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The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?

FOREST J. BOWMAN*

After barely a decade under the Code of Professional Responsibility, the American legal profession has been presented with a proposed new ethical Code. Since the decade of the Code of Professional Responsibility included the Watergate scandal, the opening up of the legal profession to advertising, the beginnings of one-on-one solicitation and attacks against the profession from all quarters of our society, including the President of the United States, it behooves us to look carefully at any proposal which seeks to improve lawyers' ethics.

The proposed new Code is the product of four years of effort by the ABA's Commission on Evaluation of Professional Standards, chaired by Robert J. Kutak of Omaha, Nebraska. It is at once a sharp departure from the form and content of the Code of Professional Responsibility, a frank and realistic reappraisal of many once prohibited practices in light of modern developments in the practice of law, and a tepid re-hash of conservative lawyer doctrine reaching back beyond even the ABA's 1908 Canons of Professional Ethics.

The new Code does not answer all of the questions (or, indeed, ASK all of the right questions) concerning lawyers' ethics in the 1980's. Its effect will not be to usher in the millennium where every lawyer will be ethical and the legal profession respected and beloved throughout the

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land. But, then, no one said it would. And the question is not whether the proposed "Model Rules of Professional Conduct" will "do it all," but whether the new Code is a desirable improvement on the present Code or no improvement at all. On careful reading, it appears to be a bit of both.

HISTORY OF LAWYERS' ETHICAL CODES IN AMERICA

While the American legal profession can trace its beginnings to the mid-17th Century,¹ the use of written codes of legal ethics can be traced only as far back as 1887— or perhaps to 1835, if we stretch the point.² Various reasons have been advanced for the absence of formal codes of ethics for lawyers in the early days of this country, but the most persuasive reason is that the practice of law, like most professional endeavors in early America, was relatively uncomplicated and the lawyer's ethical obligations and responsibilities were clearly understood by the members of the profession. Moreover, this being a largely rural country, lawyers in any locality were generally well known to one another and the collective opinion of the local bar could be called upon to bring pressure on an individual lawyer who overstepped the bounds of ethical behavior. Hence, there simply was no need for a formal code of conduct for lawyers.³

As the nation grew so did the number of lawyers and along with them a corresponding growth in the variety and complexity of their practice. The line between ethical and unethical conduct became increasingly vague. And with the increase in the size of the bar which accompanied the growth of large cities, the collective opinion of the local bar became meaningless because one lawyer could hardly know more than a small percentage of the total membership of any particular bar.⁴

DAVID HOFFMAN'S "RESOLUTIONS"

In 1835, perhaps distressed by what he had seen of the ethical behavior of his fellow lawyers, David Hoffman, a member of the Baltimore Bar, wrote "Fifty Resolutions in Regard to Professional Deportment."⁵

1. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 135-142 (1953).

2. Cady, *Canons to the Code of Professional Responsibility*, 2 *CONN. L. REV.* 222, 248 (1969) [hereinafter cited as Cady].

3. Armstrong, *Code of Professional Responsibility* in *PROFESSIONAL RESPONSIBILITY* 1 (1978) [hereinafter cited as Armstrong].

4. It is perhaps only coincidence, but it was during the time when the need for a written code of ethics was first being felt—roughly the time between the "log cabin and the hard cider" campaign of 1840 and the nation's centennial—that lawyers fell into greatest disfavor. Pound, *supra* note 1, at 223-242.

5. H. DRINKER, *LEGAL ETHICS* 338 (1953) [hereinafter cited as DRINKER].

Hoffman's resolutions, which were drafted for the assistance of a younger member of the Baltimore Bar, were broad-based and lacking in any organization, but they ring out from that bleak time with a majesty of language and a certainty of purpose that one searches for in vain in committee-drafted documents.

For example, of switching sides in a case, he wrote,

If I have ever had any connection with a cause, I will never permit myself (when that connection is for any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the formal aspect of the cause induce me to regard it as a ground of exception. *It is a poor apology for being found on the opposite side, that the present is but the ghost of the former cause.*⁶

As to who is to be in charge of the case, Hoffman left no doubt: "Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall neither be enforced nor countenanced by me."⁷ Whatever his faults, Hoffman knew where he stood on ethical matters and he stated his positions bluntly and, it must be added, eloquently.

But Hoffman also evidenced a reluctance to zealously represent a client "charged with crimes of the deepest dye" when the evidence left "no just doubt of their guilt"⁸ and said that he would never plead the statute of limitations "when based on the mere efflux of time," declaring that if his client had "no other defense than the legal bar, he shall never make me a partner in his knavery."⁹ He felt similarly about the "bar of infancy against an honest demand."¹⁰

In Hoffman's resolutions are found the beginnings of many of the most sacrosanct of today's ethical principles: courtesy toward other lawyers;¹¹ taking cases for those who cannot pay;¹² keeping clients' funds separate from counsel's monies;¹³ reasonable fees;¹⁴ lawyer not appearing as a witness in a cause in which he is also counsel;¹⁵ duty not to mislead the court;¹⁶ courtesy toward witnesses;¹⁷ and no contact with opposing party except through his counsel.¹⁸ That Hoffman meant for

6. DRINKER, *supra* note 5, at 339.

7. DRINKER, *supra* note 5, at 339.

8. DRINKER, *supra* note 5, at 340.

9. DRINKER, *supra* note 5, at 340.

10. DRINKER, *supra* note 5, at 340.

11. DRINKER, *supra* note 5, at 338.

12. DRINKER, *supra* note 5, at 342.

13. DRINKER, *supra* note 5, at 344.

14. DRINKER, *supra* note 5, at 344.

15. DRINKER, *supra* note 5, at 346.

16. DRINKER, *supra* note 5, at 348.

17. DRINKER, *supra* note 5, at 349.

18. DRINKER, *supra* note 5, at 349.

his resolutions to be a guide for the practicing lawyer is reflected in the last resolution: "I will read the foregoing forty-nine resolutions twice every year during my professional life."¹⁹ But Hoffman's resolutions received little notice in his time and are of interest today only because of their influence on the development of later ethical codes.

Then, in 1854, Judge George Sharswood of Philadelphia, at that time a member of the District Court of the City and County of Philadelphia, and Professor of Law at the University of Pennsylvania and later a Justice of the Supreme Court of Pennsylvania, published a series of lectures he had delivered before the Law Class of the University of Pennsylvania under the title "A Compend of Lectures on the Aims and Duties of the Profession of Law," a title which was later, mercifully, shortened to "An Essay on Professional Ethics."²⁰ Judge Sharswood's essay, which dealt with the duties of the lawyer in his relation to the public, the court, the profession, and the client, was widely disseminated and sparked a lively debate within the profession.

