

Washington University Journal of Law & Policy

Volume 38 *Access to Justice: Evolving Standards in Juvenile Justice: From Gault to Graham and Beyond*

January 2012

Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions

Jane Y. Kim

Washington University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Law Commons](#)

Recommended Citation

Jane Y. Kim, *Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 WASH. U. J. L. & POL'Y 383 (2012), https://openscholarship.wustl.edu/law_journal_law_policy/vol38/iss1/12

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions

Jane Y. Kim*

ABSTRACT

Imagine you are a solo practitioner and have taken on a new personal injury case. Your client, the plaintiff, is adamant about going to trial. You initially think she has a good chance at a hefty award, but as the case progresses you realize her potential recovery is much lower than expected. You strongly recommend settlement as her best possible option to obtain some meaningful payment, but she persistently refuses to settle. What do you do? Your options are either to withdraw from the case or to continue with representation, despite your disagreement with the client. In some instances, however, the court will take away your option to withdraw and mandate your continuing representation.

Both avenues can potentially create serious ethical questions. The American Bar Association (ABA) and state model ethics rules provide that it is the client who ultimately decides whether or not to settle.¹ Why, then, are attorneys allowed to withdraw in some cases because their client refuses to settle? What effect does withdrawal

* J.D., Washington University School of Law; B.A., University of California, Berkeley. I am grateful to my family and friends for their love and guidance. I am especially thankful to Guyve Shalileh for his stubborn encouragement and always-helpful advice. Thank you to *Washington University Journal of Law & Policy* for giving me the opportunity and support to publish this Note. Finally, this Note is dedicated to my mother, the best person I know, and to my father, who is with me every day of my life.

1. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html; see, e.g., ILL. RULES OF PROF'L CONDUCT, R. 1.2, narrative comment 1.2:320, available at http://www.law.cornell.edu/ethics/il/narr/IL_NARR_1_02.HTM#1.2:300 (2011).

have on a client's unfettered right to determine the objectives of the representation?²

On the other hand, continuing representation raises legitimate concerns of whether the attorney can effectively represent a client with whom he or she has a fundamental disagreement. What can the attorney do in this case? What should the attorney do?

INTRODUCTION

Jokes and real criticism about lawyers and the legal profession's perceived lack of ethics are common.³ Indeed, some lay people may be surprised to learn that ethical rules of conduct play an important part in regulating the legal profession, and lawyers facing tough decisions in their daily practice of law⁴ often turn to these guidelines, and the judicial interpretations of these guidelines, for answers.⁵ One

2. *Id.*

3. See generally Peter Tiersma, *Lawyer Jokes: Truth and Nonsense about the Legal Profession*, LANGUAGEANDLAW.ORG, <http://www.languageandlaw.org/JOKES.HTM> (last visited Oct. 23, 2011) (discussing the various categories of jokes pertaining to lawyers); see also John M. Barkett, *From Canons to Cannon*, in A CENTURY OF LEGAL ETHICS, TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS 173 (Lawrence J. Fox et al. eds., 2009) (describing a survey conducted in 1986 that found that “[o]nly 6 percent of these [corporate users of legal services] rated ‘all or most lawyers as deserving to be called ‘professionals,’” and that “68 percent said that professionalism had decreased over time, while 55 percent of state and federal judges, who were similarly surveyed, said that professionalism was declining.”).

4. See Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 740–41 (1998) (noting, in her study of defense attorneys, that “[a]t the most general level, the rhetoric of judges and lawyers revealed a tension, if not an outright division, in their interpretation of the mission of the American legal system This motif—ambiguity, contradiction, and ambivalence—was a recurrent [sic] theme throughout the rhetoric of the lawyers and judges”); see also Lucian T. Pera, *Guide to Resources and Materials on Professional Responsibility Issues*, 23 MEMPHIS ST. U. L. REV. 589, 589 (1993) (“Every lawyer, whether business lawyer or trial lawyer, must resolve ethical and professional responsibility issues on a daily basis.”).

5. Professor Peter Joy states that:

There are at least four important spheres of lawyer self-governance regulating the conduct of lawyers. First, there are ethics rules adopted by each jurisdiction, usually based on the American Bar Association . . . *Model Rules of Professional Conduct* Second, there is enforcement of ethics rules through state disciplinary processes. Third, there are court proceedings relying on ethics rules for enforcing clients' rights against lawyers in motions to disqualify or professional malpractice actions. Fourth, there are ethics opinions in which a bar association committee, bar association counsel,

scenario in which attorneys may seek guidance is when they find themselves representing a client who refuses to listen to the attorney's advice.⁶ According to the ABA Model Rules of Professional Conduct,⁷ the attorney is directed to abide by the client's decisions about the objectives of their representation, and the rules specifically leave settlement decisions solely to the client.⁸ However, what if the attorney reasonably and strongly believes that the client's case would not withstand trial? If the attorney continues, or is forced

office of disciplinary counsel, or some other entity interprets the rules and provides guidance to lawyers seeking to comply with prevailing ethical rules.

Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 316–17 (2002).

6. See Brian Sullivan, *Canning Your Client: You Have A Pretty Good Idea When Enough is Enough. But How Can You Limit the Fallout When You Give A Client the Boot?*, A.B.A. J., 46 (Mar. 2008) (describing several real-life situations in which difficult clients were encountered and offering advice on how to limit exposure to these difficult clients); see also Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 495 (2007) (offering several methods of cajoling a client to follow the attorney's advice, which she explicitly states does not include threatening to withdraw, lying, or representing to the client that the attorney's efforts will be less than zealous); Thomas L. Browne, *What Lawyers Should Do When the Clients Dig in Their Heels*, CHICAGO LAWYER, Oct. 1994, at 11 (offering advice for such situations); Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987) (discussing the moral roles of the attorney and the client in response to Professor Thomas Shaffer).

7. MODEL RULES OF PROF'L CONDUCT (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html [hereinafter ABA MODEL RULES].

8. See Sylvia Stevens, *Bar Counsel: What Can You Do?: When A Client Repudiates a Settlement*, OR. ST. B. BULL. May 2008, at 9, available at <http://www.osbar.org/publications/bulletin/08may/barcounsel.html>. Stevens argues that a "lawyer does not have a 'fundamental disagreement' with a client merely because the client refuses to follow the lawyer's advice or chooses a course the lawyer believes is unwise, particularly where the decision (settlement) is one that is squarely within the client's sole control." *Id.* at 10. Stevens recognizes the difficulty a lawyer may have when representing a client who refuses to settle:

Although we generally recognize that the client has sole authority over whether to settle, the client's refusal is more than a repudiation of the offer. It is also a repudiation of our professional advice, our stock-in-trade and the very thing the client ostensibly hired us for. The more personally involved we are in giving the advice, the more likely we will be to take offense at the client's decision and view it as a breakdown in the relationship.

Id. at 12. However, Stevens ultimately seems to brush by this difficulty and merely recommends that the attorney "can avoid some of the angst of the situation by endeavoring not to take the client's repudiation personally, and by reminding ourselves that our obligation is to do the *client's* bidding and pursue the *client's* interests." *Id.*

to continue by the courts, then he or she runs the risk of violating other ethical codes of conduct, namely, the role of the lawyer as an officer of the court,⁹ the possibility of ineffective representation,¹⁰ and the established bar against meritless claims, among others.¹¹

One of the ABA's main goals is to improve the legal profession through the promotion of "competence, ethical conduct and professionalism."¹² It has served this goal through the promulgation

9. See MODEL RULES OF PROF'L CONDUCT pmbl. (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

10. See Smith, *supra* note 6, at 491 ("So-called client-centered lawyers can do damage to their clients by 'simply acquiescing' to their foolish wishes.")

11. See The Comm. on Prof'l Responsibility, The Ass'n of the Bar of N.Y.C., *The Evolving Lawyer-Client Relationship and its Effect on the Lawyer's Professional Obligations*, 51 REC. ASS'N B. CITY N.Y. 443 (1996). This report discusses the changing nature of the attorney-client relationship, namely through greater client involvement and decision in the "scope, cost, objectives and means" of representation, which may "conflict with the lawyer's professional obligations, under the New York Code of Professional Responsibility, to provide competent and zealous representation." *Id.* at 444; see also Edward O. Lear, *Going Through Withdrawal*, L.A. LAW., Oct. 1998, at 38.

[S]everal rules and statutes exist to ensure that withdrawing attorneys—even those who are fired—do not abrogate their legal and ethical obligation to protect their clients' interests. An improper withdrawal could result in State Bar disciplinary action as well as malpractice consequences, so attorneys must proceed with caution.

Id.; Nathan M. Crystal, *Ethics Watch: "Let's Make A Deal"—Settlement Ethics*, S.C. LAWYER, Nov. 2008, at 8 (discussing a recent Oregon State Bar ethics opinion stating that "a lawyer does not have a fundamental disagreement 'merely because the client refuses to follow the lawyer's advice or chooses a course the lawyer believes is unwise, particularly where the decision (settlement) is one that is squarely within the client's sole control'").

