination of counseling and adversarial interaction. And yet there are differences. Bankruptcy law involves the type of side-shifting seen in such areas as family law and (occasionally) corporate law. ¹⁰⁵ It is a federal system that, for the most part, debtors (at least most of them) choose to use. ¹⁰⁶ And it can involve a debtor in one state, property in another, and creditors in a third. Moreover, the bankruptcy system, unlike the traditional class action, doesn't allow all of the interests affected by the bankruptcy to opt into the "class" of "creditors." ¹⁰⁷ And it is a system that considers itself to be court-monitored but often allows activities that never see the inside of a courtroom. ¹⁰⁸

It is also a system for which the adversarial model (which is itself part of the generalist model) completely misses the boat. Each bankruptcy case involves the debtor (or debtor-in-possession) and creditors in a court-monitored resolution of rights. In fact, bankruptcy cases have long been compared to class-action suits. ¹⁰⁹ But in bankruptcy, the parties can align and realign several times during the course of a single case, based on which issues are raised. ¹¹⁰ The side-switching in bankruptcy is quite unlike the norm in a class action, in which the plaintiffs stay plaintiffs and the defendants stay defendants—always opposed to each other. ¹¹¹ The side-switching is a powerful reason to reject the generalist code in the bankruptcy context. ¹¹² Conflicts rules that were designed for the traditional "plaintiff vs. defendant" model serve no one well in bankruptcy, ¹¹³ and courts that steadfastly apply the unbending state rules in their conflicts analysis ignore the constant side-switching that parties in interest in bankruptcy do: creditors siding together against the debtor; the debtor-in-possession siding with a secured creditor on a cash collateral order that may prejudice other, unsecured creditors; two unsecured creditors voting to accept a plan of reorganization after going after each other, tooth and nail, regarding one creditor's preferential payment. ¹¹⁴ Bankruptcy, then, is a hybrid of court and non-court activity, and the less it behaves as a traditional adversarial model, the less we should use traditional adversarial models of ethics to govern bankruptcy lawyers' behavior. ¹¹⁵

Even the few inroads regarding specialized bankruptcy ethics, such as the "disinterestedness" requirement for professionals hired to represent the bankruptcy estate—as set forth in sections 327(a) ¹¹⁶ and 101(14) ¹¹⁷—have been inconsistently applied, thanks to the overlay of state ethics codes. ¹¹⁸ Bankruptcy courts have been extremely inconsistent in deciding what "disinterestedness" means: some apply the Bankruptcy Code's own definition of "disinterested;" some use their home state's rules on conflicts of interest; and some use the Model Code or the Model Rules. ¹¹⁹ The result of this confused search for the "right" definition of "disinterested" is that debtors—in-possession can't know, when they seek approval of counsel to represent them, whether they'll get counsel familiar with their case or brand-new counsel who must be brought up to speed. ¹²⁰ Surely the additional costs associated with that inconsistency detract from the goal of reorganization.

I'm not going to reinvent the wheel here. I've made it clear in other articles that I believe that bankruptcy ethics don't fit within the generalist model of state ethics codes. ¹²¹ So my baseline question is answered. ¹²² Let's see where the answers to my second-order questions take us.

B. Second-order questions

It would be too facile to say that every situation involving slightly different permutations of law should have its own ethics code. There should be additional requirements before we make the radical decision to depart from the generalist model. I've isolated four additional questions that could resolve the issue in favor of a specialized code. I believe that these questions, asked in the context of bankruptcy law, point to a strong justification for a separate code of ethics.

1. Is the system populated primarily with repeat players? ¹²³

The whole point of an ethics code is to describe the range of acceptable behaviors within a given community. ¹²⁴ The community establishes the norms and enforces them. The more similar the members of the community, then the more the ethics code will reflect the mainstream beliefs of that community. If the community is a closed system composed primarily of repeat players, then there's an incentive to abide by those norms in order to survive in that community. ¹²⁵ Community norms are important, and not just because they dictate what the members of that community should and shouldn't do. The norms are important because they spell out both rules (specifics about behavior) and standards (general principles from which appropriate behavior in a particular situation can be deduced).

At least in big cities, the community of lawyers generally is not a system of repeat players. ¹²⁶ There are too many practice areas and too many types of clients for us to say that big-city lawyers necessarily interact with the same colleagues over and over again. But various practice groups comprise mini-communities and, in those communities, repeat players are the norm. ¹²⁷ We can justify departure from a generalist code, at least in part, if we can be sure that our departure won't compromise the overall level of ethics practiced by those lawyers. ¹²⁸

With a few notable exceptions, ¹²⁹ most experienced bankruptcy lawyers instinctively understand the difference between ethical and unethical bankruptcy behavior. There's a core of repeat players, both consumer-side and commercial-side. They see each other at hearings; they pass each other in the court's hallways; they eat together at monthly meetings. ¹³⁰ That's not to say that they *practice* ethical behavior—just that they tend to know the difference between good and bad behavior. There are enough good bankruptcy lawyers out there that, given enough time and input, they could codify the good and bad behavior.

Part of our problem is the bankruptcy lawyer "wanna-bes": those lawyers who dabble in bankruptcy law. Sometimes they know enough to slide by. Sometimes they know enough to be dangerous. Often, they simply don't know enough. I've spoken with several bankruptcy judges who, when I mention that I've been thinking about proposing a uniform code of bankruptcy ethics, immediately ask that I include a rule regarding competency. ¹³¹ The current ethics rules don't tell novice bankruptcy lawyers how to behave as good bankruptcy lawyers. ¹³² Because we do have talented repeat players in bankruptcy, it's important that we provide that guidance to the novices.

2. How many different layers of ethics jurisdiction exist?

In "the old days," ¹³³ lawyers didn't have practices spanning the entire country. Travel was just too difficult. At best, lawyers might have practices that covered their states, the neighboring states, and the federal courts sitting in those states. When the lawyer licensed in *state 1* appeared in a state court of *state 1*, that lawyer knew that his ¹³⁴ licensing state's ethics code governed his actions. The more "vertical" his practice (i.e., the more he practiced in state and federal courts in *state 1*), the more confusing the layers of ethics rules became, given that federal courts don't have to adopt the ethics rules of their "home" states. ¹³⁵ The more "horizontal" (*state 1* and neighboring *state 2*) his practice, the more likely it was that the lawyer would be subject to the ethics rules of his licensing state and those of the neighboring state. The more geographically broad the lawyer's practice became, the more layers of rules he had to juggle.

How does this factor cut in favor of a specialized ethics code? That question's not easy to answer. If it were true that states were the *only* ethics regulators (and if it were true that each state's ethics jurisdiction was clear-cut and non-overlapping), I'd be hesitant to supplant state power. But states nestle against each other, ¹³⁶ and federal courts overlap state courts. ¹³⁷ Some regulatory agencies have their own ethics rules or enforcement mechanisms. ¹³⁸ I'm not proposing that we take a simple system and make it more complex. I'm proposing that we take a complex system and clarify it. In terms of simplicity alone, ¹³⁹ when one is faced with a multiplicity of state regulations and a single practice area, wouldn't it be easier to regulate behavior by practice area? States might not like to cede their power in this area, ¹⁴⁰ but the practice area solution may be the more elegant choice.

3. How easy is it to impose a uniform code on the entire practice area?

One of the reasons that states can regulate attorney ethics is that they have licensing authority. They hold the ticket to the authorized practice of law. If smaller entities, such as cities, had licensing authority, things would get ugly pretty quickly. ¹⁴¹ The beauty of state licensing is its simplicity. Unless the new, uniform code has the equivalent ease of enforcement, supplanting the state ethics code probably is a bad idea. ¹⁴²

Thanks to the Constitution, bankruptcy law has that ease of enforcement. Because the Constitution provides explicitly that Congress shall make the bankruptcy laws, ¹⁴³ Congress could decide to create a concomitant code of bankruptcy ethics. ¹⁴⁴ Bankruptcy law is as federal as it gets, even though it imports some concepts of state law, such as exemptions and property rights. Regulating bankruptcy ethics through Congress or through the federal courts' rulemaking powers seems infinitely easier than regulating bankruptcy ethics through a state-by-state amendment to the "regular" ethics rules. ¹⁴⁵

4. Do the benefits of a single code for the practice area outweigh the disadvantages of abandoning state experimentation?

Some practice areas have already suggested that they be regulated by their own special rules. ¹⁴⁶ These practice areas have decided that state experimentation (the traditional "states as laboratories" explanation of federalism) ¹⁴⁷ can't provide lawyers practicing in their areas with appropriate ethical guidance regarding the peculiarities of their day-to-day problems. Why *would* a geographical grouping (e.g., states) necessarily be better than a practice-area grouping as a laboratory for improvement of ethics codes? ¹⁴⁸

Still, making the leap from the tried-and-true of state regulation to a new federal system isn't easy—or safe. The first round of a new ethics code is going to have gaps in coverage and outright missteps. ¹⁴⁹ Drafting a new code isn't something we should take lightly. ¹⁵⁰ I'm obviously in favor of making the decision to reject state experimentation in the area of bankruptcy ethics, but mine is a tricky proposition. The fear of balkanized ethics codes is real and legitimate. Lawyers in various practice areas are still part of the larger community of lawyers and should be bound by some general, agreed-upon norms. ¹⁵¹ The decision to depart from the generalized code must involve more than just the "my area's different from yours" notion. There should be serious gaps in regulation (or outright misdirection) that the generalized code is incapable of resolving before a practice area shifts to a more specialized ethics model. ¹⁵²

I'm not alone in seeing a need for a federal code of ethics for certain specialized areas of law.¹⁵³ In fact, I think that I may be one of the *last* people to get on that bandwagon,¹⁵⁴ as more and more people discover that federal practice certainly doesn't involve "federal" ethics.¹⁵⁵ But I know that the bandwagon for a uniform code of bankruptcy ethics still has plenty of seats.¹⁵⁶ In addition to the generally poor fit of state ethics rules with bankruptcy law, a subject that several of us have already discussed in numerous articles,¹⁵⁷ there are other, more upbeat issues to consider.

C. Advantages of adopting a separate code of bankruptcy ethics.

Adopting a separate code of bankruptcy ethics is not just a question of going from "bad" to "neutral." There are some advantages to such a move—advantages beyond simply fixing the current situation.

1. Easing (slightly) the problems of multijurisdictional advice and the unauthorized practice of law in bankruptcy.

Multijurisdictional practice is not the sole province of bankruptcy lawyers.¹⁵⁸ Lots of lawyers travel from jurisdiction to jurisdiction, doing a merger here, an acquisition there, a mass tort lawsuit somewhere else. And each of these multijurisdictional lawyers face the same problem: the better they are, the more

their skills will be in demand, and the more different jurisdictions they'll practice in. The high-profile lawyers aren't admitted in all fifty states,¹⁵⁹ so how are they handling questions of unauthorized practice? I'm sure that they're walking the line of unauthorized practice.¹⁶⁰ Would a uniform code of ethics, superseding all state ethics codes, avoid the problem of unauthorized practice of law? Of course not. As long as lawyers are giving advice on the laws of states in which they're not licensed, this problem won't go away. But with a single area of law, a single code of ethics *related to that substantive law* would at least give the lawyers less to fear in terms of disciplinary action.

Let's look at the practice of bankruptcy law. It's likely—but not uniformly true—that lawyers who practice consumer-side, debtor-oriented bankruptcy law may limit their practice to a single region.¹⁶¹ Even so, they may still find themselves having to give advice to in-state clients concerning legal issues of another jurisdiction. For example, an Ohio lawyer may have to advise an Ohio client on whether a Kentucky statute of limitations on a personal injury claim based on activities in Kentucky has expired. May that Ohio lawyer, who is not licensed in Kentucky, give a legal opinion based on Kentucky law?¹⁶² Life may get significantly more complex for lawyers practicing commercial-side bankruptcy.¹⁶³ A lawyer in an Ohio firm may well find herself giving advice to a Kentucky client on a California bankruptcy.¹⁶⁴

Not that long ago, a number of scholars addressed the question of whether lawyers have to be licensed in all fifty states in order to avoid charges of unauthorized practice of law or whether a choice of law rule, such as Model Rule 8.5, might be an easier, more elegant solution.¹⁶⁵ On the whole, they've come up with some pretty scary answers. Lawyers who have engaged in the unauthorized practice of law can reap punishment ranging from injunctions and contempt orders to criminal charges.¹⁶⁶ Even a fifty-state license wouldn't completely solve the problem, though, because the ethics rules of all fifty states invariably conflict on some issues.¹⁶⁷

Of course, yet another fix would be for states to adopt identical ethics rules.¹⁶⁸ But if states are supposed to be the laboratories of the federal system,¹⁶⁹ there's not much point to requiring *state* uniformity. On the other hand, we'd hate to give up the laboratory concept so completely when it comes to the sensitive subject of ethics.¹⁷⁰ As I'll discuss below, a balkanized code of ethics for certain federal practice areas might be the only decent, albeit imperfect, compromise.¹⁷¹ One of these federal practice areas is, of course, bankruptcy. When we talk about the problems of multijurisdictional practice, bankruptcy lawyers—*especially* those involved in the commercial bankruptcy area—have a pretty hefty need for some relief.

2. Uniformity as a goal in any specialized federal practice

Although others have made a persuasive case for creating a federalized ethics code for those who practice in any federal court,¹⁷² my focus is, of course, bankruptcy practice. Bankruptcy is federal law,¹⁷³ so our current practice of passively permitting different state ethics rules to affect this federal practice area may undercut the Constitution's purpose(s) in making it federal.¹⁷⁴ It is impossible to think of bankruptcy law's substantive rights as truly federal when we have state-licensed lawyers looking over their own shoulders,¹⁷⁵ trying to decide how they can advise their clients without running afoul of rules that might leave them open to disciplinary sanctions.¹⁷⁶ The problems that federal prosecutors have faced¹⁷⁷ are mirrored by the problems facing bankruptcy lawyers, and the "fix" should be roughly the same (although, as a card-carrying member of the ACLU, I'm not expressing an opinion on the propriety of the DOJ's fix).¹⁷⁸

3. A segue for people who love codes too much

When I presented an earlier draft of this article, some of my colleagues suggested (correctly) that I was an academic "who loved codes too much."¹⁷⁹ I don't deny it. I love the Uniform Commercial Code because, overall, its drafting has eased some of the problems that commercial lawyers faced with earlier, non-uniform rules.¹⁸⁰ I love the Bankruptcy Code because it tries very hard to regulate the complex relationship between debtors and creditors.¹⁸¹ My suggestion of a uniform bankruptcy ethics code probably does stem in part from my more general love of codes.¹⁸² Just because I love codes, though, doesn't mean that I'm blind to the problems of creating a brand-new one. But the other alternatives—leaving the system the way that it is; creating new Restatement provisions for bankruptcy ethics¹⁸³—make me very queasy. The Bankruptcy Code would work more smoothly if bankruptcy lawyers understood their ethical duties.¹⁸⁴

III. OBSTACLES TO A UNIFORM CODE OF BANKRUPTCY ETHICS

If you've made it through this much of my article, then you probably have an uneasy feeling yourself right about now. Why should we adopt a uniform code of bankruptcy ethics when such a code is tricky to implement, virtually impossible to draft, and ultimately not a complete fix? The answer boils down to this: a uniform code is better than all of the other alternatives. Let's walk through the main problems.

A. Federalism issues: can we impose a separate code of ethics?

The first problem is that, in general, the states regulate attorney ethics, and the states aren't going to want to give up their power in this area.¹⁸⁵ The federal government can't usurp the states' power entirely,¹⁸⁶ although the Supremacy Clause¹⁸⁷ will govern in a state vs. federal law clash, at least where Congress clearly intended to supersede state regulation.¹⁸⁸ But federal courts *are* allowed to make and enforce ethics rules for attorneys who practice before them.¹⁸⁹ And when it comes to attorney conduct in federal courts, the "states as laboratories" argument doesn't quite work.¹⁹⁰

Think about it: bankruptcy courts are allowed to regulate attorney conduct for the attorneys appearing before them.¹⁹¹ The current system, with its multiple layers of ethics rules, lets a state court discipline its licensed attorney for any misbehavior in the bankruptcy (exclusively federal) courts.¹⁹² In fact, it's possible that an attorney appearing (and misbehaving) in the United States Bankruptcy Court for the Southern District of Calypso¹⁹³ would be subject (1) to the ethics rules of the United States Bankruptcy Court for the Southern District of Calypso, (2) to the state of Calypso's rules (if the attorney was also licensed in Calypso), and (3) to the attorney's other licensing states (if any).¹⁹⁴ If the attorney appearing before the Calypso bankruptcy court wasn't licensed to practice in the state of Calypso and was giving advice about Calypso state law (e.g., perfection of a security interest in certain collateral), then the attorney might be subject to unauthorized practice sanctions as well.¹⁹⁵ Is that how we want to regulate practice in the federal bankruptcy system?¹⁹⁶

Of course, we could try to apply a choice-of-ethics-law rule, which is what Model Rule 8.5 is all about.¹⁹⁷ But that choice-of-law rule works about as well as the other choice-of-law rules, which is to say, not very well.¹⁹⁸ So let's re-examine how we *should* regulate bankruptcy ethics.

Federal courts have the power to regulate attorney conduct through bankruptcy rulemaking.¹⁹⁹ Kenneth Klee has a pithy description of that process:

Turning to the process for promulgating Rules, it is hard to conceive of a less efficient process. Congress has delegated the promulgation of rulemaking to the Supreme Court which in turn has delegated the problem to the Judicial Conference of the United States. The Judicial Conference in turn has delegated the task to its Committee on Rules of Practice and Procedure ("Standing Committee") which has set up an Advisory Committee on the Federal Rules of Bankruptcy Procedure ("Advisory Committee"), whose members are appointed for three-year terms by the Chief Justice.²⁰⁰

The system for rulemaking is both painstakingly thorough and extremely time-intensive.²⁰¹ Part of the reason for the long timeline is that the bankruptcy rulemaking power is limited in two ways by 28 U.S.C. § 2075. First, section 2075, as amended, doesn't permit the rules to "abridge, enlarge, or modify any substantive right."²⁰² As Alan Resnick observes, the line between substantive rights and procedural rules is sometimes paper-thin, so this restriction is pretty tricky.²⁰³ Second, unlike the other federal rules, governed by section 2072 (which permits the rules to supersede conflicting laws), bankruptcy rules, governed by section 2075, "are the only federal rules that may not conflict with a procedural statutory provision."²⁰⁴ Making sure that proposed rules don't run afoul of these restrictions adds months, if not years, to their promulgation.²⁰⁵

In thinking about using bankruptcy rulemaking to resolve ethics problems, we certainly don't want to go the "local" or "local-local" rule route,²⁰⁶ which would give us the worst of both worlds: non-uniform rules and drafters who are even less insulated from the pressure of local lawyers than are the members of the Advisory Committee. We may well want to go the national rulemaking route, though, given who *writes* those rules: articulate and erudite judges, law professors, and lawyers who have been able to set aside considerable time to devote to the rulemaking process.²⁰⁷ Or we may want to ask Congress to revamp the Bankruptcy Code itself, expanding its few ethics rules²⁰⁸ to cover many more ethics issues.²⁰⁹

Before we get to where we should place the responsibility for creating a uniform code of bankruptcy ethics, though, one caveat. Remember that I'm not suggesting that every specialty and sub-specialty of law should have its own ethics code. I really don't want to go that far. At the same time, creating a federal ethics code, irrespective of practice area, in which lawyers appearing in federal court would always be exempt from state disciplinary sanctions, *would* intrude too far.²¹⁰ There are some aspects of lawyer behavior that we really should leave to the states. A public good is created when states are responsible for lawyers' behavior within their jurisdictional confines—most people who hire attorneys aren't repeat players, and state licensing and discipline provides the primary²¹¹ quality control for consumers of legal services.²¹² The trick, then, is to decide which aspects of ethics regulation should belong to the states and which ones should belong to the practice areas.²¹³

B. Who should regulate bankruptcy ethics?

Assuming that I'm right—that states and their generalized codes really aren't up to the job of regulating bankruptcy ethics²¹⁴—then we still have to choose a body that *can* handle that sort of regulation. Our main choices are Congress and the federal courts (per their rulemaking power). I'm leaving out the ALI and the Restatement (Third) on the Law Governing Lawyers because the ALI doesn't seem to want "in" on this particular job.²¹⁵

1. "Capture" and related issues.