Written for oral delivery, the essay is difficult reading today. But the judge's position is clear. "There is," he wrote, "perhaps no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."²¹ And this one point—"high-toned morality"—is relied upon throughout the essay as a beacon in the night.

Like David Hoffman, Judge Sharswood insisted that lawyers regard the courts with respect, though Sharswood's viewpoint was, understandably, that of a judge.²² In his essay Judge Sharswood cautioned against *ex parte* dealings with the court,²³ unnecessary communications with jurors,²⁴ misleading the court,²⁵ misleading opposing counsel,²⁶ and attaining the "reputation of a sharp practitioner."²⁷ He encouraged lawyers to develop and maintain good relations with their

19. DRINKER, *supra* note 5, at 351.

20. Armstrong, *supra* note 3, at 2.

21. G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 55 (1896) [hereinafter cited as SHARSWOOD].

22. "Counsel should bear in mind also the wearisomeness of a judge's office, how much he sees and hears in the course of a long session, to try his temper and patience." SHARSWOOD, *supra* note 21, at 63. It is interesting to compare this viewpoint with Hoffman's fourth resolution which presumes intemperate conduct from the bench:

Should judges, while on the bench, forget that, as an officer of their court, I have rights, and treat me even with disrespect, I shall value myself too highly to deal with them in like manner. A firm and temperate remonstrance is all that I will ever allow myself.

DRINKER, *supra* note 5, at 351.

23. SHARSWOOD, *supra* note 21, at 66.

24. SHARSWOOD, *supra* note 21, at 67.

25. SHARSWOOD, *supra* note 21, at 72.

26. SHARSWOOD, *supra* note 21, at 73.

27. SHARSWOOD, *supra* note 21, at 74.

fellow lawyers;²⁸ to be diligent and zealous in representing clients;²⁹ and to take cases regardless of the offense or the accused or the nature of the cause.³⁰ On this last subject Judge Sharswood's position is considerably more liberal than David Hoffman's. Of civil cases Judge Sharswood wrote: "A defendant has a legal right to require that the plaintiff's demand against him should be proved and proceeded with according to law."³¹ In fairness to Hoffman, however, it must be noted that Judge Sharswood was as reluctant as Mr. Hoffman to condone a lawyer's pleading of technicalities to defeat "what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading"³²

Judge Sharswood also urged counsel to exercise the utmost candor in dealing with clients;³³ to represent the poor for no fees;³⁴ and to establish fair fees.³⁵ But the Judge was merciless in his condemnation of the contingent fee:

It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. He becomes blind to the merits of the case, and would find it difficult to persuade himself, no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it The worse consequence is yet to be told,—its effect upon professional character. It turns lawyers into higglers with their clients.³⁶

By contrast, Hoffman's 24th Resolution had expressly approved of contingent fees as a sort of poor man's key to the courthouse. "They are," he wrote, "sometimes perfectly proper and are called for by public policy, no less than by humanity."³⁷

THE ALABAMA CODE

Judge Sharswood's essay went through four editions in the Judge's

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28. SHARSWOOD, *supra* note 21, at 75.
 29. SHARSWOOD, *supra* note 21, at 76.
 30. SHARSWOOD, *supra* note 21, at 90.
 31. SHARSWOOD, *supra* note 21, at 95.
 32. SHARSWOOD, *supra* note 21, at 99.
 33. SHARSWOOD, *supra* note 21, at 107.
 34. SHARSWOOD, *supra* note 21, at 51.
 35. SHARSWOOD, *supra* note 21, at 51.
 36. SHARSWOOD, *supra* note 21, at 60.
 37. DRINKER, *supra* note 5, at 343.

lifetime and a fifth, thirteen years after his death.³⁸ As a result of the enthusiastic debate that the essay engendered, a number of states adopted canons or codes of professional ethics to govern the conduct of lawyers. The first of these was Alabama, in 1887. Fittingly, the first paragraph of the second section of Judge Sharswood's essay is quoted immediately following the preamble of the Alabama Code. It is cited simply: "Sharswood," evidence that Judge Sharswood's essay was familiar to all lawyers.³⁹

The Alabama Code of Ethics was written by Thomas Goode Jones, an outstanding lawyer who was to serve as Speaker of the Alabama House of Representatives, Governor of Alabama, Member of the Alabama Constitutional Convention of 1901, and U.S. District Judge for the Middle and Northern Districts of Alabama.⁴⁰ Judge Jones had urged the adoption of a code of legal ethics at the annual meeting of the Alabama State Bar Association in 1881, insisting that "[n]othing would more effectually promote the ends of justice, or tend more to advance judicial administration." Predictably, he was named to chair a committee directed to report a code of ethics to the next meeting of the association.⁴¹

It was 1887 before the Judge was ready with the final draft of his Code, written he said, without model or guide, though he did admit that he had read Judge Sharswood's "Essay on Professional Ethics." There were fifty-six sections in his Code and all but four were adopted without objection or discussion by the Alabama State Bar Association. These remaining four, however, provide an interesting foretaste of future debates on the purpose and scope of ethical codes.

First, there was spirited objection to a canon which directed lawyers to avoid unusual hospitality toward judges, the objection being that there was no necessity for the rule and that the object of a code of ethics should be "to condemn practices which have prevailed . . . and [thus] to set the seal of condemnation of the association upon certain conduct

38. SHARSWOOD, MEMORIAL TO AN ESSAY ON PROFESSIONAL ETHICS v (1896).

39. High Moral Principle Only Safe Guide 'There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. There are pitfalls and man-traps at every step, and the mere youth, at the very outset of his career needs often the prudence and self-denial as well as the moral courage, which belongs commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction.'

DRINKER, *supra* note 5, at 352.

40. Jones, *First Legal Code of Ethics Adopted in the United States*, 8 A.B.A.J. 111 (1922) [hereinafter cited as Jones].

