



Volume 26 | Issue 6

Article 2

1981

The Proposed Revisions of the Code of Professional Responsibility: Solving the Crisis of Professionalism, or Legitimizing the Status Quo

Mary Joe Frug

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>

 Part of the [Evidence Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Mary J. Frug, *The Proposed Revisions of the Code of Professional Responsibility: Solving the Crisis of Professionalism, or Legitimizing the Status Quo*, 26 Vill. L. Rev. 1121 (1981).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol26/iss6/2>

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1980-81]

INTRODUCTION:

THE PROPOSED REVISIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY: SOLVING THE CRISIS OF PROFESSIONALISM, OR LEGITIMATING THE STATUS QUO?

MARY JOE FRUG †

THIS YEAR THE LEGAL PROFESSION HAS BEEN OFFERED three proposals to revise the current rules regulating lawyer conduct.¹ In order to facilitate informed consideration of these proposals within the profession, the Editors of the Villanova Law Review invited distinguished representatives from each of the professional groups that have submitted suggested revisions to discuss the proposals. In this introduction to the Symposium that follows, my objective is to identify three issues that I think are germane to this endeavor, but which have not yet received candid and thorough attention. These issues are, first, why do members of the profession feel it necessary to revise the current rules now, only a dozen years after their adoption? Second, is this attempt at self-regulation politically or practically sound? And finally, how well, if at all, do the current proposals tackle the problems the revised rules should address? It is my thesis that the proposals to revise the profession's ethical rules have been prompted primarily by a crisis in the legitimacy of professionalism, a crisis that threatens to undermine the current role of the legal profession in the social order. I am skeptical that any attempt at self-regulation can solve a crisis of such proportions, and my skepticism is buttressed by the current proposals. The changes that have been proposed mask, rather than resolve, the crisis of professionalism,

† Professor of Law, New England School of Law, Boston, Massachusetts. At the time of her participation in this Symposium, Professor Frug was Professor of Law at the Villanova University School of Law.

1. The current code of ethics is the ABA CODE OF PROFESSIONAL RESPONSIBILITY (1979) [hereinafter cited as ABA CODE], which has been adopted in whole or in substantial part throughout the United States. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1976). The proposed revisions are the ABA's Commission on Evaluation of Professional Standards (Kutak Commission), MODEL RULES OF PROFESSIONAL CONDUCT (*Discussion Draft*, Jan. 30, 1980) [hereinafter cited as MODEL RULES]; the Roscoe Pound-American Trial Lawyers Foundation Commission on Professional Responsibility PUBLIC DISCUSSION DRAFT, THE AMERICAN LAWYER'S CODE OF CONDUCT (June, 1980) [hereinafter cited as ATLA CODE]; and the National Organization of Bar Counsel, REPORT AND RECOMMENDATIONS ON STUDY OF THE MODEL RULES OF PROFESSIONAL CONDUCT (August 2, 1980) [hereinafter cited as NOBC REPORT].

presumably in a deliberate effort to preserve the status quo for the legal profession.

I. WHY IS THE PROFESSION REVISING ITS CURRENT RULES?

Professionalism may be defined as role-differentiated behavior, reinforced by ethical, political and psychological attitudes considered particularly appropriate to accomplish the specialized tasks of a group's work.² While many factors, including education, peer socialization, client expectations, and one's own moral universe, contribute to an individual's sense of professionalism, a code of ethics plays a major role in announcing, enforcing, and legitimating conduct that would be considered inappropriate in one's non-working role.³ Thus, the problems that are found in a profession's code of ethics may signal similar problems in the profession itself. Correspondingly, any disagreement about the problems to be solved in the profession would have serious implications for any proposed ethical reforms.

In my opinion, the reason for the revision of the current Code is the same as the reason for its adoption in 1969, in place of the Canons of Ethics, and the reason for the adoption of the Canons themselves in 1908. Historically, the profession can trace the development of each of its formal codes to a crisis of the social order and the complicity of lawyers in that crisis.⁴ Thus, the Canons grew out of the revolt against unregulated industrialization in the United States. Public attention was focused on the vigorous efforts lawyers were making to help their corporate clients evade regulatory legislation, forcing lawyers to adopt in self defense a body of ethical rules.⁵ Similarly, consideration of the current Code of Professional Responsibility was initiated in 1964, when mounting dissatisfaction with inequality in the social order and the inadequacies of our justice system began to include criticism of lawyers for their efforts to preserve the status quo.⁶ In each

2. An illuminating discussion of the concept of role-differentiation is found in Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975). For discussions of the characteristics of a profession, see W. MOORE, *THE PROFESSIONS: ROLES AND RULES* 9-16 (1970); Parsons, "Professions," in 12 ENCYCLOPEDIA OF SOCIAL SCIENCES 536 (1968).