In deciding where to place the responsibility for drafting the specialized bankruptcy ethics code, considerations of public choice theory and concepts such as the "race to the bottom" and "capture" are appropriate and helpful.²¹⁶ As I understand this stuff, though, entities that are in charge of drafting legislation run the risk of being "captured" by groups that overtake the process to the detriment of other, less powerful groups.²¹⁷

Capture is just one of the awful possibilities, though. Even if one group doesn't take over the process, turning it to its own advantage, there's still the possibility that the rule drafters—wanting to make sure that they draft rules that will actually be promulgated—will water down those rules, creating a race to the bottom.²¹⁸ Deciding where to place the responsibility for drafting a rule essentially involves determining how best to minimize the capture and race to the bottom risks.²¹⁹

Capture. I believe that Congress has the authority to adopt rules of ethics governing attorneys practicing in federal bankruptcy courts.²²⁰ Of course, one of

the side-effects of having a federalized ethics code is that Congress, that purported master of well-drafted statutes, will take over the regulation and do its usual, less than adequate, job. No matter how hard I try, I can't come up with a legitimate cure for Congress's lack of drafting ability. Nor can I come up with a way to prevent the potential lobbying by bankruptcy lawyers that will ensue once it becomes clear that Congress will be creating ethics rules in this area. I also think that Congress is more likely to be—if not captured, exactly²²¹—lobbied like mad to make the ethics rules more lawyer-friendly.²²² Congress is a big institution, accessible to several groups. Members of Congress have to look over their shoulders constantly to make sure that they can continue to be re-elected. If bankruptcy is an issue to which voters will pay attention, then Congress will spend a great deal of time posturing and planning so that the rules will enhance re-election chances.²²³ Score in terms of capture: Congress, 0; Advisory Committee, 1. On the other hand, the Advisory Committee members are appointed, not elected, and presumably are less subject to capture. But the Advisory Committee is also less responsive to input from outsiders, at least until the public comment stage.²²⁴ Which should bother us more—the capture issue or the "insufficient input" issue?

Race to the bottom. When we're talking about a uniform rule that the various states may or may not adopt, then the race to the bottom means making sure that the drafted rule is attractive enough to every state that there won't be an exodus from a state with a more stringent rule to one with a more lax rule. That tendency then creates across-the-board laxity because the stringent state will prefer even the lax rule to a potential exodus. When we're talking about the development of a federal rule that will apply across the board, though, then the race to the bottom isn't a problem. There's nowhere for the "less ethical" bankruptcy lawyer to flee, as long as the federal bankruptcy ethics rules supplant the state ethics rules in bankruptcy cases.²²⁵

Going the route of Congress or national judicial rulemaking is infinitely better than relying on some form of local group rulemaking, such as local district courts. Asking each local district court to adopt a bankruptcy ethics rule for its particular district would leave us in much the same position as the current situation—a multiplicity of regulations, no uniformity, and inconsistent applications of what should be a more consistent federal rule—not to mention that local courts are currently overloaded with work and that non-uniformity will always present a race to the bottom risk.²²⁶ The current system, a jumble of multiple layers of ethics regulation, is bad.²²⁷ But if *someone* doesn't take charge on a federal level,²²⁸ then state-by-state (or district-by-district) regulation is all that we have.²²⁹

2. Practical issues

Even after we decide where to locate the power to enact our federal code(s)²³⁰ of bankruptcy ethics, we will still have several practical problems to address.²³¹

*What will we do about "gaps" between the bankruptcy ethics code and any state ethics code?*²³² In order to make a bankruptcy ethics code work, we'll have to be clear about the exact point at which a state's regulation of its licensed attorneys ends and the bankruptcy ethics rules begin. That, in turn, will involve deciding which areas of ethics regulations are truly concerns of the licensing state—concerns with which we can't (or shouldn't) tamper. And we'll have to come up with a decision rule that tells us what to do when those inevitable gaps occur. There are so many possible gaps that the line-drawing is a daunting task. Do we start the bankruptcy ethics rules' effectiveness at the first sign of financial trouble? Do we continue their effectiveness beyond confirmation? What do we do about attorney conduct in workouts or in pre-packaged chapter 11s?²³³

If we were to think about insolvency work as a continuum, we could start the applicability of the bankruptcy ethics rules at a variety of different points. We *could* start the applicability at the first sign of trouble. That, however, is definitely going to tread too much on states' toes. There are a lot of ways to resolve debtor–creditor problems, and only one of those ways is via the Bankruptcy Code. ²³⁴

We *could* start the applicability later in the process, such as when the lawyers involved in the debtor–creditor problem reasonably believe that a bankruptcy case is forthcoming. ²³⁵ But that's too messy. If the goal is to make bankruptcy ethics rules *more* clear, then we can't use fuzzy standards like "reasonable belief." My not-so–perfect solution is to start the operation of the bankruptcy ethics rules at the moment that the case is initiated and to stop the operation of those rules after the case has been dismissed or closed. It's not elegant. The transition from state ethics to federal ethics is choppy. But at least it's a viable bright–line rule. ²³⁶

Where should we place the power to sanction violations of the bankruptcy ethics rules? What we want to avoid here is a situation reminiscent of double jeopardy. We don't want an attorney who fails to follow the bankruptcy ethics rules to be subject to sanctions in the bankruptcy case *and*, afterwards, at the state level. We need to have a clear line of demarcation to indicate when the state or the bankruptcy ethics rules will govern, and we need a clear line of sanctioning authority.

When an attorney violates the bankruptcy ethics rules, should the bankruptcy court sanction the attorney, possibly via section 105(a) ²³⁷ or via specific language in the bankruptcy ethics rules? The bankruptcy court's ability to sanction an attorney for violating a bankruptcy ethics rule should be easier to justify than the bankruptcy court's general ability to punish for civil contempt, ²³⁸ and *that* question has, at least, been nominally resolved. As a related question, we might want to consider describing some appropriate sanctions—e.g., barring scofflaws from practicing in bankruptcy court for a limited (or, for that matter, unlimited) time. ²³⁹

But should there be joint, cooperative enforcement among the bankruptcy or district court and the attorney's "home" court? ²⁴⁰ The argument in favor of cooperative enforcement is that "bad" lawyers should be weeded out at every level. Consumers of legal services have a hard enough time finding competent, ethical lawyers, and any winnowing out of bad lawyers is, automatically, a public good. ²⁴¹ On the other hand, if the state court is punishing the bad lawyer for violating a bankruptcy ethics rule, then either the state is just mimicking the bankruptcy court's findings or it's attempting to interpret the bankruptcy ethics rules for itself. That's not very palatable, either. Even though I lean towards prohibiting states from piggybacking on violations of bankruptcy ethics rules, I acknowledge that that prohibition won't help my "state regulation as a consumer–protection public good" argument any. It will, however, keep us from continuing the infinite loop of enforcement that we have now.

Keeping the old joke about "assum[ing] a can opener" in mind, ²⁴² let's assume that my preference for judicial rulemaking assumption carries the day, that the new bankruptcy ethics rules govern as soon as a petition for relief has been filed, and that only the federal courts can sanction an attorney for a violation of bankruptcy ethics. In that wonderful hypothetical world, what sorts of ethics rules should we write?

IV. GUIDELINES FOR A UNIFORM CODE OF BANKRUPTCY ETHICS

Because I like Wilkins's concept of a context–based ethics code, it's no surprise that I believe that whatever ethics code we draft should keep in mind the multiple and overlapping roles that a bankruptcy lawyer plays: litigator, counselor, watchdog, negotiator, and businessperson. ²⁴³ One of our first hurdles is that these roles may differ dramatically between the consumer–side and commercial–side practices. ²⁴⁴ For the remainder of this article, I'm going to focus on the commercial–side ethics principles. I'm basing my suggestions on my practice background (midsize and large chapter 11 cases). That may not be typical, but it's what I have. ²⁴⁵ I (or, just as likely, someone else) will have to consider the different world occupied by consumer bankruptcy lawyers, ²⁴⁶ using the scholarship of such influential people as Jean Braucher, William Whitford, and the triad of Teresa Sullivan, Elizabeth Warren, and Jay Westbrook. ²⁴⁷

Client-identity issues. When it comes to the DIP as the client, bankruptcy folks aren't all on the same page. ²⁴⁸ Is the client the *DIP* or the *estate*? Some folks think that, unless the DIP behaves as though its interests are identical to those of the unsecured creditors, the DIP has violated its fiduciary duties to the estate. Others recognize the DIP's instinct for self-preservation. ²⁴⁹ Treating the DIP as the manager of the estate, with the estate as the "real" client, has very different ramifications from treating the DIP as the real client. The first approach requires us to take interests other than the DIP's own into account. The second approach places much greater reliance on other entities involved in the case—for example, the creditors' committee—to act to protect their respective constituent interests. If we can't (or won't) pin down the relationship of the DIP to the estate, we should at least pin down exactly what the attorney appointed under section 327(a) is representing. And we should do that using bankruptcy concepts, not general state ethics concepts. ²⁵⁰

Bankruptcy competency. We also need to tighten up the competency concept when it comes to bankruptcy. The best results in bankruptcy come from competent practitioners who waste no time. The worst results come from the bankruptcy "wanna-bes" and the bankruptcy "dabblers." ²⁵¹ Although the generalist codes require competency, they define competency as including an association with someone who actually does know what she's doing. ²⁵² That's too lenient a concept for bankruptcy lawyers. ²⁵³ If a lawyer doesn't have basic bankruptcy knowledge, either she shouldn't take on a bankruptcy representation at all, or she shouldn't charge the client for her learning curve. ²⁵⁴ I know that that's a harsh suggestion, but in bankruptcy, time is money. Competency errors cost money, too. And there's never enough money to go around in the first place. ²⁵⁵

Bankruptcy zealotness. I'm also in favor of decreasing lawyers' leeway in terms of zealotness. Especially in the bankruptcy context, lawyers have to remember that they're also officers of the court. ²⁵⁶ Remember, *I'm* the "Jiminy Cricket" who believes that bankruptcy lawyers have a duty to think beyond their own client's short-term interests and consider how their clients' actions may affect other, unrepresented interests in the bankruptcy case. ²⁵⁷

Conflicts of interest in bankruptcy. Lots of people have realized that conflicts of interest in bankruptcy are difficult to resolve using the generalized code, and they're turning to all sorts of alternatives in an attempt to fix this problem. ²⁵⁸ In my brave new world, we'd want to make sure that the bankruptcy ethics code covers such conflicts issues as the inherent conflicts of the DIP's counsel ²⁵⁹ and the issue of simultaneous representation of several parties in the same bankruptcy. ²⁶⁰ We may also not want to adopt the NBRC's recommendation about just tweaking the disinterestedness standard. It's not too late to revisit "disinterestedness" in our ethics code. ²⁶¹

V. CONCLUSION

We know that we've got a lot of work cut out for us if we want to develop one code (well, at least one) of bankruptcy ethics. Look at the alternatives, though. We could leave things the way that they are, but that means that courts will continue to apply multiple layers of ethics codes, confusing the lawyers and delaying bankruptcy cases. We could try a choice of law provision, but choice of law jurisprudence is at best an art, not a science. We could try to persuade states to create special rules for bankruptcy lawyers, but unless every state enacts the *same* rules, we still haven't solved the problem. We could wait for the Restatement drafters to come to our rescue, but they're not likely to do that. Or we could do it ourselves, either through Congress or through federal judicial rulemaking. As fraught with complexity as my proposal is, it's still the right thing to do, and it will—if successful—reap rewards that extend far beyond bankruptcy law.

Bankruptcy law is different from other types of law, but not too different—if we can pin down a working bankruptcy ethics code, we should then be able to apply the same principles to other areas of law for which specialized ethics rules may make sense. Perhaps environmental ethics is the next area that we should consider. ²⁶² Or perhaps the rapidly emerging internet law might call for its own specialized ethics code. We could even broaden the specialized bankruptcy ethics code to one that covers insolvency as it relates to corporations, ²⁶³ although the prospect of that gives me nightmares, thanks to the state-law implications. What's important to remember is that we can appreciate the state ethics codes for what they've done for the profession without remaining inextricably linked to them. Emerson was right. ²⁶⁴

FOOTNOTES:

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¹ Ralph Waldo Emerson, *Self-Reliance*, in *Essays and Other Writings* of R. Emerson 152 (1940). [Back To Text](#)

² See Nat'l Bankr. Rev. Comm'n, *Bankruptcy: The Next Twenty Years*, Final Report (1997) [hereinafter *Commission Report*]. [Back To Text](#)

³ Commission Report, *supra* note 2, at 38. Recommendation No. 3.3.3 reads:

Section 1107(b) should be amended to provide that a person should not be disqualified for employment under § 327 solely because such person holds an insubstantial unsecured claim against or equity interest in the debtor. Section 327 and § 101(14) should remain unchanged.

Id. Mind you, Karen Brothers proposed a new approach to disinterestedness long before the NBRC got into the act. See Karen J. Brothers, Comment, *Disagreements Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help*, 138 U. Pa. L. Rev. 1733, 1756–57 (1990) (providing suggested revisions to section 327(a)). The NBRC had originally considered a more thorough revamping of the disinterestedness requirement, but it ultimately opted for a more conservative approach. See Am. Bankr. J., Mar. 1997, at 6 (discussing NBRC's proposed recommendation defining conflict of interest for purposes of section 327, which would eliminate "disinterestedness" requirement and would define a conflict as one that created "a substantial risk that such professional's representation will be materially and adversely affected by the professional's own interests or by the professional's duties to another person that currently employs or formerly employed such professional or a third person") (recommendation not adopted in final report of October 20, 1997).

In an earlier piece, I suggested that the Code's concept of disinterestedness could be replaced by the proper use of state ethics rules governing representation of clients. John D. Ayer, the Hon. Charles N. Clevert, the Hon. Joel Pelofsky, Nancy B. Rapoport & Bettina M. Whyte, *Ethics: Is Disinterestedness Still a Viable Concept? A Discussion*, 5 Am. Bankr. Inst. L. Rev. 201, 232–33 (1997) [hereinafter *Disinterestedness*]. I recant. [Back To Text](#)

⁴ Commission Report, *supra* note 2, at 39. Recommendation 3.3.4 states:

Admission to practice in one bankruptcy court, usually by virtue of being admitted to practice in the relevant United States District Court, should entitle an attorney, on presentation of a certificate of admission and good standing in another district court, to appear in the other bankruptcy court without the need for any other admission procedure.

The Recommendation will not affect requirements (if any) to associate with local counsel. Similarly, the Recommendation will not change the requirements under state law governing the practice of law and the maintenance of an office for the practice of law. The Recommendation will only amend the local bankruptcy rule or practice requirements governing special admission of attorneys to the bankruptcy court who are otherwise not admitted to the bar of the district court in the district where the bankruptcy court is located to appear in a particular bankruptcy case.

Id. Parsing through the Recommendation is difficult, but its intent is to make it easier for key players in bankruptcy law to appear in a variety of jurisdictions. Stephen Burbank makes a persuasive case for *some* form of national regulation.

Perhaps, however, it is time to think seriously of a national bar, governed by uniform federal norms of professional conduct in all practice contexts, including in state and federal court. After all, we have gone some way down that road with the use of the multistate bar examination for admissions, and the way exists to share discipline information, if only there were a will. Are the benefits derived from state autonomy and experimentation—how much experimentation is there?—worth the costs of conflict in an age when multistate transactions have become commonplace? Obviously, any serious thinking along these lines would need to include the problem of enforcement, which lurks beneath the surface of much of the mischief that plagues us today.

Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 Fordham Urb. L.J. 969, 974 (1992); cf. John S. Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 Tex. L. Rev. 451, 467 (1989) (reviewing Richard L. Abel, *American Lawyers* (1989)) (explaining why the ABA might really want to support state-by-state ethics codes rather than supporting single, national code).[Back To Text](#)

⁵ And I'm not holding my breath. Susan Block-Lieb, though, is far more optimistic about the NBRC than I am. See Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 Ariz. L. Rev. 801, 869–70 (1997) (stating that the National Bankruptcy Review Commission's involvement will improve things due to its expertise and independence from politics).[Back To Text](#)

⁶ For a good discussion of the complicated variety of ethics issues in chapter 11 cases, see Susan M. Freeman, *The Ethics of Representing Debtors and Creditors in Bankruptcy*, 680 PLI/Comm. 181 (1994); for a good discussion of the ethics issues involved in representing pre-debtor insolvent corporations, see Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors*, 6 J. Bankr. L. & P. 403 (1997).

Apparently, the NBRC had toyed with the question of "whether the Bankruptcy Code should adopt its own rules of professional conduct governing lawyers appearing in bankruptcy courts[,] which preempt state rules," but it ultimately decided not to go that far. See Gerald K. Smith, *Conflicts of Interest in Workouts and Bankruptcy Reorganization Cases*, 48 S.C. L. Rev. 793, 899–903 (1997).[Back To Text](#)

⁷ See Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 Conn. L. Rev. 913, 917–26, 985–95 (1994) [hereinafter Rapoport, *Conflicts*] (providing scenarios indicating bankruptcy's possible conflicts of interests).[Back To Text](#)

⁸ See *id.* at 927 (defining "official entities" to include debtors-in-possession ("DIPs"), creditors' committees, and others whose appointment as professionals is governed by 11 U.S.C. § 327); see also Smith, *supra* note 6, at 795 n.2 (discussing adverse interests as disqualifying certain types of representations within bankruptcy).[Back To Text](#)

⁹ See, e.g., C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 Am. Bankr. Inst. L. Rev. 47 (1997) [hereinafter *DIP's Attorney*]. Compare Freeman, *supra* note 6, at 201 (DIP's attorney can't act on her own belief as to what is best for estate but must follow her client's decisions) with a motion filed in *In re Cole*, Case No. 94-11471 (Bankr. N.D.N.Y. 1997) (on file with author) (special counsel moves to replace trustee in case, alleging that trustee violated his fiduciary duties to estate).[Back To Text](#)

¹⁰ There are several variations on this theme. For example, courts that adhere to a strict reading of the "disinterestedness" requirement of 11 U.S.C. § 327 would prohibit lawyers with a de minimis claim against the DIP from representing the DIP, notwithstanding the fact that, outside bankruptcy, lawyers routinely represent clients who owe them money. See, e.g., *Michel v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores, Inc.)*, 44 F.3d 1310 (6th Cir. 1995). For further discussion, see *infra* note 118 and accompanying text. And, as Gerald Smith points out, under state conflicts rules, clients can waive most conflicts, but the Bankruptcy Code doesn't permit waiver. See Smith, *supra* note 6, at 867-68.[Back To Text](#)

¹¹ See, e.g., Smith, *supra* note 6, at 877-80 (noting that bankruptcy lawyers often take inconsistent positions in the same court when representing different clients—behavior that state courts would abhor). There are a lot of things that bankruptcy lawyers have to do "differently" from lawyers who don't practice bankruptcy law. For example, depending on which court opinions you believe, representing the DIP may entail making decisions in the best interests of creditors, even of individual creditors, if you agree with the *Perez* decision. See *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1214 n.5 (9th Cir. 1994) (noting that debtor's directors bear same fiduciary obligation to creditors as trustee does to debtor). Would state ethics codes interpret zealotry to require a debtor's attorney to advise the debtor to act in the best interests of the creditors, irrespective of the debtor's own interests? The Ninth Circuit believes that's what the Bankruptcy Code requires. For a pithy discussion of the Ninth Circuit's mistake in the *Perez* decision, see *DIP's Attorney*, *supra* note 9, at 83-85. For more on the inherent conflicts of interest of counsel for the DIP, see Jay Lawrence Westbrook, *Fees and Inherent Conflicts of Interest*, 1 Am. Bankr. Inst. L. Rev. 287, 289 (1993) [hereinafter Westbrook, *Fees*] (discussing types of conflicts); see also Smith, *supra* note 6, at 822-23 (discussing inherent conflicts of DIP's attorneys); *In re Rancourt*, 207 B.R. 338, 356 (Bankr. D.N.H. 1997) ("For Counsel [to the debtor, Rancourt,] to support Rancourt in his opposition to abandonment conflicts with Counsel's duties to the estate . . .").[Back To Text](#)

¹² For an interesting case discussing the relationship between the Bankruptcy Code's ethics rules and state ethics codes, see *In re Breen*, 830 P.2d 462 (Ariz. 1992), which held that section 327(c)'s provision permitting estate representation notwithstanding creditor representation was not sufficient to shield lawyer in state disciplinary proceedings. See also Smith, *supra* note 6, at 803-04 (discussing *Breen*). As Smith puts it, "[t]he Bankruptcy Code's adverse interest rule and state disqualification rules as to simultaneous representation are related but different—like the opposite sides of a coin." *Id.* at 805.