12. *Association Goals*, ABA, http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited Oct. 23, 2011) [hereinafter *ABA Goals*]. The preface to the most recent version of the ABA Model Rules states, "for more than ninety years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards which serve as models of the regulatory law governing the legal profession." MODEL RULES OF PROF'L CONDUCT preface (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html; see also Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U.L. REV. 637, 648-49 (2005). Pera states:

No one can doubt the existence, endurance, and importance of ABA leadership in American legal ethics. Since the early twentieth century, at least since the adoption of the ABA Canons of Professional Ethics in 1908, the ABA has been the dominant national leader in almost all issues of legal ethics and the regulation of the profession of law.

of various ethical guidelines which, over their history, have been sporadically and inconsistently adopted by the states.¹³ Almost all states, in some form, have adopted the most recent ABA ethical guideline, the ABA Model Rules.¹⁴ According to the ABA Model Rules regarding permissive withdrawal of counsel, an attorney may withdraw because of a fundamental disagreement with the client.¹⁵ However, this has proven to be a delicate and unpredictable ground upon which to tread,¹⁶ as seen through case law, and it leaves many

Id. He also states:

There are three absolutely essential functions of the ABA. In order of historical appearance, they are: The accreditation of law schools, leadership in legal and judicial ethics (especially including the adoption and promulgation of model rules and standards), and the review of the qualifications of federal judicial nominees. Without any one of these three functions, the ABA would not be the same enduring, essential institution.

Id. Although beyond the scope of this Note, for an interesting read on the ABA's participation in divisive social and political debates, see THE FEDERALIST SOC'Y FOR LAW & PUBLIC POLICY STUDIES, THE ABA IN LAW AND SOCIAL POLICY: WHAT ROLE? (1994).

13. See *Alphabetical List of States Adopting Model Rules*, ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alphabetical_list_of_states_adopting_model_rules.html (last visited Oct. 23, 2011) [hereinafter *ABA Model Rules Dates of Adoption*].

14. *Id.* To date, California is the only state not to have adopted the Model Rules. See Richard Acello, *New York Makes Itself a 'Model' State: California Now The Only Holdout On Adopting The ABA Model Rules*, A.B.A. J., 22 (Sept. 2009). Recently, however, the California State Bar adopted new proposed rules in order to bring itself more in line with other states that have adopted the ABA Model Rules, but there remain some key differences. *Finally, Ethics Rules Head to High Court*, CAL. B.J. (Oct. 2010), available at <http://www.calbarjournal.com/October2010/TopHeadlines/TH6.aspx>.

15. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html.

16. See generally Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 LAW & SOC. INQUIRY 237 (1998). In discussing a study of legal ethics conducted by the American Bar Association, Mertz notes the disconnect between the ABA's model rules and the everyday practice of attorneys:

A number of Shapiro's respondents expressed dismay about the gap, also pointed to by a number of our contributors, between lawyers' experiences of ethical dilemmas in day-to-day practice and the understandings of scholars and experts charged with formulating rules of professional conduct: "but, you know, these guys sit around and the Kutak Commission [which produced the Model Rules of Professional Conduct] fooled around for years and years and years. And they ducked all the questions where we need guidance. You know, any fool could have written 1.9, 1.7. You know, 'big deal, thanks a lot.'"

ethical questions unanswered when put into practice.¹⁷

In some cases, the courts have held that withdrawal was without good cause because the court believed, above all, that the client was to decide the scope of representation,¹⁸ even if the attorney disagreed.¹⁹ In other cases, courts allowed counsel to withdraw, noting precisely the ethical dilemma of the attorney (and the possibility of disciplinary sanctions, among other punishments²⁰) if made to continue with representation.²¹ The disagreement in the courts stems from their fundamental confusion as to how they should interpret their state's various ethical provisions and their relation to one another, which partly originates from the ABA's initial, unclear guidelines.²²

But there's absolutely no guidance on parent/subsidiary. . . . There's almost no guidance on the whistle-blower problem. You know, "thanks a bunch, guys!"

Id. at 240 (Respondent quoted in Shapiro n.d.). In discussing the changing nature of the practice of law and the integration of business, Deborah Jeffrey notes that the "ethics rules and their application have become so specialized and arcane that law firms need to call on outside ethics lawyers for help in negotiating their way through the basic rules of our profession." Deborah Jeffrey, *Ethical Fading*, in A CENTURY OF LEGAL ETHICS—TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS 71, 74 (Lawrence J. Fox et al. eds., 2009).

17. See *supra* ABSTRACT.

18. See generally Lear, *supra* note 11, at 67–68 ("The attorney most certainly provides his or her services to the client for compensation, but only the attorney is a fiduciary to the client, not vice-versa. As in any fiduciary relationship, the attorney must protect the client from any adverse impact with respect to the legal representation and may pursue efforts to further the client's objectives of which the client may be completely unaware."); see also John Burkoff, *Flipper Ethics*, 31 CHAMPION 38 (2007) ("He [the client] gets to decide the basic objectives of the representation (as opposed to the means you will use to attain those objectives), including whether or not he wants to flip and change his plea to guilty.").

19. See *infra* Part II–III.

20. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 (2010), available at http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_10.html. The possible sanctions for violation of a professional rule include, but are not limited to, disbarment, suspension, probation, reprimands, admonitions, reimbursement of wrongly obtained fees or awards, costs, and future limitation on practice. *Id.*

21. See discussion *infra* Part I.B.

22. In particular, one article notes:

Currently, the rules of professional ethics to be followed in a particular district within the federal court system are dictated by local rules promulgated at the district level. This approach has created a patchwork quilt of ethical standards within the federal system. A uniform approach is needed to provide certainty for the legal profession, to prevent forum shopping in the search for ethical guidelines favorable to

In particular, the relationship between the allocation of authority and permissive withdrawal provisions is unclear. If the attorney is allowed to withdraw because of a fundamental disagreement with the client,²³ then why do some courts hold this to be an impermissible reason to cease representation? Similarly, if the attorney is not allowed to withdraw, then is the court effectively mandating violations of other ethical rules, e.g. the requirement to exercise independent judgment²⁴ and provide diligent representation,²⁵ and the prohibition against meritless claims?²⁶

For an attorney struggling with this problem, ethical guidelines must be clear and concise so as to effectively protect both the attorney and the client. However, each state's piecemeal adoption of the ABA model guidelines and comments,²⁷ in addition to the lack of clear guidelines from the ABA as to how these provisions should be interpreted,²⁸ raises *more* questions about what the attorney should and can do.

a particular set of facts, and to promote public confidence in the legal profession and the justice system.

Philip K. Lyon & Bruce H. Phillips, *Professional Responsibility in the Federal Courts: Consistency is Cloaked in Confusion*, 50 ARK. L. REV. 59 (1997) (footnote omitted).

23. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html.

24. *Id.* R. 2.1 (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html.

25. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence.html. This is not to presuppose that all attorneys will not diligently represent the client if made to continue with representation. However, that does not effectively answer or address the ethical dilemma in this scenario.

26. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_1_meritorious_claims_contentions.html.

27. See *ABA Model Rules Dates of Adoption*, *supra* note 13; see also MODEL RULES OF PROF'L CONDUCT pmbL (2000) (amended 2002) ("So long as a significant number of jurisdictions continue to base their professional standards on the predecessor Model Code of Professional Responsibility, the opinions will also continue to refer to the Model Code.")

28. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt [2] (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/comment_on_rule_1_2.html.

In order to provide more guidance to the ethical attorney, the ABA should draft a new hybrid model guideline that combines the black letter rule with ethical considerations similar to the ethical considerations contained within its 1969 Model Code,²⁹ and it should provide substantial and detailed interpretive comments, practice pointers, and hypotheticals. Admittedly, this new form would sacrifice the leanness of the Model Rules, but the new rules would go further in eliminating ethical guesses. Furthermore, in order to address the problem of piecemeal adoption by the states (which consequently heightens the disconnect between the rules and their intended interaction), the ABA should develop a new incentive program as the final step in encouraging states to adopt its new rules—a different tactic than its usual practice of promulgation and advisement.³⁰

Once uniformity is achieved among the states, the different outcomes in courts hearing permissive withdrawal cases will likely come to a halt, as attorneys will be able to resolve these issues by obtaining clear guidance from where they should logically be able to: their states' ethics rules. Meanwhile, courts will be able to rely on consistent precedent when interpreting the same ethical guidelines.

Part I of this Note tracks the history of the ABA and its various model guidelines, examines the current ways in which attorneys withdraw from representation, and concludes with a look at the differences between each version of the ABA model guidelines, specifically in relation to the withdrawal of counsel and the attorney-client relationship provisions.³¹ Part II discusses various circuit court cases that have addressed the issue of permissive withdrawal in situations in which the client refuses to settle and outlines the

29. See MODEL CODE OF PROF'L RESPONSIBILITY (1969) (amended 1980), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

30. See generally *Center for Professional Responsibility Policy Implementation Committee*, ABA, <http://apps.americanbar.org/dch/committee.cfm?com=CP024000> (last visited Oct. 23, 2011). The ABA's Center for Professional Responsibility Policy Implementation Committee oversees the implementation of recent revisions to the Model Rules and provides assistance to jurisdictions wishing to adopt these rules. *Id.*

31. For purposes of this Note, provisions relating to the client engaging in or encouraging illegal conduct, which would raise other ethical issues for the attorney, will not be discussed. This Note focuses on a permissive withdrawal based on disagreement between an attorney and client in a civil matter.

relevant facts and holdings of each case. Part III compares the effect of a particular jurisdiction's ethical rules on the circuit court decisions that have disallowed permissive withdrawal with other jurisdictions under the same or similar guidance. Finally, Part IV proposes recommendations for achieving uniformity and consistency among the states in order to dispel the confusion in the courts and to provide better guidance to the attorney facing this ethical dilemma.

I.