3. For a discussion of factors which cause an individual to identify with his profession, see Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735 (1978); Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111 (1978).

4. See J. AUERBACH, *UNEQUAL JUSTICE* 40-42, 285-88 (1976).

5. *Id.* at 40-42.

6. *Id.* at 285-88; Auerbach, *What has the Teaching of Law to do with Justice?*, 53 N.Y.U. L. REV. 457, 463 (1978).

case the profession adopted new ethical codes when society became unwilling to condone behavior by lawyers that it had declared inappropriate for non-lawyers. In each situation the new ethical code excused what lawyers were doing by demonstrating, in written form, that their conduct was required by the special rules of the profession. It wasn't that lawyers especially liked Robber Barrons, recalcitrant schoolboards, or the Ku Klux Klan, but even despicable individuals have a right to at least "one champion against a hostile world."⁷ Their codes said so.⁸

Neither code fully articulated a theory that explained why the particular legal order required role-differentiated conduct for lawyers, although theories have since been suggested that attempt to defend the special rules.⁹ Moreover, neither the Canons nor the Code of Professional Responsibility was responsive to the social crisis from which each originated. The Canons did not require corporate lawyers to mitigate their zealous efforts on behalf of their clients, but cracked down hard on the unrelated, though questionable practices of individual lawyers — "ambulance chasers" and the like.¹⁰ Similarly, the Code of Professional Responsibility did not require lawyers to reform the social order, but very gingerly and niggardly allowed lawyers to work for equal justice, as long as they complied with a number of inhibiting restrictions.¹¹ Each new code, however, warded off fundamental changes in the underlying social order by adopting a new set of rules that not only diverted attention from the crisis that had prompted rule reform but relied on an unarticulated vision of a special role of lawyers in supporting the current legal order.¹²

7. M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 4 (1975).

8. ABA CODE, *supra* note 1, EC 2-26, EC 2-27, EC 2-28; DR 7-106(c)(4). See generally Simon, *The Ideology of Advocacy: Justice and Professional Ethics*, 1978 WIS. L. REV. 30.

9. E.g., Fried, *THE LAWYER AS FRIEND: THE MORAL FOUNDATION OF LAWYER CLIENT RELATION*, 85 YALE L.J. 1060 (1976). For an overview of plausible theories, see generally Simon, *supra* note 8. Working out a theory of legal professionalism is an ongoing effort among scholars. See, e.g., Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Kaufman, *Book Review*, 94 HARV. L. REV. 1504 (1981).

10. J. AUERBACH, *supra* note 4, at 42-44.

11. E.g., ABA CODE, *supra* note 1, DR 2-101, DR 2-102 (rules restricting distribution of information about legal services), DR 2-103(D)(4) (restricting group sponsored distribution of legal service), DR 5-103 (restricting lawyer contribution to litigation cost).

12. William Simon provides a fascinating and thorough articulation of this vision and the correlated view of law on which it relies. Simon, *supra* note 8.

The crisis in the social order that gives rise to current attempts to revise the Code is comparable in some respects to the issues that gave rise to the Canons and Code — lawyers are under attack for their amorality.¹³ Why should lawyers representing a criminal defendant fail to tell parents of missing children that they know where the children's bodies are located.¹⁴ Why should a lawyer help a rich client resist paying a debt to a poor lender?¹⁵ What moral arguments can a lawyer make to justify results that seem immoral? Formerly, lawyers have been able to justify conduct that would seem wrong if undertaken by non-lawyers by linking their role-differentiated conduct to the vindicating requirements of the law. The current crisis in the legitimacy of professionalism, however, is an unwillingness to excuse lawyer conduct on the professional rationale that the group's special relationship to the legal order requires such conduct. In my view, such unwillingness is rooted in a deep dissatisfaction with the legal order itself.

