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# ESSAY

## Why Formalism?

*James E. Moliterno\**

### I. INTRODUCTION

In his recent book, Professor William Simon identifies and criticizes an analytical anomaly that he perceives in the jurisprudence of the law governing lawyers: the law governing lawyers, at least the traditional court application of the lawyer ethics codes, is far more oriented toward formalism and away from legal realism and its progeny than are other areas of the law.<sup>1</sup> Simon's book argues effectively and persuasively why the law governing lawyers ought better to be analyzed as law is otherwise analyzed, in the traditions and through the methods of legal realism and its descendants that Simon calls a "contextual view of legal ethics."<sup>2</sup> Simon understandably glides past any discussion of *why* the law governing lawyers may have come to be analyzed in this way. That point is not what his book is about. This Essay attempts to offer some modest insight into the "why formalism" question that in some respects may be lurking under Simon's themes. I suggest here three reasons why the law governing lawyers may have come to be analyzed in a more formalist way, eschewing legal realism, and express some hope that future analysis of the law governing lawyers will move to conformity with the rest of the law soon.

Reading Simon's book did something quite good for me. It relieved a faint sense of ill-ease I have felt for a long time: I expect that I ought to be most comfortable in analyzing the law governing lawyers because that is primarily what I teach about, write about, and think about. But the truth is that I have always found it easier and more comfortable to analyze tort and contract and property and evidence law problems. Growing up in the law wrapped in legal realist and legal process thinking

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1. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 3 (1998). For further commentary on Simon's book, see Symposium, *The Practice of Justice by William H. Simon*, 51 STAN. L. REV. 867 (1999) and Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999).

2. SIMON, *supra* note 1, at 10. In many ways the seeds of Simon's views are seen in William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

(as our own students predominantly continue to do), working as a lawyer using legal realist analysis to do my job every day, and teaching law for fifteen or so years predominantly using legal realist and legal process analytical devices, I am naturally more comfortable around legal realist analysis than around formalism. Simon has now given me the very sensible explanation for why I am more at ease analyzing areas of the law about which I know only a little than I am analyzing the area of the law about which I know the most.

I may not be alone in this among teachers and writers of the law governing lawyers. This phenomenon may explain why so many of us have been so drawn to the "other law" aspects of the law governing lawyers and especially the decade's expansion of the law governing lawyers from the profession's codes to a law governing lawyers approach, which includes within its reach an array of control mechanisms beyond bar discipline and reference to substantive law outside the bar codes.<sup>3</sup>

## II. REASONS FOR FORMALIST ORIENTATION

### A. *In the Law Governing Lawyers, the Clients Are Lawyers*

Unlike strict formalism, legal realism imposes on clients the discomfort that flows from its relative lack of certainty.<sup>4</sup> "[T]he logical method and form flatter that longing for certainty and for repose which is in every mind."<sup>5</sup> Indeterminism is a part of realism's wake and is less comfortable and comforting for clients, at least in the context of predicting outcomes of consciously chosen actions.<sup>6</sup> In particular, clients

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3. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). See generally Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996) (discussing regulation of federal prosecutors); Ted Schneyer, *Profession Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) (discussing professional discipline in law firms).

4. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 146-58 (tent. ed. 1994); see also Stephen McG. Bundy & Einar Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 265 (1993) (discussing inevitable impreciseness even in an optimal sanctioning regime); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 511-13 (1990) (noting the range of credible interpretations that legal realism provides for lawyers).

5. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897), reprinted in 110 HARV. L. REV. 991, 998 (1997).

6. See Bundy & Elhauge, *supra* note 4, at 271 n.25, 272 n.29 (discussing the benefits of "bright-line" rules based on "easily observable features of the parties' conduct."); John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966 (1984) (arguing that uncertain laws lead to less socially desirable behavior); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 257 (1974) (noting the benefits which would result from more precise legal standards). See generally

planning future action with the help of a lawyer prefer to be told that actions produce predictable and certain results.<sup>7</sup> Who would not prefer certainty when planning? Legal realism oriented analysis deprives clients, as it must, of the level of predictability that they might prefer in favor of its counterbalance, flexibility.<sup>8</sup> Lawyers say to clients (because we tell our students they must and they go off and become lawyers): "It is most likely that your actions will produce X result, but I cannot be certain of what a judge or jury might do if the matter is litigated. There are reasonable arguments that cut the other way."<sup>9</sup>

Lawyers are professionals who assist clients in evaluating the legal implications of consciously chosen courses of action. We might reasonably expect most lawyers' conduct to be the result of their own evaluation of the legal implications of a consciously chosen course of action.