41. Jones, *supra* note 40, at 111.

which has been practiced to the detriment of the profession.”⁴²

But Jones and others met the objection head-on. This was, they said, a good rule of conduct and the main purpose of a code of ethics for lawyers was to call such basic rules of conduct to the attention of younger lawyers, and not merely to condemn established practices. The rule was adopted as read and the principle established that a major purpose of a code of ethics was to serve as a guide to proper ethical conduct.⁴³

When the canon titled “Candor & Fairness Should Characterize Attorney” was read, a motion was made to strike the language which condemned “offering evidence which it is known the court must reject as illegal, to get it before the jury, under the guise of arguing its admissibility.” Those arguing for the motion to strike this language were concerned that it would render unethical any attempts to get questionable trial court rulings on evidence before the Supreme Court for review.

The motion was rejected and the rule adopted as presented after it was pointed out that this canon did *not* condemn a lawyer who makes a bona fide offer of evidence to raise a question of law which the lawyer believes arises in a case. Thus, a second important point was made regarding this Code of Ethics: the Code seeks not to interfere with an ethical lawyer in the proper representation of a client, but to deal with those unethical lawyers who are trying, as Judge Jones put it, “to drive around the law.”⁴⁴

When Canon 14 of the proposed Code *was read*, there was strong objection. The canon read:

An attorney *may* decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression or wrong; but once entering the cause he is bound to avail himself of all lawful advantages in favor of his client, and cannot without the consent of the client afterwards abandon the cause.⁴⁵

The convention substituted *must* for *may* in the first sentence and struck other language regarding zealous representation of the client. At first reading it would appear that the Alabama Bar could not go along with Judge Jones’ frank statement of a lawyer’s duty to, once in a cause, do all that he can for his client within the bounds of the law. But Canon 10, which the convention had already adopted without objection, contained the same concept, albeit in somewhat less persuasive

42. Jones, *supra* note 40, at 112.

43. Jones, *supra* note 40, at 112.

44. Jones, *supra* note 40, at 112.

45. Jones, *supra* note 40, at 113.

language. There, quoting freely from Judge Sharswood's essay,⁴⁶ Jones had written:

An attorney 'owes entire devotion to the cause of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,' to the end, that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty.⁴⁷

So the convention was already on record in support of zealous representation of a client and the stricken language from Canon 14 did not temper that duty. One could argue however that the precise wording and the placement of the "zealous representation" language in the stricken part of Canon 14 were in many respects stronger than that in Canon 10.⁴⁸

In the end the convention rejected only one of Judge Jones' proposals—proposed Canon 20, which read: "An attorney should not conduct his own cause." While noting that this rule was undoubtedly founded on the ancient maxim that a man who is his own lawyer has a fool for a client, Alex. T. London, a lawyer from Birmingham, moved to strike the rule, saying: "It is one of the great American privileges to make a fool of yourself, and it is guaranteed by the Constitution (sic) and I don't see anything wrong in it—anything immoral in it."⁴⁹ Following Mr. London's no-nonsense argument the motion to strike was carried and the American lawyer's right to make a fool of himself was preserved.

The Alabama Code of Ethics was adopted, with slight modification, in ten other states between 1887 and 1906.⁵⁰ Then the drive for a code of ethics for lawyers went national. In 1905 George R. Peck, President of the American Bar Association, appointed a committee to report on the advisability of the ABA adopting a code of ethics. This committee reported at the annual meeting of the Association in 1906 that the

46. SHARSWOOD, *supra* note 21, at 78.

47. DRINKER, *supra* note 5, at 355.

48. It is worth noting that ABA Canon 30, the equivalent of Alabama Rule 14, adds these two sentences, the first a virtual restatement of Jones' original Rule 14:

But otherwise it is his right, and having accepted the retainer, it becomes his duty to insist upon a judgement of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

ABA CANONS OF PROFESSIONAL ETHICS NO. 30. The ABA language is stronger than the Alabama Code but not nearly so strong as Jones' original language in Rule 14. DRINKER, *supra* note 5, at 356.

49. Jones, *supra* note 40, at 113.

50. Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky and Missouri. DRINKER, *supra* note 5, at 23.

adoption of such a code was both advisable and practicable.⁵¹

In 1908 the Committee on Code of Professional Ethics of the ABA (of which Judge Jones was a member) submitted a draft for canons of ethics to a meeting of the Association held in Seattle. The committee's report stated: "The foundation of the draft for canons of ethics, herewith submitted, is the code adopted by the Alabama State Bar Association in 1887"⁵²

The ABA Code was, however, more precise and all-inclusive than any of the state codes that preceded it. It was shorter,⁵³ omitting many rules commonly included in the eleven state codes, such as, the suggestion that legal work be done for the family of a deceased lawyer at no fee,⁵⁴ advice to a trial lawyer to avoid concealing strong points of a case until the closing argument because the court and jury will think the lawyer has a weak case,⁵⁵ and the admonition to be prompt and punctual in answering letters and keeping engagements strengthen a lawyer's hold on clients.⁵⁶ One commentator on the new Code, noting that it made "no such appeals to motives of expediency and self-advantage," declared that the new ABA Code "occupies a higher plane. Its canons are left to rest on principles of right and honor."⁵⁷

The ABA Code contained one canon of considerable significance which was not found in any of the state codes, except for Kentucky's Canon 2, which declared it to be the duty of the bar "to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges" and to "protest earnestly and actively against the

51. DRINKER, *supra* note 5, at 24.

52. Jones, *supra* note 40, at 113.

53. The original ABA Code contained only 32 canons. It was expanded three times, in 1928 with the additions of Canons 33 thru 45; in 1933 with the addition of Canon 46; and in 1937 with the adoption of Canon 47. The canons in their final form (i.e., 47 canons) have been broken down into eight broad categories by one writer:

- (1) General Attorney—court relationships—Canons 1-5;
- (2) General Attorney—client relationships—Canons 6-8, 15, 16, 19, 37;
- (3) Relations with other parties, essentially in a courtroom context—Canons 9, 17, 18, 39;
- (4) Standards of Conduct during a trial—Canons 20-26;
- (5) Elementary Fiduciary principles—Canons 11 and 38;
- (6) Details as to fees and expenses—Canons 12-14, and 42;
- (7) The highly sensitive areas of associates, intermediaries, specialization and the like—Canons 27, 33-35, 43, and 45-47;
- (8) A number of generalized statements of professional principles—Canons 10-32, 40, 44.

Swindler, *Toward a Restatement of Professional Ethics*, 27 U. PITT. L. REV. 795, 796 nn.2-12 (1966).