The lack of fit with state ethics codes here reminds me of the problem in *Jurassic Park*: the scientists couldn't reconstruct the dinosaur DNA completely, so they filled in the gaps in the DNA with amphibian DNA. To control the dinosaur population, they created only females. But, after a while, the females used the amphibian DNA to change sex, if necessary, in order to breed. That led, inexorably, to velociraptors that were able to breed. See Michael Crichton, *Jurassic Park* 292, 375 (Int'l ed. 1991). By using state ethics laws to describe bankruptcy ethics, we're breeding velociraptors, too.[Back To Text](#)

¹³ Does the attorney for the DIP represent the DIP *qua* DIP or the estate? May the DIP consider its own interests or just those of the unsecureds? What the heck is the estate, exactly? See, e.g., Smith, *supra* note 6, at 794 & n.3; Stephen McJohn, *Claims & Opinions: Person or Property? On the Legal Nature of the Bankruptcy*

Estate, 10 Bankr. Dev. J. 465 (1994); *DIP's Attorney*, *supra* note 9, at 86–90; *cf. Rancourt*, 207 B.R. at 356 ("Rancourt's request that Debtor's Counsel oppose the proposed abandonment would place Counsel in the unenviable position of advocating a position not only adverse to the estate in whose employ it serves, but adverse [to] the financial interests of that very same Counsel."). [Back To Text](#)

¹⁴ See, e.g., Smith, *supra* note 6, at 799 (discussing conflicts of interests between attorneys representing limited partnerships as DIPs); McJohn, *supra* note 13; *cf. G. Ray Warner, American Bankruptcy Institute Report on the State of the American Bankruptcy System*, ABI Bankruptcy Reform Study Project 9 (December 1996) [hereinafter Warner] (on file with author) (reviewing results of statistical study of bankruptcy professionals' attitudes toward disinterestedness requirement; most respondents supported disinterestedness requirement, although some respondents didn't want to disqualify counsel for debtor solely on basis of unpaid prepetition fees). [Back To Text](#)

¹⁵ See, e.g., Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 Geo. Wash. L. Rev. 169, 190 (1997) [hereinafter Zacharias, *Reconceptualizing*] (listing various specialized ethics codes for lawyers practicing before the INS and the IRS, for family-law lawyer mediators, and for lawyers representing professional athletes). [Back To Text](#)

¹⁶ Linda S. Mullenix, *Multiforum Federal Practice: Ethics and Erie*, 9 Geo. J. Legal Ethics 89, 94 (1995) ("One of the more cliched observations is that ethical standards were drafted for small-town practice and that these rules are now hopelessly antiquated for the modern legal profession. . . . Further, hardly any attention has been paid to the professional responsibility duties of federal practitioners."). Mullenix has reviewed the almost-endless varieties of ethics rules to which federal practitioners can be subject. *See id.* at 98–101 (footnotes omitted) (pointing out that there's no uniform "general federal code of professional responsibility"; that some federal courts have "adopted the local state's code of professional responsibility, the Model Code, or the Model Rules"; that "[i]n construing alleged breaches of professional conduct, federal practitioners are generally—but not always—held accountable to the federal court's rules with reference to state courts' interpretations of their respective codes"; that other federal courts have "no local rule setting forth standards of professional conduct"; that some federal courts take an *Erie* approach, "look[ing] to their state's code and state interpretations in federal lawyer-discipline cases"; and that other courts pick and choose, as sort of federal common law of ethics). Moreover, due to additional circuit court and Supreme Court ethics rules, "circuit conduct standards may be different from—or inconsistent with—the standards of professional conduct that district courts within the circuit have adopted as their governing professional responsibility rules." *Id.* at 101 (footnotes omitted); *see also* Smith, *supra* note 6, at 809 (stating "a substantial majority of the study group favored the drafting of a Model local rule, but did not favor a uniform rule promulgated under the Rules Enabling Act."). For a comprehensive critique of the adversary system, see Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 Wm. & Mary L. Rev. 5 (1996). [Back To Text](#)

¹⁷ But *see* David B. Wilkins, *Making Context Count: Regulating Lawyers after Kaye*, *Scholar*, 66 S. Cal. L. Rev. 1147, 1219–20 (1993) [hereinafter Wilkins, *Making Context Count*] (criticizing "balkanization" objection on grounds that "group" goals supported by unitary codes are neither currently applicable nor ethically useful).

What are the things that we'd fear most from a separate code of bankruptcy ethics? Is it that Congress—a favorite of interest groups everywhere—might bow to those interests, creating a race to the bottom scenario? *See infra* notes 209–22 and accompanying text. Is it that the new bankruptcy ethics code will be so different and so abrupt a change that lawyers who are merely dabbling in bankruptcy will be caught off guard, subject to sanctions for actions that, heretofore, were not codified as "improper"? *See infra* notes 225–29 and accompanying text. Or is it that the line between "workouts" and "reorganizations" is so thin that lawyers won't be able to tell when the "regular" ethics code stops and the bankruptcy ethics code begins? *See infra* notes 225–29 and accompanying text. These are all legitimate fears, and I'll address them later in this article. [Back To Text](#)

¹⁸ Actually, in a subsequent article, I plan to explore the question of whether bankruptcy needs not one, but two ethics codes: one for attorneys practicing consumer bankruptcy, and one for attorneys practicing commercial bankruptcy. Those two worlds are different enough that it may make sense to subdivide the ethics codes further (or just to leave consumer-side bankruptcy ethics alone). *See infra* notes 231–53 and accompanying text.[Back To Text](#)

¹⁹ Model Code of Professional Responsibility (1980).[Back To Text](#)

²⁰ Model Rules of Professional Conduct (1989).[Back To Text](#)

²¹ *See* Rapoport, *Conflicts*, *supra* note 7, at 917–26 (discussing various levels of conflicts of interest present in bankruptcy). For a nice discussion of some of the issues related to bankruptcy conflicts of interest, see generally Smith, *supra* note 6.[Back To Text](#)

²² Everyone knows the old saw that "justice delayed is justice denied." In bankruptcy, justice delayed is *money* denied. Everyone loses in bankruptcy when there are unnecessary delays in the system, and the current jumble of bankruptcy ethics causes unnecessary delay.[Back To Text](#)

²³ Well, *at least* one. *See infra* notes 231–53 and accompanying text.[Back To Text](#)

²⁴ But it will just be a *first* cut. There may be a legitimate reason for creating two specialized bankruptcy ethics codes—one for commercial bankruptcy practice and one for consumer practice. *See supra* note 18; *see also infra* notes 238–61 and accompanying text.[Back To Text](#)

²⁵ *See, e.g.*, Fred C. Zacharias, *Federalizing Legal Ethics*, 73 Tex. L. Rev. 335, 337 (1994) [hereinafter Zacharias, *Federalizing*] ("I focus on a single question: would it be wise for the United States Congress to adopt a code of professional responsibility applicable to all lawyers, operating in all courts in the United States."); Zacharias, *Reconceptualizing*, *supra* note 15, at 207 ("adopting separate specialized codes explicitly requires the drafters to reexamine the general code's purposes and principles, determining their applicability.").[Back To Text](#)

²⁶ *See* Zacharias, *Federalizing*, *supra* note 25, at 345; *see also* Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on The Regulation of Lawyers by Federal Courts*, 8 Geo. J. Legal Ethics 473, 499–500 (1995) ("[M]any of those local rules of ethics, in the spirit of conformity and comity, simply adopt the professional misconduct regulations of the states in which the courts are located. Inevitably, the federal courts' ethics rules and those promulgated by other would-be federal regulators govern the same conduct in conflicting ways."); *see also supra* note 16 and accompanying text; *infra* note 118 and accompanying text.[Back To Text](#)

²⁷ My law students will recognize Calypso from her many appearances in my exam questions. Because Calypso's almost thirteen years old (a very long life in cat years), it's time to take a break from my usual Tinker, Evers, and Chance references and give her her due.[Back To Text](#)

²⁸ *See* Zacharias, *Federalizing*, *supra* note 25, at 365–66 (noting federal courts do not automatically adopt ethics rules of their home jurisdiction).[Back To Text](#)

²⁹ *See id.* at 340 (footnotes omitted) ("To the mix of state rules following the *Model Code*, the *Model Rules*, or part of one or the other, one must add regulation imposed by local federal courts. Each district court is empowered to adopt its own rules of professional conduct. While some district courts conform to the rules of the state in which they are situated, others do not. Some district courts have made the applicable standards even less predictable by declining to identify which codes or code provisions they will follow").[Back To Text](#)

³⁰ *See id.* at 344 (noting the inherent confusion of overlapping ethics rules). For example, some courts might frown at the types of advertising that other courts permit. *See id.* at 382; *see also* Smith, *supra* note 6, at

827–29 (reporting various studies regarding which ethics rules are used in bankruptcy and district courts); *supra* note 16 and accompanying text; *infra* note 118 and accompanying text.[Back To Text](#)

³¹ See Zacharias, *Federalizing*, *supra* note 25, at 346–47 (pointing out that, for example, firms that have lawyers admitted in more than one jurisdiction may have intra–firm ethics conflicts). Actually, the situation can get even uglier than that:

For example, where bankruptcy courts do not expressly identify their own attorney ethics standards, one would expect them to use the same standards used by the district court in their district, inasmuch as the bankruptcy court is a part of the district court. This does not always occur, however. In *In re Global Video Communications Corp.*, 102 B.R. 868 (Bankr. M.D. Fla. 1989), the court expressly applied the ABA Model Code despite the fact that the court's companion district court already had adopted Florida's version of the Model Rules.

Eli J. Richardson, *Demystifying The Federal Law Of Attorney Ethics*, 29 Ga. L. Rev. 137, 156 n.67 (1994) (some citations omitted).[Back To Text](#)

³² See *infra* notes 80–82 and accompanying text.[Back To Text](#)

³³ See 11 U.S.C. §§ 503(b) & 507(a) (1994); Cynthia A. Baker, *Other People's Money: The Problem of Professional Fees in Bankruptcy*, 38 Ariz. L. Rev. 35, 42–45 (1996) [hereinafter Baker, *Other People's Money*] (explaining that professional fee's constitute priority administrative expenses); Cynthia A. Baker, *Fixing What's Broken: A Proposal for Reform of the Compensation System in Bankruptcy*, 5 J. Bankr. L. & P. 435, 440–43 (1996) [hereinafter Baker, *Fixing What's Broken*] (same).[Back To Text](#)

³⁴ See Baker, *Other People's Money*, *supra* note 33, at 37 (asserting that priority system allows overspending on professional services); Baker, *Fixing What's Broken*, *supra* note 33, at 437. Yes, it's true that class action lawyers have the same *sort* of problem when deciding whether or not to accept a settlement offer. See Rapoport, *Conflicts*, *supra* note 7, at 965–74. But class action lawyers don't generally let the folks at the top of the food chain dictate legal strategy decisions that will be paid from the pockets of the folks at the bottom of the food chain.[Back To Text](#)

³⁵ See Model Rules of Professional Conduct Rules 1.5, 1.7 cmt. 5, 1.8 cmt. 3, 1.8 cmt. 6; Model Code of Professional Responsibility DR 2–106.[Back To Text](#)

³⁶ Baker proposes that each class of claims or interests should bear its own fees. See Baker, *Other People's Money*, *supra* note 33, at 68–81; Baker, *Fixing What's Broken*, *supra* note 33, at 456–80. As for the fees incurred for the DIP's benefit, Baker proposes "allocat[ing] professional costs incurred by the DIP among all classes of unsecured claims and equity interests in proportion to the value of the property distributed to each class under the plan of reorganization." *Id.* at 462. Her creative proposal illustrates a link that I make earlier in this article: considerations of ethics (here, fee gouging) can drive proposals for changing substantive bankruptcy law (here, payment of professionals).[Back To Text](#)

³⁷ We *could* just use some sort of choice of law rule to determine which jurisdiction's rules governed, on a case by case basis, see *infra* note 165. But the case–by–case approach is incredibly splintered, and it would create an unnecessary level of uncertainty. For my tastes, I prefer my mid–level approach: that some practice areas deserve their own rules, on a practice–area–by–practice–area approach.[Back To Text](#)

³⁸ But see *infra* notes 65–86 and accompanying text.[Back To Text](#)

³⁹ See Smith, *supra* note 6, at 831 ("The fifty–one Chief Justices comprising The Conference [of Chief Justices] recently resolved that each state remain exclusively responsible for regulating the professional conduct of the members of its bar.").[Back To Text](#)

⁴⁰ See David B. Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 468, 470 (1990) [hereinafter Wilkins, *Legal Realism*] ("constructing 'realist' understanding of legal ethics requires careful attention to myriad ways in which insights that may be appropriate for role of 'judge' or 'law professor' do not capture our legitimate aspirations for lawyers"); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799, 801 (1992) [hereinafter Wilkins, *Who Should Regulate?*] (prefacing article with belief that effective ethical regulation "must account for relevant differences among professional norms and among various markets for legal services"); Wilkins, *Making Context Count*, *supra* note 17, at 1149–50 (noting that most practitioners candidly admit that the "image of a unitary profession" is outdated); David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 Fordham L. Rev. 465, 482 (1996) [hereinafter Wilkins, *Managing Conflict*] (stating "that the traditional claim that a uniform set of ethical rules and enforcement practices governs all lawyers in all contexts is both descriptively false and normatively unattractive").[Back To Text](#)

⁴¹ See, e.g., Wilkins, *Legal Realism*, *supra* note 40, at 470 ("[L]egal ethics should abandon both the normative premise that legal restraints should be interpreted from the perspective of client interest and the structural premise that ethical rules should apply to all lawyers in all contexts.").[Back To Text](#)

⁴² See *id.* at 471. When I showed a preliminary draft of this article to a colleague, Art Greenbaum, he suggested that the boundary claim might be resolved on a more global level in the American Bar Association's Project 2000. See, e.g., James Poders, *Model Rules Get the Once-Over: Ethics 2000 Project Launches Review of ABA Professionalism Standards*, 83 ABA J. 90 (December 1997).[Back To Text](#)

⁴³ See Wilkins, *Legal Realism*, *supra* note 40, at 472–73 (discussing boundary claim).[Back To Text](#)

⁴⁴ See *id.* at 473–84. There's been some interesting literature on gender-based differences of lawyers. See Rand Jack & Dana Crowley Jack, *Moral vision and professional decisions: The changing values of women and men lawyers* (1989). Based on studies like the Jack & Jack study, it's possible that male and female lawyers will weigh the requirement of zealousness differently. Perhaps (and this is a gross generalization, of course) male lawyers may be more comfortable with the adversary nature of zealousness and female lawyers may be more comfortable trying to harmonize the representation of their client with the needs of society. See *id.* at 27–50; see also Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 Mich. L. Rev. 1506, 1514–17 (1990) [hereinafter Gross, *Re-Vision*] (reviewing Teresa A. Sullivan et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (1989)). Professor Gross points out that men and women may relate very differently to the world. For example, some observers have noted that, even as children, "boys approach moral issues from a perspective of rationality and impartiality (linear thinking), while girls view such issues from a perspective of caring, responsibility, and interconnectedness (relational thinking)." *Id.* at 1540 (discussing Carol Gilligan's research in Carol Gilligan, *In a Different Voice* (1982)).[Back To Text](#)

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Legal practice is and has always been deeply stratified. Wide disparities exist between the working conditions, experiences, professional status, and economic rewards enjoyed by different lawyers. Lawyers who represent large corporations are different from those who represent individuals. Plaintiffs' lawyers are different from defendants' lawyers. Lawyers in large cities are different from lawyers in small towns. Lawyers who litigate are different from lawyers who primarily negotiate or provide office counseling. As legal practice becomes more specialized and complex, these divisions are likely to increase rather than decrease.

Given these differences, the idea that all 800,000 American lawyers share a common professional culture capable of producing uniform answers to ethical problems strains credibility.

Wilkins, *Legal Realism*, *supra* note 40, at 487–88 (footnotes omitted).[Back To Text](#)

⁴⁶ See *id.* at 489 ("Unfortunately, the norms and practices generated within particular cultural enclaves may undermine rather than support the normative ideals promised by the boundary claim."). [Back To Text](#)

⁴⁷ *Id.* at 517 (footnotes omitted). [Back To Text](#)

⁴⁸ Special thanks to Ted Janger for some of these examples—and their fun phrasing. Nathalie Martin has suggested a few more: auctioneer (in asset sales) and mediator. [Back To Text](#)

⁴⁹ See 1 Collier on Bankruptcy ¶ 7.01 *passim* (Lawrence P. King et al. eds., 15th ed. rev. 1997) (discussing bankruptcy crimes); *DIP's Attorney*, *supra* note 9, at 77–78 (same); see e.g., *In re Lazar*, 1993 WL 513037, *9 (Bankr. C.D. Cal. 1993) ("The Court shares the public perception that a substantial amount of bankruptcy crime is being committed, far more than the federal prosecutors have been able to prosecute in urban centers such as Los Angeles"). For a juicy account of a spectacular bankruptcy crime spree, see *Phar–Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948 (N.D. Ohio 1997). [Back To Text](#)

⁵⁰ See Rapoport, *Conflicts*, *supra* note 7, at 917–26. Of course, the debtor-in-possession is always the DIP, creditors are always creditors, and the United States Trustee is always the United States Trustee. But if we look at the roles that each of these parties play, rather than looking just at their names, then "status" becomes quite slippery and task-related. [Back To Text](#)

⁵¹ Consumer bankruptcy law, by its very nature, is a volume-oriented practice. See William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 Am. Bankr. L.J. 397, 400 (1994); *The "Impact Volume" of Consumer Bankruptcies*, Amer. Bankr. Inst. J. Slip Opinion, Dec.–Jan. 1997, available in LEXIS, Lawrev library, Allrev file, December 16, 1997 ("Consumer bankruptcy can only be practiced profitably in volume, as any "large firm" lawyer who has had to handle a chapter 13 for a special client has learned."); Hon. A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Legal Services: Angel or Vulture?*, 2 Am. Bankr. Inst. L. Rev. 353, 354 (1994) ("Some practitioners are able to handle these types of cases [small Chapter 7 and Chapter 13 cases] on a volume basis and do excellent work on behalf of their clients for reasonable fees. Most, however, find it unprofitable."); Teresa A. Sullivan et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121, 122 (1994) [hereinafter *Ten Years*] ("[In 1981], [l]ow-cost, high-volume consumer bankruptcy practices were springing up in storefronts in big cities, and standardized treatment became the norm in consumer work."); see generally, Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501, 519–21 (1993) (describing high-volume practice). [Back To Text](#)

⁵² See Wilkins, *Managing Conflict*, *supra* note 40, at 483–90 (reasoning that contextual model is problematic). [Back To Text](#)

⁵³ Wilkins, *Making Context Count*, *supra* note 17, at 1183–85 (criticizing Kaye, Scholer's approach on the grounds that the law firm behaved as if it were in litigation posture—zealous advocacy—at all times, even though its advice was delivered in counseling posture). Wilkins points out that:

Kaye, Scholer can make only limited use of these adversary-system-based arguments, however, because virtually all of its actions on behalf of Lincoln were taken outside the context of a formal adversary proceeding. Therefore, if the firm is to take advantage of the task distinction between "litigation" and "counseling," it must first put forward a definition of "litigation" that is broader in scope than the traditional conception of "proceedings before a tribunal."

Id. at 1184–85.

One sign of a theory's influence is how much of a response it generates. Wilkins's theory has had an entire symposium devoted to it. See Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65

Fordham L. Rev. 33 , 35 (1996) (discussing that symposium); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 Fordham L. Rev. 355, 357–58 (1996) [hereinafter Little, *Federal Prosecutors*] (applying Wilkins's theory to federal prosecutors); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, Or, Who Should Regulate the Regulators?: Response to Little*, 65 Fordham L. Rev. 429, 462 (1996) [hereinafter Zacharias, *Response*] (responding to Wilkins's article with alternative approach).[Back To Text](#)

⁵⁴ Cf. Mullenix, *supra* note 16, at 122 (footnotes omitted).

[T]he existence of different federal conduct standards has led to horizontal conflicts across the federal circuit and district courts, as well as vertical conflicts between federal and state interpretations of professional responsibility duties. Consequently, federal practitioners cannot know, with a high degree of confidence, whether the lawyer's actions are consistent with a particular federal jurisdiction's understanding of applicable ethical standards.

