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Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession

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CRIMINAL MISCONDUCT: ETHICAL RULE USAGE LEADS TO REGULATION OF THE LEGAL PROFESSION

*Ellen S. Podgor**

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INTRODUCTION

The legal profession as a regulated industry is becoming an unfortunate reality, as a recent criminal court decision interpreted an ethical guideline as a rule of law.¹ Courts have used ethical and disciplinary rules of the legal profession as a standard to resolve conflict of interest issues,² incompetent counsel

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1. *United States v. Anderson*, 798 F.2d 919, 923 (7th Cir. 1986) (Code of Judicial Conduct imposes mandatory standard of conduct on judges). See *infra* notes 92-109 and accompanying text for a discussion of *Anderson*.

2. See, e.g., *Satterwhite v. State*, 359 So. 2d 816, 818 (Ala. Ct. App. 1977) (reversible error for attorney to confer with defendant, and then prosecute him); *State v. Chambers*, 86 N.M. 383, 388,

claims,³ and even allegations of prosecutorial misconduct.⁴ In some jurisdictions, they have been implemented as a source of guidance in civil cases alleging attorney malpractice.⁵ Clearly they serve a useful purpose in judging the conduct of lawyers or judges in disciplinary actions. But their place in the criminal trial of a defendant judge or attorney was nonexistent until recent case law deemed it acceptable to use ethical rules in this new capacity.⁶

This article examines the evolution of ethical rules for lawyers and judges, and considers the various forums in which these rules have appeared. The article centers upon the recent use of these rules in the context of a criminal trial of an attorney or judge and discusses the court's preliminary findings of materiality and/or relevance of the ethical rules to the issues of the criminal trial. In those cases in which the courts have found ethical rules admissible as evidence or as a jury instruction, they are admitted as either a "rule of law" or as a "guideline." The distinction between these two roles is studied, as well as the prejudicial effect of admitting the rules. Finally, the article reflects upon the harms which accrue by the admission of these ethical rules, and the remedies available to curtail future application of these ethical rules in criminal trials of judges or attorneys.

I. HISTORICAL DEVELOPMENT

A. Attorneys

The historical development of ethical standards for attorneys reflects a gradual transition from informal words passed via lectures to actual codified rules. Apparent in the rules existing today is strong prefatory language, stressing the necessity to keep the legal profession self-regulating.⁷

524 P.2d 999, 1004 (Ct. App.) (defendant's attorney, who is later appointed assistant district attorney, cannot prosecute defendant), *cert. denied*, 86 N.M. 372, 524 P.2d 988 (1974); *State v. Leigh*, 178 Kan. 549, 552-53, 289 P.2d 774, 776-77 (1955) (canons used to reverse conviction where attorney held conflicting positions).

3. See, e.g., *Tokash v. State*, 232 Ind. 668, 670 115 N.E.2d 745, 746 (1953) (canons of ethics used to reverse conviction where defendant not properly advised of right to counsel by judge pro tempore who was subsequently appointed defendant's counsel).

4. See, e.g., *United States v. Bess*, 593 F.2d 749, 754 (6th Cir. 1979) (disciplinary rules prohibit prosecutor from interjecting personal opinion in trial); *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979) (prosecutor's comments about defendant's failure to testify were reversible error); *Withers v. United States*, 602 F.2d 124, 126 (6th Cir. 1979) (prosecutor's racial comment in closing argument was harmful error).

5. See generally Faure & Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 373-377 (1986) (details applicability of Model Rules to legal malpractice actions); Comment, *The Georgia Code of Professional Responsibility: A Catalyst for Successful Legal Malpractice Actions*, 37 MERCER L. REV. 817, 823-828 (1986) (examination of Georgia Code of Professional Responsibility in civil litigation, emphasizing malpractice actions).

6. See *United States v. Machi*, 811 F.2d 991, 999 (7th Cir. 1987) (attorneys' ethics rules proper as evidence in criminal trial); *United States v. Anderson*, 798 F.2d 919, 923 (7th Cir. 1986) (judicial canon used as jury instruction). An ethical rule instruction was given to the jury in *United States v. Christakos*, No. H-CR-85-22 (N.D. Ind. April 1987). Attorney Lee J. Christakos, however, did not appeal his conviction.

7. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Scope (1983).

At their inception, ethical rules for attorneys lacked a definitive nature. Ethical issues were noticeable in the lectures given by George Sharswood of Pennsylvania in the mid-nineteenth century which, when reduced to written form, were entitled *The Aim and Duties of the Profession of the Law*.⁸ The sole purpose of these lectures was to educate new admittees to the bar.⁹

A second precursor to formalized ethical rules was David Hoffman's *Fifty Resolutions In Regard To Professional Deportment*.¹⁰ Like Sharswood's ethical considerations, the focus of Hoffman's resolutions was to assist the young practitioner.¹¹ The Baltimore bar member espoused premises such as courteous deportment,¹² respectfulness to the bench,¹³ careful possession of client's funds,¹⁴ non-communication with a party opponent who has legal counsel,¹⁵ and bi-annual review of the fifty resolutions.¹⁶

Hoffman's and Sharswood's writings attained a level of formality with the passage of the first formal code, the *Code of Ethics of the Alabama State Bar*.¹⁷

8. G. SHARSWOOD, *PROFESSIONAL ETHICS* (1896). The original publication was entitled "A Compend of Lectures on the Aims and Duties of the Profession of Law." The lectures were delivered before the law class of the University of Pennsylvania. *Id.* at Preface. See also G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 18 (1978).

9. G. SHARSWOOD, *supra* note 8, at 117-18. In speaking of a Code of Professional Responsibility, Sharswood stated:

The criminal and disgraceful offence of taking fees of two adversaries, of allowing himself to be approached corruptly, whether directly or indirectly, with a view to conciliation, ought, like parricide in the Athenian law, to be passed over in silence in a code of professional ethics.

Id. at 119.

Sharswood relates the morality he proposes as incumbent, pursuant to the Oath of Office. The motto upon which he builds the lecture is, "Fidelity to the court, fidelity to the client, fidelity to the claims of truth and honor." *Id.* at 58, 62-116.

10. H. DRINKER, *LEGAL ETHICS* 338-51 (1953). An additional forerunner of principles of professional ethics is seen in a lecture delivered by William Allen Butler on February 3, 1871, before the Law School of the City of New York. In discussing the Attorney's Oath, Butler stated:

The lawyer is, in every instance, thus pledged to fidelity to his client, and the oath which he takes, at the outset of his career, binds him, not only to the support of the organic law of the State, but also to the faithful discharge of the duties of his office of attorney and counsellor. But an honest man is always under oath; and the sanction of a formal vow adds nothing to the moral obligation springing of itself from the relation of lawyer and client, just as the oath of a witness in court imposes no new obligation to veracity, but only places him in a position of definite responsibility for a falsehood.

W. BUTLER, *LAWYER AND CLIENT THEIR RELATION, RIGHTS, AND DUTIES* 17-18 (1871). See also H. JESSUP, *THE PROFESSIONAL IDEALS OF THE LAWYER—A STUDY OF LEGAL ETHICS* (1925). Henry Wynans Jessup quotes Dean Rogers of Yale as saying, "Professional Ethics can never be *dependent* on a written code." *Id.* at 14.

11. H. DRINKER, *supra* note 10, at 338 n.1.

12. *Id.* at 338 (Rule 5).

13. *Id.* at 338-39 (Rules 3, 4 and 6).

14. *Id.* at 344 (Rules 25, 26).

15. *Id.* at 349 (Rule 43).

16. *Id.* at 351 (Rule 50).

17. *Id.* at 352. Adopted in 1887 by the Alabama Bar Association, the *Code* was written by Thomas Goode Jones. Between 1887 and 1906, the *Code* was enacted with minor changes in the states of Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Mary-

This code was prefaced with a section entitled "No Set Rules for Every Case" which emphasized the flexibility necessary for enforcement of ethical standards. It is apparent from this introductory section that the rules were meant as guidelines for conduct, and not as legal proscriptions.¹⁸

In 1908, the American Bar Association ("ABA") promulgated the first Canons of Professional Responsibility.¹⁹ These canons, largely adopted from the aforestated lectures and the Alabama Code, were hortatory in nature.²⁰ The Preamble of the 32 Canons explicitly emphasized that the standards were a "general guide" and that they were not all-inclusive.²¹ Commentary to the Canons stressed the non-obligatory nature of these rules.²²

Despite the virtually complete acceptance of the Canons by most states,²³ a growing dissatisfaction with them resulted in the eventual passage of a Code of Professional Responsibility by the ABA in 1969.²⁴ The Model Code is divisible

land, Kentucky, and Missouri. The states of Washington, California and Oregon adopted codes of "duties" with seven canons taken from the oath of advocates prescribed by the laws of the Swiss Canton of Geneva. A similar Code of Ethics with eight canons was placed in the 1899 Charter of the State Bar of Louisiana. In 1906 Florida adopted David Hoffman's Fifty Resolutions. By 1908, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, Oklahoma, South Dakota, and Utah had adopted Codes of Ethics. *Id.* at 23.

18. *Id.* at 353. The preface stated:

No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the conscience, and the conduct of honorable and distinguished attorneys in similar cases, and by an analogy to the duties enjoined by statute, and the rules of good neighborhood.

The following general rules are adopted by the Alabama State Bar Association for the guidance of its members:

Id. at 353 (emphasis added).

19. CANONS OF PROFESSIONAL RESPONSIBILITY (1908). *See also* H. DRINKER, *supra* note 10, at 309.

20. G. HAZARD, *supra* note 8, at 19.

21. CANONS OF PROFESSIONAL RESPONSIBILITY Preamble (1908). The Canons were supplemented to add Canons 33 through 45 in 1928, Canon 46 in 1933, and Canon 47 in 1937. *Id.*

22. In answering the question of how canons differ from statutes, Henry Wynans Jessup stated: In the application thereof. For a statute is to be applied to particular conduct by judicial interpretation. Where a canon is primarily to be applied and interpreted by the personal conscience and judgment of the individual lawyer.