54. DRINKER, *supra* note 5, at 362 (Alabama Code, Canon 52).

55. Baldwin, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541 (1908) [hereinafter cited as Baldwin].

56. DRINKER, *supra* note 5, at 359 (Alabama Code, Canon 33).

57. Baldwin, *supra* note 55, at 542.

appointment or election of those who are unsuitable for the Bench.”⁵⁸

Only one canon, number 13 dealing with contingent fees, was substantially amended from the form it took in the committee report. That amendment was one of form more than substance in order to make it plain that contracts for contingent fees were proper where sanctioned by law, provided the terms were reasonable.⁵⁹

The right of a lawyer to decline employment, a matter not clearly expressed in any of the state codes, was settled by Canon 31 which read in part: “No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment.”⁶⁰

So Thomas Goode Jones’ creation, itself Judge Sharswood’s essay in many respects, became the ethical guide of the American legal profession. And if this Code was not perfect it was in the words of one writer, “a fair general statement of the main duties of members of the legal profession.”⁶¹ Unfortunately, the ABA stopped short of making the new Code anything more. Mr. Justice David J. Brewer of the United States Supreme Court, a member of the committee which drafted the Code, had suggested that a set of rules be drafted to give the new Code binding force by legislation or, where permitted, action of the highest courts of the states. The committee rejected Justice Brewer’s suggestion and, instead of urging such an endorsement of the Code on the states, drafted a form of oath to be taken on admission to the bar.⁶²

The convention adopted the new Code and went forth from the ABA’s 1908 meeting in Seattle, for eventual adoption by a majority of the states, burdened with the most serious complaint that was ever to be made against it—that the Code was nothing more than a pious declaration of what a lawyer ought to do.

In truth, of course, this Code was just that—a collection of aspirational statements of what a lawyer ought to do, often couched in fairly general terms,⁶³ combined in no particular order with statements of

58. ABA CANONS OF PROFESSIONAL ETHICS NO. 2; DRINKER, *supra* note 5, at 310.

59. ABA CANONS OF PROFESSIONAL ETHICS NO. 13; Baldwin, *supra* note 55, at 544; DRINKER, *supra* note 5, at 312. The Alabama Code had permitted contingent fee contracts, but reluctantly. “Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred.” Baldwin, *supra* note 55, at 544 citing Alabama Code, Canon 51; DRINKER, *supra* note 5, at 362.

60. ABA CANONS OF PROFESSIONAL ETHICS NO. 31; DRINKER, *supra* note 5, at 320.

61. Baldwin, *supra* note 55, at 546.

62. Baldwin, *supra* note 55, at 545.

63. The assertion made in Canon 2 that

[t]he aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves

is a good example. ABA CANONS OF PROFESSIONAL ETHICS NO. 2.

minimum standards which declared what a lawyer "should not do." There was not, however, any internal statement establishing that the Code was to serve as the basis for discipline for violations of the minimal standards. It was a "toothless tiger" waiting for the various states to give it enforcement effect. In this respect, of course, it resembled the earlier codes after which it was modeled.

As the years passed there were other and more specific complaints against the 1908 Code:

The . . . code of ethics . . . appears to be a haphazard mixture of specific, precise prohibitory rules designed for use as a disciplinary code and of affirmative, edifying statements of guiding principles—although unfortunately the latter are often more overstated than appealing and more assertive than informative.⁶⁴

[T]here is a tendency to regard the code either as being an expression of ethical goals or as being a disciplinary code of minimum standards, rather than taking it for what it is: an accidental combination of the two.⁶⁵

. . . [T]he form of the present code of ethics is one of exaggerated exhortations arranged in helter-skelter fashion.⁶⁶

. . . The Canons of Ethics are virtually unteachable.⁶⁷

. . . [O]ne of their most serious flaws is that they are directed almost entirely to the litigation situation. Yet our profession as a whole devotes the overwhelming percentage of its time to office practice.⁶⁸

. . . [T]he Canons are, to a very large extent, a hodge-podge. . . . There is no particular order or development to them. Some are generalizations . . . Others are quite specific . . . And others have no coherent order or development which leads the reader from one phase to the next.⁶⁹

. . . In an era of solo practitioners with offices in small communities, where ethical questions were clear-cut, black or white, seldom gray, and lawyers were neighbors of their clients, the Canons of Professional Ethics served the legal profession well. As society has become more complex the Canons have become less effective as a basis for governing a profession composed of large and small firms, corporate legal departments, and government lawyers.⁷⁰

. . . The 'weaknesses of the present canons are four-fold.' These

64. Sutton, *A Re-evaluation of the Canons of Professional Ethics: A Revisor's Viewpoint*, 33 TENN. L. REV. 132, 136 (1966) [hereinafter cited as Sutton I].

65. Sutton I, *supra* note 64, at 137.

66. Sutton I, *supra* note 64, at 138.

67. Mathews, *The Legal Profession Course*, 41 COLO. L. REV. 379, 381 (1969).

68. Sears, *A Re-evaluation of the Canons of Professional Ethics—A Professor's Viewpoint*, 33 TENN. L. REV. 145, 147 (1966).

69. Sears, *supra*, at 160.

70. Cady, *supra* note 2, at 222.

weaknesses [are] (A) their lack of application to disciplinary enforcement, (B) the many areas of law not covered, (C) out-of-date language, and (D) their failure to 'constitute a format or a blueprint for inspirational action by individual lawyers and the bar as an organized entity.'⁷¹

Lewis F. Powell, Jr., President of the ABA in 1964-65, probably summed up the criticisms best:

Many aspects of the practice of law have changed significantly since 1908. When the original canons were framed, the typical lawyer was a general practitioner, usually alone, who divided his time between the courts and a family-lawyer office practice. There were very few large law firms, few corporate legal departments and few lawyers working for government. There was virtually no administrative law; no income tax law; no great body of corporate law practice; and little specialization in the practice. The flood of tort litigation was yet to come.⁷²

The pressure for reform built slowly but steadily. In 1924 the Committee on Professional Ethics of the ABA concluded that "it might be more desirable to have the canons consist of a statement of fundamental principles that should govern a lawyer's conduct rather than of definite rules as to specific items of 'conduct.'" But the committee did not suggest any concrete changes.⁷³

In 1933 the ABA Special Committee on Canons of Ethics defended the Code, pointing out that it was "not an endeavor to formulate a statement of general principles or to make a philosophic subdivision of topics according to a lawyer's several relations to others." A better code could be drafted, the committee agreed, "[b]ut the existing canons have undoubtedly been useful."⁷⁴ Two years later the same committee recommended either a revision of the canons or that a supplemental code of practice be drafted.⁷⁵

In 1955, at the request of the ABA, the American Bar Foundation undertook a study of the need for expansion of the canons. The committee making the study for the Foundation found that the canons were deficient in four principal respects:

- (1) The Canons do not concentrate sufficiently on the professional activities of lawyers . . .
- (2) The Canons are not arranged in such a way as to make their

71. Cady, *supra* note 2, at 223.

72. Swindler, *supra* note 53, at 795.

73. Wright, *The Code of Professional Responsibility: Its History & Objectives*, 24 ARK. L. REV. 1, 3 (1970) [hereinafter cited as Wright].