Id. at 109. The Supreme Court hasn't been much help in this area: "The Supreme Court has not had many occasions to address the issue of applicable federal conduct standards, but when it has, the Court typically has spoken in general platitudes that are ritually repeated by lower federal courts." *Id.* [Back To Text](#)

⁵⁵ See, e.g., 46 C.F.R. § 502.32 (regulating practice by former Federal Maritime Commissioners); Charles L. Brieant, *Address: Professionalism, Civility, and the Maritime Bar: A View From the Bench*, 28 J. Mar. L. & Com. 551, 552–53 (1997) (discussing "high code of ethics" shared by maritime lawyers); 6A Benedict On Admiralty 7.84.3–84.4 (7th ed. 1991) (reprinting the New York Society of Maritime Arbitrators Code).[Back To Text](#)

⁵⁶ See Brieant, *supra* note 55, at 553 (listing major provisions of maritime ethics code).[Back To Text](#)

⁵⁷ See 31 C.F.R. § 10.20 (regulating attorneys practicing before IRS); Frederic G. Corneel, *The Service and the Private Practitioner: Face to Face and Hand in Hand—A Private Practitioner's View*, 11 Am. J. of Tax Pol'y 343 (1994). Corneel notes that tax lawyers face the problem of overlapping layers of ethics regulation. See *id.* at 361. Zacharias also points out tax law's emphasis on the lawyer's role as an officer of the court than as a client advocate. See, e.g., Zacharias, *Reconceptualizing*, *supra* note 15, at 201 & nn.141–42 (citing 31 C.F.R. § 10.34 (1996) (restraining tax lawyers obligation of zealousness); 8 C.F.R. § 292.3(a)(3) (1992) (emphasizing role as officer of court)).[Back To Text](#)

⁵⁸ See 8 C.F.R. § 292.3 (1992) (governing conduct of lawyers before INS); cf. Zacharias, *Reconceptualizing*, *supra* note 15, at 201 & nn.141–42 (discussing duty of tax attorney to both client and tax system).[Back To Text](#)

⁵⁹ See 8 C.F.R. § 292.3.[Back To Text](#)

⁶⁰ See, e.g., Zacharias, *Reconceptualizing*, *supra* note 15, at 191–92 (suggesting that ethics rules might change in some practice areas in order to guide lawyers with respect to how their clients actions will affect third-party interests—e.g., in family law and environmental law); see also *id.* at 192–94 (discussing difficulties of representing clients consisting of many different constituencies—e.g., corporations, unions, class action plaintiffs, insurance companies—and concluding that "[s]pecialized codes might need to depart from the traditional codes in defining conflicts of interest[s] and the level of client partisanship demanded of lawyers").[Back To Text](#)

⁶¹ See Model Rules of Professional Conduct Rule 4.2; Model Code of Professional Responsibility DR 7–104(A)(1); see generally Neals–Eric William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 Am. U. L. Rev. 855 (1995).[Back To Text](#)

⁶² See, e.g., Delker, *supra* note 61, at 857–58.[Back To Text](#)

⁶³ If not always obeyed.[Back To Text](#)

⁶⁴ See Delker, *supra* note 61, at 862–89.[Back To Text](#)

⁶⁵ The now–famous "Thornburgh memorandum" stated, in part, that:

[I]t is the Department's [DOJ] position that contact with a represented individual in the course of authorized law enforcement activity does not violate [DR 7–104 of the ABA Model Code of Professional Conduct]. The Department will resist, on Supremacy Clause grounds, local attempt to curb legitimate federal law enforcement techniques.

United States v. Ferrara, 847 F. Supp. 964, 969 (D.D.C. 1993) (citing Memorandum from Dick Thornburgh to All Justice Department Litigators, June 8, 1989) (concluding that Thornburgh memorandum does not "constitute[] 'federal law,' for purposes of preempting state regulation of attorney ethics"); see also Little, *Federal Prosecutors*, *supra* note 53, at 357 (citing The Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong., 1st Sess. 502 (1995)) ("Early in 1995, legislation appeared in the United States Senate containing a startling one–sentence provision: 'Notwithstanding the ethical rules or the rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutions in the courts of the United States'"). For further discussion of the development of federal prosecutorial ethics, see, e.g., Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non–Adversarial Roles of Federal Prosecutors*, 37 B.C. L. Rev. 923 (1996); Smith, *supra* note 6, at 808–09 (referring to no–contact "Reno rule").[Back To Text](#)

⁶⁶ Little, *Federal Prosecutors*, *supra* note 53, at 369–71 (footnotes omitted); see also Elizabeth A. Allen, Note, *Federalizing The No–Contact Rule: The Authority of the Attorney General*, 33 Am. Crim. L. Rev. 189, 224 (1995) (commenting that Justice Department regulation is premised upon principles underlying ethics rules).[Back To Text](#)

⁶⁷ See, e.g., Zacharias, *Response*, *supra* note 53, at 454–56 (questioning whether Congress might not have been better forum for drafting prosecutorial ethics rules).[Back To Text](#)

⁶⁸ See, e.g., V.F. Biondo, Jr., *Lawyer Hypocrisy*, ABA Jnl. 12 (January 1998) (letter to editor arguing in favor of the rule).[Back To Text](#)

⁶⁹ See *infra* notes 179–220 and accompanying text.[Back To Text](#)

⁷⁰ Smith, *supra* note 6, at 809.[Back To Text](#)

⁷¹ For discussion of these implications, see, e.g., Frank D. Bowman, *A Bludgeon By Any Other Name: The Misuse of Ethical Rules Against Prosecutors to Control the Law of the State*, 9 Geo. J. Legal Ethics 665, 738–42 (1996) (discussing federal courts' reaction to "no–concert" rule); see also Martin S. Murphy, *The "No–Contact" Rule and the Sixth Amendment: A Dilemma for the Ethical Prosecutor*, 38 Bos. B. J. 8, 23 (1994) (discussing history of Model Rule 4.2).[Back To Text](#)

⁷² See *infra* notes 238–61 and accompanying text.[Back To Text](#)

⁷³ Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 Mil. L. Rev. 1, 1 (1989) (new rules were promulgated in October 1987).[Back To Text](#)

⁷⁴ See *id.* at 7–10; see also Col. Eilleen M. Albertson, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 Fed. Bar News & J. 334, 335 (1988) (stating that service attorneys could be licensed in one of fifty four states, all with potentially different interpretations of the same standards).[Back To Text](#)

⁷⁵ See Ingold, *supra* note 73, at 6–7.[Back To Text](#)

⁷⁶ Cf. *id.* at 8–10.[Back To Text](#)

⁷⁷ I'm not sure how the JAG's rules have worked out, though.[Back To Text](#)

⁷⁸ See 50 U.S.C. App. § 574 (1997).[Back To Text](#)

⁷⁹ Of course, we already have some separate bankruptcy ethics rules. Section 327(a), for example, governs whether lawyers may represent the estate, based on a concept of "disinterestedness." See 11 U.S.C. §§ 327(a), 101(14) (1994). But we don't have an entirely separate bankruptcy ethics system.[Back To Text](#)

⁸⁰ See Rapoport, *Conflicts*, *supra* note 7, at 972–75 (noting similarity in shifting client identity). Dovetailing my theory that bankruptcy law and family law share many of the same characteristics in terms of shifting conflicts of interest, Zacharias envisions that a code for matrimonial lawyers might also reflect such shifting loyalties:

Perhaps equally significant, these codes would need to consider the possibility that the lawyer's role should change at different stages of, or with respect to different aspects of, the representation. Thus, for example, new codes for matrimonial lawyers might consider it reasonable for a divorcing spouse's lawyer to adopt one level of partisanship when finances are discussed but to take a different attitude in addressing custody issues.

Zacharias, *Reconceptualizing*, *supra* note 15, at 194.[Back To Text](#)

⁸¹ I swear: no pun intended. For some recent discussions of developments in family law, see Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 Baylor L. Rev. 271 (1997) (discussing issues in marital law); Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 Buffalo L. Rev. 369 (1997) (discussing intersection of financial and marital breakups); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 Cardozo L. Rev. 1299 (1997) (discussing variations on "traditional" families).[Back To Text](#)

⁸² See Rapoport, *Conflicts*, *supra* note 7, at 972–75 (discussing family law's temporary conflicts of interest); see also Steven H. Hobbs & Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role, and Law Approach*, 62 Fordham L. Rev. 1411, 1421 (1994) ("The traditional notions of representation and adversarial ethics do not quite fit.").[Back To Text](#)

⁸³ See, e.g., Model Rules of Professional Conduct Rule 2.1 (1989); Model Code of Professional Responsibility EC 7–8 (1980).[Back To Text](#)

⁸⁴ Yes, this is an unlikely development, but it *could* happen. It happens all the time in soap operas. For some more realistic elder law ethics issues, see, e.g., *Proceeding of the Conference on Ethical Issue in Representing Older Client: Report of Working Group on Lawyer as Fiduciary*, 62 Ford. L. Rev. 1055 (1994).[Back To Text](#)

⁸⁵ Hobbs & Hobbs, *supra* note 82, at 1421 (suggesting that family lawyers "treat[] the family unit as a client" and that family lawyers are "really functioning in the role of intermediary as suggested by Model Rule 2.2."). Some examples of proposed rules include:

1.1 An attorney is responsible for the competent handling of all aspects of a representation, no matter how complex.

2.9 An attorney should share decision-making responsibility with the client, but should not abdicate responsibility for the propriety of the objectives sought or the means employed to

achieve those objectives.

2.13 An attorney should never encourage a client to hide or dissipate assets.

2.27 An attorney should refuse to assist in vindictive conduct toward a spouse or third person and should not do anything to increase the emotional level of the dispute.

See American Academy of Matrimonial Lawyers, *Bounds of Advocacy*, in *American Academy of Matrimonial Lawyers Standards of Conduct* 9 J. Am. Acad. Matrim. Law 6, 9, 15, 21, 30 (1992) (respective pages). As the American Academy of Matrimonial Lawyers explains,

Existing codes often do not provide adequate guidance to the matrimonial lawyer. First, their emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters. Second, the existing codes delineate the minimum level necessary to avoid professional discipline, rather than describe optimum ethical behavior toward which attorneys should strive. Third, the rules are often vague and provide contradictory guidelines in some of the most difficult family law situations.

Id. at 3.[Back To Text](#)

⁸⁶ See Hobbs & Hobbs, *supra* note 82, at 1422 ("The idea that different areas of practice require ethical guidelines unique to that practice is what prompted the American Academy of Matrimonial Lawyers to issue its own standards of conduct."); see also Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham L. Rev. 1253, 1256 (1994) ("Also challenging the established approach, but in a less confrontational manner, the ABA Section of Real Property, Probate and Trust Law . . . has recommended guidelines for ethical representation of spouses").[Back To Text](#)

⁸⁷ Professor Judith Maute properly raises the issue of whether the self-interest of matrimonial lawyers may have affected their proposed ethics rules. See e-mail from Judith Maute to Nancy B. Rapoport (March 19, 1998) (on file with author).[Back To Text](#)

⁸⁸ Obviously, bankruptcy law incorporates certain state law concepts (e.g., exemptions, issues of perfection of security interests), but it is still a practice that is based in federal (bankruptcy) court. For discussions of the relationship between federal bankruptcy law and state law attributes, see, e.g., Thomas H. Jackson, *The Logic And Limits of Bankruptcy Law* (1986); Douglas G. Baird, *The Elements of Bankruptcy* (1992); John D. Ayer, *The Role of Finance Theory in Shaping Bankruptcy Policy*, 3 Am. Bankr. Inst. L. Rev. 53, 66–69 (1995); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989); Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815 (1987); Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. Leg. Stud. 73 (1985); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725 (1984); Thomas H. Jackson, *Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857 (1982); Lynn LoPucki, *A General Theory of the Dynamics of the State Remedies/Bankruptcy System*, 311 Wis. L. Rev. 311 (1982).[Back To Text](#)

⁸⁹ Apparently, environmental law also has its problems with current state conflicts of interest rules. See J.B. Ruhl, *Malpractice and Environmental Law: Should Environmental Law "Specialists" Be Worried?*, 33 Hous. L. Rev. 173, 178 & n.8 (1996) (discussing potential conflicts and liabilities on environmental law).[Back To Text](#)

⁹⁰ See J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 Loy. L.A. L. Rev. 825, 835 (1994) ("The current codes are based on a tradition of advising the client to offer as little information as possible in order to avoid self-incrimination. Under such codes discreet silence—not open disclosure—is the norm. This approach runs counter to the operation of our environmental laws."). For a

classic account of the many interests that must be balanced in environmental cases, see Jonathan Harr, *A Civil Action* (1995). This book should be required reading for all new law students.[Back To Text](#)

⁹¹ See also *supra* note 52 and accompanying text.[Back To Text](#)

⁹² Futrell, *supra* note 90, at 837–38 (footnotes omitted).[Back To Text](#)

⁹³ See *infra* note 174 and accompanying text.[Back To Text](#)

⁹⁴ Cf. Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-Based Approach*, 21 Harv. Envtl. L. Rev. 337, 376 (1997) (discussing "long fuse" problem of economic resource allocation of environmental law).[Back To Text](#)

⁹⁵ See *supra* note 42 and accompanying text.[Back To Text](#)

⁹⁶ Zacharias cautions us not to jump headfirst into a specialized code of ethics without determining what our priorities are:

There is a place for both specific and generalized regulation, depending on the purpose that the drafters have in mind for particular regulation. Before promulgating a code or reform provision, however, it is important that drafters identify their purpose or, when the regulation serves multiple purposes, assign priorities among them. Only with this foundation can drafters hope to formulate rules that have an optimal effect.

Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, 224–25 (1993) [hereinafter Zacharias, *Specificity*] (footnotes omitted).[Back To Text](#)

⁹⁷ See *infra* notes 123–57 and accompanying text.[Back To Text](#)

⁹⁸ Obviously, these questions aren't going to be completely useful all the time, but they're a good start.[Back To Text](#)

⁹⁹ See Rapoport, *Conflicts*, *supra* note 7, at 924–26. At the AALS Annual Conference this past January, Walter Effross suggested a new approach to describing the complexity of conflicts of interest in bankruptcy. I was tickled pink by Walter's suggestion, so here it is. Assume that normal conflicts of interest have the difficulty level of a chess game. (We know that chess player A always opposes chess player B, and that the opposition is always bi-directional.) If that is true of normal conflicts, then bankruptcy conflicts have the complexity of a game of Go. Cf. George Johnson, *To Test A Powerful Computer, Play an Ancient Game*, N.Y. Times (July 29, 1997) (discussing potential computer version of Asian game of "go"); Mark E. MacDonald, et al., *Pictures are Worth A Thousand Words: Understanding the Chapter 11 Process Through Models and Simulation*, 526 PLI/Comm 453 (1990) (explaining dynamics and "models" of interpreting Bankruptcy Code). Players can oppose each other by placing their pieces, not just in a bi-directional opposition, but in a multi-directional opposition. After our AALS panel, Paul Shupack suggested that I go one better in my description: instead of Go, which involves only two players, I should analogize to the game of Diplomacy, which involves numerous players and lots of double-crossing. Kudos to both Walter and Paul.[Back To Text](#)

¹⁰⁰ Family law and bankruptcy law are two good examples here. See Rapoport, *Conflicts*, *supra* note 7, at 974–75 (using adoption law as example of where simultaneous representation of both sides can occur).[Back To Text](#)

¹⁰¹ See Smith, *supra* note 6, at 807, 897–98, & n.394 ("The Reporter's Memorandum accompanying Council Draft No. 13 stated that, after extensive discussion and correspondence it was decided not to deal explicitly with bankruptcy."). Smith points out that the ALI's conflict rules, although considered far superior to the

conflict rules of the Model Code or the Model Rules, still don't mesh well with the realities of bankruptcy practice. *See id.* at 838–51 (criticizing Restatement (Third)'s conflict rules as they relate to bankruptcy practice).[Back To Text](#)

¹⁰² *See* Nancy B. Rapoport, *Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney*, 70 Ind. L.J. 783, 790–806 (1995) [hereinafter Rapoport, *Forest*] (describing bankruptcy attorney's role as advocate and counselor to debtor and discussing the inability of ethic rules to deal with them); Rapoport, *Conflicts*, *supra* note 7, at 917–26 (noting that, especially in bankruptcy, "more parties" means "more conflict of interest problems").[Back To Text](#)

¹⁰³ *See supra* note 48 and accompanying text.[Back To Text](#)

¹⁰⁴ *See* Rapoport, *Conflicts*, *supra* note 7, at 970–75 (discussing temporary attorney conflicts arising out of the use of counseling and adversarial skills in context of corporate and family law); Rapoport, *Forest*, *supra* note 102, at 818–44 (discussing how representation of multiple parties can overwhelm existing principles governing conflicts of interest).[Back To Text](#)

¹⁰⁵ *See* Markell, *supra* note 6, at 405–11. Of course, conflicts problems aren't limited to the realm of bankruptcy law. *See, e.g.,* John Gibeaut, *A Switch in Time: Courts Cool to Restatement Proposal on Lawyer Job-hopping*, 83 ABA J. 40, 41 (November 1997) (discussing Restatement (Third) of the Law Governing Attorneys provision for screening conflicts of interests in private practice).[Back To Text](#)

¹⁰⁶ Most bankruptcy petitions are voluntary. *See* 11 U.S.C. § 301 (1994) (voluntary petitions). *But see id.* § 303 (involuntary petitions); Susan Block–Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 Brook. L. Rev. 803 (1991) [hereinafter Block–Lieb, *Why Creditors*] (studying involuntary petitions); 2 Collier on Bankruptcy ¶ 303.01 (Lawrence P. King ed., 15th ed. rev. 1997); *cf. id.* § 303(b)(3) (partnership petitions which, if not unanimously supported by all of the general partners, are considered involuntary). On the other hand, the bankruptcy court *isn't* usually the first-choice forum for creditors.[Back To Text](#)

¹⁰⁷ *See, e.g.,* Rapoport, *Forest*, *supra* note 102, at 803–06 (discussing "unrepresented" interests that attorneys must protect); *see also* Nathalie Martin, *Recognizing Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 Ohio St. L.J. ____ (forthcoming 1998).[Back To Text](#)

¹⁰⁸ *See, e.g.,* 11 U.S.C. § 363 (permitting debtor-in-possession to operate its business as usual, without court supervision, if it is behaving "in the ordinary course of business"); *see also In re Latanowich*, 207 B.R. 326 (Bankr. D. Mass. 1997) (discussing the Sears reaffirmation imbroglio). Not only are most reaffirmations unscrutinized, but creditors have begun forcing discharged debtors into repaying the *discharged* debt. *See* Karen Gross, *As We Fleece Our Debtors*, 102 Dick. L. Rev. ____ (forthcoming 1998); *see also* Karen Gross, *Perceptions and Misperceptions of Reaffirmation Agreements*, 102 Comm. L.J. 339, 345–46, 349–54 (1998) (discussing creditor misbehavior that took advantage of debtors lack of understanding of the Bankruptcy Code's protections, especially the post-discharge protections).[Back To Text](#)

¹⁰⁹ *See, e.g.,* John D. Ayer, *Down Bankruptcy Lane*, 90 Mich. L. Rev. 1584, 1597 (1992) (comparing bankruptcy cases to class action suits). For another take on bankruptcy litigation vs. "bilateral" civil litigation, *see* Smith, *supra* note 6, at 804.[Back To Text](#)

¹¹⁰ *See* Rapoport, *Conflicts*, *supra* note 7, at 913–17 (comparing "traditional" conflicts of interest analysis to that of bankruptcy).[Back To Text](#)

¹¹¹ *See id.* (noting bankruptcy's shifting allegiances).[Back To Text](#)

¹¹² *See id.* at 917–26 (discussing how multiple representations in bankruptcy cases overwhelm current conflicts law). Such notables as Professors Wolfram and Hazard have also recognized that "bankruptcy [does]

not fit the model of bilateral civil litigation." Smith, *supra* note 6, at 885. In fact, Professor Hazard observed that "[b]ankruptcy reorganization represents a hybrid of administration and litigation. . . . Alliances between debtor management, creditor and equity may vary issue by issue during the case." *Id.* at 886.[Back To Text](#)

¹¹³ Or in many other areas, either. Zacharias notes several situations in which opposing parties may not be true adversaries: for example, clients in mutually beneficial transactions (e.g., real estate) or clients who need to get certain governmental services (health or other benefits). See Zacharias, *Reconceptualizing*, *supra* note 15, at 190.[Back To Text](#)

¹¹⁴ See Rapoport, *Conflicts*, *supra* note 7, at 917–19 (discussing problems that arise due to the application of state ethics codes).[Back To Text](#)

¹¹⁵ As Wilkins described in his analysis of the *Kaye, Scholer* situation:

There are many nonjudicial proceedings in which most, and in some cases all, of the animating assumptions [of the advocacy model] hold. Formal hearings before an administrative law judge or an agency review board are obvious examples. Nevertheless, the farther one moves away from court proceedings, the harder it is to justify full-fledged partisan advocacy.