The law governing lawyers is about lawyer relationships with clients, other lawyers, the justice system, and the public. Because the law governing lawyers is about lawyers' relationships, in the law of lawyering, as in no other area of the law, lawyers systematically are clients. In other words, while in the usual course of their practice, lawyers experience the effects of contract, tort, and property law vicariously as experts through the direct experiences of their clients, in the application of the law governing lawyers, the lawyers *are* the clients.<sup>10</sup> The law operates directly on the lawyers, their actions, and their relationships. The legal profession, at least in the context of the application of the bar ethics codes, is self-governing. Lawyers decide on the system of analysis that will be used when the law governing lawyers is applied to a lawyer's conduct. If planning clients would be more comfortable with the predictability of formalism than the uncertainty of realism, and if in the law governing lawyers, the clients are lawyers with

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Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) (classic fun-poking at indeterminism).

7. See Ehrlich & Posner, *supra* note 6, at 263-72.

8. HART & SACKS, *supra* note 4, at 146-58.

9. We do say this sort of thing to our students and they do go off and so advise their clients. William N. Eskridge, Jr. & Philip P. Frickey, *Historical & Critical Introduction* to HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS*, at li-iii (1994) (discussing the incredible influence on generations of lawyers of the Hart & Sacks materials).

10. See James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprenticeship System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 98 (1991).

the power to determine what system of analysis will apply, it should be unsurprising if the system chosen is the comfortable one, formalism.<sup>11</sup>

*B. Absence of Redeeming Policy*

There are legitimate policies underlying the bar ethics enforcement system, to be sure. Courts typically discuss the protection of the public from incompetent and dishonest lawyers and the maintenance of public confidence in the system of laws and justice.<sup>12</sup> Less frequently, a judge will also acknowledge a punishment policy in the application of the bar ethics rules.<sup>13</sup> But the mix of the profession's self-interest and the influence of early twentieth century bar leaders,<sup>14</sup> concerned in part about their clients' interests,<sup>15</sup> in the rationales underlying many of the bar ethics rules makes the use of legal realist, policy-oriented, social-result-oriented analysis both tricky and embarrassing—and, therefore, I suggest, less done.

Although Simon focuses his attention mostly on the formalist approach to defining "the bounds of the law"<sup>16</sup> and on the defining themes of the lawyer-client relationship, the same sort of formalism he describes applies in many other bar and court applications of bar ethics rules. Take the rule concerning loaning clients money during litigation.<sup>17</sup> In *Committee on Professional Ethics v. Bitter*,<sup>18</sup> the lawyer was disciplined in part for loaning his impecunious clients \$986.70 interest-

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11. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 511-13 (1990). See generally Bundy & Elhauge, *supra* note 4.

12. Cf. ABA JOINT COMM. ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS § 1.1 (Tentative Draft 1978). The Standards state: The purpose of lawyer discipline and disability proceedings is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or are likely to be unable to properly discharge their professional duties.

*Id.*

13. E.g., *In re Rosellini*, 646 P.2d 122, 126-27 (Wash. 1982) (Dolliver, J., dissenting).

14. See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 4-6 (1976) (discussing the stratification of the legal profession); see also Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 66, 71 (1935) (analyzing the profession's attitude towards lawyer-client financial arrangements).

15. See, e.g., *In re Sizer*, 267 S.W. 922, 925 (Mo. 1924) (en banc) (dismissing disciplinary action against personal injury lawyer following bar investigation of their client-getting activities underwritten by a consortium of railroad lawyers).

16. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980).

17. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1998); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103 (1980).