Unlike the crises that prompted earlier rule changes, the current crisis is not limited to a single question of social reform. Widespread criticism abounds of most of our major institutions today. Government services, such as the public schools and administrative regulation, not only fail to meet expectations but seem worse than they used to be. Private institutions, from the flailing automakers to the American family itself, seem progressively inefficient and corrupt. In the past, the legal order has been partially immunized from criticism of social institutions because of a protective aura of neutrality. But we are now in a critical period of legal history in which the law is losing its claim to neutrality and

13. E.g., J. LIEBERMAN, *CRISIS AT THE BAR* (1978). Acknowledging that many observers attribute public contempt for lawyers to the fact that they have failed to abide by their own, self-professed principles, Lieberman contends instead "that the public contempt for lawyers stems rather from their adherence to an unethical code of ethics", a thesis which he sets out to prove in his book. *Id.* at 15-16.

14. This question arises from the facts of a widely celebrated incident in Lake Pleasant, New York. Lawyers who had learned that their client had committed murders other than that of which he was accused and for which the attorneys were representing him, refused to answer questions from one of the additional victim's parents when they came to the lawyers seeking information about their missing child. These lawyers' staunch protection of the client's confidence was authorized by the Code *supra* note 1, in DR 4-101, and was vindicated by the courts when New York prosecutors brought an action claiming that disclosure was mandated by a state public health law requiring that deaths be reported. *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd mem.*, 50 A.D.2d 1088, 276 N.Y.S.2d 771 (1975), *aff'd per curiam*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

15. This question arises from the facts of the case of *Zabella v. Pakel*, 242 F.2d 452 (7th Cir. 1957), *cited in* Fried, *supra* note 9, at 1064, n.13. *Zabella* is discussed in Postema, *supra* note 9, at 66.

certainty.¹⁶ The legal order is increasingly accused of sustaining, cultivating, and nourishing our festering institutions.¹⁷ Lawyers, therefore, who help these institutions navigate their course through the supporting legal structure are inevitably included in the public's mounting criticism. Thus, the crisis in the legitimacy of professionalism that I believe is prompting current efforts to revise our Code consists of the failure to believe that the laws require special rules of conduct for lawyers, a failure that derives from a collapse of confidence in the laws themselves.

In order to alleviate such a crisis, lawyers would need to draft rules articulating with heretofore unprecedented specificity the nature of a lawyer's special relationship to the law. Moreover, until lawyers could persuade themselves and others that the laws and the legal processes that they serve are morally defensible, they would not be able to justify their special rules of conduct. Consequently, in order to surmount the crisis in the legitimacy of professionalism, lawyers would also need to accomplish the Herculean assignment of addressing grave issues within the legal order which are troubling lawyer and non-lawyer alike, issues such as the nature of equality and of justice.

Twice before, the profession has defused criticism of lawyer conduct stemming from dissatisfaction with an aspect of the social order by formulating fresh articulations of the same old rules. Such diversionary, apologetic tactics have shored up the profession and averted change in the social order. There is some indication that a similar strategy is under way again in the current revision efforts. Evidence for such a strategy can be found in the radically narrow way some define the nature of the crisis that demands revision of the current Code.

This narrow view is that the Code of Professional Responsibility is in need of revision simply because of its widely noted failure to shoulder its responsibility to announce and enforce the elements of legal professionalism. The crisis of professionalism, in this view, is a weakened sense, among individual lawyers, of what conduct is expected of them in their work and a corresponding drop in the profession's strength and respectability.¹⁸ Once the prob-

16. R. UNGER, *LAW AND MODERN SOCIETY* 192-223 (1976).

17. See G. FRUG, *The City As A Legal Concept*, 93 *HARV. L. REV.* 1059 (1980); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205 (1979).

18. The Chairman of the ABA Commission which has promulgated the Model Rules has advanced this view. Kutak, *Proposed Model Rules of Professional Conduct*, 36 *BUS. LAW.* 573, 574-76 (1981).

lem is so defined, it is not hard to find plausible evidence to document it.

For example, the first decade of the Code's existence has been marked by an unprecedented series of judicial decisions that have invalidated rules restricting lawyers' abilities to charge less than set minimum fees,¹⁹ to advertise,²⁰ to talk to the press about ongoing cases,²¹ to solicit clients,²² and to monopolize the delivery of legal services.²³ As long as these individual rules are not replaced, the Code's ability to guide lawyers' conduct is diminished.