Wilkins, *Making Context Count*, *supra* note 17, at 1188.[Back To Text](#)

¹¹⁶ 11 U.S.C. § 327(a) (1994). Section 327(a) provides:

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

Id.[Back To Text](#)

¹¹⁷ 11 U.S.C. § 101(14). Section 101(14) provides:

"disinterested person" means person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

Id.[Back To Text](#)

¹¹⁸ See Smith, *supra* note 6, at 813–15 (discussing development of disinterestedness concept as anachronistic anomaly when applied to DIP's professionals and not to *trustee's* professionals); Vergos v. Timber Creek, Inc., 200 B.R. 624, 627–30 (W.D. Tenn. 1996) (refusing to impute conflict of partner in firm to entire firm, where partner previously was officer of debtor, because Bankruptcy Code didn't require imputation and because ethics rules in Tennessee and Sixth Circuit permit screening of conflicted-out partner); Capen Wholesale, Inc. v. Michel (*In re* Capen Wholesale, Inc.), 184 B.R. 547, 550–51 (N.D. Ill. 1995) (approving general notion that Rules of Professional Conduct can be used to interpret section 327(a) but rejecting bankruptcy court's conclusion that Rules required imputation of conflict in this particular situation); *In re* Natchase Assocs. Ltd. Partnership, No. 94–10356–A 1994 Bankr. LEXIS 1319, *4 (Bankr. E.D. Va. Aug. 30, 1994) ("The American Bar Association's Code of Professional Responsibility is applicable to the disqualification of attorneys in bankruptcy proceedings.") (citing E.D. Va. Local R. 105(I), which states "the ethical standards relating to the practice of law in this Court shall be the Canons of Professional Ethics of the American Bar Association and the Virginia State Bar"); *In re* Vanderbilt Assocs., 117 B.R. 678, 681 (D. Utah 1990) (noting that both district court and bankruptcy court have adopted Utah Rules of Professional Conduct and Code of Professional Responsibility); *In re* Lee, 94 B.R. 172, 177–78 (Bankr. C.D. Cal. 1988) (applying California ethics rules—and Model Rule 1.7—to question of whether appointment under section 327(a) was permissible); *In re* Thompson, 54 B.R. 311, 316 (Bankr. N.D. Ohio 1985) (bankruptcy court may deny compensation if it finds violation of professional ethics); see also Mullenix, *supra* note 16, at 124 (footnotes omitted) ("Apart from interdistrict and intercircuit conflicts, the disparity among possible ethical standards also may inspire conflicting 'vertical' interpretations between the federal district courts and the state in which those courts sit, with some federal courts choosing to follow state law, and other federal courts choosing to ignore it."); cf. *Disinterestedness*, *supra* note 3, at 207–08. Eric Sommers, my research assistant, did a rough count of how often the courts stuck to the disinterestedness rules of section 327(a) and 101(14).

One example of the lack of consistency in bankruptcy cases is how the courts define "disinterestedness." Although seemingly straightforwardly defined within the bankruptcy code itself at § 101(14), courts have not relied on this definition exclusively. Although a majority [did use] the definition supplied in § 101(14) (60%), still a large minority of cases either assume[d] the definition in a conclusory fashion (13%), rel[ied] on case law (12%), gloss[ed] over it entirely (7%), or [found an alternative] definition within state statutes (4%) . . . [T]he bankruptcy courts use the definitions provided by the [C]ode most often (70%), the courts of appeal are next at 50%, and the least reliable are the district courts, using the [C]ode definition 40% of the time, but also having the greatest amount of conclusory statements (27%) and case law reliance (20%).

E-mail from Eric Sommers to Nancy B. Rapoport (March 23, 1998) (on file with author). [Back To Text](#)

¹¹⁹ See *supra* note 118. Compare Freeman *supra* note 6, at 201 (showing that DIP counsel is required "to urge the DIP to meet its fiduciary duties to creditors, but is to abide by the client's decisions as long as there is a nonfrivolous basis for doing so" and is not permitted "to act on her own as she believes best for the estate, but only to refrain from filing bad faith or frivolous pleadings, and to withdraw if the high standards for withdrawal are met.") with *DIP's Attorney*, *supra* note 9, at 58–72 (discussing how Estate Counsel has fiduciary duty to estate and not to DIP). See also *supra* notes 16, 118 and accompanying text. [Back To Text](#)

¹²⁰ For example, in Michel v. Federated Dep't Stores, Inc. (*In re* Federated Dep't Stores, Inc.), 44 F.3d 1310 (6th Cir. 1995), the Sixth Circuit determined that the bankruptcy court had no leeway to give the DIP's professionals a break in terms of section 327(a)'s requirements. In relying on two of its earlier decisions, Childress v. Middleton Arms Ltd. Partnership (*In re* Middleton Arms, Ltd. Partnership), 934 F.2d 723 (6th Cir. 1991) and Michel v. Eagle–Picher Indus., Inc., 999 F.2d 969 (6th Cir. 1993), the Sixth Circuit reiterated its earlier holding—that section 1107(b)'s exception to section 327(a) was "very narrow Where a professional is disqualified for other reasons [besides prior employment by the DIP] expressly listed in the statutory definition of an 'interested person,' § 1107(b) does not apply." *In re* Federated Dep't Stores, 44 F.3d at 1318 (citing *In re* Middleton Arms, 934 F.2d at 724).

Gerald Smith notes that the House of Delegates of the ABA has recommended that:

the per se disqualification rules of the disinterestedness standard be abandoned as to counsel for the debtor-in-possession and replaced by the requirement that counsel not hold or represent an interest materially adverse to the estate and meet the applicable standards of professional responsibility for the district in which the case is pending.

Smith, *supra* note 6, at 823. Of course, that doesn't solve the problem. Under the House of Delegates' proposal, attorneys would still be subject to multiple layers of ethics rules (at least one per case).[Back To Text](#)

¹²¹ See Rapoport, *Conflicts*, *supra* note 7, 940–51 (detailing how Model Code of Professional Responsibility, Model Rules of Professional Conduct and Restatement (Third) of the Law Governing Lawyers do not satisfactorily deal with ethically dubious situations arising in bankruptcy cases); Rapoport, *Forest*, *supra* note 102, at 785–86 (discussing state ethics requirement of zealous client representation as not working with multiple interest in bankruptcy).[Back To Text](#)

¹²² At least from *my* perspective.[Back To Text](#)

¹²³ See Wilkins, *Who Should Regulate?*, *supra* note 40, at 816–17 (noting sophistication of certain types of clients). Wilkins points out that these clients, "[a]s 'repeat players, . . . usually have a considerable baseline of experience from which to formulate the goals of the representation and to evaluate lawyer performance." *Id.* at 817; see also Nathalie D. Martin, *Fee Shifting in Bankruptcy: Deterring Frivolous, Fraud-Based Objections to Discharge*, 76 N.C. L. Rev. 97, 124 (1997) (pointing out that institutional creditors, such as banks, are often repeat players).[Back To Text](#)

¹²⁴ See, e.g., Zacharias, *Specificity*, *supra* note 96, at 225–48; Andrew S. Morrison, Comment, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 Cal. L. Rev. 1093, 1139 (1987) ("[O]ne of the central purposes for having a code of professional ethics . . . is to provide attorneys with clear guidelines by which to shape their own conduct.").[Back To Text](#)

¹²⁵ See, e.g., Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 B.Y.U. L. Rev. 591, 625 ("In game theory terms, the strategy that motivates a repeat player engaged in continued interactions with other repeat players to avoid overreaching is the game of 'tit for tat.'"); Block-Lieb, *Why Creditors*, *supra* note 106, at 815–19 (describing "tit for tat" strategy); Greg M. Zipes, *Discovery Abuse in the Civil Adversary System: Looking to Bankruptcy's Regime of Mandatory Disclosure and Third Party Control over the Discovery Process for Solutions*, 27 Cumb. L. Rev. 1107, 1161 n.208 (1996) ("The bankruptcy bar's small size is noteworthy because dispute resolution theoreticians have argued that such a small community militates toward cooperative behavior, as opposed to confrontational behavior, which facilitates efficient dispute resolution.") (citing Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 520–22 (1994)).[Back To Text](#)

¹²⁶ On the other hand, plenty of us would be willing to bet that small-town practice is different, with repeat players as the norm and not the exception.[Back To Text](#)

¹²⁷ See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 547–48 (1994) (noting that, in larger cities, the ability to learn about the reputations of individual lawyers is constricted).[Back To Text](#)

¹²⁸ My repeat-player theory isn't perfect. What if the repeat players are all sleazoid lawyers? We don't want them enforcing *their* norms. So obviously "repeat-player-ness" by itself isn't a good reason to depart from a generalist norm. Moreover, there's all sorts of ways to define repeat-player-ness. All of the lawyers in my home town are repeat players, too, no matter what type of law they practice, simply because I come from a

small home town. So how do I incorporate repeat–player–ness into my theory? Ted Janger and I discussed this problem a little bit. He pointed out that, according to game theory, players in cohesive communities will cooperate until somebody cheats, and then all of the non–cheaters will gang up on the cheater. In game theory, repeat players—even, God forbid, sleazoid repeat players—have a rational incentive to deal honorably with each other or face the consequences. See e–mail correspondence from Ted Janger to Nancy B. Rapoport (November 21, 1997) (on file with author); see also Williard K. Tom, *Game Theory in the Everyday Life of the Antitrust Practitioner*, 5 Geo. Mason L. Rev. 457,459 (1997) (discussing how repeat interactions among lawyers will discourage cheating).[Back To Text](#)

¹²⁹ See, e.g., *In re Leslie Fay Cos.*, 175 B.R. 525, 533–39 (Bankr. S.D.N.Y. 1994) (reprimanding Weil, Gotshal & Manges for failure to disclose information relating to alleged conflicts of interest but permitting firm to remain in case for certain purposes); *In re CF Holding Corp.*, 164 B.R. 799,808 (Bankr. D. Conn. 1994) (rejecting Weil, Gotshal's argument that it had no obligation to advise court of conflict of interest posed by appointment of another professional in case); see also Kurt Eichenwald, *Milbank, Tweed is Accused of a Conflict*, N.Y. Times Feb. 28, 1997, at D1, D2 (reporting Milbank, Tweed's alleged conflict of interest in Bucyrus–Erie bankruptcy); Dean Starkman, *Willkie Farr Is Criticized for Role in Case*, Wall St. J., at B8 (January 27, 1998) (conflicts of issue problem). But see, e.g., *Gleasant v. Jones, Day, Reavis & Pogue* (*In re Gleasant*), 933 F.2d 1277,1278 (5th Cir. 1991) (affirming grant of summary judgment in favor of Jones, Day on malpractice action based on conflicts of interest allegations; two–year statute of limitations had run); *Bank of Am. Nat. Trust & Sav. Ass'n v. Weil, Gotshal [sic] & Manges* (*In re Global Marine, Inc.*), 108 B.R. 1007, 1008–09 (S.D. Tex. 1988) (granting Weil, Gotshal's motion to dismiss appeal based on alleged conflicts of interest). Is it that bankruptcy ethics are *so* different from normal ethics that these firms can't help making mistakes, or are there other reasons? Cf. notes 3, 118 (discussing confusion surrounding disinterestedness).[Back To Text](#)

¹³⁰ See Rapoport, *Conflicts*, *supra* note 7, at 926 & n.37 (referring to repeat players in bankruptcy); cf. Nancy B. Rapoport, *Turning the Microscope on Ourselves: Self–Assessment by Bankruptcy Lawyers of Potential Conflicts of Interest in Columbus, Ohio*, 58 Ohio St. L.J. 1421, 1424–40 (1997) (describing research on Columbus bankruptcy bar).[Back To Text](#)

¹³¹ See Judith A. McMorro, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. Rev. 959, 976–77 (1991) ("Because federal courts are the largest court system in the United States, . . . and because they fill a leadership role for the other courts, they are in an unequaled position to assert a dominant vision of competence."); cf. Smith, *supra* note 6, at 817 ("At the same time that the potential for conflicts of interest has increased . . . the availability of competent legal specialists has been concentrated under fewer roofs."). With all apologies to folks like Posner, although there may be a market for bankruptcy lawyers when bankruptcy business is booming, that market doesn't create particularly competent bankruptcy lawyers—just breathing ones. Cf. Alvin C. Harrell, *The Consumer Issue Agenda Of The National Bankruptcy Review Commission*, 51 Consumer Fin. L. Q. Rep. 9, n.8 (1997) (noticing increased filings by novice bankruptcy attorneys in order to increase their income and clientele).[Back To Text](#)

¹³² And novice bankruptcy lawyers have a much more difficult time of it, especially in the area of identifying potential conflicts of interest. See Rapoport, *Conflicts*, *supra* note 7, at 988–89 (noting inexperienced attorney's inability to foresee conflicts that arise in bankruptcy). As Susan Block–Lieb points out:

Bankruptcy issues can be complex and technical. Like tax laws, banking laws, and the laws of secured transactions, bankruptcy laws involve numerous detailed provisions that arguably are only fully understood by . . . the handful of lawyers that specialized in the area. Bankruptcy practice is so distinct from other areas of expertise that many State Bar Associations require lawyers to receive special certification of their expertise. Congress also has distinguished bankruptcy adjudication and bankruptcy procedure from that in other federal courts by creating special bankruptcy courts to hear and determine most of the litigation in bankruptcy cases, and by empowering the Supreme Court of the United States to promulgate separate Federal Rules of Bankruptcy Procedure.

Block–Lieb, *supra* note 5, at 859–60 (footnotes omitted).[Back To Text](#)

¹³³ Everyone defines "the old days" differently. For me, it's life before the creation of the Comedy Channel. But for this purpose, let's reach back a little further in time.[Back To Text](#)

¹³⁴ If we're *really* talking about the old days, then it's likely that the lawyer was male. *See, e.g.,* Gross, *Re–Vision*, *supra* note 44, at 1546; Karen Gross, *Some Preliminary Findings on Women in Bankruptcy Law Practice*, in *The Impact of Race and Gender in Bankruptcy Law Practice: A Time for Reflection* 8–10 (1993) (reporting that women comprise roughly 15–16% of bankruptcy practitioners and participate within organizations at approximately that same level and that earlier generations of women in law focused on areas other than bankruptcy); Lynn LoPucki, *The Demographics of Bankruptcy Practice*, 63 *Am. Bankr. L.J.* 289, 297–99 (1989); Zipporah Batshaw Wiseman, *Women in Bankruptcy and Beyond*, 65 *Ind. L.J.* 107, 115 (1989).[Back To Text](#)

¹³⁵ *See* Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 *Wash. L. Rev.* 699, 719 n.62 (1975) (identifying federal district courts that have established independent examination and competency requirements). Although most do, in one form or another. *See supra* notes 16–118 and accompanying text; *cf.* Kathryn R. Heidt & Robert B. Millner, *Is Incorporation Venue a Good Thing?*, 7 *Bus. L. Today* 26–42 (Jan.–Feb. 1998) (describing debate about permitting corporations to file for bankruptcy protection in the state of their incorporation).[Back To Text](#)

¹³⁶ *See* J.F. Westmeier & Leonard T. Nuara, *Ethical Issues for Lawyers on the Internet and the World Wide Web*, 587 *PLI/Pat* 145, n.7 (1997) (explaining which states adopted Model Code and Model Rules); *see also* Zacharias, *Federalizing*, *supra* note 25, at 344 & n.2, 345–46 (noting state ethical codes not only overlap but sometimes conflict); Geoffrey J. Ritts, *Professional Responsibility and the Conflict of Laws*, 8 *J. Legal Prof.* 17, 18–20, 25–26 (1993) (discussing how state ethics codes conflict in areas of confidentiality, client privilege, contingent fees, and advertising).[Back To Text](#)

¹³⁷ *See supra* notes 27–29 and accompanying text.[Back To Text](#)

¹³⁸ For example, the Treasury Department has the independent statutory authority to discipline tax lawyers who are bad actors:

After notice and opportunity for a proceeding, the Secretary [of the Treasury] may suspend or disbar from practice before the Department [of the Treasury] a representative who–

(1) is incompetent;

(2) is disreputable;

(3) violates regulations prescribed under this section; or

(4) with intent to defraud, willfully or knowingly misleads or threatens the person being represented or a prospective person to be represented.

31 U.S.C. § 330(b) (1994).[Back To Text](#)

¹³⁹ *Cf.* 3 *The New Palgrave: A Dictionary of Economics* 691 (J. Eatwell et al. eds. 1987) (defining Occam's Razor, "[W]hat can be done with less is done in vain with more.") (Occam's Razor).[Back To Text](#)

¹⁴⁰ *See infra* notes 185–212 and accompanying text.[Back To Text](#)

¹⁴¹ Think of all of the traditional city rivalries: Houston vs. Dallas; San Francisco vs. Los Angeles; Columbus vs. Cleveland. Each of these cities has its own personality. Perhaps the city ethics code would, too.[Back To](#)

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¹⁴² Of course, we could ask *why* states are the superior ethics regulators at all. Is geography really destiny here? [Back To Text](#)

¹⁴³ See U.S. Const. art. I, § 8, cl. 4 (Bankruptcy Clause); *see also* The Federalist No. 42 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into the different states, that the expediency of it seems not likely to be drawn into question."). [Back To Text](#)

¹⁴⁴ After all, bankruptcy already has its version of the Federal Rules of Civil Procedure. *See* Fed. Bankr. R. P. 7001–7087. No one seems to be rushing to the forefront on the issue of creating bankruptcy ethics rules. Even the ALI is staying away from it. *See* Smith, *supra* note 6, at 807 (noting that the Reporters for American Law Institute's Restatement (Third) of the Law Governing Lawyers "intentionally eschew[ed] efforts to create separate conflict rules for bankruptcy, insolvency and other collective proceedings"); *see id.* at 881–902 (recapping debates between Reporters for Restatement (Third) of the Law Governing Lawyers and various opponents of tentative drafts as they relate to bankruptcy ethics). [Back To Text](#)

¹⁴⁵ See *infra* notes 185–212 and accompanying text. [Back To Text](#)

¹⁴⁶ See, e.g., *supra* notes 65–69 (discussing specialized rules for federal prosecutors) and notes 54–58 (discussing rules for maritime lawyers and lawyers practicing before the IRS and the INS); Federal Bar Ass'n, *Model Rules of Professional Conduct for Federal Lawyers*, Codes of Professional Responsibility 495–557 (Rena A. Gorlin ed., 3d. ed. 1994) (federal lawyers); Ass'n of Trial Lawyers of America, *Code of Conduct*, Codes of Professional Responsibility 559–61 (Rena A. Gorlin ed., 3d. ed. 1994) (litigators); Academy of Family Mediators, *Standards of Practice for Family and Divorce Mediation*, Codes of Professional Responsibility 427–432 (Rena A. Gorlin ed., 3d. ed. 1994) (dispute resolution); American Arbitration Ass'n, *Code of Ethics for Arbitrators in Commercial Disputes*, Codes of Professional Responsibility 437–45 (Rena A. Gorlin ed., 3d. ed. 1994) (same); Society of Professionals in Dispute Resolution, Inc., *Ethical Standards of Professional Responsibility*, Codes of Professional Responsibility 461–63 (Rena A. Gorlin ed., 3d. ed. 1994) (same). [Back To Text](#)

¹⁴⁷ See, e.g., *United States Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1872–75 (1995) (Kennedy, J., concurring) (explaining ideas behind federalism and what is within a state's powers); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing states as laboratories of social and economic experimentation); Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep,"* 45 Case W. Res. L. Rev. 705, 741 & n.176 (1995) (describing states as laboratories of future activity). [Back To Text](#)

¹⁴⁸ See *infra* note 212 and accompanying text. On the one hand, states are the primary laboratories because they possess the right to license—and sanction—attorneys practicing within their borders. But is the sanctioning authority enough of a justification when the state ethics codes haven't kept up with the changing nature of legal practice?