74. Wright, *supra* note 73, at 3.

75. Wright, *supra* note 73, at 4.

importance easily understood, and to make clear their relation to the statements of principles which they contain . . .

(3) The Canons do not present in sufficient detail and variety the guides useful to the individual lawyer in the determination of solutions to ethical problems arising in specific situations encountered in actual practice . . .

(4) The form and content of the Canons are not suited to disciplinary proceedings.⁷⁶

Then, in August 1964, at the request of ABA President Powell, the House of Delegates of the Association created the Special Committee on Evaluation of Ethical Standards. After intensive study of the shortcomings of the canons, this committee concluded that mere amendment of the canons would not fill the need for an adequate statement of professional responsibility. The committee then turned to the drafting of an entirely new document⁷⁷ and by July 1, 1969, had drafted the Model Code of Professional Responsibility.⁷⁸

THE CODE OF PROFESSIONAL RESPONSIBILITY

What a legal code of ethics should consist of was no more settled at that time than it is now. Clearly such a code ought to provide some "aspirational reach," some outline of a higher and better role to which a lawyer should aspire. In addition, it should prescribe basic and fundamental duties—toward other lawyers, toward clients, and toward society—the violation of which can result in sanctions. Moreover, a viable code should perform these two functions in a clear and understandable fashion. As to this second goal in particular, the code should classify for the lawyer what is the "law" of legal ethics, i.e., what are the rights and duties of the lawyer in performing a particular role for the client.⁷⁹ Finally, a code should not only be clear and understanda-

76. Wright, *supra* note 73, at 4.

77. Armstrong, *supra* note 3, at 4.

78. See Wright, *supra* note 73, at 6.

79. As Dean L. Ray Patterson explained it:

Underlying the emerging law of legal ethics are several propositions that may aid the lawyer in assessing the Rules. . . . The first proposition is that rules of ethics are not discretionary ethical rules, but rules of law, and they are in fact extensions of, and complementary to, general law. The second proposition is that the lawyer-client relationship has two bases: contract and status. It is the status aspect of the relationship to which the law of legal ethics is primarily directed for it is the status of the lawyer as an officer of the legal system that precludes him from being simply an agent of the client. The third proposition is that there are only three basic standards of conduct for the lawyer: loyalty to the client, candor to the tribunal, and fairness to others, including the opponent The fourth proposition is that the rights and duties of the lawyer in acting for the client are derived from the rights and duties of the client.

Patterson, *An Analysis of the Proposed Rules of Professional Conduct*, 31 MERCER L. REV. 645, 647 (1980) [hereinafter cited as Patterson I].

ble, but it should lend itself to the teaching of its basic concepts and the nuances deriving therefrom.

To their credit, the drafters of the Code of Professional Responsibility strove to keep separate the aspirational goals and the required minimal standards of the new Code. But they did so in such a radically different fashion that clarity was sacrificed. The resulting Code of Professional Responsibility was an abrupt departure from the canons in two important and highly visible respects: appearance and organization. It was organized on the basis of nine fundamental concepts regarding lawyers' ethics. Within these nine broad areas, called "Canons,"⁸⁰ the Code was further divided into two main components: Ethical Considerations and Disciplinary Rules. As the Preliminary Statement to the Code defined them:

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive . . .

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.⁸¹

The new Code attempted to deal with two major defects in the old canons; the lack of any organization or structure, and the haphazard mixture of minimum disciplinary standards and mere aspirational statements.⁸²

In matters of basic ethics, however, the changes in the new Code were mostly variations of emphasis and scope. There were, in fact, only four changes in the "law" of legal ethics reflected in the document.

First, old Canon 34 had prohibited fee-splitting, except where based on a division of services *or* responsibility. DR 2-107(A)(1) & (3) of the Code of Professional Responsibility prohibited fee-splitting except where based on a division of services *and* responsibility.

Second, the new Code permitted the lawyer to use, "in connection with his name, an earned degree or title derived therefrom indicating

80. A "canon" under the Code of Professional Responsibility is quite different from a canon under the old Code. The Code of Professional Responsibility defines canons as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY. In the Code of Professional Responsibility canons are little more than chapter headings, organizing the main body of the Code into nine chapters. Under the old Code, however, the "canons" were everything. Sutton, *Professional Responsibility: What's New About the New Code?*, 41 PA. B.A.Q. 127, 132 (1970) [hereinafter cited as Sutton II].

81. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

82. See Sutton II, *supra* note 80, at 129-30.

his training in the law.”⁸³ The old canons had said nothing on this subject but ABA Opinion No. 321 (1969) had prohibited the use of the title “Doctor” by recipients of the J.D. degree.

Third, DR 2-102(B) of the Code of Professional Responsibility prohibited a legislator from leaving his name in the firm name when not actively and regularly practicing as a member of the firm. The old canons were silent on this subject but ABA Opinion No. 318 (1967) had said that if a lawyer intended to hold office only “temporarily” he could leave his name in the firm name “but only if proper precautions are taken not to mislead the public as to his degree of participation in the firm’s affairs.”

And finally, DR 6-101(A)(3) made neglect of a legal matter entrusted to a lawyer a matter of legal ethics. The old Code was silent on this subject.⁸⁴

With these four exceptions, then, the Code of Professional Responsibility was, as to matters of substance, a re-draft of the old 1908 ABA Canons of Professional Ethics, a document that was itself a virtual recodification of the Alabama Code of Ethics of 1887. As a body of “law of ethics” the Code of Professional Responsibility was essentially unchanged from its 1908 predecessor—while the profession to which it would apply had undergone vast changes in the intervening sixty-one years.