H. JESSUP, *supra* note 10, at 14.

See also E. BOLTE, *ETHICS FOR SUCCESS AT THE BAR* (1928). Edwin Bolte presented four elements for building a monetarily successful law practice. In the initial thirteen chapters of his book he discussed issues such as the office, admission, suspension, disbarment, duties, and liabilities of attorneys to their clients. He concluded that although the ethical rules are not binding, success in practice is premised upon knowing and keeping the code of ethics. *Id.* at 105.

23. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 *ARK. L. REV.* 3 (1970).

24. *Id.* at 3-5. In 1955 an American Bar Association committee was organized to study the possible expansion of the canons. Although the committee never prepared a draft, it did file a report which found the existing canons deficient. Likewise, in 1964, a Special Committee on Evaluation of Ethical Standards was created by the ABA to make recommendations for changes in the Canons. *Id.* at 4. The Wright committee is given credit for the development of the Model Code of Profes-

into three separate levels of review.²⁵ The Canons, like the prior Canons of Ethics, are "axiomatic norms;"²⁶ the Disciplinary Rules are "mandatory in character;"²⁷ and the ethical considerations are aspirational in nature.²⁸

Despite the mandatory wording of the disciplinary rules found within the Code, the overall flavor of the Code as merely a guideline for lawyers is prevalent.²⁹ The Preliminary Statement of the Code, which follows the Preamble, leaves open for interpretation the questions of who will judge a transgressor of the Code, and how punishment for that transgressor will be effectuated.³⁰ It may be presumed, however, that the enforcing agency referred to is the disciplinary board, or a court enforcing the rules through a disciplinary proceeding against the attorney.³¹

The Code of Professional Responsibility received overwhelming acceptance and adoption almost immediately after its promulgation.³² It was eventually

sional Responsibility. G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, xxxiv (Supp. 1987).

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

26. The Preliminary Statement of the Model Code states:

The Canons are statements of axiomatic norms, expressing in general terms of the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

Id. at 1.

27. G. HAZARD & W. HODES, *supra* note 24, at xxxiv.

28. *Id.*

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1969). The preamble states: "[t]he Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor."

30. *Id.* at Preliminary Statement, n.12. The Preliminary Statement includes the following language:

The Model Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency in applying the Disciplinary Rules, may find interpretive *guidance* in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

Id. (emphasis added).

31. *See id.*, which provides:

The Model Code seeks only to specify conduct for which a lawyer should be disciplined. Recommendations as to the procedures to be used in disciplinary actions and the gravity of disciplinary measures appropriate for violations of the Code are within the jurisdiction of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement.

Id.

It should be noted that footnote one to the Code of Professional Responsibility, explains that the footnotes are intended merely to enable the reader to relate provisions of the Code to the prior Canons, and are not to be viewed as an annotation of the American Bar Association's drafting committee's views. *Id.* at Preliminary Statement, n.1.

32. Wright, *supra* note 23, at 1. The Arkansas Bar Association adopted the Code within three days. By March of 1970, eight other states had fully accepted its provisions: Kansas, Kentucky, Maine, New Hampshire, New York, Oklahoma, Pennsylvania, Wisconsin. *Id.*

adopted in substantial form by forty-nine state bar associations.³³ In reviewing the Code, Charles Frankel found "the function of a professional code, as the authors of the new Code recognized implicitly, is not to provide practitioners with textbook maxims. It is to sensitize them to the scope, depth and complexity of the commitments they have undertaken in entering the profession."³⁴

Like the Canons of Professional Responsibility, the Code of Professional Responsibility was soon seen as beset with deficiencies, and although an improvement over the prior Canons, a far cry from a definitive answer to the ethical concerns within the legal profession. For some, it was viewed as a starting point from which the profession could examine and confront the ethical problems of a post-Watergate society.³⁵

For others, the overwhelming problems with the Code necessitated change. In 1977, this led to the establishment of a Special Commission on Evaluation of Professional Standards by the American Bar Association. Known as the Kutak Commission,³⁶ it recommended a total revision of the Code into black letter rules with comments.³⁷ After substantial debate, revision, and deliberation, the Model Rules of Professional Conduct were adopted by the American Bar Association on August 2, 1983.³⁸

The Rules of Professional Conduct, which have been adopted in some form by thirty jurisdictions,³⁹ are significantly more specific in their purpose and scope sections than their predecessor, the Code of Professional Responsibility.⁴⁰

33. Frankel, *Book Review*, 43 U. CHI. L. REV. 874, 875 (1976) (reviewing 1975 version of the Model Code of Professional Responsibility). California adopted their own rules in 1975. *Id.* at 875 n.10.

34. *Id.* at 883.

35. *Id.* at 886. Charles Frankel stated:

The Code of Professional Responsibility is a useful point of departure for such a discussion, but its principal potential utility will be lost if the discussion remains at the starting line it has defined. For in the legal profession, as in most domains of life, the elevation of standards comes in the main from neither exhortation nor codification. It comes from renewed attention to first principles, from a freshened awareness of the changed problems people confront, and from a sustained debate about the best ways to deal with them.

Id.

36. The Commission was named in honor of Robert J. Kutak, the chairman who died shortly before the completion of the committee's report. G. HAZARD & W. HODES, *supra* note 24, at xxxv (Supp. 1986).

37. *Id.*

38. *Id.* at xxxviii. For a critical view of the ABA's attempt at reforming its rules and code, see Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U.L. REV. 79 (1983).

39. Virginia, New Jersey, Arizona, Montana, Minnesota, Washington, Delaware, North Carolina, Arkansas, Missouri, New Hampshire, Nevada, Oregon, Connecticut, Idaho, Florida, Indiana, Louisiana, Maryland, Mississippi, New Mexico, Wyoming. G. HAZARD & W. HODES, *supra* note 24, at 866 (Supp. 1987). Additionally the states of North Dakota, Wisconsin, Pennsylvania, South Dakota, Utah, Kansas, Michigan, and Oklahoma recently adopted the Rules. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (1988). The Judge Advocate General of the United States Army adopted the Rules for all lawyers who appear before an Army court. *Army Adopts Model Rules*, A.B.A. J. 132 (January 1988).

40. See MODEL RULES OF PROFESSIONAL CONDUCT (1983). The Scope section states, "[t]he Preamble and this note on Scope provide general orientation." *Id.* at Scope.

The Rules take a firm position in maintaining the legal profession's autonomy and continued self-regulation.⁴¹ Unlike the Code of Professional Responsibility, the Rules of Professional Conduct, speak directly to enforcement through a disciplinary proceeding.⁴² The Rules explicitly state that they are not to be regarded as imposing an absolute duty in the event a breach occurs.⁴³

41. The Preamble states:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Id. at Preamble.

42. The Scope section of the MODEL RULES OF PROFESSIONAL CONDUCT notes that:

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Id. at Scope.

43. The Scope section provides:

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

B. Judges⁴⁴

Unlike the Canons of Ethics, Code of Professional Responsibility, and Rules of Professional Conduct, language of self-regulation is absent from the rules for the judiciary. Nevertheless, the nature of "guiding" as opposed to "outside regulation" is evident, leading to the conclusion that this is a mere *casus omissus* of the authors.

One of the first documentaries offered to the judiciary on ethical standards was the Rules of Sir Matthew Hale for the Guidance of Judicial Officers.⁴⁵ These eighteen rules, which include items such as being "short and sparing at meals, that I may be the fitter for business,"⁴⁶ are a far cry from the judicial codes of today.

Sixteen years after the adoption of the Canons for attorneys, the American Bar Association formulated 34 Canons of Judicial Ethics.⁴⁷ The Preamble stresses the nature of the canons as being guidance oriented, as opposed to obligatory in nature.⁴⁸ In 1945, as a part of the implementation of these Judicial Canons, the ABA Ethics Committee authorized the appointment of an advisory committee to oversee and rule on the conduct of judges when their propriety was questioned.⁴⁹

After a fifty-year life, the Judicial Canons, which had been adopted by most states, were ready for revision.⁵⁰ As such, a Code of Judicial Conduct was

Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Id. at Scope.

44. Judges are subject not only to Judicial Rules, but also, as attorneys to Lawyer's Rules of Professional Responsibility.

45. Reprinted in H. JESSUP, *supra* note 10, at 92.

46. *Id.* (Rule 18).

47. H. DRINKER, *supra* note 10, at 274. The Canons of Judicial Ethics were adopted by the ABA at the 47th Annual Meeting on July 9, 1924. The committee chaired by Chief Justice Taft, had commenced preparation in 1922. *Id.*

48. CANONS OF JUDICIAL ETHICS Preamble (1924).

In addition to the Canons for Professional Conduct of lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following canons, the spirit of which it suggest as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

Id.

49. DRINKER, *supra* note 10, at 274.

50. E. THODE, THE DEVELOPMENT OF THE CODE OF JUDICIAL CONDUCT 3 (Paper Delivered at the Round Table for Professional Responsibility 1971 Annual Meeting of Association of American Law Schools) (December 19, 1972). The ABA Judicial Committee evaluation recommended changes in the Judicial Canons, which had not been revised since 1924:

At the first meeting of the Committee (Special Committee on Standards of Judicial Conduct of the American Bar Association) several important decisions were made. The first was that neither the form nor the style of the old *Canons of Judicial Ethics* was satisfactory. Therefore, the conclusion was reached that we should start over. This decision did not

adopted by the House of Delegates of the ABA on April 16, 1972.⁵¹

Unlike the Preamble of the Judicial Canons, the Code of Judicial Conduct does not contain language of a "guidance" orientation, nor does it specify any enforcement model or applicability as law.⁵² In the Preface to the Code of Judicial Conduct, as submitted by the ABA committee, there is a statement espousing a mandatory nature.⁵³ Commentary on the Judicial Code, however, reflects that its purpose was to aid an independent judiciary in establishing and enforcing proper standards of conduct.⁵⁴ In professing a mandatory nature, the Judicial Code failed to specify who should oversee the mandate. Although the seven canons are followed by a section entitled "Compliance," that section merely provides the Judicial Code's respective applicability to Part-Time, Pro Tempore, and Retired Judges.⁵⁵

The Judicial Code was adopted in most states in various forms.⁵⁶ Unlike

mean that the substance of the old canons was rejected; in fact, there is close correlation between some portions of the old canons and certain sections of this new Code. A second important decision was that an independent judiciary can not continue to exist unless the members of the judiciary not only comply with, but also are actively involved in establishing and enforcing, proper standards of conduct for judges. This basic premise eventually became Canon 1 of the new Code. A third decision was that the standards for judges should be mandatory and enforceable, although this committee also decided that it would not undertake to suggest the proper enforcement mechanisms or penalties.

