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LEGAL ETHICS, COMMERCIAL PRACTICE, AND THE CERTAINTY IMPERATIVE: A CAUTIONARY NOTE

Diane Lourdes Dick[*]

I. INTRODUCTION

The American Bar Association ("ABA") Commission on Ethics 20/20 (the "Commission"), broadly charged with modernizing the Model Rules of Professional Conduct (the "Model Rules"), recently circulated for comment revised draft resolutions[1] in respect of Model Rule 1.7.[2] Rule 1.7 is one of a series of conflicts-of-interest rules codified in the Model Rules.[3] In a move that stands to impact the application of all such conflicts-of-interest rules, the Commission recommends that the ABA amend Rule 1.7 to allow a lawyer and client to agree that a representation will be governed by the conflicts rules of a particular jurisdiction, provided that certain requirements are met.[4] Specifically, the attorney would be required to obtain the client's "informed consent," confirmed in writing.[5] Additionally, under the proposed amendments, a lawyer and client would be required to choose the law of a jurisdiction that has a sufficient nexus to the representation, and the resulting application of such jurisdiction's conflicts-of-interest rules must not result in the application of a rule to which informed client consent is not permitted under the rules of the jurisdiction that would otherwise apply to the representation.[6] As a result, the chosen law would govern the analysis of all potential conflicts, including

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1. ABA Comm'n on Ethics 20/20, Revised Draft Resolution for Comment— Model Rule 1.7 Conflict of Interest (Sept. 18, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_choice_of_rule_model_rule_1_7_comment_draft_final_posting.authcheckdam.pdf [hereinafter ABA Draft Resolution].

2. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012).

3. *See id.*

4. ABA Draft Resolution, *supra* note 1, at 1.

5. *Id.* A previous draft would have required that the attorney advise the client to seek independent counsel regarding any choice of law agreement. ABA Comm'n on Ethics 20/20, Revised Draft Resolution for Comment— Model Rule 1.7 (July 11, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120711_third_draft_resolutions_and_report_conflicts_and_choice_of_law.authcheckdam.pdf [hereinafter July ABA Draft Resolution].

6. ABA Draft Resolution, *supra* note 1, at 1.

imputation of conflicts within law firms under Model Rule 1.10,[7] except that it cannot provide a safe harbor with respect to conflicts that would have been nonwaivable absent the choice of law agreement.[8]

According to the Commission's report, the proposal to allow conflicts-specific choice of law agreements is intended to respond to the demands faced by commercial attorneys in the interstate and international legal marketplace, where clients, engagements, and their attendant conflicts often straddle multiple jurisdictions with inconsistent conflicts rules.[9] Soliciting input from practicing attorneys and related interest groups, the Commission weighed the realities of the modern legal landscape and identified a need for "certainty,"[10] "uniformity,"[11] and "predictability"[12] in the law governing conflicts of interest.[13] And, although the Commission stopped short of creating a bright-line rule[14] – instead drafting a set of standards that must be applied to each unique set of circumstances – the Commission chose to incorporate the revisions into the text of Rule 1.7 in an effort to provide sure guidance.[15]

However, the interests identified by the Commission in support of the amendments are markedly different from the interests that historically drove the ABA's promulgation of attorney conflicts rules. Since their initial promulgation, the attorney conflicts provisions of the Model Rules have been anchored in client-centered interests.[16] Generally, conflicts rules have been firmly rooted in

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7. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2012).

8. ABA Draft Resolution, *supra* note 1, at 1.

9. ABA Comm'n on Ethics 20/20, Draft for Comment Report—Model Rule 1.7 Conflict of Interest at 1-2 (Sept. 18, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_choice_of_rule_model_rule_1_7_comment_draft_final_posting.authcheckdam.pdf [hereinafter ABA Draft Report].

10. *Id.* at 1. The report provides, in pertinent part: "The Commission's proposal, if adopted, could mitigate some of the uncertainty."

11. The Commission references a goal of uniformity in the nomenclature for the relevant working group. *Id.* (referring to the "Uniformity, Choice of Law, and Conflicts of Interest Working Group").