Predictably, the Code of Professional Responsibility played to mixed reviews from the very beginning. Some saw the new Code in a positive light:

. . . In the long run, the structural innovations in the Code of Professional Responsibility should prove to be greatly beneficial to the ethical climate of the profession.⁸⁵

. . . The old Canons lasted about 70 years and the new Code is a decided improvement, so it should last longer.⁸⁶

However, the more common reaction was negative:

. . . Though few could quarrel with the Canons, themselves, their implementation in the Disciplinary Rules demonstrates such insensitivity to the basic rights of both attorney and client, that many will demand a total revision.⁸⁷

83. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE NO. 2-102(E). Hereinafter the Code’s Ethical Considerations will be cited as ECs and Disciplinary Rules as DRs.

84. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3).

85. Sutton II, *supra* note 80, at 135.

86. Latta, *D.C. Bar Association to Vote on New Code of Professional Responsibility*, 37 D.C. B. J. 57, 67 (1970).

87. Brown, *ABA Code of Professional Responsibility: In Defense of Mediocrity*, 16 CATH. LAW. 314, 325 (1970).

And a law student from the University of Kansas criticized the Code for

codifying rather conservative views on problems of legal ethics rather than encouraging innovations to meet the needs of a rapidly changing society. Instead of helping the legal profession serve society, the new Code may make that task even more difficult.⁸⁸

The pragmatic approach was taken by Professor Cady who had served as chairman of the Committee on Ethics and Grievances of his state bar association: "Better to have a code that will muster the necessary votes when presented for adoption than the ideal code that fails of enactment."⁸⁹ The unquestioned accuracy of this observation fails to mask the sense of futility inherent in the statement.

Among the other problems the Code of Professional Responsibility was to face was its misfortune of coming into being at the wrong time. The Watergate scandal and the highly placed and very visible lawyers who were trapped in that ethical morass led to a great deal of professional soul searching, including the 1974 amendment to the ABA Educational Standards which advocated that teaching the Code of Professional Responsibility in law schools be mandatory.⁹⁰ Inevitably, the failure of the present ethical code to "prevent" the lawyers' involvement in Watergate reflected on that code. Moreover, the Watergate affair led to a resurgence of interest in legal ethics in general and the Code of Professional Responsibility was subjected to an intense scrutiny as a part of that general interest. Many found the new Code wanting. For instance, public defenders and legal aid lawyers found the Code's provisions relating to the providing of legal services for the poor to be inadequate and in some respects even harmful.⁹¹ And, Professor Thomas D. Morgan of the University of Illinois College of Law, argued that the Code was guilty of misordering of priorities, putting the public interest last, the client's interest next and the interest of the individual lawyer first.⁹² Another scholar, Dean L. Ray Patterson of the Emory University School of Law, contending that the Code was "a transitional document, representing a middle stage in the development of law for lawyers," described it as "rigid and simplistic, complex and

88. Witten, *ABA Code of Professional Responsibility—Law Student's Viewpoint on the New Canons*, 18 U. KAN. L. REV. 702, 709 (1970).

89. Cady, *supra* note 2, at 248.

90. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 958-59 (1978).

91. See generally Kettleison, *Revising the Code of Professional Responsibility*, 35 NATIONAL LEGAL AID & DEFENDER ASSOCIATION BRIEFCASE 40 (1978).

92. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 706 (1977).

contradictory, and difficult to read."⁹³ The negative feeling about the Code was, perhaps, best summed up by a professor from Columbia University, who described it as "[a] good try, but not really good enough."⁹⁴

The result of this continuing inquiry into the professional conduct of lawyers and the considerable discontent with the Code of Professional Responsibility was the reference by the ABA of the Code to the Commission on Evaluation of Professional Standards for further study.⁹⁵ That Commission's study of the Code of Professional Responsibility led it to the conclusion that, as the Commission later reported, "more than a series of amendments or a general statement of the Model Code of Professional Responsibility was in order . . . a comprehensive reformulation was required."⁹⁶ The result was the Model Rules of Professional Conduct.

THE MODEL RULES OF PROFESSIONAL CONDUCT

If the Code of Professional Responsibility is—as Dean Patterson suggests—"a transitional document, representing a middle stage in the development of law for lawyers,"⁹⁷ the Model Rules may also represent merely another stage in the long struggle to develop law for lawyers. It represents, in format and organization, as vast a break with the Code of Professional Responsibility as that document was with the Canons of Professional Ethics. And, in matters of substance, the Model Rules are even further away from the Code of Professional Responsibility than was that document from its predecessor.

It is important to remember, however, that, as one writer put it, "the statutory rules of conduct that regulate American lawyers do not un-

93. Dean Patterson called for a new Code of Professional Responsibility based on these premises:

- (1) The lawyer is more than an advocate serving the interests of a client; he is an administrator of law, a private citizen fulfilling public responsibilities.
- (2) The three basic standards of conduct for the lawyer are loyalty, candor, and fairness.
- (3) The implementation of the standard varies according to three major factors:
 - (a) the particular role of the lawyer—that is, an adviser, advocate, agent, private adjudicator, and law maker;
 - (b) the process of law administration in which the lawyer is engaged: the judicial, the administrative, the legislative, or the private legal process; and
 - (c) the rights and duties of the client.

Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 640 (1977) [hereinafter cited as Patterson II]. Dean Patterson served as legal consultant to the Kutak Commission and much of his thinking is reflected in the Model Rules.

94. Jones, *supra* note 90, at 960.

95. The Code, notwithstanding the work that had gone into it, was clearly in need of rethinking.

96. DISCUSSION DRAFT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT i.

97. Patterson II, *supra* note 93, at 639.

dertake to create new ethical requirements, but simply define those that are inherent in the practice of law itself.”⁹⁸ Thus, we are not dealing with a whole new set of concepts of professional “conduct” or “ethics” or “responsibility,” but with yet another refinement of some *basic* rules that have been with us since the very beginning, and with our subtly changing views of these rules. Certain concepts may change, for example, the acceptability of the contingent fee contract, or notions of what constitutes acceptable advertising, but even these changes stem from basic ideas about the practice of law and our efforts to maintain high standards while remaining in tune with modern business and professional developments.

Yet any new codification of “law for lawyers,” even if it is grounded on the same basic principles, can, because of different focus and approach, make an enormous difference in what lawyers do and how they do it. An inquiry into the Model Rules of Professional Conduct is, then, most appropriate.