Id. See also E. Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 797-803 (1972) (review of highlights of Code of Judicial Conduct); D. Weckstein, *Introductory Observations on the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 785, 792-93 (1972) (beneficial aspects of Code of Judicial Conduct).

51. The Code of Judicial Conduct was adopted three years after the Code of Professional Responsibility was adopted for attorneys by the American Bar Association. See *supra* notes 24-33 and accompanying text.

52. CODE OF JUDICIAL CONDUCT Canon 1 (1972).

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id.

53. The CODE OF JUDICIAL CONDUCT Preface (1972) provides:

In the judgment of the Association this Code, consisting of statements of norms denominated canons, the accompanying text setting for the specific rules and the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated.

Id. See also E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 43 (1973) (although some suggested code should serve only as guidelines, committee maintained rules were mandatory).

54. Lubet, *Participation By Judges In Civic and Charitable Activities: What are the Limits*, 69 JUDICATURE 68, 68 (1985) (judicial code extends to judges' nonjudicial activities). See also E. Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 795-96 (1972) (advocates proper standards as being necessary to maintain independent judiciary).

55. CODE OF JUDICIAL CONDUCT Compliance with the Code of Judicial Conduct (1972). Prior to the discussion of part-time, pro tempore, and retired judges the Code states "[a]ll judges should comply with this Code except as provided below." *Id.*

56. See Shaman, *Two More States Adopt Code of Judicial Conduct*, 71 JUDICATURE 56, 56 (1987). Forty-seven states have adopted the model code in some form. Additionally, the District of

the professional standards of lawyers, however, the Code of Judicial Conduct remains the controlling body without modification to "Rules" as is presently seen with attorney professional standards.⁵⁷ One can only wonder if Rules of Judicial Conduct will be forthcoming from the ABA in light of the positive lagging correlation seen in the past development of standards.⁵⁸

On the federal level, judicial discipline received formal statutory codification in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.⁵⁹ The act provides a procedural method for reviewing, investigating, and hearing a complaint filed by a "person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. . . ."⁶⁰ But even these rules that stress self-regulation by the judiciary only provide a mere procedural framework for reviewing complaints.⁶¹

The one apparent ingredient throughout all the Canons, Codes, and Rules of lawyers and judges is that they are designed to benefit the public. Nevertheless, despite their desire to benefit the public, they are not designed for use by the public, but rather for use by the legal profession in regulating itself.⁶²

II. USE OF ETHICAL RULES IN A SETTING OTHER THAN WHEN AN ATTORNEY OR JUDGE IS A DEFENDANT IN A CRIMINAL TRIAL

There are a plethora of cases that have applied rules of ethics to examine the conduct of an attorney or judge in a non-criminal setting.⁶³ Apparent in all of these cases is the proposition that ethical rules are not rules of law, substantive law, or statutory authority.⁶⁴ If used at all, they should be used as a method

Columbia and the federal Judicial Conference have adopted the code. It has not been adopted by Montana, Rhode Island, and Wisconsin. Wisconsin, however, presently has it under consideration. *Id.* See also Greenberg, *The Task of Judging the Judges*, 59 JUDICATURE 459, 459-467 (1976) (details present judicial disciplinary systems, why they were established, and how they can be most effective).

57. E. Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 793 (1972). The American Bar Association Committee developed the Code of Professional Responsibility prior to turning their attention to the Canons of Judicial Ethics, which had not been revised since 1924. The committee then drafted the Code of Judicial Conduct. *Id.*

58. A committee, entitled the Subcommittee on Code of Judicial Conduct, has recently been formed by the ABA. The committee is chaired by William F. Womble. To date, the committee has not formulated a revision to the Code of Judicial Conduct. ABA Ethics Hotline, Chicago, Illinois. See also *Judicial Code Re-Examined*, A.B.A. J., Apr. 1988, at 152, 152 (participants at ABA sponsored public hearing raised concerns about code of conduct); Middleton, *Bringing Judges Into the 1990s*, 10 NAT'L L.J., Feb. 22, 1988, at 1, 26 (new code needed to deal with increasingly complex issues facing judiciary).

59. Pub. L. No. 96-458, 3, 94 Stat. 2035, 2036-40 (1980) (amending 28 U.S.C. § 372).

60. 28 U.S.C. § 372(c)(1) (1982).

61. Burbank, *The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?*, 67 JUDICATURE 183, 184 (1983) (analysis of Federal Judicial Discipline Act).

62. See B. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM* (1976) which stated, "[t]he culture of professionalism released the creative energies of the free person who was usually accountable only to himself and his personal interpretation of the ethical standards of the profession." *Id.* at 92.

63. See *infra* notes 64-76 and accompanying text.

64. See, e.g., *Estates Theatres Inc. v. Columbia Pictures Indus.*, 345 F. Supp. 93, 95 n.1

for "guiding" the court on the issue involved.

A. Civil Actions

In the realm of civil cases, ethical rules have been used in actions regarding attorney fees,⁶⁵ probate proceedings,⁶⁶ cases involving questions of the unauthorized practice of law,⁶⁷ and the disclosure of information.⁶⁸ In these cases, the court admitted the ethical rule as relevant evidence or as an instruction on the proper standard for attorney conduct. For example, in *Cambron v. Canal Insurance Co.*,⁶⁹ the Supreme Court of Georgia found an attorney disciplinary rule relevant as an instruction to assist the jury in deciding an insurance company's equitable right to set aside two default judgments. Since the facts of the case concerned the propriety of an attorney's conduct, the court found it acceptable to permit the jury to consider the standards applicable to licensed practitioners in the state.⁷⁰

Even where the Code had not been adopted by a court having jurisdiction over the case, it was held that the Code was a proper vehicle for examining whether an attorney should be disqualified in an action.⁷¹ Courts have found it improper, however, to use ethical rules to resolve a discovery dispute,⁷² and to sustain an action of intentional emotional distress.⁷³

(S.D.N.Y. 1972) (code of ethics without force but recognized as standard for professional conduct). See *infra* notes 66-77 and accompanying text.

65. See, e.g., *Bryant v. Hand*, 158 Colo. 56, 60, 404 P.2d 521, 523 (1965) (canons used in dispute involving attorney's contingent fee); *Deupree v. Garnett*, 277 P.2d 168, 175 (Okla. 1954) (ethical violations do not prohibit collection of attorney fees).

66. See, e.g., *In re Estate of Pedrick*, 505 Pa. 530, 541-45, 482 A.2d 215, 222-23 (1984) (failure to comply with professional code held not to invalidate a will); *In re Estate of Weinstock*, 40 N.Y.2d 1, 6-9, 386 N.Y.S.2d 1, 3-4, 351 N.E.2d 647, 649-50 (1976) (code used to resolve dispute whether attorney could serve as executor of will).

67. See *Illinois State Bar Ass'n v. United Mine Workers*, 35 Ill. 2d 112, 117-25, 219 N.E.2d 503, 506-10 (1966) (labor union found to have engaged in unauthorized practice of law), *vacated*, 389 U.S. 217 (1967); *In re Maclub of Am.*, 295 Mass. 45, 3 N.E.2d 272 (1963). Courts have also used ethical standards to resolve attorney disqualification issues. See *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964).

68. See *Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank of Chicago*, 408 F.2d 1099, 1102 (8th Cir. 1969) (canons used to conflict where former United States Attorney represented plaintiff in issue on which attorney had participated in criminal trial), *cert. denied*, 396 U.S. 823 (1969).

69. 246 Ga. 147, 269 S.E.2d 426 (1980).

70. *Id.* at 151, 269 S.E.2d at 430.

71. See, e.g., *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 438-43 (9th Cir.) (attorney disqualified in action based upon unfair labor practices), *cert. denied*, 464 U.S. 851 (1983).

72. *Sobel v. Yeshiva Univ.*, 28 Empl. Prac. Dec. (CCH) 32,479 (S.D.N.Y. 1981) *rev'd*, 839 F.2d 18 (2d Cir. 1988) (reversed and remanded on substantive issues). The *Sobel* trial court stated: "The defendants seem to lose sight of the fact that the purpose of the disciplinary rule is to evaluate the ethical conduct of attorneys. . . . It is not a rule of the court, nor a limitation on discovery procedures. It was not intended, and should not be used as a rule of law." 28 Empl. Prac. Dec. (CCH) at 32,479.

73. See *East River Sav. Bank v. Steel*, 169 Ga. App. 9, 11, 311 S.E.2d 189, 191 (1983) (code, standing alone, cannot be legal basis to support civil action based upon intentional infliction of emotional distress). Similarly, in cases involving other professions, ethical rules have been found inad-

Surrounding most of the decisions is the belief that a court cannot resolve an ethical problem in a vacuum and as such, ethical rules serve the purpose of guidance.⁷⁴ Ethical rules help the court to resolve cases in which an attorney's conduct is an issue or is raised as a defense. But in its guidance capacity, the resolution of the problem is the function of a court and not a jury.⁷⁵ Further, that court is clearly maintaining that the ethical standard is not a rule of law.

Although the new Rules of Professional Conduct restrict their use to a self-regulatory motif for attorneys, the prior Code of Professional Responsibility has been used in attorney malpractice actions.⁷⁶ Likewise, there have been numerous legal malpractice cases in which the courts have found use of the ethical standards of the Code improper, contending that violations of the Code do not constitute legal malpractice.⁷⁷

B. Criminal Proceedings

In criminal proceedings, ethical rules are becoming a defense attorney's tactic in the request for recusal of a judge,⁷⁸ or in arguing a violation of due process.⁷⁹ Defendants, likewise, employ the tactic against their trial counsel when

missible. For example, in *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986), the court affirmed a trial court's finding that evidence from a police department disciplinary proceeding was prejudicial and inadmissible under Federal Rule of Evidence 403. *Id.* at 1417. See also *Tigges v. Cataldo*, 611 F.2d 936, 938 (1st Cir. 1979) (disciplinary action against police officer not admissible on police brutality claim).