12. *Id.* at 5 ("The Commission's proposal is intended to provide more predictability to clients and their lawyers by permitting them to agree in advance to be bound by the conflict rules of a particular jurisdiction."); *see also* ABA Comm'n on Ethics 20/20, *For Comment: New Drafts Regarding Choice of Rule Agreements for Conflict of Interest and Choice of Law Issues Associated with Fee Division Between Lawyers in Different Firms* (Sept. 18, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_co_chair_cover_memo_comment_drafts_on_fee_division_model_rule_1_7_final_posting.authcheckdam.pdf [hereinafter *Cover Memo*] ("[The choice of law agreements contemplated by the amendments to Rule 1.7] could help lawyers and their clients predict with more accuracy than Model Rule 8.5(b) (Choice of Law) allows").

13. ABA Draft Report, *supra* note 9, at 1.

14. *Id.*

15. In a very early draft of the proposed revisions, the new language was added to a Comment and the text of Rule 1.7 was unchanged. *Id.* at 2.

16. *See infra* note 17 and accompanying text.

the principles of fairness, loyalty, and independent judgment, which interests tend to support broad prohibitions against conflicted representations.[17] Where the Model Rules have permitted exceptions, drafters cited both a need to improve access to legal services in remote or underserved communities, and to respect client autonomy.[18] In stark contrast, the proposed revisions to the Model Rules' conflicts provisions seem to reflect attorney-focused and market-oriented interests.[19] And, although the Commission suggests that attorneys *and* clients will be benefited by, and have a need for, greater certainty, uniformity, and predictability in attorney conflicts rules, the benefits of the proposed amendments seem likely to accrue most directly to attorneys and large law firms serving as intermediaries in the interstate and international market for legal services.[20]

The Commission's black letter approach and its many references to certainty, predictability, and uniformity are also deeply reminiscent of a broader trend in commercial law that I've previously written about: what I call the "Certainty Imperative."[21] The Certainty Imperative is a rapidly spreading and deeply entrenched rhetoric,[22] pursuant to which certain vague value concepts are used to justify the adoption of laws and policies that advance the interests of large commercial institutions.[23] By anchoring statutory changes and legal decisions in auspiciously noble goals, such as the achievement of greater "certainty," "predictability,"[24] and "uniformity,"[25] the Certainty Imperative shifts focus away from or even completely masks outcomes that are inconsistent with other important societal goals, such as fairness and equity in a particular case. Indeed, as one commentator warns, "[a] number of risks are inherent in a crude reliance on . . . unanalyzed value-concepts such as legal certainty . . . [T]here is the obvious danger that the concept of 'legal certainty' becomes fetishized, and stands in the way of any real evaluation of the merits of law reform."[26]

In this Essay, I caution the ABA to ensure that recent reform efforts, such as those that have generated the proposed amendments to Rule 1.7, remain firmly anchored in the important, client-centered interests of fairness, loyalty, and independent judgment, and do not reflect the rampant, fetishized Certainty

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17. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.7, cmt. 1 (2012).
18. *See infra* notes 47-49 and accompanying text.
19. *See* ABA Draft Report, *supra* note 9, at 1.
20. *See id.* at 2.
21. Diane Lourdes Dick, *Confronting the Certainty Imperative in Corporate Finance Jurisprudence*, 2011 UTAH L. REV. 1461, 1466 (2011).
22. *Id.* at 1473.
23. *Id.* at 1474.
24. *Id.* at 1475.
25. *Id.*
26. Joanna Perkins, *Legal Certainty and the Role of the Financial Markets Law Committee*, 2 CAP. MKTS. L.J. 155, 163 (2007).

Imperative that has dominated commercial law in recent decades. Even more, I challenge rule makers to carefully monitor the practice of supporting legal reforms with inexplicit references to certainty, predictability, and uniformity.

By engaging on a deeper level with the application of these value concepts to the proposed amendments to Rule 1.7, legal scholars, rule drafters, and policymakers in legal ethics and commercial law can help to ensure that the Certainty Imperative does not take root in the law governing attorney conduct. This Essay proceeds as follows: Part II briefly describes Rule 1.7 and related attorney conflicts rules, along with the Commission's proposed amendments thereto. This Part concludes with a discussion of the goals and interests identified by the Commission in proposing amendments to Rule 1.7. Further exploring certainty, uniformity, and predictability as value concepts, Part III describes the Certainty Imperative as a dominant paradigm in commercial law. Part IV more closely examines the Commission's references to certainty, predictability, and uniformity, and questions whether the Certainty Imperative is becoming similarly entrenched in the law governing attorney conduct. Part IV also attempts to reconcile the goals of certainty, predictability and uniformity with more traditional interests that underlie attorney ethics rules, and notes areas of potential conflict. Part V concludes.