To begin—a few first impressions about the new Code. First, it is decidedly non-sexist. In place of the universal use of the pronoun “he” by the Code of Professional Responsibility, the new Code simply says “he or she” or “the lawyer.” It is a small matter, perhaps, but a step in the right direction. The Model Rules approach moves away from the “detail and triviality” of the Code of Professional Responsibility present, for example, in Canon 2 and the amazing detail about what can appear on a lawyer’s stationery. In addition the new Code is less “preachy” and more practical. In particular, it addresses the lawyer as he or she must function in the modern world to a degree that was never attempted by the Code of Professional Responsibility. While the comments to the Model Rules repeatedly offer aspirational guides, the special, if nonetheless confusing, role of the Ethical Considerations as an aspirational document is missing. Finally the Model Rules approach makes for much easier reading. Ethical codes for lawyers will never rank near the top of anyone’s reading list, but lending itself to easier understanding is an important goal of any legal document.

The Model Rules format is different from the tri-partite organization of the Code of Professional Responsibility. It consists of black letter law rules with commentary, a stylistic approach with which most lawyers have become familiar through the American Law Institute’s Restatement of Law. And, instead of being broken into separate, numbered paragraphs with the implication that each stands more or less alone, as the 130 Ethical Considerations in the present Code, the

98. Armstrong, *supra* note 3, at 1.

comments read as comments should—as a logical exposition of the textual matter of the Rules.

The proposed Rules clearly constitute legislation—court-adopted administrative regulations, perhaps—but black letter law just the same. That, theoretically, was to have been the role of the Disciplinary Rules under the Code of Professional Responsibility, but unfortunately the Ethical Considerations tended to take on that role, too. Where, for example, the Ethical Considerations merely restate the Disciplinary Rules they obviously are not merely aspirational but have become mandatory like the Disciplinary Rule they restate.⁹⁹ Moreover, when an Ethical Consideration states, as does EC 5-15, “A lawyer should never . . .,” it obviously is couched in more than merely aspirational language. For example, the Supreme Court of Iowa took the matter to its ultimate conclusion in 1979 and held that violation of an ethical consideration, standing alone, *will* support disciplinary action.¹⁰⁰ Two years earlier, however, an Indiana Court of Appeals had taken the more common position and held that “the Disciplinary Rules, and not the Ethical Considerations, prescribe the conduct which constitutes a violation of the Code of Professional Responsibility.”¹⁰¹ So much, then, for the argument that adoption of the Code of Professional Responsibility in the fifty states has resulted in uniformity in the processing of disciplinary complaints.

As this distinction between the Disciplinary Rules and the Ethical Considerations has become blurred, and even disappeared as in Iowa, the fundamental reason for the unusual organization of the Code of Professional Responsibility has become less important. Yet, restructuring the format of our ethical code is not a matter to be undertaken lightly and one of the principal criticisms of the proposed Code has been this very change.¹⁰² In public hearings held by the Kutak Commission to receive comments on the proposed Rules from members of the bar and others, considerable objection was had to the change in format.¹⁰³

99. Ethical Considerations 5-14 and 5-15 restate Disciplinary Rule 5-105(A) and quite clearly are not addressing themselves to purely aspirational matters.

100. Committee on Professional Ethics & Conduct v. Behnke, 276 N.W. 2d 838 (Iowa 1979). The effect of this decision is to completely obscure any distinction between the ethical considerations and disciplinary rules in Iowa.

101. Kizer v. Davis, 369 N.E. 2d 439, 444 (Ind. 1977).

102. “[W]e have found substantial sentiment favoring retention of the form of the present code.” Letter from Commission Chairman Robert J. Kutak, addressed to “Dear Colleagues,” (Dec. 5, 1980).

103. Richard Moser, Chairman of the Ethics Committee of the New York County Lawyers Association, complained that the commission had thrown out old language that has come to have particular meaning. Summary of Comments of Speakers Before Public Hearing of the Commission on Evaluation of Professional Standards in New York City 4 (May 5, 1980). Victor Drexel, Chairman of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Re-

The National Organization of Bar Counsel (hereinafter referred to as NOBC), a respected organization of counsel to state bar associations throughout the United States, has also objected to the proposed change in format, raising concerns that are well-reasoned and worthy of consideration.¹⁰⁴ The NOBC argues that the adoption of a new Code (as opposed to mere revision of the present Code) "would seriously impair the acceptability and effectiveness of a Model Code, and substantially undermine the giant strides which have been achieved since the adoption of the format and construction of the present Code of Professional Responsibility."¹⁰⁵

The reasons for this belief are, essentially, that lawyers are familiar with the Code of Professional Responsibility, since nearly one-half of all practicing lawyers are post-1970 graduates and have studied the Code in law school and "the remaining one-half have practiced under the present Code for ten years;" that a substantial body of law has grown-up around the present format and would be lost under a completely different structure; and that the "absence of voiced need for change in format along with historical reluctance to depart from proven forms suggests that many jurisdictions would be reluctant to adopt the Model Rules in its present format."¹⁰⁶

As a former Executive Director of a unified state bar, one of the duties of which was to process all ethical complaints against lawyers in the state and all ethical inquiries made by lawyers in the state and a present member of the Legal Ethics Committee of that same bar, I have serious questions about how familiar today's lawyers really are with the Code of Professional Responsibility. Given the confusing format of the Code, the fact that today's lawyers may "have studied" or "practiced under" this Code is hardly justification for the assumption that these lawyers really *know* the Code, let alone are well served by it. The same argument could have been made, and no doubt was made, in favor of the old Canons and against the "new" Code of Professional Responsibility. But, assuming that the Model Rules are an improvement, this

sponsibility, indicated that his committee would prefer to amend the present Code. *Id.* at 11. Luther Avery of the American College of Probate Counsel, said in Honolulu, on August 5, 1980, that he believed the restatement format to be inferior to "that format which is familiar to us." Oscar M. Beubhausen, President of the Association of the Bar of the City of New York and Professor Eleanor M. Fox of New York University Law School expressed reservations about abandoning the present code which they described as "generally carefully drafted, thoughtful and wise."

104. The National Organization of Bar Counsel is an organization of counsel to state bar associations throughout the United States. The organization was founded in 1965 and incorporated in 1977. NAT'L ORGANIZATION B. COUNSEL REPORT ON A STUDY OF THE PROPOSED ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH RECOMMENDATIONS 1 [hereinafter cited as NOBC REPORT].