74. See *Silver Chrysler Plymouth Inc. v. Chrysler Motor Corp.*, 518 F.2d 751, 757-60 (2d Cir. 1975) (Canon 9 used to resolve attorney conflict issue).

75. *Contra Cambron v. Canal Ins. Co.*, 246 Ga. 147, 151-52, 269 S.E.2d 426, 430 (1980) (disciplinary rule proper as jury instruction).

76. See, e.g., *Lipton v. Boesky*, 110 Mich. App. 589, 598, 313 N.W.2d 163, 167 (1981) (violation of professional responsibility code is rebuttable evidence of malpractice); *Woodruff v. Tomlin*, 616 F.2d 924, 936 (6th Cir.) (Code of Professional Responsibility provides some evidence of standards required of attorneys), *cert. denied*, 449 U.S. 888 (1980).

77. See, e.g., *Bickel v. Machie*, 447 F. Supp. 1376, 1383 (N.D. Iowa) (disciplinary rules do not set standards for civil liability), *aff'd*, 590 F.2d 341 (8th Cir. 1978); *Nelson v. Miller*, 227 Kan. 271, 289, 607 P.2d 438, 451 (1980) (violation of Code does not create cause of action); *Ayyildiz v. Kidd*, 220 Va. 1080, 1085-86, 266 S.E.2d 108, 112 (1980) (Code is not basis for private cause of action); *Brody v. Ruby*, 267 N.W.2d 902, 907-08 (Iowa 1978) (violation of Iowa Code of Professional Responsibility does not furnish basis for private negligence action); *Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. Civ. App. 1978) (violation of disciplinary rule does not create private cause of action).

78. See *United States v. Murphy*, 768 F.2d 1518, 1537-41 (7th Cir. 1985) (judicial ethical opinions used to resolve issue of recusal of judge), *cert. denied*, 475 U.S. 1012 (1986); *Jones v. State*, 416 N.E.2d 880, 882 (Ind. Ct. App. 1981) (judicial canon unsuccessfully used by defendant in recusal allegation). See also Note, *The Legal Profession, Appeals Premised Upon Ethical Grounds*, 11 U. Tol. L. Rev. 473 *passim* (1980) (details code of professional standards in appellate matters, emphasis on Sixth Circuit appeals from 1978-1980); Lubet, *Judicial Impropriety And Reversible Error*, 3 ABA-CRIMINAL JUSTICE 26 *passim* (1988) (discussion of several cases of judicial impropriety).

79. See *Estes v. Texas*, 381 U.S. 532, 535 (1964) (Judicial Canon 35 used as basis for due process claim premised upon telecasting and broadcasting of courtroom proceedings). But see *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 826, 827 (1986) (Canon requiring judge to disqualify himself where he or she has personal bias or prejudice, does not impose a constitutional requirement under Due Process Clause).

arguing inadequate representation by trial counsel,⁸⁰ as well as to convince the court of the necessity for independent counsel on death penalty actions.⁸¹ Here again, the courts are merely determining, in a supervisory capacity, the rightfulness of the alleged violation.⁸²

In criminal proceedings such as these, there are no questions presented for jury determination, and the resolution of the legal issue is performed by judges who regard the ethical rules as standards and not statutes. More importantly, even if the court determines that a violation of an ethical rule has occurred, other than perhaps an emotional or publicity sanction, there is no direct punishment being given to the attorney or judge.⁸³

C. Disciplinary Proceedings

The only other use of ethical rules is in the obvious setting of a disciplinary proceeding. Even in disciplinary hearings, the rules are used, in most cases, as guidance of proper conduct, with the courts specifically proclaiming that they are not rules of law.⁸⁴

In the notorious case of *State v. McCarthy*,⁸⁵ the court held that Joseph R. McCarthy did not violate the disciplinary rules by accepting the position of United States senator during his election term to the office of circuit judge. The court stated that, "while it is true that the canons of ethics, both those governing the conduct of lawyers and of judges, set up standards which should be faithfully observed by those to whom they are applicable they do not amount to rules of conduct for which a lawyer or judge may be punished as for a misdemeanor or a crime."⁸⁶

80. *Tokash v. State*, 232 Ind. 668, 670, 115 N.E.2d 745, 746 (1953) (canons of ethics used to reverse conviction on basis of inadequate representation where defendant not properly advised of right to counsel by judge pro tempore at arraignment, although judge pro tempore subsequently appointed defendant's counsel). See generally Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977).

81. See *Fleming v. State*, 246 Ga. 90, 92-94, 270 S.E.2d 185, 188-89 (1980) (Georgia Code of Professional Responsibility used to determine necessity for separate counsel on death penalty actions), *cert. denied*, 449 U.S. 904 (1980). In *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), the court held that "[s]ince the Code of Professional Responsibility is applicable, it would be grossly incongruous for the courts to blink its violation in a criminal matter." *Id.* at 485, 348 N.E.2d at 898, 384 N.Y.S.2d at 423.

82. See *United States v. Springer*, 460 F.2d 1344, 1353-54 (7th Cir.) (defendant claimed violation of Canon Nine of Code of Professional Responsibility), *cert. denied*, 409 U.S. 873 (1972).

83. The court does of course have the option of submitting the violations to a disciplinary board.

84. See *In re Kuzman*, 335 N.E.2d 210, 212 (Ind. 1975) (canons used as evidence of proper standards of conduct in disciplinary action); *In re Hallett*, 58 Ill. 2d 239, 250, 319 N.E.2d 48, 54 (1974) (canons proper for guidance in disciplinary action); *In re Moore*, 8 Ill. 2d 373, 378, 134 N.E.2d 324, 326-27 (1956) (disciplinary measures proper when canons are usurped); *People ex rel. Chicago Bar Ass'n v. Gilmore*, 345 Ill. 28, 46, 177 N.E. 710, 711 (1931) (canons not equivalent to statutes in disbarment proceeding).

85. 255 Wis. 234, 38 N.W.2d 679 (1949).

86. *Id.* at 246, 38 N.W.2d at 685. The court found that defendant McCarthy had not been derelict in the discharge of his duties and obligations as a lawyer. Despite a finding of an infraction of the moral code, the court found that the violation was "in a class by itself which is not likely to be

In the context of a non-litigant, it is apparent that ethical rules have, for the most part, been used as guidance for attorneys and judges. This use is in keeping with the historical setting in which the rules were first formulated. If the founders of these rules intended only that they would be used by disciplinary boards, then courts employing these guidelines have exceeded the historical origins of the rules. On the other hand, it is arguable that there is only a semantic difference between the use of ethical standards as rules of law or as rules of guidance, since in both instances a court adopts the rules for judicial interpretation.⁸⁷ Oddly enough, however, in the criminal trial of an attorney or judge, this semantic argument proves unimportant, as a recent criminal case strayed to the point of characterizing an ethical rule as a rule of law.⁸⁸

III. THE USE OF ETHICAL RULES IN A CRIMINAL TRIAL OF A LAWYER OR JUDGE

Although one's initial reaction might be that ethical rules have no place in the criminal trial of an attorney or judge, courts have permitted their use in these trials.⁸⁹ In those cases in which the rules have been found relevant, the courts have admitted them as either rules of law or as guidelines. In either capacity, the prejudicial effect is apparent. Ethical rules should be admissible only when offered by a defendant to show intent.

A. The Relevance of Ethical Rules

While some courts have found ethical rules irrelevant, in the context of a criminal proceeding,⁹⁰ three appellate decisions have used ethical rules as evidence or as a jury instruction in a criminal trial where the defendant is an attorney or judge.⁹¹ In *United States v. Anderson*,⁹² the United States Court of Appeals for the Seventh Circuit found that the rules could be properly used as a jury instruction in the criminal trial of a judge.⁹³

repeated." *Id.* at 250, 38 N.W.2d at 687. The court chose not to enforce the code as to this violation and dismissed the petition which requested discipline. *Id.* at 251, 38 N.W.2d at 687-88.

87. See generally Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, 717-722 (1981) (legal code of ethics should define rights and duties not only of lawyers but also of clients).

88. *United States v. Anderson*, 798 F.2d 919, 923-24 (7th Cir. 1986).

89. See *United States v. Machi*, 811 F.2d 991, 1000 (7th Cir. 1987) (attorney disciplinary rule admitted as evidence); *United States v. Anderson*, 798 F.2d 919, 925 (7th Cir. 1986) (judicial canon admitted as instruction); *People v. Buster*, 77 Ill. App. 2d 224, 231, 222 N.E.2d 31, 35 (1966) (ethical rule used by court). In *Willis v. State*, 512 N.E.2d 871 (Ind. App. 1987), the Indiana Court of Appeals found that any error in the admission of testimony concerning the defendant-attorney's prior disciplinary complaints was waived due to a failure to specifically object to the admission of the testimony. *Id.* at 876.

90. See *Hefner v. State*, 735 S.W.2d 608, 626 (Tex. App. 1987) (ethical rule irrelevant in theft action); *Pope v. State*, 179 Ga. App. 739, 744, 347 S.E.2d 703, 707 (1986) (ethical rule prejudicial in forgery case).

91. *United States v. Machi*, 811 F.2d 991 (7th Cir. 1987); *United States v. Anderson*, 798 F.2d 919 (7th Cir. 1986); *People v. Buster*, 77 Ill. App. 2d 224, 222 N.E.2d 31 (1966).

92. 798 F.2d 919 (7th Cir. 1986).

93. *Id.* at 925.