Other aspects of recent history have also exposed deficiencies in the Code's informational and enforcement functions. Trying hard to disassociate from the lawyers who participated in Watergate and other abuses of public office,²⁴ the bar urged law schools to require ethical instruction for all law students, and many complied.²⁵ While requiring instruction in legal ethics moved the Code into academic respectability,²⁶ it also encouraged substantially increased scrutiny, yielding thus far a large body of legal literature which criticizes the Code's failure to provide rules that adequately address and resolve the problems of modern legal func-

19. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

20. *Bates v. Arizona State Bar*, 433 U.S. 350 (1977).

21. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

22. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). *But see In re Primus*, 436 U.S. 447 (1978). For a discussion of *Ohralik* and *Primus*, see Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 185 (1978).

23. *Oregon State Bar v. Gilchrist*, 272 Or. 552, 538 P.2d 913 (1975); *but see State Bar v. Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976); *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978).

24. See J. AUERBACH, *supra* note 4, at 299-306; Watson, *Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441 (1974) (linking Watergate to legal education in the adversary system). For an elegant essay gently deriding the attention Watergate focused on lawyers, see Freund, *The Moral Education of the Lawyer*, 26 EMORY L.J. 3 (1977).

25. See generally Pre-Conference Materials, 1977 NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY vii-xlvi (S. Goldberg ed. 1977) (survey of American Law schools and their treatment of legal ethics); M. KELLY, MONOGRAPH ON THE TEACHING OF ETHICS II, LEGAL ETHICS AND LEGAL EDUCATION (The Hastings Center, 1980). In 1974 the ABA amended its standards for legal education to include as a mandatory requirement preparation in professional responsibility, ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS 302(a)(iii), ratification reported in *Proceedings of the House of Delegates*, 60 A.B.A.J. 1207, 1213 (1974).

26. See generally M. KELLY, *supra* note 24. For a sampling of legal profession case books published after the ABA amended its accreditation standards, see, e.g., R. ARONSON, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1978); A. KAUFMAN, *supra* note 1; T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY PROBLEMS AND MATERIALS (1976); N. REDLICH, PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH (1976); M. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION (1979).

tions.²⁷ The Code's failure to offer guidance for counselors and negotiators and for lawyers working in bureaucratic settings has been noted.²⁸ Its failure to provide definitive solutions for common conflicts of competing rules has been widely discussed.²⁹

Neither informational deficiencies created by judicial invalidation of current rules nor the inadequacies in coverage exposed by recent academic work in professional responsibility are defensible. They weaken the profession's ability to achieve uniform and consistent role-differentiated behavior among its members. However, similar inadequacies in the informational capacities of ethical rules have never before been sufficient to galvanize the development of new rules.³⁰ More importantly, a reform effort that concentrates on eliminating inexactitudes, extending coverage, and mitigating apparent conflicts in the ethical rules serves as a ploy to avoid change in the present structure of legal services and to preserve the prevailing legal order.

II. IS SELF-REGULATION POLITICALLY OR PRACTICALLY SOUND?

Adopting a special set of rules to regulate its own members has long been a characteristic attribute of a professional group.³¹ The bar's current attempt to develop and approve new ethical rules might, therefore, appear to represent no more than the le-

27. A selective sampling of the vast amount of literature generated by the Code includes: Bellow & Kettleon, *The Problem of Fairness: Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Frankel, *Review, Code of Professional Responsibility*, 43 U. CHI. L. REV. 874 (1976); Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683 (1979); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

28. E.g., Marquis, *An Appraisal of Attorney's Responsibilities Before Administrative Agencies*, 26 CASE W. RES. L. REV. 285 (1976); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

29. Schwartz, *supra* note 28, at 669. See generally, G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978); Greenbaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L. REV. 285 (1976); Sevilla, *Between Scylla and Charybdis: The Ethical Perils of the Criminal Defense Lawyer* 2 NAT. J. CRIM. DEF. 237 (1976).

30. The gaps in the current Code are no more serious than earlier deficiencies. For more than one-and-a-half centuries prior to the 1908 Canons of Ethics, American lawyers got along without the specific guidance of model rules. Despite substantial changes in legal work created by the rise of the administrative state during the thirties, lawyers were left with as little guidance for their professional conduct as lawyers now have, but reform efforts were still unsuccessful. See *Preface*, 1969 FINAL DRAFT ABA CODE OF PROFESSIONAL RESPONSIBILITY reprinted in AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, xv-xvi (1979).