Maybe the practice areas *are* good laboratories. Unlike other types of race to the bottom problems, see *infra* notes 216–29 and accompanying text, practice areas may be more likely to draft ethics rules with an eye toward providing guidance on sticky ethical dilemmas, rather than with the intention of providing jurisdictions that have the (wink, wink) "easier" ethics rules. *See* Edward Janger, comments on prior draft of this article (November 21, 1997) (on file with author). [Back To Text](#)

¹⁴⁹ For example, I have absolutely no idea how (or whether) to cover issues that blend bankruptcy law and state court litigation (e.g., abstentions), lawyers who engage in fraud as part of the debtor's pre-bankruptcy planning, or lawyers whose conduct in a pre-bankruptcy workout is reprehensible. I plan to leave the resolution of important issues like these for another day (and another article). One idea that really intrigued

me, though, is Juliet Moringiello's suggestion for handling pre-bankruptcy planning. *See* Juliet M. Moringiello, *Distinguishing Hogs from Pigs: A Proposal for a Preference Approach to Pre-Bankruptcy Planning*, 6 Am. Bankr. Inst. L. Rev. ____ (forthcoming 1998).[Back To Text](#)

¹⁵⁰ Gerald Smith does a great job of describing the National Bankruptcy Conference's objections to the Restatement (Third) of the Law Governing Lawyers, specifically its sections on conflicts rules. *See* Smith, *supra* note 6, at 865–902. For another criticism of this Restatement, see Nancy J. Marshall & Patricia A. Lynch, *Lowering the Bar: New Restatement on Lawyer Competence May Protect Less Skillful Lawyers*, ABA J., Nov. 1997 at 78 (stating that "[T]he ALI Restatement articulates a much lower bar for competence than the ABA rule demands").[Back To Text](#)

¹⁵¹ But should those norms necessarily be *state* norms? I'll have to leave that question for another day.[Back To Text](#)

¹⁵² *See* Smith, *supra* note 6, at 820–24 (applying conflicts rules suggested by Restatement (Third) of the Law Governing Lawyers to issue of bankruptcy conflicts).[Back To Text](#)

¹⁵³ *See supra* notes 54–95. To make matters easier for all of us, Zacharias has identified at least three considerations that should dictate whether to federalize a particular ethics system: "the need for federal intervention, Congress's competence to enact professional regulation, and the practical impact that new federal rules would have." Zacharias, *Federalizing*, *supra* note 25, at 337. Another possibility is to create a single code of ethics for all lawyers practicing in federal courts, no matter what type of law they're practicing in those courts. The Standing Committee on Rules of Practice and Procedure is considering a proposal that lawyers admitted to federal court would have to abide by ten Federal Rules of Attorney Conduct. The first of these rules would "specif[y] that the standards for an attorney's conduct in proceedings pending in a district court would be the standards adopted by the state in which the district court sits, except that Rules 2 through 10 [covering confidentiality, conflicts of interest, candor toward the tribunal, the lawyer as witness, truthfulness in statements to others, and communications with persons represented by other counsel] would apply instead of corresponding state rules." *See Legal News*, U.S. Law Week 2549 (March 17, 1998). The Standing Committee's proposal is a nice start, but it's not the perfect solution. I still prefer my subject-area approach.[Back To Text](#)

¹⁵⁴ *See supra* note 25 and accompanying text; *see also* 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, 460 (1996) (proposing "that the federal judiciary undertake rulemaking to develop a single set of highly detailed rules of professional conduct" rather than merely adjusting hodgepodge of existing rules); Mullenix, *supra* note 16 (proposing uniform federal code of ethics); Richardson, *supra* note 31, at 141–44 (proposing "straightforward six-step approach" that forces federal courts to clarify exactly which ethics rules it will use, *exclusively*); Smith, *supra* note 6, at 828 (citing study by Daniel Coquillette suggesting that federal courts adopt uniform federal rules for certain areas of attorney conduct, such as conflicts, dealing with represented parties, "lawyer as witness" issues, and fees; Coquillette also suggests a choice of law rule be adopted as part of these uniform federal ethics rules); Brakel & Loh, *supra* note 135, at 699; Burbank, *supra* note 4, at 973–74.[Back To Text](#)

¹⁵⁵ *See* Mashburn, *supra* note 26, at 475–76 (discussing "morass of often contradictory federal common law, local rules, agency regulations, and state laws" bearing on ethics issues in federal courts); *see also* Richardson, *supra* note 31, at 152–58 (noting same, impossible confusion).[Back To Text](#)

¹⁵⁶ My particular bandwagon—possibly proposing *two* codes of bankruptcy ethics, one for consumer-side and one for commercial-side—is still empty, except for my seat. Kenneth Klee has hinted that some reworking of bankruptcy ethics is in order. *See* Kenneth N. Klee, *The Future of the Bankruptcy Rules*, 70 Am. Bankr. L.J. 277, 285 (1996) ("The Rules should adopt uniform standards of professional conduct in bankruptcy courts and eliminate the parochial practice of requiring out-of-town counsel to retain local counsel as a condition to appearance in a case or proceeding."). Presumably, no one on the NBRC is likely to get on board my

bandwagon, given that the NBRC's Working Group on Ethics rejected a suggestion that the "Bankruptcy Code should adopt its own rules of professional conduct governing lawyers appearing in bankruptcy courts which preempt state rules." Smith, *supra* note 6, at 899. The Working Group thought that such a proposal would maintain the current non-uniformity of ethics rules. *See id.* But *see id.* at 902 ("The possibility of bankruptcy rules of professional conduct is alive.").

Obviously, I don't want to go too far, creating an ethics code for every conceivable type of law. But some types of law naturally group themselves into ethics "units." Zacharias has suggested that certain types of law may need their own codes because their very nature differs dramatically from the traditional adversarial system: "What areas of practice such as matrimonial, elder, probate, real estate, transactional, mental health, social services, juvenile law, and, particularly, mediation have in common is that lawyers might feel more pull than in other areas of practice to seek the cooperation or advice of the party who technically opposes the client." Zacharias, *Reconceptualizing*, *supra* note 15, at 197 & n.126 ("Bankruptcy practice is an area in which lawyers usually must act from the traditional, adversarial posture but sometimes must acknowledge that the debtor and creditors (or debtor-in-possession) share interests; for example, where all parties are trying to maximize the return from the estate Therefore, traditional notions of the lawyer's proper role do not always fit.") (citing John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 Am. Bankr. L.J. 355, 357, 387 (1986)).[Back To Text](#)

¹⁵⁷ *See, e.g.*, John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 Am. Bankr. L.J. 355 (1986); Westbrook, *Fees*, *supra* note 11; Rapoport, *Conflicts*, *supra* note 7; Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 Geo. J. Legal Ethics 823 (1992); Christopher M. Ashby, Comment, *Bankruptcy Code Section 327(a) and Potential Conflicts of Interest—Always or Never Disqualifying?* 29 Hous. L. Rev. 433 (1992); Joseph D. Vaccaro & Marc R. Milano, Note, *Bankruptcy Code Section 327(a), A Statute in Conflict*, 5 Am. Bankr. Inst. L. Rev. 237, 254 (1997) (discussing Code section 327(a) and calling for uniformity, stating that "bankruptcy is a creature of the Federal Courts, and the regulation of ethics should be uniform throughout").[Back To Text](#)

¹⁵⁸ *Cf.* Brakel & Loh, *supra* note 135, *Regulating the Multistate Practice of Law*, 50 Wash. L. Rev. 699, 699–700 n.3 (1975) (discussing interstate practice regulations); Note, *Attorneys: Interstate and Federal Practice*, 80 Harv. L. Rev. 1711, 1711 (1967) (describing increase in multistate practice and providing reasons for nationalization of legal practice).[Back To Text](#)

¹⁵⁹ Correct me if I'm wrong here.[Back To Text](#)

¹⁶⁰ *See infra* note 170 and accompanying text.[Back To Text](#)

¹⁶¹ Lawyers who practice near the border of two states probably have practices that involve both sides of the border.[Back To Text](#)

¹⁶² *Cf.* State Unauthorized Practice of Law Comm. v. Paul Mason & Assocs., 159 B.R. 773, 779 (N.D. Tex. 1993) (holding that agency that assisted creditors in bankruptcy case was not engaged in unauthorized practice of law, based on protection of Bankruptcy Rule 9010(a)). In that case, the court refused to apply the state's unauthorized practice prohibition in the context of bankruptcy, stating:

Under the [Unauthorized Practice of Law Committee]'s scheme of regulation, the UPLC could seek to enjoin a person from performing acts that constitute the unauthorized practice of law under the state's standards even though those same acts may be specifically authorized by a federal court under Bankruptcy Rule 9010(a). The potential for conflict between what the federal courts believe is the unauthorized practice of law and what the State of Texas believes is the unauthorized practice of law is substantial.

. . . Federal courts cannot defer to states when making determinations as to who may perform which acts in furtherance of their administration of justice.

Id. at 779–80; *Cf.* Mullenix, *supra* note 16, at 106 (discussing state vs. state horizontal" conflict problems and "interdistrict and intercircuit . . . 'vertical'" conflicts and explaining that "[i]n federal practice, . . . professional responsibility problems may arise both from the traveling lawyer as well as the traveling legal matter"). Consumer–side and commercial–side practices both have their areas of complexity, but my gut hunch tells me that the areas of complexity differ from each other. Here's one way to look at things: [Back To Text](#)

¹⁶³ *But see* Whitford, *supra* note 51, at 500 & n.12 (discussing rise in debtor–side consumer bankruptcy specialists and noting that fewer than 15% of debtors file *pro se* petitions); Braucher, *supra* note 51, at 503–a (describing local culture of consumer–side bankruptcy lawyers). *Cf.* Lisa Hill Fenning & Craig A. Hart, *Measuring Chapter 11: The Real World of 500 Cases*, 4 Am. Bankr. Inst. L. Rev. 119, 120 (1996) (observing that most individual debtors don't have counsel and that most small business debtors use their usual non–bankruptcy attorney). [Back To Text](#)

¹⁶⁴ *In re Peterson*, 163 B.R. 665 (Bankr. D. Conn. 1994), is one of my favorite cases because it tries valiantly to distinguish between authorized and unauthorized practice of law in the bankruptcy context:

Put another way, an attorney who is not licensed by the State of Connecticut but who is authorized [per pro hac vice rules] to practice before the bankruptcy court may . . . practice law in this state and even maintain an office here so long as the services rendered are limited to those reasonably necessary and incident to the specific matter pending in this court. There is a difference, however, between maintaining an office in this state for the convenience of litigating a matter in this court and maintaining such an office for the purpose of giving legal advice on bankruptcy matters to all clients who seek it and accepting all cases which can be filed here.

Id. at 675. *Accord* *Sperry v. Florida*, 373 U.S. 379, 402 (1963) (footnotes omitted) ("Moreover, since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives.").

It's clear that the practice of law isn't the provincial, sleepy operation that it used to be. Many, if not most, firms have several offices (nationally and internationally) and national and international clients.

[L]awyers find themselves today with clients who are only blocks away or as far as a continent away. Innovations in telecommunications and transportation have made keeping in touch with distant clients almost as effective as communication with clients in the same community. For their own part, lawyers' reputations, at least in some specialties, have also spread beyond an otherwise confining web of state lines. Many lawyers with a national or regional reputation are as likely to receive calls for legal services from prospective clients from distant states as from the lawyer's own jurisdiction. This series of changes has manifested itself in such structural alterations as the proliferation of out–of–state offices (we

are not supposed to call them "branch" offices) of national law firms. For a growing percentage of practitioners, this means that law practice has become a career consisting of collecting frequent-traveler awards as lawyers criss-cross the country and globe to serve their clients' legal needs.

Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 665, 669 (1995) (footnotes omitted); *see also* Zacharias, *Federalizing*, *supra* note 25, at 342–43 (noting lawyers and firms have broadened their practices to provide service to mobile individual and commercial clients); Mullenix, *supra* note 16, at 94 (noting rise of "national law firms with multistate or global legal practices").[Back To Text](#)

¹⁶⁵ *See, e.g.*, Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. Tex. L. Rev. 1075 (1995); Edward A. Carr & Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. Tex. L. Rev. 859 (1995); David Luban, *A Friendly Amendment to Model Rule 8.5*, 36 S. Tex. L. Rev. 1015 (1995); Fred C. Zacharias, *A Nouveau Realist's View of Interjurisdictional Practice Rules*, 36 S. Tex. L. Rev. 1037 (1995) [hereinafter Zacharias, *Nouveau Realist*]; Kathleen Clark, *Is Discipline Different? An Essay on Choice of Law and Lawyer Conduct*, 36 S. Tex. L. Rev. 1069 (1995); *see also* Wolfram, *supra* note 164, at 680 (discussing various ways of admission to bar).[Back To Text](#)

¹⁶⁶ *See* Needham, *supra* note 165, at 1083 (describing various penalties for unauthorized practice); Wolfram, *supra* note 164, at 685–90 (describing disconnect between what lawyers are supposed to do about "unauthorized practice" rules and what they *actually* do; listing sanctions for unauthorized practice).[Back To Text](#)

¹⁶⁷ *See* Needham, *supra* note 165, at 1076–79 (noting that it is "a classic 'catch 22' [:] lawyers' escape from unauthorized practice prosecution [but] expose them[selves] to potentially conflicting ethical requirements"). Another possibility is for each state to adopt rules defining "unauthorized practice of law" extremely narrowly, e.g., exclusively in-court practice, so that lawyers can give transactional advice to clients in (or advice about) other jurisdictions without fear of violating "unauthorized practice" rules. Needham surveys the laws of several jurisdictions, searching for ways that states have exempted certain types of practice from being "unauthorized practice." *See id.* at 1084–87 (discussing exemptions and special admission categories). These state-by-state fixes aren't perfect. Needham points out that "[i]n the other forty-six jurisdictions within the United States, the regulations prohibiting the unauthorized practice of law still apply to prohibit in-house lawyers who are licensed in other states from giving legal advice while they are located within the geographical borders of a jurisdiction in which they are not licensed." *Id.* at 1087. (footnotes omitted).[Back To Text](#)

¹⁶⁸ *See id.* at 1100 (recommending that states make their ethics rules uniform, but noting that such uniformity is probably pipe dream).[Back To Text](#)

¹⁶⁹ *See infra* note 195 and accompanying text.[Back To Text](#)

¹⁷⁰ There's yet another possible solution: Model Rule 8.5, which creates a conflict-of-law rule for conflicting ethics codes. I'm not fond of that Rule. For a detailed critique of Model Rule 8.5, *see* Clark, *supra* note 165, at 1070–73 (suggesting that states apply their usual choice of law rules, and not special ethics choice of law rule, to solve problem of multijurisdictional conflicts in the ethics rules); Needham, *supra* note 165, at 1094–96 (critiquing proposed ethics conflicts of law rule, Model Rule 8.5); Luban, *supra* note 165, at 1015–20 (discussing problems associated with Model Rule 8.5); Zacharias, *Nouveau Realist*, *supra* note 165, at 1048 & n.47 (critiquing variety of proposals—especially Model Rule 8.5—for fixing problems with unauthorized practice of law rules); Mullenix, *supra* note 16, at 107–08 (discussing how Model Rule 8.5 "relates to Erie/Klaxon principles").[Back To Text](#)

¹⁷¹ See *infra* notes 231–53 and accompanying text; see also Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 Iowa L. Rev. (1997) (citations are to the Wash.–St. Louis Working Paper No. 97–7–2) (on file with author), Working Paper No. 97–7–2, 69–73 (federal law provides better alternative to uniform or non-uniform state law in certain areas of law because it (1) eliminates "concerns about interstate competition and the race to the bottom"; and (2) is less susceptible to capture because more, and more varied, groups can participate in drafting process); but see *id.* at 72–72 (noting that worst thing about federal lawmaking is that Congress would draft it: "The UCC is a model of clarity and craftsmanship by comparison to the federal statutes.") (footnote omitted). [Back To Text](#)

¹⁷² Bruce Green describes the benefits of a uniform federalized set of ethics rules:

To promote consistency, a set of detailed rules of conduct for federal practitioners, revised on a regular basis to resolve conflicting judicial interpretations, is superior to adopting the ABA Model Rules. In either case, one set of rules will apply throughout the federal courts. The difference is that a uniformly applicable set of detailed rules will leave less room for interpretation and therefore engender less inconsistent interpretation.

...

The alternative that each federal court incorporate the rules of its state would promote consistency between federal and state practice at the expense of interdistrict practice.

...

Moreover, it is far from certain that federal litigators have a greater need for consistency between state and federal practice than among the federal district courts. Even if one favors federal–state consistency, the development of detailed federal rules might prove preferable in the long run. The adoption of a single set of rules for federal court practice would likely influence state courts in the development and interpretation of their own rules, thus fostering consistency on the state as well as federal level. The incorporation of state court rules would only perpetuate inconsistencies in the intrastate standards of professional practice.

Green, *supra* note 154, at 526–27 (footnotes omitted); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 Geo. J. L. Ethics 149, 152 (1993) (urging that Bar adopt "separate ethics codes for at least certain of the specialty practices"); cf. *Berger v. Cuyahoga County Bar Assoc.*, 983 F.2d 718, 724 (6th Cir. 1992) (finding based on improper fee charged by Ohio lawyers in a federal civil rights action, the Supreme Court of Ohio suspended the lawyers for one year; Sixth Circuit affirmed, explaining "we know of no authority . . . stating that federal disciplinary standards preempt states from disciplining attorneys for improper acts performed in federal courts.") (footnote omitted); see Brackel & Loh, *supra* note 135, at 737 ("Specialist lawyers, whether corporation, civil rights or military, should not be subjected to more stringent rules than other attorneys when applying for foreign admission. . . . On the other hand, further study is needed to make a persuasive case for more lenient or limited admission standards for specialist lawyers."). [Back To Text](#)

¹⁷³ See *supra* note 143 and accompanying text. [Back To Text](#)

¹⁷⁴ See Elizabeth Warren, *Why Have a Federal Bankruptcy System?*, 77 Cornell L. Rev. 1093, 1094–95 (1992) (footnote omitted).

The question is: Why have a federal bankruptcy system? Why not leave the problem to state law or to private, extra-legal collection? The justification for the existence of the federal bankruptcy system is based on two premises. One is that a federal uniform system, specifically designed to address collapse, is a rational way to deal with failure. . . . The race to the bottom as states pass laws to encourage corporations to do business locally in the context of corporate law has produced serious problems. Consider the implication if the states determined what would happen to a multinational corporation once it decided to file for

bankruptcy in Delaware, South Dakota, Oklahoma, or wherever. The ide[a] is that the consequences of failure ought to be the same no matter where it happens. Moreover, a federal system can reduce total cost by providing nationwide service of process, as well as full coverage of all debtors, creditors and property in dispute. . . .

The second premise of federal bankruptcy law is that these uniform laws should reduce the total loss imposed by the system. This is why, for example, secured creditors cannot just pull the plug on a faltering business.

Id. Cf. Block–Lieb, supra note 5, at 838 (discussing conflicting views of bankruptcy theorists regarding goals of bankruptcy law).[Back To Text](#)

¹⁷⁵ Left *and* right, given the multiplicity of ethics codes that could affect them.[Back To Text](#)

¹⁷⁶ See Smith, *supra* note 6, at 827 ("No national rules governing admission and professional conduct have been promulgated under the Rules Enabling Act. Rules of conduct are governed by local rules of the bankruptcy courts, to the extent they are governed. *The resulting lack of uniformity is a serious problem*") (emphasis added and footnote omitted).[Back To Text](#)

¹⁷⁷ See *supra* notes 65–69 and accompanying text (discussing federal prosecutors).[Back To Text](#)

¹⁷⁸ We've already started along the path to this fix, what with our rules on disinterestedness, see *supra* notes 114–18 and accompanying text, and our own, "tweaked" version of the Federal Rules of Civil Procedure, see Fed. R. Bankr. P. 7000 *et. seq.* (1994).[Back To Text](#)

¹⁷⁹ I'm sensing a new market for self–help books along this line.[Back To Text](#)

¹⁸⁰ I know: the UCC isn't perfect. But it's pretty darn good. See, e.g., Janger, *supra* note 171, at 73.[Back To Text](#)

¹⁸¹ Nope, the Bankruptcy Code's not perfect, either.[Back To Text](#)

¹⁸² I don't love all codes, though. I'm not particularly fond of the way that the Model Code and the Model Rules mesh with the Bankruptcy Code.[Back To Text](#)

¹⁸³ *That's* not likely to happen. See Smith, *supra* note 6, at 807, 887–902 (noting that the Restatement provisions only address part of the problem and calling for specific rules; discussing National Bankruptcy Review Commission's debates and suggestions on conflicts of interest).[Back To Text](#)

¹⁸⁴ Of course, that understanding will have to come about by virtue of the bankruptcy ethics rules and the enforcement of those rules by the community of bankruptcy lawyers.[Back To Text](#)

¹⁸⁵ See Smith, *supra* note 6, at 831 (reporting that Conference of Chief Justices abhors idea of losing power to regulate attorney ethics).[Back To Text](#)

¹⁸⁶ See U.S. Const. amend. X.[Back To Text](#)

¹⁸⁷ See U.S. Const. art. IV., § 3, cl. 2.[Back To Text](#)

¹⁸⁸ See, e.g., *Sperry v. Florida*, 373 U.S. 379, 385 (1963) (holding that Florida couldn't enforce its attorney licensing requirements when those requirements ran counter to requirements of practice before Patent Office); see also *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1415 (E.D.N.Y. 1989) ("to the extent the enforcement of a state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement").[Back To Text](#)

¹⁸⁹ Congress vested federal courts with power to adjudicate attorney ethics disputes by providing that "[t]he Supreme Court and all courts established by Act of Congress may . . . prescribe rules for the conduct of their business." 28 U.S.C. § 2071(a) (1988). Section 2072, in turn, grants the Supreme Court the power to prescribe rules of practice and procedure. *See id.* § 2072(a). Based on that grant, each federal court may discipline attorneys for misconduct in that court and to prohibit attorneys from practicing in that court, as part of the general grant to regulate "the conduct of their business." *See id.* § 2071; *see also* *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 724 (6th Cir. 1993) ("Federal courts have the inherent authority to discipline attorneys practicing before them."); *In re Kelton Motors, Inc.*, 109 B.R. 641, 649 (Bankr. D. Vt. 1989) ("We [the bankruptcy courts] possess an inherent power to regulate the conduct of attorneys and to disbar attorneys from practicing before us.").

28 U.S.C. § 2075 permits the federal courts to make rules regulating bankruptcy practices and procedures:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

28 U.S.C. § 2075 (1994); *see also* Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 Am. Bankr. L.J. 217, 219–20, 235–36 (1996) (discussing development of bankruptcy rules); Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 Am. Bankr. L.J. 245 (1996) (describing process of enacting bankruptcy rules).