In this case, Orval W. Anderson, a judge of the Lake County Court in Indiana, had testified pursuant to subpoena as a defense witness in the trial of John Marine and Kenneth Anderson.⁹⁴ On cross-examination the government asked Judge Anderson if he had ever disposed of a case in his chambers without the presence of a prosecutor.⁹⁵ Anderson replied, "No, no. Always prosecutors there."⁹⁶ At the conclusion of the trial, the government offered evidence contrary to this statement to a grand jury and Judge Anderson was subsequently indicted.⁹⁷ Judge Anderson was charged with two counts of making a false material declaration, and one count of obstructing justice by giving false and misleading testimony.⁹⁸

At Judge Anderson's trial, the government offered evidence consisting of eight cases in which guilty pleas to the charge of driving under the influence were taken by Judge Anderson in his chambers without the presence of a prosecutor.⁹⁹ Anderson testified at his trial that he had no specific recollection of those eight cases, and he had obviously misspoken, in what he termed an honest mistake.¹⁰⁰ The jury rejected this argument and instead found Judge Anderson guilty of knowingly making a false material declaration.¹⁰¹ Anderson appealed but the United States Court of Appeals for the Seventh Circuit rejected his arguments of lack of materiality¹⁰² and lack of falsity of the statements.¹⁰³

Of significance to this article is a lengthy discussion by the court on the permissibility of using a Judicial Canon as a jury instruction. Despite objection by trial counsel, the court instructed the jury that the Code of Judicial Conduct required the presence of a prosecuting attorney when a guilty plea is entered.¹⁰⁴

A key argument by the defendant was the court's misconception of the rule

94. *Id.* at 921. John Marine and Kenneth Anderson, who was not related to Judge Anderson, were charged for their participation in a ticket "fixing" scheme. *Id.* at 921 n.2.

95. *Id.* at 922.

96. *Id.*

97. *Id.*

98. *Id.* at 922.

99. *Id.* Anderson handled approximately 34,000 cases as a judge during the time period in question.

100. Record at 1299-1300, *Anderson*, 798 F.2d 919 (7th Cir. 196) (85-2368). See also Brief for Appellee at 5, *United States v. Anderson*, 798 F.2d 919 (7th Cir. 1986) (85-2368).

101. *Anderson*, 798 F.2d at 921. Anderson received a three year sentence of incarceration, and a \$50.00 special assessment. Judgment and Probation/Commitment Order, 798 F.2d 919 (7th Cir. 1986) (No. 85-2368). He served one year of that sentence in a federal penitentiary. Commitment and Release Orders, 798 F.2d 919 (7th Cir. 1986) (No. 85-2368). Anderson resigned his license to practice law. Order Accepting Resignation, *In re Anderson*, Indiana Supreme Court Clerk's Office, 217 State House, Indianapolis, Indiana 46204.

102. *Anderson*, 798 F.2d at 925-29. The government used the testimony of the defense attorney who called Orval W. Anderson as a witness in the trial of John Marine and Kenneth Anderson. Additionally, the government's proof of materiality included a transcript of the defense attorney's closing argument from the trial, in which the attorney's argument referred to the testimony given by Orval W. Anderson. *Id.* at 929-31.

103. *Id.* at 929-31. Anderson argued that the acceptance of a guilty plea in chambers was not equivalent to a "hearing," and as such, he was not literally guilty of testifying falsely. *Id.* at 925-29.

104. Brief for Appellant at 7, *United States v. Anderson*, 798 F.2d 919 (7th Cir. 1986) (85-2368). Instruction No. 23 in the *Anderson* trial stated:

itself. The defendant proposed an instruction which professed the view that there was no statute or rule of procedure in the State of Indiana that required a prosecutor to be present at the taking of a guilty plea.¹⁰⁵ The court, however, rejected this defense instruction as an incorrect, confusing, and misleading interpretation of the Indiana Code of Judicial Conduct.¹⁰⁶

On appeal, Anderson's counsel argued not only that the instruction was prejudicial to the defendant, but also that "it put before the jury an issue which need not be decided by them and which was supported neither by law nor by evidence."¹⁰⁷ The government admitted in their response that the instruction related to a collateral matter concerning Anderson's knowledge of the falsity of his testimony.¹⁰⁸ The Seventh Circuit resolved this issue by concluding that the instruction was not prejudicial to the defendant.¹⁰⁹ The circuit court did not,

In the operation of their courts and carrying out their judicial duties, Indiana state court judges are governed by a Code of Judicial Conduct adopted by the Indiana Supreme Court.

As applicable to this case, the Code of Judicial Conduct provides in part: A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law. . . and, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.

The term *ex parte* means without the other party. An *ex parte* proceeding, therefore is any judicial proceeding at which only one party is present.

The criminal cases which are at issue in this trial were adversarial cases. That is, on one side is the prosecuting attorney on behalf of the State of Indiana, and, on the other side is the defendant charged with the particular misdemeanor.

....

In any action by a judge, whereby proceedings are conducted which bear on the outcome of a pending criminal case, the Code of Judicial Conduct requires the presence of both the prosecuting attorney and the defendant.

Thus, the submission of a guilty plea by a defendant, whether accepted by the judge or not, requires the presence of a prosecuting attorney.

Anderson, 798 F.2d at 923.

105. Brief for Appellant at 6-7, *United States v. Anderson*, 798 F.2d 919 (7th Cir. 1986) (85-2368). Tendered Instruction No. 24 by the defendant stated:

You are instructed that the statutes of the State of Indiana, the Indiana Rules of Trial Procedure and the Code of Judicial Conduct are the sole authorities for directing what procedures are to be used by all courts in the State of Indiana for the handling of cases.

You are further instructed that there is no statute or rule of procedure in the State of Indiana that requires that a prosecutor be present or that a court reporter be present or that a tape recording be made of a guilty plea to a driving under the influence charge or misdemeanor made by a defendant.

You are further instructed that the laws of the State of Indiana and the rules of procedure specifically authorize a judge to accept a guilty plea and sentence a defendant pursuant to that guilty plea without the attendance of a clerk or other court officials.

Anderson, 798 F.2d at 925.

106. *Id.*

107. Brief for Appellant at 7, *United States v. Anderson*, 798 F.2d 919 (7th Cir. 1986) (85-2368).

108. Brief for Appellee at 12, *United States v. Anderson*, 798 F.2d 919 (7th Cir. 1986) (85-2368). The government argued that since it related to a collateral matter, even if the instruction were to be held improper, it could not be the basis of a reversal of the appellant's conviction. *Id.*

109. *Anderson*, 798 F.2d at 924. The court stated:

Judge Anderson also contends that the trial Court's giving of this jury instruction No. 23

however, comment on the relevance of the ethical rule to this criminal trial.

In *United States v. Machi*,¹¹⁰ the Seventh Circuit court went one step further and held that three Wisconsin disciplinary rules were relevant to the criminal trial of an attorney. Attorney Calarco was one of two defendants charged with obstructing the due administration of justice¹¹¹ and conspiracy to obstruct justice.¹¹² Calarco was convicted for his participation in a scheme in which a convicted drug dealer paid \$50,000 for what he thought would be a "fixed" reduction of a four-year prison sentence to fifteen months.¹¹³

The trial court rejected the defendant's arguments that the three Wisconsin disciplinary rules were erroneously admitted pursuant to Federal Rules of Evidence, Rules 401 and 403.¹¹⁴ The government contended that admission of the ethical rules was proper to rebut attorney Calarco's defense that he was not an active participant in the scheme.¹¹⁵ The government maintained that the attorney would not have risked his legal career to engage in unethical conduct merely as a favor to a friend.¹¹⁶

On appeal, the Seventh Circuit found that the disciplinary rules supported the government's position that Calarco had chosen to "cast aside his ethical obligations and responsibilities as an attorney."¹¹⁷ The court further accepted the government's position that these rules were relevant and stated that "the introduction of the ethical rules in evidence was proper to establish the inference that . . . Calarco had more than a passing interest in the scheme and was not merely doing it as a 'favor to a friend.'"¹¹⁸

A third case involving the use of ethical rules is *People v. Buster*,¹¹⁹ a decision of the Third District Appellate Court of Illinois. In this case, the court used the rules to resolve a charge of criminal contempt against an attorney.¹²⁰ The court found that a Canon of Professional Ethics was relevant to guide the court on the issue of the propriety of the attorney's failure to appear on a client's drunk driving charge.¹²¹

substantially prejudiced his right to a fair trial in directing the jury to an issue they were not required to decide since Count I of the indictment fails to allege that a prosecutor must be present at the submission of a misdemeanor—defendant's guilty plea. We disagree since any possible prejudice to the defendant resulting from the giving of instruction No. 23 was minimal, if any, due to the limiting instruction given as the Court's jury instruction.

Id.

110. 811 F.2d 991 (7th Cir. 1987).

111. *Id.* at 993. The defendant was charged with a violation of 18 U.S.C. § 1503 (1982).

112. *Id.* at 993. The defendant was charged with a violation of 18 U.S.C. § 371 (1982).

113. *Id.* at 993. The convicted drug dealer advised the IRS of the scheme and ultimately obtained a deal with the government recommending probation. Brief for Appellant Machi at 12, *United States v. Machi*, 811 F.2d 991 (7th Cir. 1987) (No. 86-1352).

114. *Machi*, 811 F.2d at 999-1000.

115. *Id.* at 1000.

116. *Id.*

117. *Id.*

118. *Id.* at 1001.

119. 77 Ill. App. 2d 224, 222 N.E.2d 31 (1966).

120. *Id.* at 231, 222 N.E.2d at 35.

121. *Id.*

In contrast to the position taken by the courts in *Anderson*, *Machi*, and *Buster*, other courts have rejected the attempt to use ethical rules in criminal trials of attorneys or judges. In *Hefner v. State*,¹²² the defendant attorney requested an instruction on provisions of the Texas Code of Professional Responsibility.¹²³ He argued, on appeal, that the court erred by failing to instruct the jury on an attorney's duty to represent his client zealously¹²⁴ within the bounds of the law.¹²⁵ The appellate court rejected the defendant's argument and concluded that "the disciplinary rules have no bearing on the present case, a criminal prosecution for theft."¹²⁶

This opposition to the use of ethical rules in a criminal trial was also evident in *Pope v. State*.¹²⁷ The Georgia Court of Appeals reversed a conviction of forgery, finding testimony concerning ethical rules unfairly prejudicial to the attorney-defendant.¹²⁸ Attorney Pope was found to have signed his client's name on an insurance check in the sum of \$2,500.¹²⁹ He then removed \$1,000 as attorney fees, and presented the clients with a check for \$1,500, representing that the check was from the insurance company.¹³⁰ At trial, the court permitted a state's witness to testify about an advisory opinion given by the State Disciplinary Board of Georgia.¹³¹

The *Pope* court, agreed with the defendant that this testimony was irrelevant and immaterial.¹³² The majority's decision, however, concentrated on the prejudicial effect of this testimony as opposed to the actual purpose for which this testimony was admitted.¹³³ Three dissenting justices argued that the evidence was relevant to respond to the primary defense of lack of intent.¹³⁴ The dissenters claimed that the evidence should have been admissible to show that the lawyer knew or should have known that he was not the rightful recipient of the funds.¹³⁵ Noting the strong dissent in the *Pope* case, as well as the decisions of *Anderson*, *Machi*, and *Buster*, it is apparent that the admission of ethical rules in the criminal trial of an attorney or judge is not a mere aberration.