II. BACKGROUND: MODEL RULE 1.7

Rule 1.7 is part of a larger uniform set of standards intended to serve as a model for state regulatory law governing the legal profession.[27] The ABA originally adopted the Model Rules in August 1983, replacing the 1969 Model Code of Professional Responsibility.[28] To date, attorney licensing authorities in forty-nine states, the District of Columbia, and the U.S. Virgin Islands have adopted codes of professional responsibility that are based on the Model Rules as initially published by the ABA.[29] Not every state has adopted all the subsequent amendments.[30] The ABA has made periodic revisions to the Model Rules, with the most substantial redrafting taking place in 2002.[31] The ABA

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27. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012).

28. MODEL RULES OF PROF'L CONDUCT, History (2000).

29. *Alphabetical List of States Adopting Model Rules*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 4, 2013). California has not adopted the Model Rules.

30. *Chronological List of States Adopting Model Rules*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html (last visited Mar. 4, 2013).

31. ABA CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF'L CONDUCT, 1982-2005, RULE 1.7 – CONFLICTS OF INTEREST: CURRENT CLIENTS (2006) [hereinafter A LEGISLATIVE HISTORY].

Commission on Ethics 20/20's proposed revisions, if adopted, would constitute the most substantial revisions to the Model Rules since 2002.

Rule 1.7, which pertains to conflicts that have the potential to impact current clients, is the first in a series of Model Rules addressing attorney conflicts of interest.[32] Model Rule 1.8 addresses specific, personal-interest conflicts that can arise with respect to current clients.[33] Model Rule 1.9 addresses conflicts that can arise in respect of former clients.[34] And Model Rule 1.10 sets forth the mechanisms by which conflicts can be imputed to attorneys within the same law firm.[35]

Generally speaking, Rule 1.7 prohibits an attorney from engaging in a representation where the client's interests will be "directly adverse" to the interests of another client or where there is a "significant" risk that the representation will be "materially limited" by the attorney's "responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer," unless each client gives informed consent, confirmed in writing, and the attorney reasonably believes that assumption of the new representation will not adversely impact any client.[36] The requirement that affected clients give informed consent means the attorney must provide adequate disclosure of the potential legal and practical effects of both the waiver and the proposed representation.[37] Although most conflicts, including future conflicts, can be waived by clients under the rule,[38] certain conflicts are deemed to be inherently nonwaivable.[39] For instance, an attorney may not represent directly adverse litigants, notwithstanding the clients' willingness to provide consent.[40]

Although the ABA has made periodic revisions to the Model Rules, the substance and spirit of Rule 1.7 has remained fairly consistent over the years. In fact, the text of the rule was not changed at all in the first nineteen years following its initial promulgation, and, in that same period, the comments were revised only to include a sentence addressing the practice of conflicts-checking.[41] In 2002, the rule underwent significant redrafting, to clarify the operation of the rule and to strengthen its expression of the important interests sought to be advanced.[42] However, although the 2002 revisions dramatically changed the text

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32. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8, 1.9 & 1.10 (2012).
33. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2012).
34. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2012).
35. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2012).
36. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012).
37. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012) (defining "informed consent").
38. MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt.22 (2012).
39. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2)-(3), cmts.14, 16, and 17 (2012).
40. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2012).
41. MODEL RULES OF PROF'L CONDUCT R. 1.7, History (2000).
42. ABA Comm'n on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates, Reporter's Explanation of Changes to Model Rule 1.7 (Aug. 2001),

of both the rule and the comments, most of the changes were not meant to be substantive in nature;[43] rather, they were intended merely to provide amplification and clarification of the existing substantive rules.[44]

As the comments to Rule 1.7 articulate, particularly as amplified by the 2002 amendments, the rule is designed to protect important, client-centered interests of fairness, loyalty, and independent judgment.[45] In particular, Comment 1 explains, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."[46] Although it may seem contrary to these interests that the rule provides a mechanism whereby clients may waive conflicts (thereby allowing attorneys to represent directly adverse interests in certain cases), ABA reports from the early 1980s reveal that the drafters sought to protect clients in less populated areas, where there was limited access to legal services.[47] The drafters believed that a blanket prohibition on all representations to the extent that the attorney is also representing an adversely situated client would only further exacerbate the obstacles that many clients already face in remote or rural areas.[48] Additionally, client waiver provisions of this sort promote the important goal of client autonomy.[49]

