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Code of Ethics Revisited

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by Professor William I. Weston

Over two years ago, I filled these pages with an analysis of the newly-approved Model Rules of Professional Conduct for Maryland which had been adopted in April of 1986 by the Court of Appeals of Maryland. (17.1 U. Balt. L. Forum 31 (1986)). Although disciplinary actions involving the Model Rules have only recently begun to appear in the Advance Sheets, the application of the Model Rules to the everyday practice of law has already been felt. Despite the absence of court decisions, lawyers are determining the parameters of their conduct by the Model Rules. Another look at some of the Rules, therefore, may be of value.

The first provision which has impacted upon the practitioner with significant force is Rule 1.5 dealing with fees. Although the language waffles a bit, the intent is to place on the individual attorney the burden of implementing a fair and reasonable system of charging fees which he must communicate to the client in such a way that the client comprehends and agrees to the system. Although Rule 1.5 draws a dichotomy between the new client and the former client, the burden is the same. At a minimum, whether the client is an existing one or a new one, the lawyer should present a written document which spells out the method by which the fee will be charged, the time frame during which the fee is to be charged, the services which are included and excluded, and the obligation(s) as to costs and monies due at the outset. It is shortsighted for a lawyer today to deal with any client without a written fee document.

An additional concern, also found in Rule 1.5, is whether the lawyer may consider the results of his representation of the client in setting his or her fees, (hereinafter referred to as "result orientation"). Increasingly, lawyers for both defendants and plaintiffs are abandoning the traditional approach of the hourly rate in favor of a combination of hourly rate and result orientation. The consideration of results obtained in setting a fee is permitted by the Model Rules — as long as the total fee is reasonable. Although there are some situations in which result orientation rewards competence and hard work above and beyond the ordinary, there is legitimate concern that result orientation will become the normal and accepted way of setting fees. Moreover, the use of result orientation in setting a fee brings into clash the words of the Model Rules and the concepts of professionalism. The danger in such an approach is that result orientation gives the lawyer a piece of the action. Instead of maintaining an objective and detached view of the case, the lawyer becomes an interested party, protecting his or her own interests as much as that of the client. The lawyer must serve as the facilitator of the entrusted legal matter and not as the dealer in a card game.

The incentive to achieve a good result should exist irrespective of the financial gain; and, if there is any extraordinary gain, it should benefit the client. Rule 1.5 says the lawyer is entitled to a reasonable fee for his or her efforts. There is nothing wrong with a lawyer being paid a reasonable bonus for an extraordinary achievement. The major beneficiary of a positive result, however, should remain the client.

Fees charged and collected under Model Rule 1.5 for the referral of a client continue to be a serious concern to lawyers and to the Bar. Pennsylvania and Texas have modified their version of the Model Rules to permit charging and collecting a referral fee. Maryland does not permit collection of referral fees. The rule prohibiting referral fees comes from a combination of the rules governing reasonable fees and lawyer responsibility. A lawyer who is not responsible for the case or who has not shared in the work involved in the case is not entitled to share in the fee collected. To do so would render the fee unreasonable. For example, if the second lawyer may pay the first lawyer up to one-third of the fee collected only for the act of referring the case, without any work or responsibility, then the fee being charged the client is too high - probably one-third too high. According to the Supreme Court, lawyering is in the free flow of commercial information (*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)); however, nothing in the Supreme Court opinion(s) suggest that professionalism and the placing of the client ahead of the greed of the attorney are inconsistent with commercial activities by an attorney.

The second provision of the Model Rules which is troublesome is Maryland's version of Model Rule 1.6. Specifically, section 1.6 (b)(1) and (2) provide that a lawyer "may" reveal information which the lawyer believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes will result in death, substantial bodily harm, or substantial injury to the financial interests

or property of another. ("Information" is the new term of art replacing "confidences" and "secrets" in the old Model Code). Subsection (2) allows the lawyer to reveal information to rectify the consequences of the client's criminal or fraudulent act.

While the goal of revealing information to avoid bodily harm or economic harm is noble, the vehicle chosen is incorrect. The terms are ill-defined and unclear. What, for example, is a fraudulant act? Is the act violative of criminal fraud, civil fraud, or some yet-to-be-defined notion of fraud? What is "substantial injury to the financial interests of property of another?" From what perspective is that phrase drawn and, if it is from the lawyer's perspective, how does he or she have the information necessary to make a conclusion that "another" is to undergo substantial injury to his or her financial interest of property.

Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) was a case where it was necessary to reveal information to "another." There, a psychologist failed to take sufficient steps to warn his patient's girlfriend that the patient intended to kill her. The fact that the psychologist contacted the campus police did not extricate him from his responsibility to the third party. In the case of possible death or bodily harm, the decision to reveal information is a bit easier to make and the stakes involved do demand a balanced approach. When considering economic harm, however, the risks to the attorney are enormous.

For an attorney to believe that he may break the most sacred of his fiduciary duties, confidentiality, to avoid the occurrence of this type of economic injury constitutes a lack of understanding of the nature of his duties. Only in the most compelling circumstances should an attorney reveal information. Possible economic harm can never be equated to serious bodily injury or death and, hence, should not give an attorney ground for disclosure. In addition, the attorney is placed in the position of making all of the judgment. He "may" reveal the information that he "reasonably believes" is necessary to avoid death or the economic harm which he "believes" will result. Upon reading the language in Rule 1.6, one understands why no other state has chosen to adopt the strict version of this rule.