B. Ethical Rules as "Rules of Law"

Perhaps the most blatant example of a court's use of an ethical rule as a

122. 735 S.W.2d 608 (Tex. App. 1987).

123. *Id.* at 626.

124. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-101.

125. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-102(A)(2).

126. *Hefner*, 735 S.W.2d at 626.

127. 179 Ga. App. 739, 347 S.E.2d 703 (1986).

128. *Id.* at 744, 347 S.E.2d at 706-707.

129. *Id.* at 740, 347 S.E.2d at 704.

130. *Id.*

131. *Id.* at 743, 347 S.E.2d at 706.

132. *Id.*

133. *Id.* at 742-43, 347 S.E.2d at 706-07. It should be noted that the court did speak of this evidence with regard to the issue of "intent." *Id.* at 744, 347 S.E.2d at 706.

134. *Id.* at 746, 347 S.E.2d at 708.

135. *Id.*, 347 S.E.2d at 709.

"rule of law"¹³⁶ is seen in the opinion of *United States v. Anderson*.¹³⁷ Using language from disciplinary board cases, the United States Court of Appeals for the Seventh Circuit characterized the Judicial Canons as mandatory rules.

In *Anderson*, the court equated the Judicial Rules with rules of law based upon language found within a disciplinary board case that eventually found its way into court on an appeal of the administrative hearing.¹³⁸ Additionally, the *Anderson* court cited a case that stated that a violation of a Judicial Canon due to a judge's extrajudicial personal bias or prejudice would be a basis for requiring that a judge disqualify him or herself in a proceeding.¹³⁹

The Seventh Circuit, in the *Anderson* decision, never discussed how the use of an ethical rule in a disciplinary board hearing or in a criminal action where the defendant is not the judicial officer on trial might differ from the use of an ethical rule in the context of a criminal trial of an attorney or judge.¹⁴⁰ The *Anderson* court adopted what it believed to be the Indiana Supreme Court view that the Code of Judicial Conduct and Ethics should have the force and effect of law and be considered mandatory standards governing the conduct of judges.¹⁴¹

In opposition to the position taken in *Anderson*, the Supreme Court of Georgia in *Marcus v. State*,¹⁴² rejected the use of a disciplinary rule in consideration of a demurrer to an indictment. Attorney Paul Robert Marcus was charged pursuant to a false statement statute¹⁴³ for presenting to a deputy sheriff an order releasing his client on bail of \$30,000 knowing that it contained a typographical error when it set bail at \$300,000.¹⁴⁴ He brought an interlocutory

136. In this context, "rule of law" means the mandatory application of the ethical or disciplinary rule rather than whether a particular legislature or court has adopted the ethical rules. The legislature or court's adoption of the ethical rules are for the most part irrelevant in that they have adopted the "scope" section which specifically states that the rules are not applicable to an antagonistic in a collateral proceeding or transaction.

137. 798 F.2d 919 (7th Cir. 1986).

138. *Id.* at 923-24 (*Terry* court's suspension of judge for violating Code of Judicial Conduct and Ethics "clearly demonstrates" that *Terry* court considered Code as having force and effect of law) (citing *In re Terry*, 262 Ind. 667, 671-73, 323 N.E.2d 192, 195 (judicial ethics have been increasingly formalized), *cert. denied*, 423 U.S. 867 (1975)).

139. *Id.* at 924 (citing *Jones v. State*, 416 N.E.2d 880, 881 (Ind. App. 1981) (judge not required to recuse himself when no actual extrajudicial personal bias or prejudice shown)).

140. The *Anderson* court, by accepting the majority opinion in *Terry*, implicitly rejected the concurring and dissenting opinion of Justice DeBruler of the Indiana Supreme Court. Justice DeBruler stated:

The Code of Judicial Conduct and Ethics effective March 8, 1971, which existed at the time of the allegedly unethical conduct of Judge Terry did not purport to set specific legal standards, but was a statement of an ideal to which we were exhorting the judges of the State. . . . In my opinion, we cannot consistently with the Due Process Clause of the Fourteenth Amendment, elevate these Rules of Conduct to the level of law.

In re Terry, 262 Ind. 667, 686-87, 323 N.E.2d 192, 203 (1975) (emphasis added).

141. *Anderson*, 798 F.2d at 923-24.

142. 249 Ga. 345, 290 S.E.2d 470 (1982).

143. *Id.* at 345-46, 290 S.E.2d at 471. He was indicted under Georgia Code Ann. §§ 26-2408 charging that he did "knowingly and willfully conceal and cover up by trick, scheme and device, a material fact." *Id.*

144. *Id.* at 346, 290 S.E.2d at 471.

appeal contesting the court's denial of a general demurrer to his indictment. In reversing the superior court, the Supreme Court of Georgia dismissed the case and held that the indictment failed to allege criminal conduct.¹⁴⁵ Finding that ethical rules should not play any consideration in the court's decision, the Georgia Supreme Court stated that "behavior which might be unethical and might even subject an attorney to discipline by the State Bar does not necessarily rise to the level of criminal conduct."¹⁴⁶ The court stated that it would be improper to "apply to an attorney a standard different from that applied to layman" when judging criminal conduct.¹⁴⁷ Although the court in *Marcus* found the ethical rule was neither a criminal rule nor evidence of criminal conduct, the court did not specifically remark on whether the disciplinary rule was in fact a "rule of law."

It is arguable that *Anderson* and *Marcus* are not comparable in that one involved the judicial rules and the other the lawyer's professional code. It is further arguable that these cases can be distinguished in that *Anderson* involved a charge to the jury while *Marcus* involved a demurrer review. It is also apparent that *Anderson* clearly held that the judicial canon was a rule of law, while *Marcus* merely found that the ethical rule was not a standard of criminal conduct. Evident in both cases, however, is a clearly contrasting view as to the applicability of ethical rules in a criminal action.¹⁴⁸ *Anderson* found these rules useful, while *Marcus* rejected them.

145. *Id.* at 346, 290 S.E.2d at 472.

146. *Id.* at 346, 290 S.E.2d at 472. See also *Cranford v. Cranford*, 120 Ga. App. 470, 474-75, 170 S.E.2d 844, 847-48 (1969), ("[t]here are no statutory criminal penalties visited upon an attorney who in violation of his ethical relation to his client divulges a confidential communication.").

147. 249 Ga. at 346, 290 S.E.2d at 472. See also *People v. Ehle*, 273 Ill. 424, 112 N.E. 970 (1916), a case in which the Supreme Court of Illinois stated: "Attorneys at Law must maintain a higher standard of honesty, but when accused of a crime they are entitled to a fair trial and cannot be convicted except according to the established rules of procedure and the law in such cases made and provided." *Id.* at 434, 112 N.E. at 974.

148. In cases involving the converse situation, the courts have used a criminal conviction or criminal conduct to support a disciplinary violation. Courts have universally proclaimed that an acquittal in a criminal case does not bar a disciplinary action. See *In re Conduct of Roth*, 293 Or. 179, 188-89, 645 P.2d 1064, 1070 (1982) (although finding willful violation of Canon 2A of Oregon Code of Judicial Conduct, the court stated this is not to "imply that any violation of law, however trivial, harmless or isolated, would also be a violation of 2A."); *In re Nicholson*, 243 Ga. 803, 805, 257 S.E.2d 195, 198 (1979) (pattern of repetitious nonfiling of tax returns for multiple years held dishonest and involving moral turpitude); *In re Thomas B. Coggins*, No. COJ-12 (Ala. Ct. of the Jud. June 16, 1981) (judge committed felonies in violation of Florida statutes, specifically the purchase of 981 pounds of marijuana in the Bahamas and possession of loaded pistol). See also *Ex parte Wall*, 107 U.S. 265, 287-90 (1883) (disbarment of attorney upheld on attorney's criminal acts even though no criminal conviction had); *Zitney v. State Bar of Cal.*, 64 Cal. 2d 787, 790 n.1, 415 P.2d 521, 523 n.1, 51 Cal. Rptr. 825, 827 n.1 (1966) (acquittal of attorney in criminal trial did not prohibit disbarment proceedings); *Yapp v. State*, 62 Cal. 2d 809, 817, 402 P.2d 361, 365, 44 Cal. Rptr. 593, 597 (1985) (acquittal of attorney in grand theft action did not preclude disciplinary proceeding); *Best v. State Bar of Cal.*, 57 Cal. 2d 633, 637, 371 P.2d 325, 328, 21 Cal. Rptr. 589, 592 (1962) (acquittal of attorney in criminal action does not bar disciplinary proceeding).

C. Ethical Rules as Guidelines

More frequent in the case law are those situations in which a court uses an ethical rule as a guideline and not as a rule of law.¹⁴⁹ Like the civil and disciplinary cases which have considered the disciplinary rules as proper tools for evaluating an attorney or judge's actions in the context of an attorney's or judge's criminal trial, the rules as guidelines have been held valid.

In *People v. Buster*,¹⁵⁰ the Third District Appellate Court of Illinois applied the Professional Ethics of the Illinois State Bar Association in order to evaluate the conduct of an attorney charged with criminal contempt. Attorney James D. Reynolds was charged with contempt because he failed to appear as the attorney of record at two trial settings on the case of Buck Buster.¹⁵¹ The appellate court affirmed the order of contempt and found that Reynold's failure to appear for his client without filing a written motion of withdrawal, was disrespectful to the orderly disposition of matters in the court.¹⁵²

To reach this conclusion, the Illinois court relied on Canon 21 of the Ethical Rules of Illinois.¹⁵³ The court specifically ruled that "while such canons do not have the force and effect of judicial decision or statutory law, they nevertheless are of interest to this court, provide guidelines to members of the profession and are helpful in reaching determinations in particular cases."¹⁵⁴

One might remark that perhaps a contempt hearing, although emanating from a criminal charge, is quasi-disciplinary in nature, and as such should permit the use of ethical rules as guidelines. Nevertheless, a contempt proceeding can entail a jail sentence and, therefore, procedural due process should preclude the use of ethical rules as guidelines, absent legislative enactment of these rules for other than disciplinary proceedings.