Of course, much has changed in the last thirty years, and the drafters' early interest in the needs of small-town clients has given way to modern focus on the unique issues that arise in an increasingly multijurisdictional, cross-border practice environment. While the profession's shifting focus was foreshadowed by numerous articles in professional journals in the 1990s and early 2000s addressing cross-border practice,[50] the modern sea of change is most clearly reflected in the ABA's decision in 2000 to convene a Commission on Multijurisdictional Practice to study potential reforms to the Model Rules.[51] In fact, certain of the 2002 amendments, such as the revisions to Rules 5.5 and 8.5, were in response to this commission's research findings.[52] Similarly, just as the ABA has taken a deep interest in the cross-border nature of modern legal

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available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule17rem.html [hereinafter Reporter's Explanation of Changes to Model Rule 1.7].

43. The 2002 amendments required that informed consent be "confirmed in writing." *Id.*

44. Carl A. Pierce, *Ethics 2000: What That Means for Business Lawyers: The Provisions*, 12 BUS. L. TODAY 48 (2002).

45. MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 1 (2012).

46. *Id.*

47. A LEGISLATIVE HISTORY, *supra* note 31, at 2.

48. *Id.*

49. *See* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L. J. 407, n.25 (1998).

50. *See, e.g.*, Barrie Althoff, *Multijurisdictional Practice*, 2002 PROF. LAW. 83, 85 (2002); William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1502-03 (2001).

51. MODEL RULES OF PROF'L CONDUCT, Preface (2012).

52. *Id.*

practice, so, too, has the ABA evidenced a growing interest in the application of the Model Rules to the transactional environment.[53] Indeed, this emerging interest is clearly reflected in the 2002 revisions to Rule 1.7. For instance, the 2002 amendments added Comment 7, which explains how directly adverse conflicts might arise in transactional practice.[54]

In the years following the 2002 amendments, the ABA has continued to study the application of the Model Rules to an increasingly cross-border, multijurisdictional, and highly sophisticated commercial practice environment. In fact, the very decision to convene the Commission on Ethics 20/20 in 2009 was rooted in a desire to "perform a thorough review of the [Model Rules] and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments."[55] The Commission's earliest work products included issues papers on multijurisdictional practice[56] and on choice of law in cross-border practice.[57]

With respect to conflicts of interest, the latter report identified several scenarios in which application of the Model Rules yielded uncertain outcomes due to the complex, cross-border nature of modern practice.[58] For instance, the report provided a hypothetical in which a single firm maintains offices in two jurisdictions: an attorney in the firm's New York office represents a client in a transactional matter, while an attorney in the firm's Country Q office seeks to commence a new representation that would oppose the existing client in an unrelated matter.[59] Under the conflicts of interest rules in Country Q, the new representation would be permissible even without client consent because the New York attorney's conflict would not be imputed to the attorney in Country Q.[60] However, Model Rule 1.10, as adopted in New York, treats all of the firm's lawyers as one person for conflicts purposes.[61] Accordingly, the attorney in

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53. *See infra* note 54 and accompanying text.

54. A LEGISLATIVE HISTORY, *supra* note 31, at 26.

55. *About the Comm'n*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Mar. 4, 2012).

56. Memorandum from ABA Comm'n on Ethics 20/20, Working Group on Uniformity, Choice of Law, and Conflicts of Interest, *For Comment: Issues Paper Concerning Multijurisdictional Practice to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individuals, and Entities* (Mar. 29, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/int/multijurisdictional_practice.authcheckdam.pdf.

57. Memorandum from ABA Comm'n on Ethics 20/20, Working Group on Uniformity, Choice of Law, and Conflicts of Interest, *Issues Paper: Choice of Law in Cross Border Practice* (Jan. 18, 2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/20111801.authcheckdam.pdf [hereinafter *Issues Paper*].

58. *Id.* at 2-4.

59. *Id.* at 3.

60. *Id.*

61. *Id.* at 3; *see* MODEL RULES OF PROF'L CONDUCT R. 1.10 (2012).