*A. History of ABA Model Guidelines*³²

Prior to the adoption of the ABA Model Rules in 1983 (1983 ABA Model Rules), the ABA distributed two models intended to serve as ethical guidelines for practicing attorneys.³³ The first, the Canons of Professional Ethics (ABA Canons), was adopted in 1908³⁴ and remained in effect until 1969, when the ABA replaced it with the Model Code of Professional Responsibility (ABA Model Code).³⁵ Most recently, in 1997, the ABA commissioned a task force, the Ethics 2000 Commission, to review and provide recommendations for revisions to the 1983 ABA Model Rules; the ABA adopted the recommendations in 2002 (ABA Model Rules).³⁶ The changing focus

32. For a look at the history of the ABA, see EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* (1953).

33. See *Model Rules of Professional Conduct: About the Model Rules*, ABA, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Sept. 14, 2011) [hereinafter *ABA About the Model Rules*]. The ABA's project in the early twentieth-century to create a set of model ethical rules and guidelines for practicing attorneys has been described as one of its key functions that has persisted to this day. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 *SMU L. REV.* 1385, 1439 (2004) (the "principal advancement that the ABA brought to the field of legal ethics was conversion of ethical standards into workable and enforceable rules of law. Indeed, most states have adopted the ABA's Model Rules of Professional Conduct, or some variation on them, as binding rules of law.").

34. See *CANONS OF PROF'L ETHICS* (1908), available at http://www.abanet.org/cpr/mrpc/Canons_Ethics.pdf [hereinafter *ABA CANONS*].

35. See *MODEL CODE OF PROF'L RESPONSIBILITY* (1969) (amended 1980), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

36. See generally *Ethics 2000 Commission*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html (last visited Oct. 23, 2011).

of the ABA on ethical issues and the role of the lawyer are reflected not only in the provisions' interpretative comments, but also in the form in which the model guidelines were drafted.³⁷ The ABA Canons were modeled after the Alabama State Bar Association's code of ethics,³⁸ which were adopted in 1887 after the state realized that a comprehensive guideline was needed in order to prevent and curtail avoidable, improper misconduct by lawyers.³⁹ Similarly, in keeping with its mission to ensure that the legal profession as a whole maintained a high level of ethical conduct guided by the formulation

37. See NEW JERSEY STATE BAR ASSOCIATION, *Report of the Special Committee of the New Jersey State Bar Association to Review the Rules of Professional Conduct Promulgated by the Commission on Evaluation of Professional Standards of the American Bar Association*, in RESPONSES TO DISCUSSION OF DRAFT OF MODEL RULES OF PROFESSIONAL CONDUCT: GENERAL COMMENTS 8 (1980) [hereinafter *New Jersey State Bar Report*]. The New Jersey State Bar Association applauded the new focus of the 1983 ABA Model Rules:

Historically, the conduct of lawyers has been regulated by Canons of Ethics and Rules of Discipline. These canons and rules have been applied uniformly and broadly to all activity of the lawyer. No attempt was made to distinguish specific standards dependent upon the specific function performed by the lawyer By contrast, the Kutak Commission has created a body of rules classified according to the role of the lawyer as advisor, advocate, negotiator, intermediary, and legal evaluator.

Id. The New Jersey State Bar Association continued with a comment on the particular form of the 1983 ABA Model Rules, which were formulated in part to better fit the Commission's new focus on the various roles of the lawyer. *Id.* at 9. However, it also noted the "over-lapping" of several roles of the lawyer, such that the standards differ in separate provisions of the 1983 Model Rules. *Id.*

38. MODEL RULES OF PROF'L CONDUCT preface (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble.html. The ABA Canons were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 as *Professional Ethics*, and from the fifty resolutions included in David Hoffman's *A Course of Legal Study* (2d ed. 1836). *Id.*

39. See Andrews, *supra* note 33, at 1435–36. Andrews describes Thomas Goode Jones as a "a prominent Alabama lawyer and later Alabama Governor and federal judge," *id.* at 1435 n.368, and his influence in the formation of the Alabama Code of Ethics:

In 1882, Thomas Goode Jones proposed that the newly formed Alabama State Bar Association create a code of ethics. Jones argued that many cases of improper conduct by lawyers were "thoughtless rather than willful" and could be avoided if the lawyers had "within easy reach" a "short, concise Code of Legal Ethics, stamped with the approval of the Bar."

Id. at 1435.

of clear principles,⁴⁰ the ABA drafted the ABA Canons to provide uniform guidelines for attorneys across the country.⁴¹ The ABA Canons were adopted by “nearly every state and local bar association in the country . . . with no more than minor changes.”⁴² Despite its widespread adoption, the ABA Canons were criticized as not being “an effective teaching instrument and fail[ing] to give guidance to young lawyers beyond the language of the Canons themselves”⁴³ They were, however, seen as a good starting point for the amalgamation of standard ethical principles in general, as the ABA Canons “‘crystallize[d]’ existing principles of legal ethics” and

40. Andrews, *supra* note 33, at 1439–40. In addition, Susan Martyn notes that the preamble of the 1908 Canons dramatically announced that

the future of the republic was at stake. They [the drafters of the ABA 1908 Canons] then expressed their specific purpose—to promote public confidence in the administration of justice by maintaining “Justice pure and unsullied.” And they believed that justice could not “be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.”

Susan R. Martyn, *Back to the Future: Fiduciary Duty Then and Now*, in A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS 3 (Lawrence J. Fox et al. eds., 2009) (footnotes omitted).

41. See Samuel A. Alito, Jr., *Introduction*, in A CENTURY OF LEGAL ETHICS, TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS xxix, xxxi (Lawrence J. Fox et al. eds., 2009). In tracing the history of the ABA and its model guidelines, Justice Alito described the need for uniform guidelines:

1908, when the canons were passed, was a period of flux for legal practice. During the late nineteenth century and the early twentieth century, the structure of legal practice was changing from the small town, all-purpose lawyer, to the bigger and more specialized law firms of the kind we are intimately familiar with today. With this change in business models for the legal practice came the need for a uniform code of ethics that would govern across geographical boundaries.

Id.

42. Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 J. PROF. LAW. 161, 168. The intention of the ABA Canons was construed in different ways, however, with some under the belief they were “only intended to be fraternal admonitions,” and others firmly believing that the intention of the ABA Canons was for states and courts to enact or rule them into positive law. *Id.* at 174–75. Either way, the ABA Canons “did not state that they were meant to be enforceable,” *id.* at 174, but were intended to “provide a ‘general guide,’ which should not be construed as limiting other ‘equally imperative though not specifically mentioned’ obligations.” Martyn, *supra* note 40, at 3–4.

43. MODEL CODE OF PROF’L RESPONSIBILITY preface (1969) (amended 1980).

“critiqued the standards, updated them to some degree, and, more importantly, nationalized them.”⁴⁴

The 1969 ABA Model Code⁴⁵ was adopted with the hope that it would help resolve ethical questions about professional responsibility left unanswered by the ABA Canons and provide a “set of principles designed to be more specific and more amenable to disciplinary enforcement.”⁴⁶ However, after its adoption by most states⁴⁷ and subsequent scrutiny, it was found to have “answered many questions badly and left others unresolved altogether.”⁴⁸ The ABA Model Code was a “restatement of existing ethical principles, with new wording and detail,” in addition to the incorporation of the past fifty years of

44. Andrews, *supra* note 33, at 1442. Andrews notes that “[o]ver the next thirty years, the ABA continued to amend many of the canons and added two more. In addition, the ABA issued hundreds of opinions (both formally and informally) as to the proper interpretation and application of the canons.” *Id.* at 1443 (footnotes omitted); *see also* ABA CANONS, *supra* note 34.

45. Andrews remarks that “[t]he Model Code had a novel format, with three components: the Canons, Ethical Considerations, and the Disciplinary Rules.” Andrews, *supra* note 33, at 1444. The ABA Canons had consisted entirely of the ethical canons themselves. *See* ABA CANONS, *supra* note 34.

46. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 12 (10th ed. 2008); *see also* Martyn, *supra* note 40, at 6 (“For the first time, the narrative general guides of the canons were replaced with a code that included both black-letter disciplinary rules and narrative ethical conclusions.”); Alito, *supra* note 41, at xxxiv (“For the first time, the ABA included in the preamble to the code that a violation of the disciplinary rules would subject the lawyer to discipline.”).

47. *See* Pera, *supra* note 4, at 648. He writes:

When the 1969 ABA Model Code of Professional Conduct replaced the influential 1908 Canons, in very short order, every American jurisdiction adopted ethics rules based on, and closely patterned after, the new Model Code. The adoption by the jurisdictions of new rules patterned after the 1983 ABA Model Rules of Professional Conduct, however, proceeded much more slowly; indeed, two states have not moved to the Model Rules even as I write [in 2005].

Id.

48. MORGAN & ROTUNDA, *supra* note 46, at 1–2; *see also* Steven Krane, *Ethics 2000: What Might Have Been*, 19 N. ILL. U. L. REV. 323, 325 (1999). Krane states the Model Code

[Was] not without its deficiencies. It focused almost exclusively on the professional responsibilities of litigating attorneys, ignoring the many lawyers who are perfectly happy never to see the inside of a courtroom. It barely touched on the obligations of lawyers representing organizational clients, or of those who work in large bureaucratic public and private firms. Instead, the Code continued to proceed from the outdated paradigm of the individual lawyer representing an individual client.

Id.

court and ABA opinions.⁴⁹ However, it failed to clearly set forth guidelines for enforcement and discipline, which ultimately was the reason it “never achieved stability.”⁵⁰

The 1983 ABA Model Rules⁵¹ were adopted amidst contentious disagreements about the scope and content of the rules, in addition to continued opposition to the necessity of a revision of the ABA Model Code in the first place.⁵² Indeed, “one will find more nonuniform versions of the Model Rules than existed during the heyday of the Model Code. In fact, a few jurisdictions still follow the format of the

49. Andrews, *supra* note 33, at 1444–45.

50. *Id.* at 1445–46.