18. 279 N.W.2d 521 (Iowa 1979).

free for humanitarian reasons.<sup>19</sup> This conduct violated Disciplinary Rule (DR) 5-103(A).<sup>20</sup> The violated rule is based in part on conflict of interest grounds and in part on the common law crimes and torts of champerty, barratry, and maintenance (in this instance, especially maintenance).<sup>21</sup> Bitter's conduct violated the plain meaning of the rules language.<sup>22</sup> And that is how carefully the court treated the issue—formalism at its best (or worst, depending on one's perspective on the value of formalism). The language of the rule does not require that Bitter have taken unfair advantage of his clients; thus, his motives and the good that his actions may have actually produced for his clients are irrelevant.<sup>23</sup> Even if Bitter's actions produced justice by, for example, allowing his clients to withstand delaying tactics or low-ball settlement offers and therefore stay in the litigation to a judgment based on the merits, Bitter's conduct would have violated the legal ethics rule and subjected him to discipline. Never mind that other conflicts of similar danger and magnitude allow for client waiver;<sup>24</sup> this rule's language does not permit waiver, so Bitter's clients' probable waiver or consent is irrelevant.<sup>25</sup> Never mind that similar conduct in the absence of litigation, say during a client's patent application process, but not during a patent infringement suit, would be permitted. The *Restatement (Third) of the Law Governing Lawyers*, in an admirable show of candor, acknowledges that this rule distinguishes between litigation and non-litigation settings for "largely historical" reasons.<sup>26</sup> Never mind that the actions and crimes for champerty, barratry, and maintenance (the historical antecedents to the ethics

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19. *Id.* at 523.

20. *Id.* (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(A) (1980)).

21. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 cmt. b. (Proposed Final Draft No. 1, 1996); ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 121 (3d ed. 1996).

22. See MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1998). Model Rule 1.8(e) provides: A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

*Id.*

23. See generally Radin, *supra* note 14, at 72 (referring to the good that sometimes results from lawyer acts of champerty and maintenance).

24. E.g., MODEL RULES OF PROF'L CONDUCT R. 1:7 (1998); see also *Lavaja v. Carter*, 505 N.E.2d 694, 699-700 (Ill. App. Ct. 1987) (allowing representation of multiple parties who were informed and consented).

25. The ethics rule is as much about restraints on client-getting activities as it is about conflicts of interest between lawyer and client.

26. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 cmt. b. (Proposed Final Draft No. 1, 1996).

rule) all required a malice element;<sup>27</sup> the language of this rule does not, so Bitter's good motivation and the absence of any showing of malice toward his clients' litigation opponents are irrelevant. How far would we get if we had to make policy-based arguments in applying Model Rule 1.8(e) to Bitter's conduct? In part, at least, we would find ourselves analyzing what result would best serve the original drafters' (here I mean the drafters of the Canons) intent to restrain the bringing of personal injury claims by those unable to withstand the delay of litigation against the drafters' corporate clients.<sup>28</sup> What better reason to use a formalist approach than the inclination to avoid dealing with awkward and embarrassing policy discussions?

Imagine the discussion of "legislative history" or historical context in a legal realist style opinion applying some of the bar ethics rules when the drafters' intent was to exclude outsiders from the profession or diminish their ability to attract and serve clients. Setting higher educational standards for admission to the bar was one means chosen to keep the unwanted out of the profession, to "purify the stream at its source," as one ABA committee put it.<sup>29</sup> Take a case like *In re Lammers*.<sup>30</sup> Mr. Lammers had taken and passed the Ohio bar exam after having completed all requirements for his J.D., save the submission of a seminar paper. After passing the bar exam, he practiced law successfully for seven years, earning praise from colleagues and clients alike. When the educational infirmity came to light, the bar moved against his license, and the Ohio Supreme Court revoked his law license.<sup>31</sup> When evaluating the rationale for disbaring Lammers, should the court have considered whether one result or the other in the case would further the interest in excluding ethnic, racial, and religious minorities from the practice of law as expressed by the original creators of the policies underlying the educational requirements? What if it had?

A court that got as close as any to such candid policy analysis in the context of client-getting and financial assistance was the Missouri

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27. See Radin, *supra* note 14, at 67.

28. Some states have amended their versions of Model Rule 1.8(e) to ameliorate this impact of the rule. See, e.g., MINN. RULES OF PROF'L CONDUCT R. 1.8(e), *reprinted in* 52 MINN. STAT. ANN. (West 1993); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(d), *reprinted in* TEX. GOVT CODE ANN. tit. 2 app. A (Vernon 1998).