Country Q would need to obtain informed consent from the client in order to proceed with the representation.[62] The report concluded the hypothetical with a query: "Can [the attorney in Country Q] undertake the engagement?"[63] Addressing the choice of law question, the report noted that it is unclear under the current rules whether attorneys can specify "in their original engagement letters with their clients that the conflicts rules in a designated jurisdiction (or in the Model Rules) would govern their relationship."[64]

Other attorney interest groups have raised similar concerns about the potential inconsistencies in attorney conflicts provisions of the Model Rules, and have called for greater certainty and uniformity. For instance, Attorneys' Liability Assurance Society, Inc., the nation's leading provider of attorney malpractice insurance for large law firms, remarked: "one of the challenges facing lawyers and clients when they undertake legal matters across multiple jurisdictions is the differing rules of professional conduct and, in particular, differing rules on conflicts of interest that must be observed in the representation."[65] Similarly, attorneys serving on the Law Firm General Counsel Roundtable, an association comprised of general counsel and risk managers of more than thirty large law firms, recently protested "the lack of a single, uniform set of rules governing professional conduct across the country—a lack that often results in conflicting, inconsistent, and unpredictable results from one jurisdiction to another[.]"[66]

The Commission's proposed amendments to Rule 1.7 are intended to respond to criticisms of this sort, and to provide enhanced certainty, uniformity, and predictability in the law governing attorney conflicts. As described above, the Commission recommends that the ABA amend Rule 1.7 to allow a lawyer and client to agree that a representation will be governed by the conflicts of interest rules of a particular jurisdiction, provided that certain requirements are met.[67] Specifically, the attorney would be required to obtain the client's "informed consent," confirmed in writing, to the choice of law decision.[68] Additionally, under the proposed amendments, a lawyer and client would be required to choose the law of a jurisdiction that has a sufficient nexus to the

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62. *Issues Paper*, *supra* note 57.

63. *Id.*

64. *Id.*

65. ABA Comm'n on Ethics 20/20, *Comments on Revised Draft Proposal on Model Rule 1.7 (Choice of Rule Agreements for Conflicts of Interest)* 2 (Aug. 15, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/alas_comments_revised_model_rule_1_7.authcheckdam.pdf (submitted by Attorneys' Liability Assurance Society, Inc., a Risk Retention Group).

66. James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients*, 121 YALE L.J. ONLINE 589, 590 (2012).

67. ABA Draft Resolutions, *supra* note 1, at 1.

68. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 1.7 (c)(1) (2012).

representation, and would not be permitted to use the choice of law mechanism to bypass a local rule that would render a conflict nonwaivable.[69]

Agreements of this sort would stand at the intersection of two exceedingly complex areas of the law— conflicts of law and choice of law—where clients are unlikely to have previous experience. Yet the most recent draft of the proposed amendments omits an earlier draft's requirement that the lawyer encourage the client to seek independent counsel with respect to a choice of law agreement.[70] In many cases, absent guidance from independent counsel, "informed consent" may not be particularly meaningful.

The Commission's publications cast light on how these choice of law agreements will likely manifest in practice. For instance, although the proposed amendments speak of a choice of law "agreement" between the lawyer and client,[71] in practical terms the choice of law decision is unlikely to be manifested in a free-standing, choice of law contract between the attorney and client.[72] Rather, as the Commission's issues paper suggests,[73] the "agreement" is likely to be included as a sentence or two within the initial engagement letter. Indeed, this is currently a popular method among law firms for obtaining advance waivers from clients.[74]

The danger is that these agreements may expose clients to conflicts rules that provide less stringent loyalty obligations than would otherwise govern the representation. Yet concerns of this sort appear to be neglected, while the Commission's reports focus on the proposed amendments' ability to deliver certainty, uniformity, and predictability.[75] Of course, to the extent that "certainty" in this context simply refers to a person's ability to predict the jurisdiction whose law will apply to any attorney conflicts issues, it is tautological to say that the proposed amendments will enhance certainty for lawyers and their clients. Clearly, there is a benefit to lawyers and law firms when they can identify with certainty the conflicts rules that will apply to any given representation. Without a doubt, this is why law firm general counsels and attorney malpractice insurance providers have lobbied for increased certainty. But what is the benefit to be gained *by clients* from the certainty, uniformity, and predictability offered by the proposed amendments? To be sure, in a world of continued *un*certainty, attorneys would be forced to err on the side of caution by

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69. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 1.7 (c)(3)(4) (2012).

70. *See* July ABA Draft Resolution, *supra* note 5.

71. ABA Draft Resolution, *supra* note 1, at 1; MODEL RULES OF PROF'L CONDUCT R. 1.7(c)(4) (2012).

72. *See infra* notes 73 and 74 and accompanying text.

73. *See supra* note 57 and accompanying text.