51. See Martyn, *supra* note 40, at 6. Martyn writes that “[h]ere, rules replace code and canons. Both the common law and disciplinary rules now consciously mirror each other and provide significant content to the lawyer’s obligations.” *Id.* The author emphasizes that the core fiduciary duties, what she labels the “5 C’s,” have been “a part of the common law for 200 years,” but are “more carefully and clearly articulated today.” *Id.* at 7; see also Robert Meserve, Chairperson’s Introduction, MODEL RULES OF PROF’L CONDUCT, (1983) (amended 2002), available at http://www.law.cornell.edu/ethics/aba/2001/ABA_CODE.HTM. The introduction stresses the intent of the 1983 Model Rules and the importance of viewing (and adopting) the Model Rules as a coherent whole:

The Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct. Although the Commission endeavored to harmonize and accommodate the views of all the participants, no set of national standards that speaks to such a diverse constituency as the legal profession can resolve each issue to the complete satisfaction of every affected party. Undoubtedly there will be those who take issue with one or another of the Rules’ provisions. Indeed, such dissent from individual provisions is expected. And the Model Rules, like all model legislation, will be subject to modification at the level of local implementation. Viewed as a whole, however, the Model Rules represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other law, such as constitutional, corporate, tort, fiduciary and agency law.

Id.

52. Schneyer, *supra* note 42, at 171. Schneyer notes that the California and New York State Bar Associations opposed the Model Rules and only ceased their strident opposition when “it became clear that some version would be adopted.” *Id.* In contrast, Pera stated:

Although the ABA had amended the Model Rules from time to time during the intervening two decades, the consensus among the ABA leadership and lawyers in the area of ethics and professional responsibility was that the many changes in the legal profession as well as in the world of its clients since 1983 warranted a complete review of the ABA Model Rules. New issues needed to be addressed; new case law developments needed to be recognized, incorporated, or rejected; and some old issues needed to be readdressed.

Pera, *supra* note 12, at 639.

Model Code although the substance is usually similar to the Model Rules.⁵³ Nevertheless, the 1983 ABA Model Rules were adopted to address the progression of the legal profession from its traditional role as “mouthpieces” or “hired guns” to a more modern, integrated, and responsible profession.⁵⁴

In order to provide greater clarity to states on the interpretation and application of the substance of the 1983 ABA Model Rules,⁵⁵ in 1997 the ABA created the Ethics 2000 Commission to review and revise the 1983 ABA Model Rules.⁵⁶ Their work culminated in the 2002 version of the Model Rules.⁵⁷ Similar to the prior versions of

53. MORGAN & ROTUNDA, *supra* note 46, at 13. The authors note:

[As] of 2002, over forty-two jurisdictions had revised their own rules to follow the 1983 Model Rules in substantial part. Others had amended their Model Code to adopt important 1983 Model Rules ideas. By early 2008, several states had adopted the Model Rules substantially as amended in 2002–03. Several others had established committees to review the 2002–03 changes and more state supreme courts are likely to adopt them in due course.

Id.

54. See *New Jersey State Bar Report*, *supra* note 37, at 10–11. One of the purposes of the 1983 ABA Model Rules, to “make the lawyer more responsible to his clients, to the public, and to his profession,” was part of the ABA’s “inten[tion] to meet the mounting criticism of the profession in a modern society which has become increasingly disenchanted with the traditional role of the lawyer in the adversary system.” *Id.*

55. Andrews, *supra* note 33, at 1449; see also Pera, *supra* note 12, at 640 (“[T]he legitimate needs of practicing lawyers and their clients and related institutional concerns that ABA leadership in legal ethics should be preserved and strengthened had combined to create increasingly intense pressure for greater uniformity among jurisdictions on the rules that governed how we practice law.”).

56. ABA *About the Model Rules*, *supra* note 33; see also Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002) (describing the major changes made to the 1983 ABA Model Rules). Steven Krane also notes that:

Early on, it became apparent that the Commission, dubbed “Ethics 2000,” did not intend to do more than tinker with the existing platform provided by the Model Rules of Professional Conduct As a result, what is emerging from the Commission is not a proposed regulatory scheme for the next century, but merely an updating of the existing set of Model Rules, driven to a great extent by the view that the substance of the American Law Institute’s recently completed Restatement of the Law Governing Lawyers should be imported into the Rules.

Krane, *supra* note 48, at 323–24.

57. For a chart of the states that have adopted the revised rules, see *Status of State Review of Professional Conduct Rules*, ABA, http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf (last visited Oct. 23, 2011). For a comparison of the states’ revised rules and the ABA revised rules, see *Charts Comparing*

the ABA model guidelines, adoption of the 2002 ABA Model Rules was not unanimous by all the states.⁵⁸ Of those who have adopted the 2002 ABA Model Rules, not all have adopted the interpretive comments that were meant to elaborate on the black letter rules.⁵⁹ As a result, differing interpretations of the 2002 ABA Model Rules provisions arise even within the same judicial district.⁶⁰

B. The Current 2002 ABA Model Rules Withdrawal Provisions and Procedure

ABA 2002 Model Rule 1.16, the provision on termination of representation, mandates withdrawal in three circumstances: when “(1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or (3) the lawyer is discharged.”⁶¹ Other than these three situations, the lawyer may choose to withdraw from representation for a variety of reasons, including when “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”⁶² In either mandatory or

Professional Conduct Rules, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/charts.html (last visited Oct. 23, 2011). ABA has amended individual rules since the adoption of the 2002 Model Rules as a whole, but as these amendments are not related to the topic of this Note, they will not be discussed. See MODEL RULES OF PROFESSIONAL CONDUCT preface (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html; Andrews, *supra* note 33, at 1385, 1450.

58. *ABA Model Rules Dates of Adoption*, *supra* note 13.

59. See *infra* Part III.

60. See *infra* Part III.

61. MODEL RULES OF PROFESSIONAL CONDUCT R.1.16 (2010).

62. *Id.* The full ABA Model Rule 1.16 states that an attorney may withdraw when:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the

permissive withdrawal, the attorney must ensure that the client's interests have been reasonably protected from harm that may arise from the attorney's withdrawal, and the attorney must give proper notice to the applicable tribunal.⁶³

The ABA's comments to this rule elaborate upon its particular provisions and point to other rules and duties that may be affected by an attorney's withdrawal. For example, Comment 1 states that, as an initial matter, an attorney "should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion," and it points to Rules 1.2(c), 6.5, and 1.3, Comment 4.⁶⁴ The remaining comments expand upon mandatory withdrawal, discharge by the client, and optional withdrawal provisions, and discuss the requirement that the lawyer assist the client upon withdrawal.⁶⁵

C. The Variances between the ABA Model Guidelines

1. ABA 2002 and 1983 Model Rules

The 2002 ABA Model Rules revised the language of the 1983 ABA Model Rules provision regarding permissive withdrawal of counsel. The 2002 Rules state that an attorney may withdraw from counsel when the "client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."⁶⁶ The 1983 ABA Model Rules did not contain the "fundamental disagreement" language, although they did provide that the attorney could withdraw when actions taken by the client were

lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

Id.

63. *Id.* at R. 1.16(c), (d).

64. *Id.* at cmt. 1.

65. *Id.* at cmts.

66. *Id.* at R. 1.16(b)(4).

“imprudent.”⁶⁷ In addition, the 2002 ABA commentary to the permissive withdrawal section states that a lawyer may withdraw for good cause “even if it causes material adverse impact to the client,” even though the good cause for withdrawal does not arise out of something illegal.⁶⁸ Although the Ethics 2000 Commission changed the language slightly in order to “clarify [the] significance of permission to withdraw,”⁶⁹ the ABA stressed that “no change in substance is intended” from the 1983 Model Rules comment.⁷⁰ 2002 ABA Model Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer⁷¹ states that “a lawyer shall abide by a client’s decisions concerning the objectives of representation.”⁷² The ABA Model Rules deleted the 1983 Model

67. RICHARD ZITRIN, CAROL LANGFORD & KEVIN MOHR, *LEGAL ETHICS: RULES, STATUTES, AND COMPARISONS* 343 (2008) (comparing 1983 and 2002 versions of the Model Rules); *see also* AM. BAR ASS’N., *A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005*, 360 (2006). The Ethics 2000 Commission Reporter’s Explanation of Changes states that the reason the Commission changed the language from “imprudent” to “fundamental disagreement” was to prevent

[a]llowing a lawyer to withdraw merely because the lawyer believes that the client’s objectives or intended action is “imprudent” [which] permits the lawyer to threaten to withdraw in order to prevail in almost any dispute with a client, thus detracting from the client’s ability to direct the course of the representation. Nevertheless, the Commission believes that a lawyer ought to be permitted to withdraw when the disagreement over objectives or means is so fundamental that the lawyer’s autonomy is seriously threatened.

Reporter’s Explanation of Changes, Model Rule 1.16, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule116rem.html (last visited Oct. 23, 2011).

68. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE* 634 (2008–2009); *see also* AM. BAR ASS’N., *A LEGISLATIVE HISTORY*, *supra* note 67.

69. AM. BAR ASS’N., *A LEGISLATIVE HISTORY*, *supra* note 67.

70. *Id.*

71. The 1983 Model Rules title to this provision was “Scope of Representation.” The 2002 version added the allocation language. *See* ROTUNDA & DZIENKOWSKI, *supra* note 68, at 94.