D. The Prejudicial Effect of Ethical Rules in a Criminal Trial

When ethical rules are used in a criminal trial, either as evidence or as a jury instruction, the question of whether the defendant has been prejudiced by such use necessarily arises. In *United States v. Anderson*,¹⁵⁵ the Seventh Circuit found that the Judicial Code's mandatory standards were equatable to rules of law. The court then took a paradoxical approach to hold that such use created

149. See *supra* notes 62-87 and accompanying text for a discussion of ethical rules used as guidelines in criminal and non-criminal matters.

150. 77 Ill. App. 2d 224, 222 N.E.2d 31 (1966).

151. *Id.* at 226, 222 N.E.2d at 32. The court fined Reynolds \$50 as punishment for his conduct. *Id.*

152. *Id.* at 231, 222 N.E.2d at 35.

153. Canon 21 of the Professional Ethics of the Illinois State Bar Association imposed a duty on a lawyer "not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes." PROFESSIONAL ETHICS OF THE ILLINOIS STATE BAR ASSOCIATION Canon 21.

154. *Buster*, 77 Ill. App. 2d at 231, 222 N.E.2d at 35 (quoting Illinois State Bar Ass'n v. United Mine Workers, 35 Ill. 112, 119, 219 N.E.2d 503, 507 (1966)).

155. 798 F.2d 919 (7th Cir. 1986). See *supra* notes 92-109 and accompanying text for a discussion of the facts of *Anderson*.

"minimal, if any" prejudice to the defendant.¹⁵⁶ The rationale for the "minimal, if any" prejudice was not because the Judicial Code contains mandatory language, but because the trial court gave a cautionary instruction stressing that the defendant was on trial for obstruction of justice and knowingly making false declarations at a trial.¹⁵⁷

The Seventh Circuit again found a limiting instruction to be adequate protection for the defendant in the case of *United States v. Machi*.¹⁵⁸ In *Machi*, the court completely bypassed any direct discussion as to whether the rules of professional conduct were "rules of law" or "rules of guidance." The *Machi* court rejected the defense argument that it was prejudicial to admit an ethics rule because its use permitted a jury to equate the rule with the crime.¹⁵⁹ The *Machi* court reasoned that because the jury had been cautioned three times not to infer a violation of the federal statute because of a violation of an ethical rule,¹⁶⁰ and because the ethical rule was necessary to negate the defense presented, the probative value outweighed the prejudicial effect of the evidence.¹⁶¹

When offered as evidence in *Pope v. State*,¹⁶² the Court of Appeals of Georgia found that use of a professional rule of ethics was improper despite a cautionary instruction.¹⁶³ Although the trial court overruled the appellant's objection to the admission of an advisory opinion of the State Disciplinary Board of Georgia, it *sua sponte* presented cautionary words at the time the evidence was admitted.¹⁶⁴

In reversing the conviction of Attorney Pope, the Court of Appeals of Georgia concluded that this testimony left the jury with an unmistakable impression that violating the state bar rule was equivalent to an intention to defraud the client.¹⁶⁵ Citing *Marcus v. State*,¹⁶⁶ the court found the rules unfairly prejudicial in that unethical conduct did not necessarily imply criminal conduct.¹⁶⁷ The *Pope* court emphasized that "evidence of State Bar rules which set forth standards of conduct for attorneys different from those applied to a layman should not be admitted, as it is inherently unfair to subject an attorney accused of a crime to a standard different from that applied to layman."¹⁶⁸ It should be noted, however, that the court did limit this holding to evidence offered at trial,

156. 798 F.2d at 924.

157. *Id.* See *supra* note 109 for an excerpt of the *Anderson* court's rationale.

158. 811 F.2d 991 (7th Cir. 1987). See *supra* notes 110-18 and accompanying text for a factual discussion of *Machi*.

159. 811 F.2d at 1001-02.

160. *Id.* The jury was cautioned in closing arguments by both prosecution and defense, as well as by the court in an instruction. *Id.*

161. *Id.*

162. 179 Ga. App. 739, 347 S.E.2d 703 (1986).

163. *Id.* at 744, 347 S.E.2d at 707.

164. *Id.* at 743, 347 S.E.2d at 706.

165. *Id.* at 743, 347 S.E.2d at 707. The court did note that this was the only "direct" evidence of intent to commit the crime. *Id.* at 743, 374 S.E.2d at 707.

166. 249 Ga. 345, 290 S.E.2d 470 (1982). See *supra* notes 142-47 and accompanying text for discussion of *Marcus*.

167. *Pope*, 179 Ga. App. at 743, 347 S.E.2d at 707.

168. *Id.* at 744, 347 S.E.2d at 707 (1986).

and in a footnote stated that this position would not necessarily hold true in determining the applicability of the State Bar rules offered as a charge to the jury.¹⁶⁹

Thus, it is evident that there is a split in views on whether ethical rules are prejudicial in a criminal trial. Although perhaps a jurisdictional dichotomy, it does appear that the use of a cautionary instruction will not always suffice to render the rules admissible.¹⁷⁰

E. Ethical Rules to Show Intent

One rare exception to the position against the use of ethical rules at a criminal trial should be noted. This exception is in those instances when the rule is offered as the basis for the attorney's or judge's intent to commit the alleged crime. Obviously, a crucial determinant would be whether the rule really was relevant to the intent of this particular crime.¹⁷¹

In the case of *State v. Hefner*,¹⁷² the court rejected a defendant's attempt to use a disciplinary rule in his trial for the crime of theft. Despite the defendant's claim that the disciplinary rule would support his defense of lack of criminal intent, the court claimed that the Texas Code of Professional Responsibility had no bearing on the alleged theft, and was thus improper.¹⁷³

This contrasts with the case of *Machi*,¹⁷⁴ where the court permitted evidence of three Wisconsin disciplinary rules, finding the resulting prejudice inconsequential in light of the court's cautionary instruction.¹⁷⁵ Despite the tenuous relationship between the rule and the intent to commit the crime, the court did not instruct the jury that the disciplinary rule should be considered only for the purpose of determining the intent of the defendant.¹⁷⁶ Consequently, the admission of the evidence, although not denoted a rule of law or guidance for the jury, would clearly have impact in the decisionary process outside the realm of an intent discussion. It serves as an evidentiary harpoon that discredits the character of the defendant.

169. *Id.* at 744 n.2, 347 S.E.2d at 707 n.2.

170. *See id.* at 744, 347 S.E.2d at 707 (court held professional rules of ethics testimony improper despite cautionary instruction).

171. *See infra* notes 172-76 and accompanying text for a discussion of the use of ethical rules to prove criminal intent. In *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), the trial court's rejection of an instruction encompassing an ethical consideration was found proper. Although offered to raise the issue of intent, it was not an error to exclude the confusing instruction since the jury would not be passing on the lawyer's ethical obligations. *Id.* at 983 n.16. *See also* *United States v. Casperson*, 773 F.2d 216, 224 n.13 (8th Cir. 1985) (court found although some instruction of defense of good faith legal representation might be proper, it was not error to exclude defendant's particular instruction on attorneys' duties and responsibilities).

172. 735 S.W.2d 608 (Tex. App. 1987).

173. *Id.* at 626. *But see* *United States v. Rabbitt*, 583 F.2d 1014, 1025 (8th Cir. 1978) (violation of ethical rules, "although bearing on intent to defraud, do not in and of themselves establish the substantive crime of mail fraud"), *cert. denied*, 439 U.S. 1116 (1979).

174. 811 F.2d 991 (7th Cir. 1987).

175. *Id.* at 1002. The court stated, "[t]he defendants are not on trial for any action or conduct not alleged in the indictment." *Id.*

176. *Id.*

An example of an instance in which a disciplinary or ethical rule would be proper would be in those situations when it was offered by a defendant for the purpose of showing a lack of criminal intent. If an attorney were charged with obstruction of justice as a result of advice to a client, a defense might be that the attorney did not have the intent to obstruct justice, and was merely representing the client zealously pursuant to the disciplinary rules.¹⁷⁷

If the ethical guideline is found to be relevant to show a lack of intent, then the disciplinary or ethical rule should be admitted. This admission, however, necessitates a limiting instruction, stating that these ethical rules are not evidence of guilt, and are not "rules of law." The jury should be specifically cautioned that the ethical rules should be used only as a basis for determining whether a defendant lacked the proper intent to commit the alleged crime.

In this example, it would be unlikely that a jury would equate the disciplinary rule with the law of obstruction of justice, and thereby balance these two items. The jury or court would, however, have the opportunity, if a defendant so desired, to reflect upon whether there was in fact an intent to obstruct justice or merely a misguided attorney following ethical rules he or she believed to be proper guides of conduct. In these instances, in which a defendant uses disciplinary or ethical rules to negate intent, courts should admit the rules coupled with cautionary instructions.

IV. THE HARMS OF USING AN ETHICAL RULE IN THE CRIMINAL TRIAL OF AN ATTORNEY OR JUDGE

There are four possible harmful ramifications of permitting ethical rules to be used in a criminal trial. First and foremost is the possible prejudice to a defendant when these rules are admitted. Asking a jury to differentiate between misconduct and criminality, even with cautionary instructions, is analogous to requiring a defendant to be tried in jail clothes.¹⁷⁸ The guilt or innocence of the criminal defendant becomes irrelevant, as a jury is swayed by the prevailing appearance.

A second problem with using ethical rules in the criminal trial of an attorney or judge is that the rules historically were designed for use by disciplinary boards, and as such the language of the rules is written for those who will place the alleged transgressor in the perspective of the profession. Permitting lay jurors to interpret these rules could result in attorneys making courtroom decisions based upon how they perceive a future lay jury will react to these decisions as opposed to the view an experienced disciplinary board might take. For instance, jurors might be appalled by judges' research being performed by law clerks. Will this be construed as a violation of a judge's diligent discharge of his

177. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) (attorney has duty to represent client zealously).