74. *See generally* Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97 (2009).

75. ABA Draft Report, *supra* note 9, at 5.

seeking informed consent from their clients to any potential conflict, taking into account a range of potential conflicts rules that might apply. Such an outcome is arguably beneficial to clients to the extent that it provides them with increased disclosures and a higher degree of loyalty from their attorneys. Until we have a clear sense as to how certainty, uniformity, and predictability in the attorney conflicts rules might benefit clients, there is a danger that these value concepts might be used as mere rhetoric to cloak reforms that ultimately serve attorney self-interest.

The following section explores these questions as they have emerged in commercial law, with particular focus on the potentially dangerous consequences that arise when the vague value concepts of certainty, uniformity, and predictability are permitted to take root as rhetorical justifications for law reform.

III. THE CERTAINTY IMPERATIVE IN COMMERCIAL LAW

In a previous work, I explored what I call the "Certainty Imperative" in commercial law.[76] The Certainty Imperative is a legal paradigm that infuses the goal of market stability into the deeply entrenched, normative theme of legal certainty.[77] The Certainty Imperative manifests as a pervasive rhetoric in the commercial law context, and most notably in finance and lending law. It commonly takes the form of policy arguments that place tremendous emphasis on the value concepts of certainty, predictability, and uniformity.[78] Typically focused on the needs of large commercial institutions, the Certainty Imperative promotes bright-line rules that provide "all prospective lenders the certainty that is so important to the effective operation of markets,"[79] or that deliver "guiding principle[s] for those whose daily activities must be limited and instructed" by laws and regulations governing commercial transactions.[80] The Certainty Imperative tends to manifest in rather spirited language: for instance, expressions that a legal reform might "throw credit markets into confusion and destabilize

76. Dick, *supra* note 21, at 1466.

77. *Id.*

78. *E.g.*, Pinter v. Dahl, 486 U.S. 622, 652 (1988) (explaining that the securities market "demands certainty and predictability"); *In re* Symons Frozen Foods Inc., 432 B.R. 290, 300 (Bankr. W.D. Wash. 2010) (resolving a conflict of laws question pertaining to statutory liens based in part upon the court's belief that "the application of Washington law . . . is supported by its effect of . . . creating certainty in the market").

79. *In re* Bulson, 327 B.R. 830, 844 (Bankr. W.D. Mich. 2005) ("[S]ome line must be drawn so that the lenders generally can make rational decisions when underwriting loans . . . . [T]he outcome . . . is at least one that a lender could have anticipated and adjusted for accordingly.").

80. Dirks v. SEC, 463 U.S. 646, 664 (1983) (declining to expand insider trading liability).

[an] area of law,"[81] or "disrupt orderly credit markets."[82] The Fourth Circuit even suggested that a ruling adverse to the expectations of lenders[83] might send tremors through the industry, causing "untold and unknown consequences that cannot now be fully foreseen," "undefinable instability," and even "widespread confusion."[84] Adding further fuel to an already fiery verbiage, the Certainty Imperative is frequently articulated in legal advocacy efforts in the commercial law sector, manifesting in litigation briefs, lobbying efforts, and legislative proposals.[85]

As noted above, the Commission on Ethics 20/20 repeatedly cites the interests of certainty, uniformity, and predictability, using language that is deeply reminiscent of the Certainty Imperative.[86] However, there is one important distinction: the Commission repeatedly notes that these goals are important to both attorneys *and* clients.[87] In contrast, in the commercial law context, expressions of the Certainty Imperative do not suggest that the advancement of certainty, uniformity, and predictability offers direct benefits to borrowers or consumers.[88] Rather, courts and legislatures acknowledge that the benefits of certainty, uniformity, and predictability accrue mainly to large financial institutions and other market intermediaries. At the same time, they

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81. Smith v. Anderson, 801 F.2d 661, 665 (4th Cir. 1986) ("[T]he loan transaction here complied with the careful requirements of state and federal law. To supplement those requirements with ones of our own devising would throw credit markets into confusion and destabilize this area of law.").

82. Algemene Bank Nederland v. Hallwood Indus., Inc., 133 B.R. 176, 180–81 (W.D. Pa. 1991) (explaining that under a loan assumption agreement, the assignor remained liable to the holder after the holder was unable to recover from the assignee because of involuntary bankruptcy; to find otherwise "would not only be unwarranted but would also disrupt orderly credit markets").