72. MODEL RULES OF PROF’L CONDUCT, R. 1.2(a) (2010). The rule also states that the attorney

may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rules⁷³ comment that “both lawyer and client have authority and responsibility in the objectives and means of representation” and made it clear that it is the client’s “ultimate authority.”⁷⁴ The ABA Model Rules comment to this provision also deleted the 1983 comment that “a lawyer is not required to pursue objectives or employ means simply because the client may wish the lawyer to do so.”⁷⁵ Instead, it added to this provision an explanation that in some cases, “because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.”⁷⁶ The 2002 commentary continues to suggest that the attorney should consult other applicable law, attempt to reconcile with the client, and if “such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation.”⁷⁷

2. 1983 ABA Model Rules and 1969 Model Code⁷⁸

As stated above, 1983 ABA Model Rule 1.16 allows for withdrawal of representation when “a client insists upon pursuing an

Id.

73. MODEL RULES OF PROF’L RESPONSIBILITY R. 1.2 (1983); *see also* ZITRIN, LANGFORD & MOHR, *supra* note 67, at 277.

74. ZITRIN, LANGFORD & MOHR, *supra* note 67, at 277.

75. *Id.* at 142.

76. ROTUNDA & DZIENKOWSKI, *supra* note 68, at 92.

77. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 2 (2010). The change in the language from the 1983 version to the 2002 version is seen as a result of the influence of the Restatement of the Law Governing Lawyers, Third’s provisions on the attorney-client relationship, which took an even more restrictive view on the allocation of authority between the client and attorney. ROTUNDA & DZIENKOWSKI, *supra* note 68, at 110. The Restatement “adopts the view that a lawyer’s conduct in setting the means of a representation affects the client’s interests and therefore clients should have control over means as well as objectives.” *Id.* The ABA notes, however, that if the “lawyer and the client disagree as to the means, the client’s choice should be honored or the lawyer should consider terminating the representation.” *Id.*

78. For a chart showing the applicable ABA Model Rules that pertain to a particular ABA Model Code provision, see *Model Code & Model Rules Comparison*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/ethics/aba/mcpr/COMPARISON.HTM#EC_2-32 (last visited Oct. 23, 2011).

objective that the lawyer considers repugnant or imprudent.”⁷⁹ Both the 2002 and 1983 ABA Model Rule versions of Rule 1.16 allow for withdrawal when “other good cause exists,”⁸⁰ which was not included in the 1969 Code, and withdrawal is “not limited to cases where the tribunal finds good cause.”⁸¹ The 1969 Model Code, Disciplinary Rule-2-110(C), permitted withdrawal “regardless of the effect on the client if: (1) His client . . . insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.”⁸² Ethical Consideration 2-32 further provides that the “decision by a lawyer to withdraw should be made only on the basis of compelling circumstances.”⁸³

1983 ABA Model Rule 1.2(a) loosely parallels the ethical considerations in Canon 7 from 1908. Specifically, Ethical Consideration 7-8 states that the client has the final say on whether to “forego legally available objectives or methods because of nonlegal factors” but that “[i]n the event the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment,” which pointed to the disciplinary rule regarding termination of counsel, as noted above.⁸⁴

3. 1969 ABA Model Code and 1908 Canons

The 1908 ABA Canon dealt broadly with withdrawal from employment as counsel. It stated that the right to withdraw must

79. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(3) (1983) (amended 2002).

80. *Id.* R. 1.16(b)(7).

81. ROTUNDA & DZIENKOWSKI, *supra* note 68, at 634.

82. ZITRIN, LANGFORD & MOHR, *supra* note 67, at 180.

83. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-32 (1980).

84. ZITRIN, LANGFORD & MOHR, *supra* note 67, at 143. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(B)(1) (1980) also states that “a lawyer may, ‘where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.’” *Id.*

“arise only from good cause,” which may result from a client insisting on pursuing a pointless case or “if the lawyer finds himself incapable of conducting the case effectively.”⁸⁵ In relation to the allocation of power between the attorney and client, ABA Canon 16 stated the lawyer should use his “best efforts” to stop a client from pursuing actions “which the lawyer himself ought not to do,” and if the “client persists in such wrongdoing the lawyer should terminate their relation.”⁸⁶ Furthermore, ABA Canon 24 allowed the lawyer to decide the “incidental matters pending the trial,” and “[i]n such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.”⁸⁷

85. The ABA discussed the issue of withdrawal in 1961 and again in 1965 by looking to Canon 44 for guidance. The question the ABA addressed in the first informal opinion was whether an attorney was justified in withdrawing as counsel when, on the day of trial, the opposing party gave an offer of settlement and the client refused to accept. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. C-455 (1961). The ABA stated: “[u]nder the terms of Canon 44, the lawyer should not throw up the unfinished task to the detriment of his client, except for reasons of honor or self-respect.” *Id.* It went on to say that “[t]he mere fact that in the attorney’s judgment the settlement offer is equal to or greater than the probable amount of a jury verdict, in our opinion does not give him ‘good cause’ to withdraw from the employment assumed.” *Id.* This is clarified in the second informal opinion in which the ABA stated that “if the lawyer honestly believes that he can no longer represent the client effectively and that withdrawal will not be detrimental to the client, it is our opinion that the attorney could ethically state that he preferred to withdraw effective upon substitution of other counsel.” ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 807 (1965); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. C-780 (1964) (“Canon 44 provides that a lawyer is justified in withdrawing from the case ‘if the lawyer finds himself incapable of conducting the case effectively.’ Certainly he cannot conduct the case effectively without his client’s cooperation.”).

86. CANONS OF PROF'L ETHICS Canon 16 (1908).

87. *Id.*

II. CIRCUIT COURT CASES⁸⁸

In addition to the varied nature of the ABA's model guidelines over the years, courts have created a conflicting body of case law that addresses the particular question of permissive withdrawal of counsel and, implicitly, the nature of the relationship between the attorney and client.⁸⁹ In a Seventh Circuit case, *Banks v. Andersen Consulting, LLP*, the court upheld the grant of a motion to withdraw as counsel after the attorney stated that it would create an ethical conflict for her to continue representing the client when the client wished to continue

88. District court cases demonstrate a wider disparity of opinions on this issue, even within the same district. For example, the United States District Court for the Southern District of New York heard *Heileman v. Administrator of the Veterans Administration*, No. 82 Civ. 7036-CSH, 1985 U.S. Dist. LEXIS 15400, at *1 (S.D.N.Y. Oct. 1, 1985), in which the court denied the attorney's motion to withdraw after the client refused to listen to the attorney's advice to accept a settlement offer. The attorney claimed that the client expressed an attitude of "thinking that he knows how to handle it and he prefers to handle it his way." *Id.* at *2. The court criticized the attorney and stated that "[r]ather than acknowledging that it is his professional obligation to carry out his clients' instructions, even perhaps against his better judgment, counsel instead insists that his clients must follow his advice or he will withdraw his services." *Id.* In so denying the motion to withdraw, the court looked to the Model Code of Professional Responsibility for support of its interpretation of the permissible bounds of attorney autonomy. *Id.* at *4–*5.

However, another case in the same district held that an attorney seeking to withdraw because the client refused to accept a settlement was permissible. *Best v. City of New York*, 04 Civ. 10114 (BSJ) (RLE), 2005 U.S. Dist. LEXIS 28106, at *1 (S.D.N.Y. Nov. 15, 2005). In *Best*, the court noted that the client's refusal to accept settlement was not a "good and sufficient cause to withdraw" but allowed the attorney to do so because it was not in the client's best interests to have an attorney who had no interest in the case represent the client. *Id.* at *3.

Similarly, in *WABC-AM Radio, Inc. v. Vlahos*, 89 Civ. 1645 (CSH), 1992 U.S. Dist. LEXIS 14771, at *1 (S.D.N.Y. Sept. 29, 1992), the court granted the attorney's motion to withdraw due to the breakdown in the attorney-client relationship. In addition to failing to pay attorney fees, the client had refused several times to accept advice regarding settlement. *Id.* at *1–*2. The court noted that even though relief would cause delay in the matter, the attorneys should be allowed to withdraw from the case. *Id.* at *4. Interestingly, this case was heard by the same judge as the *Heileman* case above, in which the court denied the attorney's motion to withdraw.

Other district court cases—and again even those within the same circuit—exhibit this disconnect. The proposals for resolving the differences in circuit court opinions discussed in Part IV apply with equal force to the confusion exhibited in the district courts. *See infra* Part IV.

89. This Note addresses the ethical dilemma that stems from a client refusing to listen to an attorney's advice in a civil matter. For a separate, but related, issue involving clients refusing to listen to an attorney's advice in a criminal matter, and specifically in relation to plea bargains, see *Uresti v. Lynaugh*, 821 F.2d 1099 (5th Cir. 1987) (stating that it would constitute ineffective assistance of counsel if the attorney had *not* warned the client that withdrawal of counsel was likely if the client did not heed the attorney's advice to accept the plea bargain).

representation despite the attorney's belief that the case would not survive summary judgment.⁹⁰ The appellate court noted that the trial court had "properly considered Hakeem's ethical concerns regarding the continuation of her client's case as a valid reason for her withdrawal."⁹¹ The court concluded that "[w]hen a client rejects her counsel's advice, counsel may withdraw from the case," and it ultimately dismissed the client's appeal.⁹² Also within the Seventh Circuit, a trial court allowed counsel to withdraw (on the very day of trial) when the clients had agreed to settle but then changed their minds and demanded the attorney continue.⁹³ The circuit court upheld the district court's ruling, finding that the circumstances of the case (the client did not follow the attorney's advice and did not object to the withdrawal) warranted the trial court's exercise of discretion in allowing the attorney to withdraw.⁹⁴

The Seventh Circuit in *Jiricko v. Illinois Anesthesia, Ltd.* again upheld the trial court's grant of a motion to withdraw when counsel filed a motion that they would not be able to "successfully pursue the lawsuit."⁹⁵ The circuit court noted that counsel believed the case would not be successful, and that the contract between the attorney and client had allowed for counsel's withdrawal if the attorney did not feel the case had merit.⁹⁶ Thus, the court recognized the trial court's action was "entirely proper" based upon the circumstances of the case.⁹⁷

The Second Circuit also allowed an attorney to withdraw when the client refused to accept the attorney's advice on the eve of trial.⁹⁸ In *Whiting v. Lacara*, the court allowed the attorney to withdraw after the client said he could dictate legal strategies and then sue the

90. *Banks v. Andersen Consulting, LLP*, No. 97-3110, 1998 U.S. App. LEXIS 6555, at *1, *4 (7th Cir. Mar. 27, 1998).