31. W. MOORE, *supra* note 2.

gal profession's natural exercise of its undisputed communal right of self-government. If so, the only serious question to consider regarding self-regulation would be which group, among those proposing code revisions, best represents the profession: the American Bar Association, the American Trial Lawyers Association, or the National Organization of Bar Counsel.

Even the question of which organization should speak for the whole profession in the revision enterprise is not an easy one. Although the American Bar Association drafted both the Canons and the Code of Professional Responsibility, it only represents approximately half of the nation's lawyers.³² Moreover, since the adoption of the Code in 1969, not only has the size of the profession doubled,³³ but the organization of law practice has been changed by the increased size of the groups in which lawyers work, and by the development of new forms of delivery mechanisms, such as legal clinics.³⁴ The increase in size and diversity of the legal profession makes it unlikely that any one organization can adequately speak for all lawyers.

More significantly, even if one of the organizations proposing reforms were able to claim legitimacy by persuading the appropriate authorities to adopt its revision, many lawyers would pay little attention to any of the changes which were not vigorously enforced. The efficacy of an ethical code is related to the cohesion of the professional group and the influence the organization has on its individual members.³⁵ The more closely individuals identify with a professional group, the more they are likely to accept and internalize the group's rules as standards without the necessity of exercising enforcement procedures and sanctions.³⁶ Conversely, the more individuals feel alienated and separate from their professional group, the more they are likely to view the group's standards as rules which "they" are imposing on the individuals. Thus, the very existence of competing organizations seeking to articulate standards for the profession as a whole, coupled with the tenuous

32. In 1979, outgoing ABA President S. Shepard Tate reported ABA membership at 250,000. 65 A.B.A.J. 1133 (August, 1979). The 1977 lawyer and judge population was 462,000. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 419 (1978).

33. See Schwartz, *The Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1269-71 (1980).

34. *Id.* at 1270-77.

35. E. DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 6-8 (C. Brookfield trans. 1958).

36. *Id.* at 7-9.

nature of the members' allegiance to those various organizations, suggests that effective self-regulation is not a practical possibility.

This weakness in the legal profession's capacity for self-regulation is not new. Indeed, because of the legal profession's obvious ties to the legal system, its attempts at fully autonomous self-discipline have always been limited by participation of the courts and the legislatures in the regulation of lawyer conduct. Because the involvement of lawyers is crucial to the courts' operation, lawyer qualifications and conduct are considered subject to the judicial branch's inherent authority to protect its own functioning, its dignity, and its existence.³⁷ Accordingly, in most jurisdictions, the legal profession's ethical rules are adopted by and enforced through sanctions imposed by the highest court of the particular jurisdiction.³⁸ In addition, state legislatures have enacted legislation purporting to authorize courts to adopt rules regulating lawyer conduct, such as the Code of Professional Responsibility,³⁹ and have also enacted legislation regulating such aspects of law practice as advertising and solicitation of clients.⁴⁰ Thus, the profession has traditionally been limited in its powers of self-regulation by governmental controls on the bar imposed by judicial and legislative action. Historically, the bar has provided both the incentive for adoption and the substantive content of these regulations. However, during the past decade, legislative regulation of lawyers has substantially increased⁴¹ and judicial supervision of professional conduct has proved less susceptible to the bar's influence.⁴² The increase in independent government regulation has significant implications for the profession's expect-

37. Comment, *Separation of Powers: Who Should Control the Bar?* 47 J. URB. L. 715 (1969); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law*, 60 MINN. L. REV. 783, 785 (1976).

38. See ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 10-23 (1970).

39. See Note, *supra* note 37, at 798.

40. 1979 AM. B. FOUNDATION RESEARCH J. 180-82.

41. See, e.g., G. HAZARD, *supra* note 29, at 16-17; Tunney & Frank, *Federal Roles in Lawyer Reform*, 27 STAN. L. REV. 333 (1975).

42. For an example, compare the lengthy recommendations for amending the Pennsylvania Code of Responsibility's advertising regulations in which the Philadelphia Bar Association suggested adoption of ABA proposal B, set out in REPORT OF THE ABA PROPOSALS TO AMEND CANON 2 OF THE CODE OF PROFESSIONAL RESPONSIBILITY, AND RECOMMENDATIONS OF THE PHILADELPHIA BAR ASSOCIATION TO THE SUPREME COURT OF PENNSYLVANIA, as amended, September 28, 1977, with the rules adopted without comment by the Pennsylvania Supreme Court, reported in 7 PA. BULL. 1269 (1977). (A copy of the Philadelphia Bar Association's Report is on file in the Villanova Law Library).

tations regarding self-regulation, for it not only has directly diminished the profession's control over its own members, but it has conditioned lawyers to look beyond the profession's own rules to other sources for complete guidance in matters of conduct.