83. Where the expectation of lenders is reasonable and based on an agency interpretation in a particularly complex field of law. Cetto v. LaSalle Bank Nat'l Ass'n, 518 F.3d 263, 277 (4th Cir. 2008).

84. *Id.*

85. *E.g.*, Todd C. Pearson, Note, *Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes*, 76 MINN. L. REV. 295, 299–300 n.17–18 (1991) (citing legislative history of a variety of credit-specific statutes of frauds); *Growth and Development of the Derivatives Market: Hearing Before the Subcomm. on Int. Trade and Fin. of the S. Comm. on Banking, Hous. and Urban Affairs*, 109th Cong. 6–7 (2005) (statement of Joseph P. Bauman, CEO, JB Risk Consulting, LLC). Indeed, the Imperative's rhetoric is so pervasive that legislation in the financial law realm at times includes the phrase "legal certainty" in its very title. *See* Legal Certainty for Bank Products Act of 2000, 7 U.S.C. § 27a–f (2012) (providing that no over-the-counter derivative contract shall be unenforceable under any federal or state law based on a failure to comply with the Commodity Exchange Act).

86. *See supra* notes 10-12.

87. ABA Draft Report, *supra* note 9, at 5; *Cover Memo*, *supra* note 12, at 1.

88. *See, e.g.*, A.I. Credit Corp. v. Gov't of Jamaica, 666 F. Supp. 629, 633 (S.D.N.Y. 1987) ("[O]ur holding could have a devastating financial impact . . . [on the borrower]. But it is not the function of a federal court . . . to evaluate the consequences to the debtor of its inability to pay nor the foreign policy or other repercussions . . . . Such considerations are properly the concern of other governmental institutions.").

intimate an *indirect* benefit that will flow to borrowers or consumers: the willingness of financial institutions to lend.[89] For instance, in *Sharon Steel Corp. v. Chase Manhattan Bank*,[90] the Second Circuit succinctly summarized the importance of uniformity in construing boilerplate provisions: "uniformity in interpretation is important to the efficiency of capital markets."[91] The court further explained:

> [T]he creation of enduring uncertainties . . . would decrease the value of all debenture issues and greatly impair the efficient working of capital markets. Such uncertainties would vastly increase the risks and, therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice.[92]

In other words, the Certainty Imperative in commercial law asserts that borrowers and consumers ultimately benefit *indirectly* when the legal construct provides certainty, uniformity and predictability in a manner that *directly* benefits lenders. The following section explores these value concepts in the context of attorney ethics, with a particular emphasis on the direct or indirect benefits that clients can expect to receive when legal reforms are premised upon the advancement of certainty, uniformity and predictability.

IV. AN EMERGING CERTAINTY IMPERATIVE IN THE LAW GOVERNING ATTORNEY CONDUCT?

Is the Certainty Imperative taking root in the realm of attorney ethics? Clearly, we see an emergence of the same unarticulated value concepts of certainty, uniformity, and predictability.[93] Of course, to some extent the Commission's heavy reliance on these value concepts may simply reflect a studied reflection on broader commercial law issues, such as sophisticated cross-border transactional practice and the increasingly global economy, where legal certainty is the subject of much discourse.[94] But the Commission's newly articulated goals might also signal a more dangerous sea of change in attorney ethics reform efforts, whereby unarticulated value concepts might be used as rhetorical devices to support legal reforms that would fail under a more traditional client-centered analysis.

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89. Dick, *supra* note 21, at 1474.
90. 691 F.2d 1039 (2d Cir. 1982).
91. *Id.* at 1048.
92. *Id.*
93. *See supra* notes 10-12.
94. ABA Draft Report, *supra* note 9, at 1.

As a recent essay by legal ethics commentator Lawrence Fox suggests, recent reform efforts might have already reached such a perilous point.[95] In his scathing review of proposals submitted to the Commission by the Law Firm General Counsel Roundtable, Fox asserts that some reform participants have chosen to sacrifice client loyalty in an effort to protect attorney economic interests and to enable large law firms to practice law in a less restrained, market-based manner.[96] Although the General Counsels' proposals claim to be client-centered,[97] Fox argues that the proposals radically reduce the duties owed by an attorney to certain "sophisticated clients."[98] In a published response to Fox's critique, attorneys from the Law Firm General Counsel Roundtable explain that the reforms are necessary to enable attorneys and large law firms to compete in an increasingly global and competitive market for legal services.[99] The authors note that the "world of legal practice" has changed,[100] and describe the "mutual needs of sophisticated clients and their lawyers to be able – *by mutual consent and when they choose* – to determine with certainty how the conflict of interest rules should apply in their relationships."[101] However, consistent with the Commission's own vague use of "certainty" as a value concept to support legal reform, the authors never articulate the direct benefits that would accrue to clients from the increased certainty.[102]