91. *Id.* at *4.

92. *Id.*

93. *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1086 (7th Cir. 1982).

94. *Id.* at 1088.

95. *Jiricko v. Ill. Anesthesia, Ltd.*, Nos. 92-2613, 92-2682, 1993 U.S. App. LEXIS 22030, at *2 (7th Cir. Aug. 17, 1993).

96. *Id.* at *5-*6.

97. *Id.* at *6.

98. *Whiting v. Lacara*, 187 F.3d 317 (2d Cir. 1999).

attorney if the attorney did not do as he wanted.⁹⁹ The court recognized the ethical conflict in this situation: “if required to continue to represent Whiting, Lacara will have to choose between exposure to a malpractice action or to potential Rule 11 or other sanctions,” and so it overturned a lower-court decision denying the attorney’s withdrawal motion.¹⁰⁰

In the First Circuit, the circuit court dismissed the client’s appeal in no uncertain terms: “[t]here is no doubt that there is no substantial question that the district court did not abuse its discretion in allowing appellants’ counsel to withdraw.”¹⁰¹ The client in this case had expressed “dissatisfaction with his counsel, his unwillingness to cooperate with counsel’s plans and state[d] his intention of bringing in a new lawyer” and had “ignored his counsel’s advice.”¹⁰² The circuit court dismissed the client’s arguments that the withdrawal of counsel had resulted in a forced settlement because he did not have counsel or a continuance,¹⁰³ as the client was “solely responsible for the position in which he found himself.”¹⁰⁴

The two circuit court opinions that held contrary to the majority of circuits were *Nehad v. Mukasey*, in the Ninth Circuit,¹⁰⁵ and *Augustson v. Linea Aerea Nacional-Chile S.A.*, another Fifth Circuit case.¹⁰⁶ In *Nehad*, the client was an immigrant facing deportation charges.¹⁰⁷ The client sought asylum, but, two hours before meeting

99. *Id.* at 322.

100. *Id.* at 323.

101. *Citibank, N.A. v. Accounting Sys.*, No. 90-1145, 1990 U.S. App. LEXIS 14377, at *8 (1st Cir. Aug. 7, 1990).

102. *Id.*

103. The court noted that the client had neither asked for a continuance nor objected to proceeding *pro se*. *Id.* at *9.

104. *Id.* at *9.

105. 535 F.3d 962 (9th Cir. 2008). At first glance, the Ninth Circuit case seems like an outlier—it is from a jurisdiction that has not adopted the ABA rules and thus may be dismissed as a “free-agent.” See Mark Hansen, *HOT Off the PRESS: Revised Model Ethics Rules Are Nearly Ready for State Scrutiny*, 88 A.B.A. J. 37, 38 (June 2002) (“California, perhaps not surprisingly, has a unique system of lawyer regulation.”). However, because California’s provision on permissive withdrawal closely mirrors the ABA Model Code’s provision on permissive withdrawal, it may be analyzed in relation to the other cases/jurisdictions that are influenced by the ABA Model Code. See CAL. RULES OF PROF’L CONDUCT R. 3-700 (2010), available at http://www.law.cornell.edu/ethics/ca/code/CA_CODE.HTM.

106. 76 F.3d 658 (5th Cir. 1996).

107. 535 F.3d at 965.

with the immigration judge, the client claimed that his attorney had recommended that he accept voluntary departure in lieu of proceeding with the removal hearing.¹⁰⁸ The client agreed to voluntary departure at that time but challenged it later under the claim that he had not received effective assistance of counsel.¹⁰⁹ The Ninth Circuit found that the attorney had pressured his client to accept voluntary departure, which led the client to misunderstand his position and the options available to him.¹¹⁰ The court thus found that the attorney's violation of the California Rules of Professional Conduct had resulted in prejudice to the client and remanded the case accordingly.¹¹¹

In *Augustson*, the Fifth Circuit reviewed the lower court's award of attorney's fees to attorneys who had withdrawn as counsel.¹¹² The attorneys had attempted to settle on the basis of their legal opinion that the potential award for the plaintiffs would be minimal.¹¹³ The plaintiffs refused to settle, despite the attorneys obtaining a higher

108. *Id.* The client also claimed that his attorney had considered his claim for asylum to be "weak" and that the attorney would not represent him after that day because his case was complicated and he had some personal issues. *Id.*

109. *Id.* at 966.

110. *Id.* at 969. Specifically, the court found that:

Speyer presented Rawshan with (1) his inability to continue with the representation beyond that day's hearing, without any explanation of how Rawshan might obtain new counsel (or even that he could likely obtain a continuance to do so); (2) a (new) [sic] negative assessment of the merits of Rawshan's claim; and (3) an offer of voluntary departure, without any exploration of other options (e.g., asking for a continuance to obtain new counsel, requesting voluntary departure at the conclusion of removal proceedings), all within hours of a scheduled hearing.

Id. The court further noted that in California, the rule on withdrawal of counsel "requires that a lawyer take all steps reasonably necessary to protect his client when he withdraws, specifically including 'giving due notice to the client' and 'allowing time for employment of other counsel.'" *Id.* at 970 (quoting CAL. RULES OF PROF'L CONDUCT R. 3-700(A)(2) (1988)). In addition, the court stated that the allocation of authority between attorney and client necessarily mandated that "a lawyer may not burden a client's decisionmaking by threatening to withdraw if the client refuses to settle." *Id.* at 970-71.

111. *Id.* at 973.

112. *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 660 (5th Cir. 1996).

113. *Id.* at 661. The particular plaintiffs in this case sued the airline for willful misconduct in the wrongful death of their family members. The plaintiffs would have had to show that the airline's actions were of willful misconduct for all claims, a standard that the attorneys believed would be a tough burden to carry and was presumably the reason they advised plaintiffs to accept settlement. *Id.*

settlement offer than the potential limit if the case went to a jury.¹¹⁴ Ultimately, the attorneys moved to withdraw.¹¹⁵ While the appellate court noted that courts must “be concerned about the quality of representation a client will receive from an attorney who has a fundamental disagreement with a client’s objective, or who believes that the client’s objective poses an unreasonable financial burden,” the court ultimately concluded “the objective is for the client to choose”¹¹⁶ and that it was the client’s “risk to take.”¹¹⁷

III. ANALYSIS

The disconnect between the courts ruling on this issue raises concerns about the cohesiveness of the ABA ethical guidelines and their interpretation by the states.¹¹⁸ This presents a problem for the ethical attorney who wishes to withdraw but is subject to shifting and unclear standards.

Augustson was heard in Texas in 1996, which adopted the 1983 ABA Model Rules and comments in 1989.¹¹⁹ Thus, it is reasonable to believe that *Augustson* would be in accord with other jurisdictions that adopted the 1983 ABA Model Rules.¹²⁰ However, as discussed below, that is not the case.

114. *Id.* The attorneys agreed to proceed to trial for the plaintiffs, but asked for mediation. At mediation, the arbitration panel also suggested to the plaintiffs that they settle, but the plaintiffs again refused. *Id.*

115. *Id.*

116. *Id.* at 664.

117. *Id.* at 666. The court felt the attorneys could have continued to represent the clients without any ethical dilemmas and expressed concern that allowing attorneys to withdraw from “bad” cases and still obtain fee awards would encourage attorneys to drop nonlucrative cases. *Id.* at 664.

118. *See* *Culebras Enterprises Corp. v. Rivera-Rios*, 846 F.2d 94, 98 (1st Cir. 1988). Although “[t]his court has stated that, in acting upon a motion to disqualify or sanction an attorney, the district court should generally apply the ethical standard that is in effect at the time of the motion,” when the ethical standards are inconsistent and lack interpretive guidance, the results reached by the courts similarly are inconsistent.

119. *ABA Model Rules Dates of Adoption*, *supra* note 13.

120. Indeed, the *Augustson* court explicitly cited to the Texas Disciplinary Rules regarding the allocation of authority and withdrawal of representation: “under the Texas Disciplinary Rules of Professional Conduct ‘a lawyer shall abide by a client’s decisions: (1) concerning the objectives and general methods of representation; [and] (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law.’” 76 F.3d at 665–66 (quoting TEX. DISCIPLINARY RULES OF PROF’L CONDUCT 1.02(a) (1991)).