These limits on the legal profession's ability to engage in self-regulation are based on the inherent difficulties in any attempts at self-government. At least three reasons traditionally have been offered to justify self-regulation. First, self-regulation historically has furthered the economic monopoly that the bar, like other professions and their guild predecessors, has characteristically maintained.⁴³ Second, self-regulation has restricted the task of judging a lawyer's exercise of specialized knowledge to those who are familiar with the information and skills involved.⁴⁴ Finally, self-regulation has reinforced the profession's identity by differentiating its members in their professional capacity from the rest of society.⁴⁵

I cannot say whether there is a consensus among members of the legal profession which supports these objectives today. I doubt it. It is clear, however, that many non-lawyers have begun to oppose the profession's economic protectivism, just as they increasingly object to concentration of power in the federal government and in giant corporations. Moreover, consumers of legal services have begun to assert an interest in influencing decisions about the delivery of these services that parallels the claims they are asserting more generally to participate in decision-making elsewhere in society.⁴⁶ Finally, the crisis of professionalism discussed above indicates that both lawyers and non-lawyers are increasingly unwilling to permit the profession, through self-regulation, to stand apart from the standards society establishes for itself.⁴⁷

It may be that social pressures opposing self-regulation are no greater than they have been before, and that adopting a new code will convince people, as it has in the past, that the profession is adequately patrolling its own borders. But the legal profession's ability to ward off regulation by outsiders, if it still exists, cannot excuse lawyers from confronting the problems of continued self-regulation. The questions posed by the revision of

43. See, J. LIEBERMAN, *supra* note 13, at 68-106.

44. See *id.* at 218.

45. See *id.* at 45-54.

46. See Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619 (1978).

47. See Simon, *supra* note 8.

the rules affecting lawyer conduct should raise issues in which all society has a legitimate interest — questions such as how the delivery of legal services can be altered so that justice is no longer predicated on the amount of money spent, or how the legal system can be restructured to eliminate procedural injustice.

Like non-lawyers, many lawyers are offended by the perversion of representative democracy that occurs when a special interest group is able to exercise disproportionate influence to lobby proposed legislation into law. It is no less offensive for an organization that does not claim all lawyers in its membership to persuade the judiciary to adopt its revision of rules regulating lawyer conduct. Since these rules determine how lawyers serve their clients, and since how lawyers serve their clients in turn influences the structure of society, it would seem apparent that the issues involved in the revision project deserve consideration and deliberation by a wider portion of society than the current attempt at self-regulation permits.

III. EVALUATING THE PROPOSED REVISIONS

In the Symposium that follows this essay, able representatives of the American Bar Association⁴⁸ and the Roscoe Pound-American Trial Lawyers Association,⁴⁹ as proponents of two new code proposals, concentrate their debate on the manner in which their suggested ethical codes attempt to resolve the fundamental conflict lawyers experience between a duty of confidentiality to their clients and a duty of candor toward the courts. This issue generates such controversy that it can easily foreclose a thoroughgoing evaluation of the proposed revisions in their entirety as well as consideration of the objectives the revisions seek to further. But even analyzing how each revision treats this one particular issue reveals the apologetic nature of each proposal.

In their suggested code, the American Trial Lawyers assume that whoever serves a client by preserving his confidences automatically and unavoidably serves the court. That's the adversary system as the American Trial Lawyers view it, and they don't want to change it. Professor Freedman even asserts it would be

48. McKay, *In Support of the Proposed Model Rules of Professional Conduct*, 26 VILL. L. REV. 1137 (1981).

49. Freedman, *The Kutak Model Rules v. The American Lawyer's Code of Conduct*, 26 VILL. L. REV. 1105 (1981).

unconstitutional to change it, arguing that a client's right to effective assistance of counsel would "whipsaw" his right not to incriminate himself if his lawyer were permitted or required to reveal certain confidences.⁵⁰ This argument stoutly ignores the indeterminacy of the constitutional rights on which it relies;⁵¹ it assumes that the proper role of a lawyer is to be her client's tool and then defines the constitutional right to a lawyer's assistance to be consistent with that assumption. The American Trial Lawyer's proposed code thus solves the crisis in the legitimacy of professionalism by denying it. Their code reaffirms the necessity for lawyers to behave differently from non-lawyers, relying on a rationale of the client's need for professional loyalty. Their confidence that such a system would redound to the public benefit itself relies on a formalistic view of the nature of law. Lawyers, according to the ATLA code, must act the way they do because the law commands them to do so.