Special thanks to Eric Sommers for doing the key research for me in this area. As he explains:

In the relationship between the state and national judicial branches, federalism must be taken seriously. Each judicial branch confronts questions that arise under the law of the other sovereign[,] routinely and frequently. State courts decide questions of federal law and federal courts decide questions of state law. Confrontation is inherent in . . . federalism. Conflicts are inevitable. The organization[] and jurisdictions of the state courts and the national courts intersect at points of inevitable friction. Issues of jurisdiction are issues of power. Issues of power rely on sovereignty and supremacy. The question thus becomes one of how the nation's courts are going to function as a whole: will there be strict supremacy, defer[re]nce, or cooperation?

Eric Sommers, *Regulation of Attorney Conduct Under Exclusive Jurisdiction* (paper on file with author).[Back To Text](#)

¹⁹⁰ The traditional argument (and, yes, I'm oversimplifying it) about state-regulated *anything* is that states can engage in social experimentation to determine the most rational type of regulation in a field and states can best take into account their own regional quirks. When it comes to state regulation of attorney ethics, Zacharias is skeptical:

On the surface, this logic has appeal. The legal profession and the legal systems in highly populated, industrial states may differ from those in sparsely populated, rural jurisdictions. But one might seriously question whether the current codes address these differences. Most states follow the basic format of the ABA's two model codes. The primary changes that states have made do not reflect their unique populations. Moreover, most states, like the United States as a whole, are professionally and demographically diverse, yet do not have codes that

address the disparity among legal practices within the state. As a result, one cannot help doubting that local tailoring of the rules is taking place. To the extent that local codes are insensitive to demographic factors, nationalizing regulation would not interfere with local concerns.

Zacharias, *Federalizing*, *supra* note 25, at 375–76 (1994) (footnotes omitted). When it comes to state regulation of bankruptcy ethics, I'm skeptical, too.[Back To Text](#)

¹⁹¹ See *infra* notes 199–207 and accompanying text.[Back To Text](#)

¹⁹² The system also lets a federal court disbar an attorney from appearing before the federal court, based upon the attorney's conduct in state court. See *In re Sanchez–Ferrer*, 620 F. Supp. 951 (D.P.R. 1985) (holding that attorney previously disbarred by state court should be disbarred by federal court on same grounds).[Back To Text](#)

¹⁹³ See *supra* notes 27–31 and accompanying text.[Back To Text](#)

¹⁹⁴ See *supra* notes 16, 118 and accompanying text.[Back To Text](#)

¹⁹⁵ See *supra* notes 159–71 and accompanying text.[Back To Text](#)

¹⁹⁶ As my trusty research assistant, Eric Sommers, puts it:

The law of [b]ankruptcy reside[s] exclusively in the domain of the federal courts. Unlike many federal questions that may also be heard in state courts as well, bankruptcy cannot. Thus, unlike attorney conduct in most cases, in cases of exclusive federal jurisdiction, states retain control over attorneys in [substantive law] cases that they have no right to review The interest of each state to control the members of . . . [its] bar is not based purely on control of the[] person, but [on] control over the justice system. For questions exclusive to the federal system, the state's justice system is not involved; there is no compelling state interest, and no reason to defer to the state.

Sommers, *supra* note 189.[Back To Text](#)

¹⁹⁷ Model Rule 8.5, amended August 11, 1993, American Bar Association House of Delegates, New York, New York, per Report No. 114, provides:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Model Rules of Professional Conduct Rule 8.5.[Back To Text](#)

¹⁹⁸ See discussion *supra* note 170 (discussing use of conflict-of-law rule for ethics rules).[Back To Text](#)

¹⁹⁹ See King, *supra* note 189, at 235–36 (describing federal judiciary's role in development of bankruptcy rules); Resnick, *supra* note 189, at 250–59 (describing federal judiciary's role in rule-making process).[Back To Text](#)

²⁰⁰ Klee, *supra* note 156, at 278–79 (footnotes omitted).[Back To Text](#)

²⁰¹ See Resnick, *supra* note 189, at 266–69 (stating that "time" is the price paid for thoroughness of rulemaking process); Klee, *supra* note 156, at 280 (stating that the rule promulgating process, at best, takes three years).[Back To Text](#)

²⁰² 28 U.S.C. § 2075 (1994); see also Resnick, *supra* note 189, at 261 & n.61 (pointing out that 28 U.S.C. § 2072 includes same restriction regarding other federal rules).[Back To Text](#)

²⁰³ See Resnick, *supra* note 189, at 261.[Back To Text](#)

²⁰⁴ *Id.* at 262.[Back To Text](#)

²⁰⁵ Neither of these restrictions should pose a problem for us. We're not trying to change substantive rights, just to clarify them, and we're not trying to change procedural rules, just to add to them.[Back To Text](#)

²⁰⁶ Litigators, and especially bankruptcy lawyers, are intimately familiar with the terms "local" and "local-local" rules. See Klee, *supra* note 156, at 280–81 & n.26 ("Indeed, the notion that each courtroom is a fiefdom that is the private domain of the sitting judge has led to the proliferation of local bankruptcy rules and unofficial so-called local-local rules."). "Local" and "local-local" rules are not supposed to conflict with the national rules. See Hon. Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 Am. Bankr. L.J. 287, n.240 (1993) (stating goal of uniformity in national bankruptcy procedure is undermined by local rules); Klee, *supra* note 156, at 280 n.23 ("Although Bankruptcy Rule 9029 allows district courts to adopt local bankruptcy rules, they must not be inconsistent with the national rules or prohibit or limit use of the Official Forms"). That doesn't mean that the local rules *don't* conflict with the national rules. See Hon. Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 Am. Bankr. L.J. 287, n.240 (1993) ("While such local rules may be effective in providing guidance on procedural matters in any given district, they also substantially undermine the important goal of national uniformity in bankruptcy procedure"). It just means that they're not *supposed* to conflict with them.[Back To Text](#)

²⁰⁷ See Resnick, *supra* note 189, at 247–50 (describing participants in rule-making process); Smith, *supra* note 6, at 810 (explaining judiciary's involvement in rule-making process).[Back To Text](#)

²⁰⁸ See *supra* notes 116–20 and accompanying text (explaining Bankruptcy's Code's "disinterested" requirement).[Back To Text](#)

²⁰⁹ What I *don't* want is a set of new bankruptcy ethics rules drafted by greedy lawyers who simply want to eat their cake and have it, too. I'm assuming that *my* uniform code of bankruptcy ethics would not be drafted entirely by insiders, no matter what vehicle—the judiciary or Congress—does the drafting.[Back To Text](#)

²¹⁰ As one author states:

The obvious solution is to urge promulgation of a uniform code of professional responsibility for federal practitioners. One does so with great hesitancy, however, given the ABA's past two efforts at promulgating professional responsibility standards, the fifty states' independent and idiosyncratic adaptations of those rules, and the American Law Institute's venture into restating the Law Governing Lawyers. Indeed, these efforts represent object lessons in the political perils of attempting to codify ethical standards for lawyers. Moreover, since Congressional enactment of the Civil Justice Reform Act of 1990, federal courts seem hell-bent on balkanizing local rules, rather than achieving national uniformity.

Mullenix, *supra* note 16, at 126–27 (footnotes omitted). [Back To Text](#)

²¹¹ If inadequate. *But see* Peugeot v. U.S. Trustee (*In re* Crayton), 192 B.R. 970, 980 (B.A.P. 9th Cir. 1996) (explaining the bankruptcy courts' protection of public from attorney misconduct). [Back To Text](#)

²¹² See Carr & Van Fleet, *supra* note 165, at 896–98. As the authors explain:

Federal court interjection of its own law trumping state law in the field of lawyer ethics – including client–lawyer relations – is a dubious development. It is no doubt true that a uniform set of national rules could provide the benefit of greater predictability. But unless states are to become irrelevant, they should always have certain autonomy to control the practice of law within their own borders.

The numerous differences in rules across jurisdictions are not entirely random. Rather, these variations often reflect different judgments reached by different states after weighing the policy considerations underlying the particular issue at hand. Such variations cannot uniformly be deemed capricious or otherwise unworthy of any regard; the underlying issues of professional responsibility themselves are of sufficient substance—and offer sufficient grounds for reasonable differences of opinion—that a single, monolithic "national" rule cannot be uniformly imposed without seriously impairing or destroying a given state's reasoned and significant policy judgments.

Id. at 901–02. *Cf.* Brakel & Loh, *supra* note 135, further suggest that:

[P]roposals [for uniform bar admission] . . . ignore the state law, procedure and custom component that is relevant in federal courts. Thus, while the existing scheme is deficient because [it is] too restrictive, these proposals are unsatisfactory because [they are] too lax. Standard federal admission rules seem desirable, but only in conjunction with state requirements.

Id. at 719 (footnotes omitted).

But let's not go too far with respect to states—as–quality–control. It's not unheard of for lawyers to hop from state to state, much as doctors have done, when they need to escape sanctioning, and it takes a while for the "new" state to catch up to what the "home" state did to punish the professional. *Cf.* Plummer v. American Inst. of Certified Pub. Accountants, 95 F.3d 220, 225 (7th Cir. 1996) (holding under Indiana law, Private Voluntary Associations have the right to discipline members that violate organization rules). [Back To Text](#)

²¹³ See *supra* discussion in Part II. The key case in determining when the Supremacy Clause trumps state regulation of ethics is *Sperry v. Florida*, 373 U.S. 379 (1963). In *Sperry*, the Supreme Court held that non-lawyers could practice before the Patent Office pursuant to federal regulations, notwithstanding Florida's prohibition on the unauthorized practice of law, and that "[a] State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the state's licensing board a virtual power of

review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanction by federal license additional conditions not contemplated by Congress." *Id.* at 385; *see also In re Peterson*, 163 B.R. 665, 673 (Bankr. D. Conn. 1994) ("Thus Congress could enact statutes providing for the licensing of individuals to practice in specific areas of federal law, and those statutes would preempt incompatible state laws.") (citing *Sperry v. Florida*); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1414 (E.D.N.Y. 1989) ("Thus, to the extent the enforcement of a state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement."). *But see* *Mildner v. Gulotta*, 405 F. Supp. 182, 185, 192 (E.D.N.Y. 1975) (observing that "the license to practice law in a particular State is so local in nature, even to the point of localized admission to practice before the various courts, that federal constitutional standards have not altered the traditionally wide discretion afforded State courts [in regulating the behavior of their lawyers].").[Back To Text](#)

²¹⁴ *See* discussion *supra* Part II.[Back To Text](#)

²¹⁵ *See* Smith, *supra* note 6, at 807, 887–902. If I *were* to consider adding the ALI to my list of possible drafters, then I'd have to bone up on how public choice deals with "private legislatures." *See* Block–Lieb, *supra* note 5, at 827–30 (discussing public choice theory's view towards "private legislatures" that draft uniform laws, such as the Uniform Commercial Code, drafted by the ALI and NCCUSL); *see also* Janger, *supra* note 171, at 14–15 (suggesting that uniform law process, as administered by ALI and NCCUSL, gets best possible drafters, and those drafters are "able to engage in a careful deliberative process," enabling them to draft language that would be acceptable in all 50 states). For additional fun reads about the uniform law process, *see, e.g.,* William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 Wash. U. L.Q. 243 (1997); William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common–Law Courts, and the Article 9 Reform Process*, 82 Cornell L. Rev. 1511 (1997); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Leg. Stud. 131 (1996); A. Brooke Overby, *Modeling UCC Drafting*, 29 Loy. L.A. L. Rev. 645 (1996); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83 (1993).[Back To Text](#)

²¹⁶ *See* Block–Lieb, *supra* note 5, at 828 (combining game theory and public choice theory to explain enactment and revisions of Bankruptcy Code); *id.* at 830–32 (reviewing criticisms of public choice theory); Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 Duke L.J. 469, 520–55 (1992) [hereinafter Swire, *Bank Insolvency Law*] (applying public choice theory to bank insolvency rules). I'm the first to admit that I know very little about this area. For those of you who want to know more about public choice theory (and you can count me with you, as soon as I have some free time to read about it), Ted Janger has given me a list of some primers. These include: Ribenstein & Kobayashi, *supra* note 215; Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in competition Among Jurisdictions in Environmental Law*, 14 Yale L. & Pol. Rev. 67 (1996) [hereinafter Swire, *Environmental Law*]; Overby, *supra* note 215; Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995); Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 Minn. L. Rev. 861 (1995); Robert E. Scott, *The Politics of Article 9*, 80 Va. L. Rev. 1783 (1994); Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83 (1993); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1435 (1992); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 Ala. L. Rev. 551 (1991).[Back To Text](#)

²¹⁷ When I presented this paper at an Ohio State workshop, the first comment on everyone's lips was that my solution would have the "inmates running the asylum." Why would we want those in charge of having to *obey* this new code of ethics with the responsibility of drafting it? *See* Janger, *supra* note 171, at 16–17 (explaining that "capture . . . is most likely where a legal rule results in a benefit (or cost) to a relatively small and concentrated group, but the cost (or benefit) of the rule is borne (or obtained) by a relatively large and diffuse group") (footnote omitted); *cf.* Swire, *Bank Insolvency Law*, *supra* note 216, at 542–43 (observing that "the concentrated benefits to the FDIC of easy collection of assets are paired with a very diffuse affected

group—primarily, borrowers who receive loans from banks that later become insolvent") (footnote omitted). The answer is that I trust those charged with drafting per the judicial rulemaking authority. (I'm not quite as trusting of Congress.)[Back To Text](#)

²¹⁸ Cf. Janger, *supra* note 171, at 25 ("The uniform law drafters wish to ensure that the statute they prepare will be widely adopted. They must therefore draft a statute where state competition will not induce states to enact non-uniform versions of the code.") (footnote omitted); *see also id.* at 15–16 (pointing out weaknesses in uniform law process: there's less participation in drafting process because fewer people are involved in drafting itself; capture or race to bottom may produce rotten uniform laws).[Back To Text](#)

²¹⁹ *But see infra* note 225 and accompanying text. For some good, juicy discussions of race-to-the-bottom and related capture issues, see, e.g., Janger, *supra* note 171, at 8–27; Swire, *Environmental Law*, *supra* note 216, at 72–74 (analyzing "race to the bottom" in context of regulation of environmental law). In terms of drafting uniform laws, Ted Janger has come up with some interesting rules for when these problems are likely to occur. *See* Janger, *supra* note 171, at 28–29 ("Thus, there are two types of rules that are likely to lead to failure of the uniform law process: rules that are likely to cause the drafters to anticipate and facilitate the capture of state legislatures, and rules that are likely to cause the drafters to anticipate and facilitate a race to the bottom.").[Back To Text](#)

²²⁰ *See* Mashburn, *supra* note 26, at 514–15 ("[W]hen the will of Congress or the federal courts to assume control over some aspect of attorney regulation is clear, federal laws regulating attorneys (in federal tribunals or in their effectuation of federal rights) easily triumph in a straightforward clash with state ethics laws."); *see also supra* note 213 and accompanying text. As one author explains:

Under the Supremacy Clause, state laws that are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" are invalid State rules regulating attorney conduct are subject to the operation of the Supremacy Clause Thus, to the extent the enforcement of a state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement.

Under this view of the Supremacy Clause, then, Federal Rules of Civil Procedure effectively preempt any countervailing state ethical strictures. Similarly, were Congress to enact special rules governing federal prosecutors, presumptively these rules would preempt any inconsistent state or bar standards. Less certain, however, is the supremacy of local conduct rules promulgated by federal district courts, which technically are not Congressionally-enacted rules or statutes. It is unclear why these rules should enjoy the same federal preemptive power as Congressionally-enacted legislation.

Mullenix, *supra* note 16, at 114 (footnotes omitted). *But see* Zacharias, *Response*, *supra* note 53, at 443 (arguing further that courts have inherent authority to supervise lawyers free from congressional supervision must have limits). One could reasonably construct an argument that there are certain core or essential judicial functions upon which Congress may not intrude. These functions might be restricted to functions necessary to maintain judicial independence or authority (e.g., the contempt and bar admission powers) or might be perceived more broadly to include the control of all aspects of the judicial and lawyering process that are important to the justice system. *See id.* at 443–45. [Back To Text](#)

²²¹ I'm too much of a public choice novice to go *there*.[Back To Text](#)

²²² Cf. Swire, *Bank Insolvency Law*, *supra* note 216, at 526–29 (discussing R. Douglas Arnold's theory that elected representatives act in ways that maximize their ability to be re-elected and that they pay particular attention to issues that can be "traced" back to them). And do we *really* want Congress mucking about with ethics? Cf. Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer From Fiduciary Theory*, 1996 U. Ill. L. Rev. 57, 101 (discussing how certain executive branch decisions are too strict).[Back To Text](#)

²²³ See *id.*; see also Veryl Victoria Miles, *Fairness, Responsibility, and Efficiency in the Bankruptcy Discharge: Are the Commission's Recommendations Enough?*, 102 Dick. L. Rev. ____ (forthcoming 1998) (discussing the history of Congress's nondischargeability exceptions, which moved away from the original goal of protecting society from immoral acts to outright capture by special interests); 11 U.S.C. § 362(b)(6)–(8), § 362(b)(12)–(13), § 365(b)(3) & (d)(6) (1994) (just some examples of, shall we say, "special interest" legislation in the Code).[Back To Text](#)

²²⁴ See Resnick, *supra* note 189, at 254–57 (explaining public's ability to comment on proposed amendments upon approval of standing committee).[Back To Text](#)

²²⁵ See *infra* notes 232–36 and accompanying text; see also *In re Sauer*, 191 B.R. 402, 407 (Bankr. D. Neb. 1995) (finding that courts review not only disinterestedness but also satisfaction of other applicable ethical rules).[Back To Text](#)

²²⁶ As Ted Schneyer explains:

With law practice ever more specialized, specialty bars also stand to gain rulemaking or interpretive influence. Thus, the American College of Trust and Estate Counsel ("ACTEC") recently published "commentaries" on the ABA Model Rules of Professional Conduct. These commentaries may influence trusts–and–estates practice more than the Model Rules do, because a code addressed to lawyers of every stripe cannot address trusts–and–estates lawyers with much specificity. Therefore, projects such as ACTEC's may shift some regulatory authority from the general–purpose ABA to a specialty bar.

Schneyer, *supra* note 53, at 46 (footnotes omitted); cf. Janger, *supra* note 171, at 12 n.43 ("Where commercial law is involved, . . . the need for uniformity is paramount, and the relevant choice is between uniform state law and federal law").[Back To Text](#)

²²⁷ Instead of throwing out the baby with the bath water, this option would be the equivalent of throwing out the baby but *keeping* the bath water.[Back To Text](#)

²²⁸ Several people, including Bruce Green, favor federal judicial rulemaking over other options. See Green, *supra* note 154, at 463–64; Smith, *supra* note 6, at 829. But, according to Smith, the Conference of Chief Justices opposes a uniform code of federal ethics. See *id.* [Back To Text](#)

²²⁹ See Smith, *supra* note 6, at 902–03 (stating that "unless Congress or the Advisory Committee on Bankruptcy Rules adopts federal rules, meaningful change must come at the state level").[Back To Text](#)

²³⁰ See *supra* note 225 and accompanying text.[Back To Text](#)

²³¹ As we start developing our uniform bankruptcy code, we need to keep in mind Wilkins's admonitions: any system of professional ethics must address its "administrability . . . as well as [its] . . . fairness, efficiency, and predictability." Wilkins, *Legal Realism*, *supra* note 40, at 509. See also D. Luban, *Lawyers and Justice: An Ethical Study* (1988) (discussing importance of social policies, such as predictability and regularity).[Back To Text](#)

²³² See, e.g., Zacharias, *Reconceptualizing*, *supra* note 15, at 204–05 (suggesting that over–specificity carries its own danger–lawyers can use over–specific rules to excuse conduct not specifically addressed by those rules); Zacharias, *Specificity*, *supra* note 96, at 231 (stating that codes need be geared towards upholding general societal and systematic interests).[Back To Text](#)

²³³ Let's really get down to the nitty–gritty and list even *more* of the variations on this theme. Which rules should govern during appeals of bankruptcy cases? (I think that the bankruptcy ethics rules should apply.) What about matters removed to state courts? (Because those matters are still part of the overall bankruptcy,

probably our rules should apply.) Here's a tough one: what about bankruptcy cases that get dismissed because the petition never should have been filed? Is the attorney's "bankruptcy incompetence" to blame (in which case I can make an argument that the bankruptcy ethics rules should apply), or is the attorney's traditional "overzealousness" to blame? (For purposes of training lawyers, that "bankruptcy zealousness" should be different from garden-variety zealousness. I'd cover this behavior under our bankruptcy ethics rules, too, and give the bankruptcy court continuing jurisdiction to discipline the attorney who files a bad faith petition.)[Back To Text](#)

²³⁴ For example, there are assignments for the benefit of creditors and other state-law remedies that might be available to a debtor.[Back To Text](#)

²³⁵ For a good discussion of the distinction between certain ethics considerations, such as the use of waivers, in the workout (pre-bankruptcy) context and in the chapter 11 context, see Smith, *supra* note 6, at 851-902.[Back To Text](#)

²³⁶ In trying to draw a clear line, I'm following Zacharias's lead:

If different lawyers are expected to follow different ethical standards, lawyers and clients must be able to identify which set of standards applies. The codes also must address individual lawyers who engage in more than one kind of practice. If these lawyers are expected to follow different standards in different cases, the dividing lines must be clear. Similarly, and even more strikingly, the codes must anticipate that some lawyers will represent a single client in multiple settings that may be governed by multiple standards—for example, regulatory practice and litigation.