Although *Augustson* was facially about granting attorney fees, the court noted that the case revolved around the issue of whether the attorney had just cause to withdraw.¹²¹ The court cited the Texas Disciplinary Rule provision on withdrawal of counsel,¹²² but it related only a couple of instances in which the attorney had good cause to withdraw: “when the client has engaged in culpable conduct”¹²³ or “where continued representation is impossible due to forces beyond the attorney’s control.”¹²⁴ Despite Texas having adopted substantially the same text as the ABA 1983 Model Rules, the court seemed to have limited the scope of the provision *sua sponte*.¹²⁵ The court further construed “just cause [as] ha[ving] been found where continued representation would violate ethical obligations of the attorney or where the attorney has insufficient funds to pursue litigation,” but tellingly, it did not seem to view the continued

121. The court noted that “[t]he fundamental issue in this case, then, is whether Speiser Krause had just cause to withdraw sufficient under Texas law to receive compensation.” *Id.* at 663.

122. *Id.* at 661 n.3.

123. *Id.* at 663. The court gives several examples: “thus, for example, courts have found just cause where the client attempts to assert a fraudulent claim; fails to cooperate; refuses to pay for services; degrades or humiliates the attorney; or retains other counsel with whom the original attorney cannot work.” *Id.*

124. *Id.* Instead, the court cites several cases in which it found withdrawal justified: when the client was going to commit perjury (*Staples v. McKnight*, 763 S.W.2d 914 (Tex. Ct. App. 1988)); when there was a lack of resources (*Int’l Materials Corp. v. Sun Corp.*, 824 S.W.2d 890, 893–96 (Mo. 1992) (en banc)); and, interestingly, when ethical obligations *mandate* withdrawal rather than merely permit it (so the attorney could recover fees and costs) (*Estate of Falco*, 233 Cal. Rptr. 807 (Cal. Ct. App. 1987)). In *Falco*, the California court held that because an attorney’s withdrawal due to a client’s refusal to settle was not for good cause, the attorney could not recover his fees. *Id.* at 815–16. The *Falco* court agreed with the trial court that the attorney’s withdrawal was not justified because the case *did* have merit, as evidenced by the settlement that the clients later obtained and by the vacillating statements of the attorneys as to the merits of the case. *Id.* at 814–16. Also, the appellate and trial courts stated that the primary reason that the attorney-client relationship had broken down was the “mutual animosity” between the attorney and clients; thus, the clients’ failure to cooperate with the attorney was equally the fault of the attorney. *Id.* at 817. However, the *Falco* court also stated that “[w]e have not considered the consequences facing a client who refuses to accept a good faith settlement, including the possibility of a levy of sanctions,” *Id.* at 815 n.17, and expressly stated that “[i]n deciding this appeal, we do not intend our opinion to apply to a related but different question regarding the circumstances in which an attorney has a right to withdraw from a case.” *Id.* at 808.

125. *Augustson*, 76 F.3d at 663.

representation of the client as an ethical violation, not to mention a mandated one.¹²⁶

In contrast, *Banks* in 1998, and *Jiricko* in 1993, both Seventh Circuit cases from Illinois,¹²⁷ were decided after Illinois adopted the 1983 ABA Model Rules and comments in 1990.¹²⁸ Its provisions on authority and termination of representation are substantially similar to the 2002 ABA Model Rules in that the client determines the scope of representation, but the attorney may withdraw if he considers the action imprudent.¹²⁹

The *Banks* and *Jiricko* cases allowed the attorney to withdraw, with the *Banks* court explicitly noting the ethical dilemma of the attorney if made to continue with the representation.¹³⁰ Interestingly, despite the fact that Illinois had adopted the 1983 ABA Model Rules at the time the two cases were heard, the *Banks* and *Jiricko* courts instead relied on interpretive precedent of the issue from the *Washington* case, which had itself relied on the ABA Model Code.¹³¹

126. *Id.*

127. *Banks v. Andersen Consulting, LLP*, No. 97-3110, 1998 U.S. App. LEXIS 6555 (7th Cir. 1998); *Jiricko v. Ill. Anesthesia, Ltd.*, Nos. 92-2613, 92-2682, 1993 U.S. App. LEXIS 22030 (7th Cir. 1993).

The First Circuit also focused on common law to reach its conclusion in *Citibank, N.A. v. Accounting Systems*, No. 90-1145, 1990 U.S. App. LEXIS 14377 (1st Cir. Aug. 7, 1990). *Citibank* cited *Washington* and another First Circuit case, *Culebras Enterprises Corp. v. Rivera-Rios*, 846 F.2d 94, 98 (1st Cir. 1988) (discussing another ethical dilemma of the attorney as potential witness in the same case). In *Citibank*, an appeal heard from Puerto Rico in 1990, the court focused on the client's own culpability, and there was no mention of the Puerto Rico Canons of Professional Responsibility, which were promulgated in 1975. *Citibank*, 1990 U.S. LEXIS 14377.

128. See *Alphabetical List of States Adopting Model Rules*, ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Oct. 23, 2011). Illinois recently updated its Rules of Professional Conduct in July 2009, effective January 2010. See ILL. RULES OF PROF'L CONDUCT R. 1.2, available at http://www.state.il.us/court/SupremeCourt/Rules/ArtVIII/ArtVIII_NEW.htm#1.2.

129. It's meant to be a citation to the corresponding section in the 1983 ABA Model Rules.

130. See *Banks*, 1998 U.S. App. LEXIS 6555, at *4.

131. *Banks* and *Jiricko* both cited *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1086 (7th Cir. 1982), in finding that the attorney was well within his right to withdraw after the client refused to listen to the attorney's advice. *Banks*, 1998 U.S. App. LEXIS 6555 at *4; *Jiricko*, 1993 U.S. App. LEXIS 22030 at *5 (citing *Washington* in applying abuse-of-discretion standard to lower court's ruling on motion to withdraw). *Washington* cited to the Model Code, 694 F.2d at 1088 ("[t]his is not to say, of course, that Attorney Toole would have acted improperly had he not sought permission to withdraw. An attorney is not compelled to withdraw if his or her client refuses proffered advice.") but mainly relied on district court cases

Although all three cases were supposedly under the guidance of its state's rules (which substantially tracked the 1983 ABA Model Rules), *Banks*, *Jiricko* and *Augustson* came to differing conclusions. This inconsistency mirrors the inconsistent way in which the states have adopted the ABA's model guidelines and consequently heightens the problem of unclear and shifting standards.

The other circuit court case, *Nehad*, was decided in California, the only state that did not adopt the 2002 ABA Model Rules.¹³² California's provisions on permissive withdrawal are substantially similar to the 1969 ABA Model Code.¹³³ Due to the similarity between its black letter disciplinary rules and the 1969 ABA Model Code, it is again reasonable to expect that the *Nehad* case would be in accord with the other circuit court cases that were influenced by the 1969 Model Code—the *Washington* and *Whiting* cases.¹³⁴ Like above, however, the courts came to differing conclusions.

The *Nehad* court criticized the attorney's withdrawal because of the lack of timely notice to the client¹³⁵ and stated that the attorney "may not burden the client's ability to make settlement decisions by structuring the representation agreement so as to allow the lawyer to withdraw, or to ratchet up the cost of representation, if the client

and another circuit court case (though not directly on point) for authority. Note that *Washington*'s use of the Model Code was in support of its argument that the attorney is not compelled to withdraw but may withdraw if the attorney so chooses.

132. See *ABA Model Rules Dates of Adoption*, *supra* note 13.

133. There is one important distinguishing characteristic of the California Rules in relation to the ABA Model Code: its discussion on permissive withdrawal does not address its permissive withdrawal subprovisions, but instead focuses on the return of fees, and on "reasonable steps" to avoid prejudice to the clients through the withdrawal. See CAL. RULES OF PROF'L CONDUCT (2010), available at <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx> (last visited Oct. 23, 2011).

134. See *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1086 (7th Cir. 1982); *Whiting v. Lacara*, 187 F.3d 317 (2d Cir. 1999).

135. The court specifically notes:

Under California rules of professional conduct, his obligations were to give Rawshan timely notice that Speyer needed to withdraw, and to protect Rawshan by ensuring that he had the time and opportunity to secure new counsel. Under this rule, Speyer should have, at the least, informed the immigration court of his need to withdraw and asked, on Rawshan's behalf, for a continuance to allow Rawshan time to employ new counsel. That Speyer's omissions violated this rule is clear.

535 F.3d at 962.

refuses an offer of settlement.”¹³⁶ While concern that withdrawal may materially affect a client’s case and autonomy is reflected in both the California Rules and the ABA model guidelines, all three cases influenced by the 1969 Model Code (*Nehad*, *Washington* and *Whiting*) involved situations in which the attorney wished to withdraw shortly before or on the actual day of trial.¹³⁷ If the concern was truly to protect the client against material adverse effects due to the attorney’s withdrawal, then the outcomes in *Washington* and *Whiting* should be unique; however, as mentioned above, they are in accord with the majority of the other courts that have heard this issue.

The court in *Whiting*, decided in New York in 1999, discussed New York’s Model Code provisions on permissive withdrawal of counsel in effect at the time¹³⁸ (New York did not adopt the 2002 ABA Model Rules until 2008).¹³⁹ The attorney in *Whiting* argued that he should be allowed to permissively withdraw based on three Model Code provisions,¹⁴⁰ which the court stated provide “guidance for the court as to what constitutes ‘good cause’ to grant leave to withdraw as counsel.”¹⁴¹ Similarly, *Washington* stated that “[f]aced with his clients’ rejection of his advice, Toole did not act improperly by

136. *Id.* at 971.

137. *See* *Nehad v. Mukasey* 535 F.3d 962, 965 (9th Cir. 2008); *Washington*, 694 F.2d at 1085; *Whiting*, 187 F.3d at 319.