Unlike the American Trial Lawyers Association, the American Bar Association in its code proposal implicitly acknowledges a crisis of professionalism, but its efforts to mitigate the crisis consist primarily of several proposals to extend the ethical rules to cover relationships and aspects of law practice that are omitted in the Code of Professional Responsibility. Thus, the ABA's Model Rules discuss situations where the demands of client loyalty are uncertain, specifying a lawyer's duties when her client is an organization rather than an individual,⁵² a lawyer's duty to a client who suffers a disability,⁵³ and the responsibilities of a lawyer acting in either a supervisory⁵⁴ or a subordinate capacity to another lawyer.⁵⁵ Rules are also proposed to regulate a lawyer's conduct towards a client outside of a trial, such as when she advises⁵⁶ or evaluates a matter for a client,⁵⁷ when she is engaged in negotia-

50. *Id.* at 1171-72.

51. *See, e.g., Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-86 (1977); *see also Hazard, An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1961 (1978).

52. MODEL RULES, *supra* note 1, Rule 1.13.

53. *Id.* at Rule 1.14.

54. *Id.* at Rule 7.2.

55. *Id.* at Rule 7.3.

56. *Id.* at Rule 2.4.

57. *Id.* at Rules 6.1, 6.3.

tions,⁵⁸ when she acts as intermediary between parties,⁵⁹ and when she serves as an advocate in a non-adjudicatory proceeding.⁶⁰ Similarly, changes in the structure of law practice are acknowledged and addressed by a new non-regulatory approach to advertising⁶¹ and solicitation,⁶² and by condoning professional relationships between non-lawyers and lawyers.⁶³

Including more lawyers and more of their activities under the umbrella of the profession's ethical rules may ameliorate the alienation which many lawyers have experienced from their profession. This in turn could discourage criticism within the profession that contributes to the lack of confidence in the professionalism rationale, and it could dissuade lawyers from abandoning self-regulation. However, these changes, by concentrating on the informational problems of the current Code, neglect the more serious issue of the Code's inability to defend role-differentiation.

The ABA does attempt to deal with some of the concerns which provoke non-lawyers about the profession, proposing, for example, a series of rules which invigorate a lawyer's obligation to consult fully and openly with her client in a wide range of matters.⁶⁴ Concerns that, under current rules, lawyers can exploit their special knowledge of the laws to the disadvantage of the courts are also addressed through new rules that strengthen a lawyer's obligation to expedite, rather than delay litigation,⁶⁵ and to exercise diligence in law practice.⁶⁶ These outwardly focused changes in the ABA's proposed rules, if adopted, might avoid both further consumer pressure to intervene in the profession's self-government processes and increased judicial or legislative regulation. However, as with the informational changes discussed above, none of the changes confronts the crucial issue undermining legal professionalism — the claim that lawyers act amorally by pursuing technically lawful client objectives which society considers immoral.

58. *Id.* at Rule 4.2.

59. *Id.* at Rules 5.1-5.2.

60. *Id.* at Rule 3.12.

61. *Id.* at Rule 9.2.

62. *Id.* at Rule 9.3.

63. *Id.* at Rules 7.4-7.5.

64. *Id.* at Rule 1.4 (Adequate Communication); Rule 1.6 (Fees); Rule 1.9 (Prohibited Relationships Affecting a Lawyer and Client); Rule 4.1 (Disclosures to a Client During Negotiations).

65. *Id.* at Rule 3.3.

66. *Id.* at Rule 1.5.

The American Bar Association flirts with the disparity between the law and morality that constitutes a major part of the crisis in the legitimacy of professionalism. Unlike the American Trial Lawyers Association, the ABA does not hide its head in the sand by absolutely implying that all lawful objectives are moral. It acknowledges that this is not so, by permitting a lawyer to act according to his or her own sense of what is right in several significant instances. But there is very little support for the lawyer's decision to act morally in the ABA's proposed rules. There is no general requirement that a lawyer should serve justice over law.⁶⁷ Nor is there any suggestion how reliance on individual morality, no matter what it might be, will strengthen the ethical foundation of the profession's conduct.