29. *Proceedings of the Section of Legal Education and Admissions to the Bar*, 46 A.B.A. REP. 656, 681 (1921). For more on the bar's interest in raising educational standards to exclude unwanted ethnic and racial groups from bar membership, see AUERBACH, *supra* note 14, at 113.

30. 581 N.E.2d 1359 (Ohio 1991).

31. *Id.* at 1361.

Supreme Court in *In re Sizer*.<sup>32</sup> In *Sizer*, the court reviewed a petition to disbar two personal injury plaintiffs' lawyers for soliciting clients and, in particular, for offering, and in some cases providing, financial assistance to their clients during litigation.<sup>33</sup> Although the disciplinary matter was brought (as procedure required it to be) in the name of the bar association, the facts were investigated, the charges were encouraged, and the litigation was financed by a consortium of corporate interests and their lawyers.<sup>34</sup> In language rare in court opinions reviewing bar discipline, the court considered the context of the matter before it, even as it insisted that the context should not alter its judgment:

Let us speak plainly, as courts should speak, and say that every earmark of the evidence in this case shows that it is an effort by corporation lawyers as against what they call damage suit lawyers. All this (true as it may be, and as we think it is) does not change this case. The motive for preferring the charges is of small consequence, if, in fact, the charges are sufficient in law, and the respondents are guilty. . . . [Nonetheless] [i]f the Bar Associations, sua sponte, had preferred the charges, we would have one background, but where the corporation lawyers of the [bar] associations have induced the associations to act upon evidence procured by [their investigator], the background is different.<sup>35</sup>

The *Sizer* court considered the nature of the "damage-lawyers'" client's injuries, the economic hardships being suffered by their families, and the settlement tactics undertaken by defendants in determining to dismiss the disciplinary charges against *Sizer*.<sup>36</sup> The almost jarring nature of the court's candor evidences its inconsistency with the norm in bar discipline cases and the usual absence of discussion of context.

Doing legal realist analysis of the application of a legal rule requires examination of the policies that drive the rule, in part by examination of the rationales that animated the rule's makers. When those policies are embarrassing, or worse, the temptation is strong to confine the analysis to a more formalist approach. Particularly where the drafters are from the legal profession and the rule's interpreter, a bar association or court, is also part of the legal profession, the push will be overwhelmingly toward formalism and away from any analysis that requires examination of the embarrassing policies for the rules.

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32. 267 S.W. 922 (Mo. 1924).

33. *Id.* at 925.

34. *Id.* at 923.

35. *Id.* at 924-25.

36. *Id.* at 925-34.



C. *Courts, as Insiders to Self-Regulation, Desire to Avoid Appearing to Be Creative with the Application of Rules*

The system for applying the bar rules to lawyer conduct is, of course, a system of self-regulation. Courts and bar authorities, the arbiters of the rules' application, are insiders in that system. Much is made, in the effort to preserve the self-regulation system itself, of the need for public confidence in the policing of lawyer conduct, and of avoidance of the appearance of impropriety.

Legal realism, with its more flexible approach to interpreting and applying rule language, has the potential for creating an appearance of judicial maneuvering and manipulation. Maintaining public confidence in the system of laws and justice, and in the profession's ability to self-govern as an independent value, pushes toward formal, literal application of rules. Courts place value on the avoidance of this appearance and are pushed by this concern toward formalism: apply the plain language of the rule without regard to policy arguments that might suggest an application less apparent on the face of the rule.

Particularly as insiders to the system of self-regulation, courts (and, to an even greater extent, bar authorities), which value public confidence in the justice system and want to protect the profession's powerful interest in self-regulation, will be inclined strongly toward formal applications of rules to avoid an appearance of favoritism toward either the regulated lawyer or the organized bar as complainant. Such inclination finds expression in the appearance of impropriety notion, the application of which sometimes leads courts and bar authorities to discipline lawyers for conduct which, while not inappropriate, might appear so. When courts note the need to protect the public's "perception of the independence and integrity of the legal profession,"<sup>37</sup> or hold representation is impermissible when "an ordinary knowledgeable citizen acquainted with the facts would conclude that the . . . representation poses a substantial risk of disservice to either the public interest or the interest of one of the clients,"<sup>38</sup> they are expressing the system's concern for maintaining its independence from outside regulation. That interest, focused on ensuring that even appropriate conduct that may appear

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37. *In re* No. 653 of the Advisory Comm. on Prof'l Ethics, 623 A.2d 241, 245 (N.J. 1993) (quoting *In re* No. 415 of the Advisory Comm. on Prof'l Ethics, 407 A.2d 1197 (N.J. 1979)).