Rule 1.6 is impossible to apply and to enforce and it gives the attorney no guidance as to how to determine what he or she may reveal. When faced with the alternatives of revealing information to prevent serious economic harm and the potential of a malpractice and/or grievance action, the reasonable attorney will opt for silence. Maryland does not recognize the holding in *Tarasoff, supra; see Shaw v. Glickman,* 45 Md. App. 718, 415 A.2d 625 (1980). Thus, the potential liability for failure to disclose is not present in Maryland. It is well-intentioned for a lawyer to desire to reveal conduct which would result in serious economic harm, however, the risks, burdens, and lack of guidance implicit in this section make the revealing of this type of information impossible.

The third provision which has undergone further analysis since last year is Rule 7.1 relating to advertising. The most recent case addressing this issue is *Shapero v. Kentucky Bar Assoc.,* ____ U.S. ____, 108 S. Ct. 1916 (1988) Although *Shapero* dealt with targeted direct mail advertising, the language of the decision moves away from the Bar's attempt to limit advertising beyond what is inherently misleading or deceptive in fact. In *Shapero,* the attorney had applied to the Attorney Advertising Commission for permission to send a letter to persons he believed had had foreclosure suits filed against them. The Commission did not find the letter to be offensive, but did rule that a letter sent to people in need of an attorney's services was not constitutionally protected speech. The Kentucky Supreme Court affirmed the decision; but the United States Supreme Court reversed. The Court further ruled that the letters were not overwhelming so as to put pressure on the recipient and, in fact, no form of written communication presents that type of danger.

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Although advertising will be subject to review by the courts through the Attorney Grievance Commission, the clear message of the Court is that advertising is protected commercial speech and regulation of it by the states must be limited to those situations where the advertising is misleading or deceptive. The Court of Appeals of Maryland in *Attorney Grievance Comm'n v. McCloskey,* 306 Md. 677, 511 A.2d 56 (1987) required that proof of misleading evidence must be clear and convincing and that someone has actually been misled.

The purpose of advertising is to bring to the public's attention the availability of legal services and to make them aware of legal rights which may be afforded to them. There is, therefore, an important public component to advertising which cannot be lightly dismissed. That public component, coupled with constitutional guarantees regarding commercial speech, render proscriptions regarding advertising by the Maryland Bar or any bar very limited. Moreover, of the types of advertising which are least intrusive and hence subject to less scrutiny, newspaper advertising will receive greater protection than will television advertising.

Many lawyers object to advertising on the grounds of dignity, professionalism, and the actual content of the advertisement. The concept of advertising does not mean that all advertisements are palatable to all people. Like most other types of protected speech, however, the right of the speaker overcomes issues of dignity and professionalism. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985). Perhaps it is time for the Bar to retreat from its efforts to draw a bright line regarding advertising and to commence affirmative acts to encourage quality, competent, and clear advertising which is clearly within the spirit and letter of Model Rules 7.1-7.3.

The fourth provision of increasing concern today is Rule 3.1 and its application concerning frivolous claims. This rule is the successor to Disciplinary Rule 7-102 (A)(1) of the old Code. Model Rule 1.3 approaches the issue of frivolous claims from the perspective of good faith by stating that the lawyer should not move forward on a case absent the existence of a good faith argument in support of the client's position. This is a significant improvement over the predecessor Disciplinary Rule which defined the issue of frivolous claims by the "purpose behind the litigation." The purpose could not be to harass or injure another. The prior Model Code reviewed frivolous claims from the perspective of the attorney ("if the lawyer knows or it is obvious"), rather than the more sound approach (an objective standard) taken by the Model Rules.

Rule 3.1 has not been the subject of litigation. In light of the increasing

application of Maryland Rule 1-341, however, which "punishes" attorneys for bringing a case without substantial justification, the wisdom of the need for both rules is in question. Rule 1-341 gives to the trial judge broad powers to determine, after the fact, whether the case is "frivolous." The increasing misapplication of the rule by judges on their own motion, however, is problematic. In addition, the application of this rule obligates the "offending attorney" to expend considerable time and expense fighting the allegation(s) and often having to appeal them. All of this is conducted without the protections afforded by the Attorney Grievance Commission and Rule 3.1.

It is without question that there are frivolous cases and attorneys who bring matters without substantial justification. Model Rule 3.1, however, provides more than adequate protection to the court and the legal system in a controlled setting, guaranteeing constitutionally protected liberties. There are dangers if the same judge who is hearing or has heard the case also is assigned to determine if the case was "frivolous." Moreover, that judge makes his or her decision without the opportunity of cool reflection and detachment as provided by the Commission. No one benefits from the continuing and broad application of Rule 1-341 in lieu of the existing Model Rule.

The final provision concerning ethical conduct facing lawyers today is the application of Model Rule 6.1 concerning pro bono service. Without belaboring an already well-covered topic, the language of the Rule already provides a vehicle for public service. Two things are needed for better successes in this area: first, increasing public awareness of what is already provided by attorneys and, second, a lawyer awareness program to increase the delivery of pro bono services. The reality is that most lawyers already provide some type of pro bono legal services. These services could be done by not billing a client, or by accepting cases from legal services agencies. Attempts to expand the language and meaning of Rule 6.1 will not alter the current commitment of attorneys to the delivery of legal services.

The extent and application of the Model Rules of Professional Conduct will be realized to a greater degree over the coming year as the Court of Appeals of Maryland is called upon to interpret specific language. The Model Rules do address many of the linguistic problems that its predecessors had. This is significant. What is needed now are cautious, detached reviews of the provisions which are being applied to specific cases so that the modifications which occur to the plain meaning of the written words do not result in a document substantially different from that originally approved.

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