In fact, the response hints at an attorney and market focus, defending reform proposals that are "grounded in the realities of today's complex and highly competitive market for legal services,"[103] and noting the "evolving marketplace in which lawyers actually live and work."[104] Finally, the response admits to a "serious concern": "the burdens of unnecessarily restrictive regulations on the practice of law."[105] In language reflecting a neoclassical economic analysis of legal ethics rules, the authors note the process of deregulation that is already underway in "many parts of the world, most notably in England," and note that such "changes will liberate clients with global businesses and law firms not constrained by the U.S. regulatory structure."[106] The authors close with a

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95. Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567, 588 (2012).

96. *See id.* at 583-84.

97. *Id.* at 568 n.2 (summarizing the purportedly client-centric goals reflected by the reform proposals).

98. *Id.* at 575-76.

99. Jones & Davis, *supra* note 66, at 598.

100. *Id.* at 590.

101. *Id.* at 591 (emphasis in original).

102. *Id.*

103. *Id.* at 597.

104. *Id.*

105. *Id.* at 598.

106. *Id.*

warning: "[u]nless the rules governing the practice of law in the United States can be modified to be more in line with the prevailing norms in the rest of the world, U.S.-based and qualified lawyers are likely to be constrained in their ability to compete globally for legal business."[107]

A closer reading of the response to Fox's critique suggests an *indirect* benefit that would purportedly accrue to clients when the law provides attorneys and law firms with enhanced certainty, uniformity, and predictability.[108] The response suggests that the conflicts provisions of the Model Rules operate to restrain today's ever-expanding large law firms in the market for legal services, and that reforms are needed to provide increased certainty, uniformity, and predictability to attorneys and law firms.[109] And, just as the Certainty Imperative in commercial law promises indirect benefits to borrowers and consumers in the form of an increased willingness on the part of large commercial institutions to engage in transactions, the response seems to suggest that, as an indirect benefit to clients, attorneys will be more willing and able to serve in a broader range of matters. These are undeniably attorney and market-focused interests, premised on a belief that the rules governing attorney conduct should seek to advance the needs of the attorneys and large law firms that serve as intermediaries in a highly competitive and global market for legal services.

Notwithstanding its targeted mission to focus on the multijurisdictional practice climate, the Commission was also charged with proposing revisions that would serve the ABA's broader goals of "protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession."[110] Thus, the Commission, and the ABA more broadly, ought to engage more deeply with the goals and interests that motivate recent reform efforts, and ensure that they are consistent with these broader aims. In particular, I challenge rule makers to carefully monitor the emerging practice of supporting legal reforms with inexplicit references to certainty, predictability, and uniformity, and to ensure that legal reform efforts remain firmly anchored in the important, client-centered interests of fairness, loyalty, and independent judgment. Attorney and market-focused reforms must be strictly scrutinized in a profession where it is a true privilege and honor to serve clients. What is more, as the story of the Certainty Imperative in commercial law reveals, there is a danger in allowing unarticulated value concepts to become fetishized.

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107. *Id.*
108. *Id.* at 597.
109. *Id.* at 594.
110. ABA Comm'n on Ethics 20/20, *Introduction and Overview* 1 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf.

V. CONCLUSION

The Commission on Ethics 20/20 was convened by the ABA to "perform a thorough review of the [Model Rules] and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments."[111] As this mission statement suggests, much has changed in the last thirty years. The practice of law is increasingly cross-border, involving sophisticated transactions, complex technology, and greater competition. The Commission was also charged with proposing revisions that would advance the ABA's broader vision of "protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession."[112] As the latter rulemaking goals suggest, it remains a privilege and an honor to engage in the practice of law. What is more, the latter and former rulemaking goals are not inherently inconsistent, so long as the Commission remains focused on the traditional, client-centered interests that serve as bedrock principles of legal ethics and does not allow unarticulated, fetishized value concepts to divert reform efforts.

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111. *See About the Comm'n*, *supra* note 55.
112. *Introduction and Overview*, *supra* note 110, at 1.