Zacharias, *Reconceptualizing*, *supra* note 15, at 208 (1997) (footnotes omitted); *see also* Smith, *supra* note 6, at 851-80 (discussing various conflict of interest issues arising in workout and reorganization contexts).[Back To Text](#)

²³⁷ 11 U.S.C. § 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (1994).[Back To Text](#)

²³⁸ Bankruptcy courts may exercise civil contempt power. *See, e.g., In re Volpert*, 110 F.3d 494, 497 (7th Cir. 1997) (holding bankruptcy court can use 11 U.S.C. § 105(a) to sanction attorneys who vexatiously multiply proceedings); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 281 (9th Cir. 1996); *Placid Ref. Co. v. Terrebonne Fuel and Lube, Inc., (In re Terrebonne Fuel and Lube, Inc.)* 108 F.3d 609, 612 (5th Cir. 1997) (stating bankruptcy courts have civil contempt power via 11 U.S.C. § 105 and 28 U.S.C. § 157); *Burd v. Walters (In re Walters)*, 868 F.2d 665, 669 (4th Cir. 1989) (noting that section 105(a) gives bankruptcy court civil contempt power); *Mountain Am. Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444, 447-48 (10th Cir. 1990) (discussing how 28 U.S.C. § 157 limits grant of that contempt power to core proceedings only); *see also Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006, 1010 (Fed. Cir. 1994); *Federation of Puerto Rican Orgs. of Brownsville, Inc. v. Howe*, 157 B.R. 206 (E.D.N.Y. 1993); *In re Schatz*, 122 B.R. 327, 328 (N.D. Ill. 1990). Other courts have found additional support for the bankruptcy courts' contempt power pursuant to Bankruptcy Rule 9020. *See, e.g., Eck v. Dodge Chem. Co. (In re Power Recovery Sys., Inc.)*, 950 F.2d 798, 802 (1st Cir. 1991); *Bartel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 171 B.R. 18, 21 (S.D.N.Y. 1994); *Commercial Banking Co. v. Jones (In re Maxair Aircraft Corp.)*, 148 B.R. 353, 358 (M.D. Ga. 1992). Other courts take the easy way out by having the bankruptcy courts certify

the contempt question to the district courts, which clearly have contempt power. *See, e.g., Stein & Day, Inc. v. Coordinated Sys. & Servs. Corp. (In re Stein & Day, Inc.)*, 83 B.R. 221, 228 (Bankr. S.D.N.Y. 1988); *In re Taylor*, 59 B.R. 197, 201 (Bankr. M.D. La. 1986). Pretty much everyone agrees that bankruptcy courts don't have criminal contempt power. *See, e.g., Griffith v. Oles (In re Hipp, Inc.)*, 895 F.2d 1503, 1509 (5th Cir. 1990); *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd., Inc.)*, 827 F.2d 1281, 1284 (9th Cir. 1987); *cf. United States v. Guariglia*, 962 F.2d 160, 163 (2d Cir. 1992); *In re Maxair Aircraft Corp.*, 148 B.R. at 358. For some comprehensive discussions of the bankruptcy courts' contempt power, see Laura B. Bartell, *Contempt of the Bankruptcy Court—A New Look*, 1996 U. Ill. L. Rev. 1, 56; King, *supra* note 189; William S. Parkinson, *The Contempt Power of the Bankruptcy Court Fact or Fiction: The Debate Continues*, 65 Am. Bankr. L.J. 591, 622 (1991).[Back To Text](#)

²³⁹ *See* Nancy B. Rapoport, *Avoiding Judicial Wrath: The Ten Commandments for Bankruptcy Practitioners*, 5 J. Bankr. L.&P. 615, 627 (1996) (Ohio bankruptcy judge barred scofflaw attorney from practicing in his court until attorney remits all of his fees to client).[Back To Text](#)

²⁴⁰ Or worse: what if the attorney holds active licenses in several states? Jeffrey Parness has suggested a system of "reciprocal cooperation" among federal courts to increase the courts' ability to control the professional behavior of lawyers appearing there. *See* Jeffrey A. Parness, *Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation*, 60 Alb. L. Rev. 303, 337–38 (1996).

Better coordination requires examination of each federal district court's "institutional controls" on lawyer conduct, of the appropriate interplay between federal district and appeals courts' "institutional" and "disciplinary controls," and of the relationship between the federal trial and appellate courts' norm enforcers and the relevant state disciplinary controls. The U.S. Judicial Conference Standing Committee on Rules of Practice and Procedure should undertake such examinations as it discusses the breadth and content of appropriate professional norms for state-licensed lawyers practicing in the federal courts.

Id. at 338; *see also* J. Scott Davis, *Bar Counsel's 1996 Annual Report*, 12 Me. B. J. 308, 309 (1997) (describing Maine courts' reciprocal discipline of attorney who made false statements to disciplinary authorities); Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey Under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 Seton Hall Const. L.J. 351, 387–88 (discussing current provisions for reciprocal discipline and for reporting); Mary L. Daly, *Resolving Ethical Conflicts in Multi Jurisdictional Practice: Is Model Rule 8.5 The Answer, An Answer, or No Answer at All*, 36 S. Tex. L. Rev. 715, 789 (1995) (stating several states have taken steps to adopt reciprocal discipline rules).[Back To Text](#)

²⁴¹ *See supra* note 212 and accompanying text.[Back To Text](#)

²⁴² Here's the version that I know: A mathematician, an engineer, and an economist are stranded on a desert island with only one can of food and no can opener. The mathematician writes all sorts of complex formulas in the sand in an attempt to discover one that will open the can, but none of the formulas leads to anything. The engineer tries to build a can-opening machine out of the stones and grass on the island, but the machine isn't strong enough to open the can. In despair, the mathematician and the engineer turn to the economist, who's grinning proudly. "No problem," says the economist. "We can open the can easily. Just assume a can opener."[Back To Text](#)

²⁴³ *See supra* note 48 and accompanying text. I'm going to leave the *wording* of the uniform code for a later day, because the scope of such an undertaking is enormous. But when that code *is* drafted (either by me or by someone equally foolhardy), that drafter would do well to keep in mind that ethics codes are meant to serve several purposes simultaneously. *See* Zacharias, *Specificity*, *supra* note 96, at 231–32 (suggesting purposes of ethics codes include: (1) defining sanctionable conduct; (2) creating professional norm of conduct; and (3) providing standards for courts to use to fill in gaps).

Balancing these various purposes requires a degree of specificity that may differ for different types of rules. As Zacharias explains:

At the outset, let me define what I mean by "specificity" in code-drafting. One can identify four elements commonly attributed to specificity in legal rules: (1) language—the absence of vague terms that defy understanding, (2) observability—the ease of determining whether a rule has been complied with, (3) scope—the range of events or conduct that a rule covers, and (4) particularity—the existence of a mandate for or prohibition against particular acts.

Id. at 239–40 (footnotes omitted). In concentrating on scope and particularity, Zacharias describes a "specificity continuum." *Id.* at 244 n.62. That's a good image for us to keep in mind.[Back To Text](#)

²⁴⁴ Wilkins would be the first to note that pressures on corporate bankruptcy lawyers would likely be different in kind from pressures on consumer bankruptcy lawyers.

Corporate clients are therefore unlikely to use the disciplinary system, even when they have actually been harmed by lawyer misconduct. Individual clients do not have access to the embedded sanctions available to corporations. Although individuals have a greater incentive to invoke the disciplinary system as a protection against agency problems, they are unlikely to be able to utilize these controls effectively. As "one-shot" participants in the legal marketplace, individual clients are subject to each of the three major information asymmetries that foster agency problems: they do not know what services they need, they do not have access to information that would allow them to predict the quality of the services that a particular lawyer is likely to render, and they do not have a sufficient baseline from which to evaluate the quality of the services performed. By relying on client complaints, disciplinary enforcement simply reproduces these market defects.

Wilkins, *Who Should Regulate?*, *supra* note 40, at 828–29 (footnotes omitted). I'm not ready to decide, in this article, how (or if) I should deal with these significant differences. I am fairly comfortable dealing with what I know—commercial bankruptcy—and the problems faced by corporate bankruptcy lawyers. Wilkins goes on to explain that:

Institutional controls, on the other hand, will be specialized simply as a result of where they are located and the stratification within the bar. Thus, SEC or OTS enforcement systems will by definition apply only to corporate lawyers. Moreover, because of the growing specialization within the bar, lawyers who do securities or banking work are likely to spend a majority of their time in these areas. Therefore, specialized rules and enforcement practices can be tailored to the unique requirements of these regulatory contexts without undue confusion or contradiction. For present purposes, this specialization means that agencies can develop a wide spectrum of sanctioning procedures designed to control corporate externality problems without chilling zealous advocacy. Such efforts will be particularly effective when applied to the advising phase of these corporate relationships.

Id. at 875 (footnotes omitted).[Back To Text](#)

²⁴⁵ *But see* Fenning & Hart, *supra* note 163, at 120. Fenning & Hart's study indicated that most chapter 11 cases involve "small businesses, managed by their owners," *id.* at 120, and that "business" chapter 11 cases represented somewhere upwards of 70% of the cases studied, *id.* at 132. For more theoretical discussions of chapter 11, see, e.g., Fenning & Hart, *supra* note 163, at 120 n.2 (listing key critiques of chapter 11); Hon. Leif M. Clark, *Chapter 11—Does One Size Fit All?*, 4 Am. Bankr. Inst. L. Rev. 167 (1996); John D. Ayer, *The Role of Finance Theory in Shaping Bankruptcy Policy*, 3 Am. Bankr. Inst. L. Rev. 53 (1995); Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. Ill. L. Rev. 1; Jagdeep S. Bhandari & Lawrence A. Weiss, *The Untenable Case for Chapter 11: A Review of the Evidence*, 67 Am. Bankr. L.J. 131 (1993); David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy*

Theory, 1993 Wis. L. Rev. 465; Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 Yale L.J. 1043 (1992); Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 Yale L.J. 437 (1992); Lynn M. LoPucki, *Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig*, 91 Mich. L. Rev. 79 (1992); cf. Hon. Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 Am. Bankr. L.J. 287, 288–89 (1993) (discussing causes for delay in chapter 11 cases, some of which relate to size of case).[Back To Text](#)

²⁴⁶ Some topics that might be ripe for a consumer–side set of ethics rules could include issues of confidentiality, especially in joint cases, and conflicts of interest, especially given the finite number of debtors' counsel. Professors Whitford and Braucher have observed that, on the consumer side of things, practitioners need to spend more time thinking about their clients' individualized needs and less time conforming to local legal culture. See Whitford, *supra* note 51; Braucher *supra* note 51. To me, this is an issue of competency (and possibly an issue of jealousy).[Back To Text](#)

²⁴⁷ See, e.g., Braucher, *supra* note 51; *Ten Years*, *supra* note 51; Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (1989); Teresa A. Sullivan et al., *Folklore and Facts: A Preliminary Report From The Consumer Bankruptcy Project*, 60 Am. Bankr. L.J. 293 (1986). Of course, it's also possible that ethics rules for consumer–side lawyers should be local, given that the practice is much more local, but that possibility just puts us in an infinite loop that would lock us in this article forever.

Given enough time, I probably could follow Wilkins's approach in drafting this code. Wilkins creates a matrix of regulation consisting of:

four paradigmatic models: disciplinary controls [independent prosecution of attorney misconduct], liability controls [malpractice–type lawsuits], institutional controls [regulating attorney conduct via the particular institution in which that attorney is acting], and legislative controls [establishing an independent agency for regulating attorneys]. Second, I divide the claims made on behalf of these models into "compliance arguments," which are efficiency claims about the costs and benefits of a particular enforcement strategy, and "independence arguments," which are claims about whether a given form of regulation promotes or undermines lawyer independence. Third, I assert that reaching an accurate judgment in either of these categories of argument requires paying careful attention to differences in enforcement contexts. I therefore construct a matrix of lawyer–client interactions that highlights certain key contextual differences.

Wilkins, *Who Should Regulate?*, *supra* note 40, at 804; see also *id.* at 806–09 (discussing each model). This matrix is extremely helpful, even if it isn't absolutely perfect. Wilkins uses the matrix "to prevent two categories of professional misconduct." *Id.* at 819. He terms one category "agency problems," in which the lawyer's wrongdoing injures the client directly. The other category is "externality problems," which—as its name suggests—involves the lawyer and client colluding to injure third parties or the system as a whole. See *id.* at 820. Each of four possible combinations of lawyer misconduct—"individual/agency problems, corporate/agency problems, individual/externality problems, and corporate/externality problems"—must be enforced by a context–based system that balances the effectiveness of the chosen enforcement mechanism against the cost of that mechanism. See *id.* at 820. Those costs include:

administrative costs, by which I mean the public costs of operating the enforcement system; participant costs, which represent the costs incurred by lawyers, clients, and other private parties in determining whether a violation has occurred and in fashioning an appropriate sanction; and third party costs, which constitute whatever additional costs the use of a particular enforcement system may impose on public or private actors other than those directly involved in the enforcement process. As with the benefits of enforcement, the likely incidence of these costs may also vary with the categories of the matrix.

Wilkins, *Who Should Regulate?*, *supra* note 40, at 820–21.[Back To Text](#)

²⁴⁸ For an excellent description of the ramifications of the debtor–in–possession concept, see Barry L. Zaretsky, *Chapter 11 Issues: Trustees and Examiners in Chapter 11*, 44 S.C. L. Rev. 907, 911–16 (1993). We'll all miss Barry.[Back To Text](#)

²⁴⁹ See *DIP's Attorney*, *supra* note 9, at 85–99; cf. *Zeisler & Zeisler, P.C. v. Prudential Ins. Co. of America (In re JLM, Inc.)*, 210 B.R. 19, 25–26 (B.A.P. 2d Cir. 1997) (referring to DIP's and DIP counsel's fiduciary duties to estate and citing Connecticut's professional ethics rules, which appear to require DIP counsel to rat on DIP if DIP is not acting in best interest of estate).

Wilkins, not surprisingly, says it best:

The traditional model of legal ethics instructs the lawyer to view the bounds of the law from the perspective of maximizing client interest. This conception of professional role, however, exacerbates the problem of indeterminacy by encouraging the lawyer to discover doctrinal gaps, conflicts, and ambiguities, and it undermines the utility of structural solutions by encouraging instrumental manipulation of systemic constraints. Therefore, to the extent that allegiance to the public purposes encoded in legal rules continues to be a goal of professional regulation, there must be some modification of the underlying assumption of partisanship.

Wilkins, *Legal Realism*, *supra* note 40, at 505 (footnotes omitted). Of course, Wilkins rejected this purposivist model, too, pointing out that lawyers still have the day–to–dayness of case–specific client work within which they have to make decisions involving professional ethics. See *id.* at 508–09.[Back To Text](#)

²⁵⁰ It's pretty well understood that the attorney for the creditors' committee needs to put the committee's interests first, even if the attorney also represents an individual creditor on the committee. 11 U.S.C. § 1103(b) provides that "[a]n attorney . . . employed to represent a committee . . . may not, while by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest." *Id.* The rule is clear: dual representation is fine *only if* the interests of the creditors' committee and the individual creditor don't conflict. Cf. *In re Trust Am. Serv. Corp.*, 175 B.R. 413, 419 (Bankr. M.D. Fla. 1994) ("Section 1103(b) clearly prohibits employment of a professional such as an accountant where an adverse interest causes a conflict."); *In re Rusty Jones, Inc.*, 107 B.R. 161, 162 (Bankr. N.D. Ill. 1989) (noting that, although section 1103(b) didn't prohibit dual representation of a creditor and creditors' committee, only fees earned on committee work would be paid from estate funds). Although the rule is clear, the *application* of the rule is still fuzzy. See, e.g., *In re Michalek*, 1991 U.S. Dist. LEXIS 15343, *15 (W.D.N.Y. 1991) ("Section 1103(b) does not on its face prohibit an attorney from representing an unsecured creditor's committee simultaneously with one or more individual unsecured creditors[; but] such representation is impermissible if the situation is such that an actual or potential conflict of interest exists between the individual creditors and the entire class of creditors represented by the committee, or if the situation presents an appearance of impropriety.") (footnotes and citations omitted). Unfortunately, the *Michalek* court, not surprisingly, incorporates the Model Code concept of "appearance of impropriety" here, even though the Bankruptcy Code itself doesn't incorporate that concept. *That's* why we have to draw a clear line between *our* code and the generalist code, and that's why we need to clarify the issue of representation in the DIP context.[Back To Text](#)

²⁵¹ Even if I look like a brain surgeon, walk like one, and talk like one, that doesn't mean that I should barge into a hospital and perform operations. It's the same thing with some folks who call themselves bankruptcy lawyers, simply because they took a bankruptcy course in law school.[Back To Text](#)

²⁵² See Model Rule 1.1 (competence) & cmt. 1 (permitting competence to include "associate[ing] or consult[ing] with . . . a lawyer of established competence in the field in question."); Model Code DR 6–101(A)(1) (establishing that if lawyer knows that she isn't competent to handle a matter, she can only

handle a that matter if she "associate[s] [herself] with a lawyer who is competent to handle it."). [Back To Text](#)

²⁵³ And you thought I was simply going to *relax* the ethics rules, didn't you? [Back To Text](#)

²⁵⁴ I'm not convinced that we have to require bankruptcy *certification* for all bankruptcy practitioners, but I'm open to any suggestions that would protect clients from bankruptcy "wanna-bes." [Back To Text](#)

²⁵⁵ See *supra* note 22 and accompanying text. [Back To Text](#)

²⁵⁶ See Wilkins, *Legal Realism*, *supra* note 40, at 470–72 (describing lawyer's twin duties—to her client and as officer of court—as establishing what he terms the "boundary claim"); see also Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39, 43–46 (1989) (deconstructing meaning of "officer of the court" and giving it new content). [Back To Text](#)

²⁵⁷ See Rapoport, *Forest*, *supra* note 102, at 817–844 (discussing primary and secondary attorney considerations in bankruptcy); see also Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (1995); Karen Gross, *Taking Community Interests Into Account in Bankruptcy: An Essay*, 72 Wash. U. L.Q. 1031, 1032–35 (1994); Martin, *supra* note 107; cf. Carr & Van Fleet, *supra* note 165, at 864–68 (describing duties that lawyer owes to her client, to court, and—occasionally—to third parties). [Back To Text](#)

²⁵⁸ See Smith, *supra* note 6, at 821. Smith contends that the Restatement (Third) of Law Governing Lawyers conflict of interest standard, section 201, is best of all alternatives. Section 201 defines a conflict as "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." *Id.* (citing Proposed Final Draft No. 1, 1996). [Back To Text](#)

²⁵⁹ See *supra* note 11 and accompanying text. [Back To Text](#)

²⁶⁰ See generally Rapoport, *Conflicts*, *supra* note 7. The generalized code suggests that, if we can't figure out if simultaneous representation would create conflicts, then each client has to have his own bankruptcy lawyer. But having a "to each client, his own lawyer" approach won't really work in bankruptcy cases. Often, there aren't enough local bankruptcy lawyers (at least in big cases) to assign one per client; even in consumer cases, the key players see each other in case after case and may be conflicted out from taking on new representations; and the point of hiring a lawyer in a bankruptcy case (at least if the client is a creditor) is to save money, which doesn't happen when each client has to have his lawyer reinvent the wheel. [Back To Text](#)

²⁶¹ See *supra* notes 2–5 and accompanying text; cf. Smith, *supra* note 6, at 813–15 (discussing historical development—anachronism?—of the disinterestedness standard as it is applied to DIP's professionals). [Back To Text](#)

²⁶² See Futrell, *supra* note 90, at 825 (introducing need to bridge gap between environmental ethics and professional conduct of lawyers). [Back To Text](#)

²⁶³ See Markell, *supra* note 6, at 413–28 (discussing representation of pre-debtor insolvent corporations); see also Bryan J. Pechersky, Note, *Representing General Partnerships and Close Corporations: A Situational Analysis of Professional Responsibility*, 73 Tex. L. Rev. 919, 922–24 (1995) (suggesting context-based approach to ethics for corporate law). [Back To Text](#)

²⁶⁴ See *supra* note 1. [Back To Text](#)