138. The New York Model Code’s provision on permissive withdrawal of counsel mirrors the 1969 ABA Model Code in that it allows for permissive withdrawal of counsel if the client “[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.” *See* NEW YORK LAWYER’S CODE OF PROF’L RESPONSIBILITY DR 2-110 (2007), available at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf>. Despite this particular subsection’s applicability to matters not before a court, the ABA Model Code and New York Model Code also contain provisions that allow an attorney to withdraw if either the client insists on a meritless claim or if the client “[b]y other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.” *Id.*; *see also* MODEL CODE OF PROF’L RESPONSIBILITY (1969) (amended 1980), available at <http://www.abanet.org/cpr/mrpr/mcpr.pdf>.

139. *See* *ABA Model Rules Dates of Adoption*, *supra* note 13.

140. Specifically, the attorney argued that “(i) *Whiting* [the client] ‘insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law,’ Model Code DR 2-110(C)(1)(a); (ii) *Whiting*’s ‘conduct [has] rendered it unreasonably difficult for [Lacara] to carry out employment effectively,’ DR 2-110(C)(1)(d); and (iii) *Whiting* has ‘deliberately disregarded an agreement or obligation to [Lacara] as to expenses or fees,’ DR 2-110(C)(1)(f).” *Whiting*, 187 F.3d at 321.

141. *Id.*

seeking the court's permission to withdraw as 'in private engagements counsel may withdraw if advice (even to settle) is not followed.'"¹⁴²

Even though these two cases were influenced by the 1969 Model Code, which explicitly excluded matters pending before a tribunal from the exceptions of the permissive withdrawal section based on disagreements with the client, the courts allowed the lawyer to withdraw in matters pending before them [sic], even though trial was imminent.¹⁴³ Again, like *Augustson*, *Nehad* is at odds with the majority of the other cases, despite supposedly being guided by the same ethical principles.

One fundamental reason for the disparity in circuit court (and district court¹⁴⁴) opinions is the scattered nature with which each jurisdiction adopts (or not, as shown) the ABA model guidelines and comments.¹⁴⁵ As one author notes, "there is great variation among the versions adopted by the states."¹⁴⁶ This variation creates different interpretations and applications of the ABA's model guidelines in each state and is at odds with the purpose of the ABA's model rules in the first instance¹⁴⁷ as a cohesive, interdependent set of ethical guidelines.¹⁴⁸ Another reason for the disparity is the lack of clear guidance from the ABA model guidelines themselves,¹⁴⁹ as well as the inconsistent way in which courts accept and interpret what are supposedly the same ethical standards in effect in other jurisdictions.¹⁵⁰

Ultimately, it is troubling that in the cases that have withheld withdrawal of counsel the courts are essentially mandating an ethical

142. 694 F.2d at 1087–88 (citing *Spero v. Abbott Labs.*, 396 F. Supp. 321, 323 (N.D. Ill. 1975)).

143. See *supra* text accompanying notes 137–42.

144. See *supra* note 142.

145. See *infra* note 152.

146. Joy Miyasaki, *Avoiding Ethical Dilemmas*, in ALI-ABA COURSE OF STUDY MATERIALS, ADVANCED ESTATE PLANNING TECHNIQUES, SL073 ALI-ABA 431, 435 (2006).

147. "Uniformity of ethics rules among American jurisdictions was also a very significant, if not paramount, concern [in its decision to revise the 1969 ABA Code]." Pera, *supra* note 4, at 639.

148. See ABA Goals, *supra* note 12.

149. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt [2] (2010) (providing unclear guidance as to the allocation of authority between lawyer and client).

150. See discussion *supra* Part I.C.2.

dilemma by requiring that attorneys continue representation.¹⁵¹ Although the attorney presumably would and should not be responsible for any ethical violation stemming from their mandated representation, simply releasing them from sanctions does not effectively address the potential negative effects that mandated representation could have on the client and their case, in addition to the attorney's own mental state.

IV. PROPOSAL

Although states have been encouraged to adopt the ABA guidelines and comments in their entirety, not all states have done so.¹⁵² To that end, the ABA should cease its traditional practice of passive encouragement and create an incentive program to induce states to adopt the complete guidelines.¹⁵³ For example, the ABA

151. For example, if the attorney is forced to continue representation, can an attorney really diligently represent a client with whom she has a fundamental disagreement? *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence.html. Also, what if the client's case can be considered meritless? *See* MODEL RULES OF PROF'L CONDUCT R. 3.1.

152. In particular, not all states that have adopted the revised ABA Model Rules have adopted the comments that accompany the rules. *See* CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS'N., STATE ADOPTION OF COMMENTS TO MODEL RULES OF PROFESSIONAL CONDUCT, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments_authcheckdam.pdf (last visited Oct. 23, 2011).

153. Pera states that:

Since the completion of its revisions to the Model Rules, the ABA has attempted to support work in the various jurisdictions to evaluate and revise their ethics rules, especially through its Joint Committee on Lawyer Regulation, by providing material, speakers, and other assistance to the groups doing this work. While the ABA consciously ceases its efforts short of evangelization in favor of the adoption of the Model Rules, and generally attempts to avoid criticism of existing or proposed rules that depart from the Model Rules as being somehow inferior, the Joint Committee and the ABA Center for Professional Responsibility have made various outreach efforts to promote the adoption of the revised ABA Model Rules.

Pera, *supra* note 4, at 642. The author later elaborates on the ABA's attempt to persuade the states to adopt the Model Rules:

Commentators on earlier drafts of this article pointed out to me that the ABA does not specifically employ a team of "Model Rule evangelists" (my term, not theirs) to tour the country to convince state supreme courts and drafting committees that the ABA rules are best and should be adopted. True enough. Still, the ABA Joint Committee on Lawyer Regulation does provide much support and assistance, all of a

could offer enhanced free continuing legal education courses to the states that have adopted the ABA model guidelines in their entirety, as well as other free and comprehensive educational and practical resources that would assist the states in educating their attorneys about the ABA's (and their individual) ethical expectations.¹⁵⁴ This would create uniformity of interpretation among the states and courts, which would then resolve the tension between the disagreeing attorney and client, as the line between permissible and impermissible withdrawal of representation because of a conflict arising from the allocation of authority between the client and the attorney would be made clearer.

The form of ABA's guidelines over the years has morphed from a detailed exposition of important ethical considerations into an emphasis on the black letter rule.¹⁵⁵ The absence of clear comments as to how the provisions on the allocation of authority between the attorney and client and when the attorney can permissively withdraw contribute to the confusion within the courts.¹⁵⁶ Additionally, the changing models of guidelines promulgated over the years have cut out the vital ethical discussion inherent in the rules, while still failing to provide practical guidance to the attorney.¹⁵⁷

highly substantive nature, to drafting committees and courts around the country considering adopting ABA rules.

Id. at 650.

154. The ABA currently offers CLE courses to its members, with some at reduced prices. *Continuing Legal Education & Training*, ABA, http://www.americanbar.org/membership/benefits_of_membership/professional_development/cle_training.html (last visited Oct. 23, 2011).

155. See Meserve, *supra* note 51 ("The first format, consisting of blackletter Rules and accompanying Comments in the so-called restatement format, was submitted with the Commission's recommendation that it be adopted. The alternative format was patterned after the Model Code and consisted of Canons, Ethical Considerations, and Disciplinary Rules.").

156. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt 2 (2010).

157. The need for a clear comment is not peculiar to these two provisions. Indeed, Nancy Moore states that there are many provisions that are rarely "so clear and concise that there can be no excuse for their violation." Nancy J. Moore, *The Evolving Role of Ethics Codes*, in *A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS* 223, 223 (Lawrence J. Fox et al. eds., 2009). The author continues with the recognition that simple, clear ethics provisions may be desirable, but that the "twenty-first century lawyer ethics codes are by necessity complex." *Id.* at 226. However, the author recognizes that

[i]f our disciplinary codes are to continue to serve the public interest, they must be understandable not only to lawyers but to members of the public as well. The

To resolve this issue, the ABA should create a hybrid, comprehensive model guideline that contains the black letter rule, ethical considerations that accompany each rule, interpretive commentary, and practice pointers with hypothetical scenarios. As states look to the ABA guidelines for guidance on how to draft their own ethical rules,¹⁵⁸ clearer rules, coupled with an incentive program to encourage states to adopt these rules in their entirety, would jumpstart consistency within the courts.

In addition, providing clear and detailed guidelines will enable attorneys to monitor their own representation and practice, which would prevent these troublesome suits in the first place.¹⁵⁹ Although attorneys should make clear and reasonable predictions as to the outcomes of a case from the very beginning of representation, clearer guidelines would benefit and assist those attorneys who unexpectedly find themselves in a sticky situation with their client.

CONCLUSION

For the practicing attorney, navigating through the ethics rules is made much more difficult by the lack of consistent and comprehensive explanatory ethical guidelines. Although attorneys are directed by their professional rules of conduct to focus on the client's wishes, practical experience and professional knowledge may point to a different path in the course of representation. Also, with the current system of scattered and inconsistent guidelines from the ABA and the states, attorneys face a potential ethical conflict with every new client—not only with the allocation of authority and withdrawal, but also with every aspect of the attorney-client relationship.

challenge for future code drafters is to find the right balance of specificity that will satisfy the needs of a complex world, while simultaneously achieving the generality and clarity that the public needs

Id.

158. See MODEL RULES OF PROF'L CONDUCT pmb1. (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

159. See generally MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt 1.

In order to provide a uniform and consistent model in keeping with the ABA's goals, change is necessary.¹⁶⁰ A new hybrid regulation model by the ABA, along with prompt, uniform adoption by the states of the complete package of both the model provisions and comments, will provide consistent and predictable guidelines for an attorney venturing too close to the edge of an ethical cliff.

160. See *ABA Goals*, *supra* note 12.