178. See *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976). (Supreme Court held it violation of due process for defendant to be compelled to appear before jury in prison clothes).

or her duties?¹⁷⁹ Some may even think that defendants should not be permitted to speak at their sentencing hearing, for this would be a violation of maintaining decorum in court proceedings.¹⁸⁰ Will judges' conferences be seen as violations of the impartiality of the judiciary?¹⁸¹ Will taking a case under advisement for review be considered by lay persons as a violation of the judge's responsibility to "dispose promptly of the business of the court?"¹⁸² Although the aforementioned examples may seem to be extreme instances of lay persons' reactions, they show the necessity of keeping the attorney and judicial rules outside of the juror's province in criminal cases.

A third ramification of extending these rules to criminal trials of judges or attorneys would be the fostering of a district attorney's case when misconduct is apparent, and criminality weak. A prosecutor would be more apt to prosecute a case if the disciplinary rule could be used as an evidentiary tool to show that a defendant acted improperly. Further, the credence given to rules as applicable "law" in a criminal case may result in United States District Attorneys choosing the courtroom as a forum when an attorney or judge is a possible target as opposed to the administrative review board found in disciplinary hearings.¹⁸³

The increased number of criminal charges against lawyers and judges has the effect of discrediting the entire profession. Not only do people lose faith in the integrity of the legal system, but prior views of corruption among attorneys and judges are reinforced.¹⁸⁴ In evaluating the use of FBI undercover operations to uncover corruption in the judiciary, the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, reported that there is a loss of public confidence in the governing institutions by sting operations targeting the judiciary.¹⁸⁵

Additionally, the cost of disciplining an attorney or judge via criminal proceedings far exceeds the cost of similar action by a disciplinary board.¹⁸⁶ Operation Corkscrew, an FBI undercover operation investigating the Cleveland Municipal Court had a cost of \$144,604 for the undercover phase and FBI expense time was approximately \$604,400.¹⁸⁷ As such, adding fortification to a

179. See CODE OF JUDICIAL CONDUCT Canon 3(B)(1) (1972) (judge should diligently discharge his administrative duties).

180. See *id.* at Canon 3(A)(2) (judge should maintain order and decorum in proceedings).

181. See *id.* at Canon 2 (judge should avoid appearances of impropriety).

182. See *id.* at Canon 3(A)(5) (judge should dispose promptly of business of court).

183. This is not intended to suggest that United States District Attorneys should not proceed on cases involving criminal acts of lawyers and judges. It is merely offered to limit their evidence at trial to criminal conduct without reference to possible ethical violations.

184. HOUSE COMM. ON THE JUDICIARY, FBI UNDERCOVER OPERATIONS—REPORT OF THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, H.R. DOC. NO. 267, 98th Cong., 2d Sess. 17-18 (1984).

185. *Id.* at 16-17. The committee reported that: "While public corruption should never be tolerated, efforts to eradicate any such corruption should painstakingly avoid any activity which exaggerates its extent or overly dramatizes it." *Id.*

186. *Lawyer Misconduct: ABA Reports State Discipline Actions*, BARRISTER, Spring 1988, at 17 (costs ranged from South Carolina's ten dollars per attorney to \$362 per lawyer in Ninth Judicial District of New York).

187. HOUSE COMM. ON THE JUDICIARY, *supra* note 184, at 40.

prosecutor's choice to proceed in court as opposed to a disciplinary review board will result in not only an expensive step away from self-regulation, but a step away from presenting the image of judges and attorneys as being moral professionals, who will not tolerate misconduct within their ranks.

A fourth and final harm in using these ethical rules in the criminal trial of an attorney or judge is to place lawyers in a strata above other criminal defendants. Admission of these rules requires a defendant lawyer or judge not only to refute charges of criminality, but also to respond to allegations of misconduct. Other criminal defendants are seldom required to contend with this type of evidence in a criminal trial.¹⁸⁸ Although perhaps ethical rules can be properly considered when sentencing a defendant, use of ethical rules in order to determine the substantive issue of whether a crime was committed places an undue burden on the defendant.

V. REMEDIES

Professor Geoffrey Hazard Jr., a leading scholar on professional responsibility, saw a conspicuous regulatory motif in the legal profession's Code of Professional Responsibility.¹⁸⁹ He, however, tempered his position, saying "that the fraternal connections remain strong and thus far governance of the professions has not been fully assimilated to the regulation of an industry. Probably it never will be."¹⁹⁰ But since Hazard's profound words, the Code of Professional Responsibility has become the new rules and in the most recent court decisions we see evidence of the rules becoming law. *Buster, Machi*, and *Anderson*, appear as steps leading up the stairway to the door which will transform this profession into a regulated industry. Although these decisions may seem insignificant when compared with the ultimate step of causing the legal profession to become an administrative agency, they do cause a diminution of the self-controlling professional nature of the legal community by legitimizing ethical standards and giving them the force of law.¹⁹¹

Since it is highly questionable that true ethics can in fact be achieved by government control, one can only wonder if such a step will result in rules that will permit careful scrutiny and easy marks for the unethical circumventors and bureaucracy for the honorable practitioners.¹⁹² With the advent of the scrutiny called for in the structuring, financing, and maintenance of the disciplinary system,¹⁹³ it is hopeful that new rules or amendments will be promulgated with the

188. It can perhaps be contended that this is analogous to a defendant being subject to the workplace rules of a newspaper. See *United States v. Carpenter*, 108 S. Ct. 316, 320 (1987) (workplace rules of Wall Street Journal used to establish journal's property right to confidential information).

189. G. HAZARD, *supra* note 8, at 18.

190. *Id.* at 17-18.

191. See generally Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 390-95 (1982) (historical analysis of professionalism).

192. See generally J. WILSON, *THE POLITICS OF REGULATION* (1980) (politics of regulation as evidenced in various governmental agencies).

193. Weber, "Still in Good Standing" *The Crisis In Attorney Discipline*, A.B.A. J., Nov. 1, 1987,

purpose of maintaining the legal profession as a profession and not a government regulated industry.

The Code of Judicial Conduct needs to be modified to include language similar to that found in the Rules of Professional Conduct. Revision of the Code of Judicial Conduct is necessary to emphasize the fact that the canons are for *guidance* by the courts in resolving disciplinary matters.

It is further necessary that the courts that have characterized the canons or rules as "law" rethink their positions to understand that the effect of their decisions will be to reduce self-regulation in the legal profession. It is clearly appropriate for a court to apply ethical rules in order to disqualify counsel, or to control an attorney's participation in litigation in order to protect the rights of litigants. This practice, however, is not analogous to permitting a trial court to use ethical rules as substantive law.

The courts should differentiate between those instances in which a judge or lawyer is the defendant in the litigation and those in which the rules are being used as standards for determining the rights of a non-legal litigant. In the latter case, use of the rules or canons should be held permissible as a source of guidance for determining the rights of third party litigants. When the subject of the inquiry is a lawyer or judge, however, the court should distinguish between disciplinary proceedings and criminal trials. Since the rules and canons were intended historically for review of disciplinary matters, they should most definitely be employed for that purpose. Since they were not intended for use by "outsiders," however, the courts should preclude their use in criminal jury trials of judges or attorneys.

CONCLUSION

With the recent advent of federal undercover operations such as Corkscrew,¹⁹⁴ Bar Tab,¹⁹⁵ Greylord,¹⁹⁶ and the Philadelphia Roofer's Scandal,¹⁹⁷ more attorneys and judges are becoming the targets of federal prosecutions. In the majority of these cases, the issue of using an ethical rule at trial has not arisen, or when it has, the courts have properly found the use of these rules to be irrelevant.¹⁹⁸ *Buster*,¹⁹⁹ *Machi*,²⁰⁰ and *Anderson*,²⁰¹ however, have taken a significant step towards extending these ethical rules in criminal actions of attor-

at 58, 60 (state bar association's inability to manage growing incidents of attorney misconduct); *Attorney Discipline*, A.B.A. J., Dec. 1, 1987 at 18, 19 (National Organization of Bar Counsel calls for commission to study present attorney discipline system).

194. FBI investigation of alleged case-fixing in the Cleveland Municipal Court between 1977-1982. See generally HOUSE COMM. ON THE JUDICIARY, *supra* note 183.

195. FBI investigation of alleged ticket-fixing in the Lake County Courts, Lake County, Indiana.

196. FBI undercover investigation of corruption in the state judicial system in Chicago. See J. LAWLESS, PROSECUTORIAL MISCONDUCT 628-29 (1985). See also Tamarkin, *The Judge Who Wore A Wire*, 70 A.B.A. J. 76 (1984).

197. See generally Mallowe, *Still Crooked After All These Years*, PHILADELPHIA MAGAZINE, Dec. 1987, at 151.

198. See *supra* notes 122-35 and accompanying text for a discussion of decisions holding ethical rules to be irrelevant at trial.

neys and judges. It is necessary to end this transgression in order to keep the legal profession from becoming a regulated industry.²⁰²

Obviously, all ethical individuals wish to reduce the number of corrupt persons that are in the practice of law and on the bench. The implementation step of this goal, however, needs to be accomplished through better self-regulation, as opposed to outside controls.

199. 77 Ill. App. 2d 224, 222 N.E.2d 31 (1966). See *supra* notes 119-21 and accompanying text for a discussion of *Buster*.

200. 811 F.2d 991 (7th Cir. 1987). See *supra* notes 110-18 and accompanying text for a discussion of *Machi*.

201. 798 F.2d 919 (7th Cir. 1986). See *supra* notes 92-109 and accompanying text for a discussion of *Anderson*.

202. See B. Bledstein, *supra* note 62, at 334 which states:

The culture of professionalism has allowed Americans to achieve educated expressions of freedom and self-realization, yet it has also allowed them to perfect educated techniques of fraudulence and deceit. In medicine, law, education, business, government, the ministry—all the proliferating services middle class Americans thrive on—who shall draw the fine line between competent services and corruption?

Id.