The ABA's evasion of the basic ethical problems confronting lawyers can be demonstrated by returning to the issue of the conflict between honoring a client's confidence and protecting the integrity of the court. Although the ABA proposal forbids lawyers from offering false evidence to a tribunal in a civil matter and purportedly requires them to violate a client's confidence in order to rectify such an offering,⁶⁸ critical exception is made for the lawyer representing a defendant in a criminal case.⁶⁹ In this instance, the ABA declines to resolve the crucial issue, stating that a lawyer must comply with a client's request to offer false evidence if "applicable law requires."⁷⁰ But the law is uncertain.⁷¹ Thus, individual lawyers are permitted to reveal a client's confidence in order to fulfill a higher duty to the court and they are also permitted to balance the question in favor of the client. In either case, absent guidance from their profession on how to make this

67. *E.g.*, Rule 1.16, regulating termination of representation, requires termination if the lawyer's conduct is illegal, but only permits termination if the client's conduct is illegal or unjust; Model Rule 2.2 permits, but does not require, a lawyer to discuss moral and ethical considerations relevant to a client's concerns "unless it is evident that the client desires advice confined to strictly legal considerations." *Id.* Model Rule 2.4 requires a lawyer to "warn" a client contemplating conduct with "serious legal consequences" but this duty too is mitigated if the client "expressly or by implication asks not to receive such advice." *Id.* Model Rules 3.5 and 3.6 introduce regulations for conduct of lawyers in *ex parte* proceedings or proceedings in which the adversary is unrepresented, but both rules adopted the law rather than the individual's sense of justice as the guiding standards.

68. MODEL RULES, *supra* note 1, at Rules 3.1(a)(b).

69. *Id.* at Rule 3.1(f)(1), (3).

70. *Id.*

71. *See* note 51 and accompanying text *supra*.

decision, lawyers can rely on their profession's ethical rules to disguise their choice as "law".

The ABA would also permit lawyers to reveal a client's intent to commit a "deliberately wrongful act,"⁷² allowing individuals to avoid the guilt that role differentiated behavior might have brought them, were they to follow the profession's confidentiality rules, as well as promoting greater public trust in the morality of some members of the profession. However, as Professor Freedman astutely observes, once clients know that a conscientious lawyer does not protect confidences, those confidences may either be withheld or they may be taken to someone the clients can trust.⁷³ Making morality discretionary rather than mandatory thus places an economic and professional price tag on one's ethical decisions. Since only lawyers who can afford to alienate future clients will also be able to afford this newly permitted morality, the permission the Model Rules grant is likely to be more illusory than real.

It might be argued that under the current Code of Professional Responsibility a lawyer's duty to represent a client zealously is so exacting that a lawyer could exercise his individual moral judgment only at his peril. Under the proposed ABA revisions, the lawyer would be assured that the cost of exercising that moral judgment would not include his disbarment or censure by his peers. Taking this view of the current Code might make the ABA revision seem like a step forward. It at least avoids the path taken by the American Trial Lawyers, whose proposed revision of the Code exacerbates the crisis of professionalism by denying its existence. But the American Bar Association's revised rules seek not to solve the crisis of professionalism, but to defuse it by fostering the impression that the profession has once again vigorously improved itself. Indeed, the Model Rules carefully correct some of the ambiguities and omissions of the Code of Professional Responsibility. Moreover, the ABA's revisions come in a document, carefully and moderately written, full of beguiling promises that the profession exalts competence and service. Under the Model Rules, individual lawyers who could afford to break away from group custom and practice would be liberated to do so, leaving those lawyers in the profession unable to afford the price of individual ethics, as well as those who prefer the status quo, free to continue in the present course. Because the Model Rules camouflage the crisis of profes-

72. MODEL RULES, *supra* note 1, at Rule 1.7(c).

73. Freedman, *supra* note 49, at 1171.

sionalism, they would also leave the legal structure the profession serves less threatened than before by the possibility of change.

The Symposium that follows presents an opportunity to examine differences among the proposed revisions of the ethical rules. It also, however, may lead one to acknowledge the shortcomings of each proposal. In such case, the Symposium may also offer an opportunity to begin to consider ways of achieving changes in the profession significant enough to resolve the crisis of professionalism.