38. *In re* No. 58-91(B) of the Advisory Comm. on Prof'l Ethics, 616 A.2d 1290, 1291 (N.J. 1992) (quoting Rule 1.7(c)(2) of New Jersey's Rules of Professional Conduct).

inappropriate to non-lawyers is policed, naturally tends courts toward avoidance of legal realism's indeterminism.

### III. HOPE

Maintaining a firm formalist foot in the mud creates impediments to the sensible development of a jurisprudence of the law governing lawyers. But there is hope and there are sure signs that this problem is diminishing.

The law governing lawyers is moving toward an analytical approach more consistent with other areas of law, and in the process a more constructive jurisprudence, because the days when most of the law governing lawyers was based on the application of bar rules by bar authorities reviewed by courts are largely behind us. In most realms, malpractice, motions to disqualify, Rule 11, and so on are far more effective molders of lawyer conduct<sup>39</sup> and have become, and are becoming, a much more significant part of the law governing lawyers. Of course, the bar rules continue to play a critical role in these other control mechanisms. However, when the bar rules are applied outside the bar discipline process in litigation and other forums, courts use a very different analytical model,<sup>40</sup> far more in the legal realist spirit. This different analytical model is sensitive to a far wider range of policy arguments than that used in bar disciplinary enforcement. Courts applying the conflict of interest rules in disqualification motion settings (certainly the setting that counts most today) account for policies relating to judicial economy, equity interests of the moving party's conduct, autonomy of choice of lawyer by clients, and so on.<sup>41</sup> When lawyers are found liable for complicity in client misconduct, legal realist analysis, not formalism, is used.<sup>42</sup> When courts control fee setting, legal realist analysis, not formalism, is used.<sup>43</sup> And when courts consider dismissing

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39. Wilkins, *supra* note 3, at 802-03.

40. *See, e.g.,* Neisig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990) (stating that disciplinary rules are broad guidelines not rigid rules requiring strict adherence).

41. *See, e.g.,* Armstrong v. McAlpin, 625 F.2d 433, 444-46 (2d Cir. 1980) (denying a motion to disqualify an attorney in a securities law case where he had previously worked for the Securities and Exchange Commission (SEC) because it did not threaten to taint the trial), *vacated and remanded by* McAlpin v. Armstrong, 449 U.S. 1106 (1981) (mem.) (vacating court's holding that disqualification motions can not be appealed); Stearns v. Navigant Consulting, Inc., 89 F. Supp. 2d 1014, 1016 (N.D. Ill. 2000) (denying a motion to disqualify a law firm that had violated the letter but not the spirit of ethical rules).

42. *See, e.g.,* Westlake v. Abrams, 565 F. Supp. 1330, 1349-51 (N.D. Ga. 1983) (applying SEC liability to lawyer conduct).

criminal complaints based on prosecutor violation of bar ethics rules, legal realism, not formalism, is used.<sup>44</sup>

It may even be that the formalist approach to analyzing bar ethics rules is already more the exception than the rule. If lawyers are more influenced in their actions by control mechanisms other than bar discipline, as must surely be the case in many contexts, then lawyers may behave less in a way that contemplates a formalist analytical mode in their lawyer-client relationships than Simon suggests.

As time passes, more and more of the law governing lawyers will be about mechanisms beyond bar enforcement, and more and more will accordingly be subject to realist analysis rather than the formalist approach that Simon notices and argues against—eventually resulting, if it has not already, in less lawyer behavior that is formalist referenced and more that is contextual or legal realist referenced.

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43. See, e.g., *Pfeifer v. Sentry Ins.*, 745 F. Supp. 1434, 1443 (E.D. Wis. 1990) (discussing court regulation of fee award).

44. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1463-64 (9th Cir. 1993) (holding that trial court erred in dismissing charges against defendant based on prosecutor's violation of Model Rule 4.2); *United States v. Jamil*, 546 F. Supp. 646, 660 (E.D.N.Y. 1982) (holding that court cannot exclude evidence obtained in violation of ethics rule), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983).