105. NOBC REPORT, *supra* note 104, at 2.

106. NOBC REPORT, *supra* note 104, at 3.

argument is not very persuasive.¹⁰⁷

Similarly, the fact that a substantial body of law has grown up around the Code of Professional Responsibility is no reason not to adopt a new code, if the new code represents an improvement. True, it will be necessary to “build” a new body of law around the new language of a new code, but this problem is faced wherever there is any substantial revision of a statute or recodification of the law. Commission Chairman Kutak perhaps explains this best:

Lawyers have managed to weather—and indeed, adapt quickly to—the replacement of probate statutes by the Uniform Probate Code, the replacement of a number of commercial statutes by the U.C.C., and a complete revision of the Federal Bankruptcy Code. I am confident in their abilities to adjust to a revision of our ethics code.¹⁰⁸

This same problem was faced by the profession when the Code of Professional Responsibility was adopted after lawyers had lived for nearly 70 years under the old Canons. Surely the profession can adapt to change after barely a decade under the Code of Professional Responsibility.¹⁰⁹

As to the absence of voiced need for change in format, the Kutak Commission’s very existence is a reflection of concern over the need for change in general. The change in *format* is the result of this commission’s attempt to address the need for revision *in general*. Perhaps the reason the need for a change in format was never voiced was that no one had considered *how* to improve the Code of Professional Responsibility to the extent that the Kutak Commission did.¹¹⁰ The absence of

107. Unfamiliarity with the Code of Professional Responsibility is almost commonplace among the members of the practicing bar of my acquaintance. I often address lawyer groups (CLE seminars, prosecuting attorney meetings, and the like) and have yet to encounter a group of practicing lawyers who evidence any real familiarity with the Code of Professional Responsibility. I am persuaded (given my contacts within the profession throughout the country) that this is not a purely West Virginia phenomenon. When I was Executive Director of the West Virginia State Bar, I received at least three telephone calls per week from lawyers inquiring about what the Code of Professional Responsibility said. At least 75% of these questions concerned matters on which the Code was clear and unambiguous. I was repeatedly told, “I don’t understand these rules” or “I can’t seem to find anything in them.” Given my past acquaintanceship with the Code of Professional Responsibility and the fact that I now teach Professional Responsibility, I still receive two or three inquiries per month about the contents of the Code from lawyers who just aren’t willing to dig through a format that is completely unfamiliar to them.

108. Remarks by Robert J. Kutak at an ABA Standing Committee on Professional Discipline Workshop on Disciplinary Law and Procedure held in Scottsdale, Arizona (June 5, 1980) (copy on file at the *Pacific Law Journal*).

109. Admittedly, however, this last decade has been a “busy” one in the ethical field and no doubt more law has grown up around the subject in this decade than in any similar period under the old canons.

110. Commission Chairman Kutak discussed this question in the Scottsdale, Arizona, workshop.

Why change the code format? Wouldn’t an amendment accomplish the same purpose?

We could have taken that approach and it may have satisfactorily addressed some of

“voiced need for change in format” is indicative of nothing.

A big change in format brought about by the Model Rules is the organization of the code under the various roles the lawyer assumes, reflecting the view of the Kutak Commission that a lawyer's ethical duties vary depending on the role the lawyer is performing.

The Model Rules division is: (1) Client-Lawyer Relationship, which includes such subjects as diligence, fees, conflict of interest, and confidentiality; (2) Counselor; (3) Advocate; (4) Transactions With Persons Other Than Clients; (5) Law Firms & Associations; (6) Public Service; (7) Information About Legal Services; and (8) Maintaining the Integrity of the Profession.¹¹¹

The concept underlying this organization is that lawyers perform many different roles with the precise ethical requirements varying according to the role being performed. In one instance, at least, the existing Code of Professional Responsibility already recognizes that different standards may obtain depending on the lawyer's role. EC 7-3 provides: “Where the bounds of the law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different.”

A variety of groups has opposed the proposed format of the Model Rules. The NOBC, for instance, has opposed the organizational structure of the January 1980 “Discussion Draft” of the Model Rules, which also recognized the application of different standards to different roles, and presumably will oppose the similar organization of the Final Draft. The NOBC has complained that the Discussion Draft “creates a false illusion that different ethical standards apply to different areas of practice.”¹¹²

the issues in ethics and some of the issues raised in connection with the Code. We chose on a number of grounds, however, to pursue a different tack.

For one, to add specific provisions for the roles and practice settings that the Code ignores would have further complicated an already complex piece of legislation. On this point it should be noted that even without extensive amendment, many practitioners—who, unlike yourselves, have no expertise in legal ethics—find the Code's structure and organization inconvenient and very difficult to use.

A more convenient and familiar format, one paralleling the recently adopted Code of Judicial Conduct and similar to the ALI Restatements of the law, seemed to us more conducive to the extensive additions that must be made. Accordingly, after much consideration, we adopted such a format for the proposed rules.

Introduction to the Proposed Model Rules of Professional Conduct, ABA Standing Committee on Professional Discipline, Workshop on Disciplinary Law Procedure, Scottsdale, Arizona 9-10 (June 5, 1980) (copy on file at the *Pacific Law Journal*).

The author has railed privately for years about the absolute unworkability of the present Code's organization. Other lawyers have shared this opinion with me. I suspect that the support for the present tripartite organization is not nearly so widespread or deep as the Code's supporters would insist.

111. FINAL DRAFT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT (May 30, 1981).

112. NOBC REPORT, *supra* note 104, at 3. It is perhaps uncharitable to suggest it, but some of

The Roscoe Pound—American Trial Lawyers Association (hereinafter referred to as ATLA), unhappy with both the Code of Professional Responsibility and the Discussion Draft of the Model Rules, though it clearly prefers the Code of Professional Responsibility over the proposed Model Rules of Professional Conduct,¹¹³ has had its own code of conduct drafted by Professor Monroe H. Freedman of the Hofstra University School of Law. Professor Freedman rejects “the idea of writing this Code in separate sections for lawyers in litigation, negotiation, and so forth,”¹¹⁴ and the ATLA Code, understandably perhaps, views *all* of a lawyer’s functions as part of an adversary role and speaks accordingly.

For all the criticism it has received the Model Rules approach does attempt to deal with a common criticism of the Code of Professional Responsibility: that it treats all lawyers as if they were engaging in a single kind of activity, what a participant in a conference of lawyers held in Seven Springs, New York, once described as practice in “down-state Illinois in the 1860’s.”¹¹⁵ In this respect, as in so many others, the Code of Professional Responsibility was merely echoing the ABA’s 1908 Canons of Professional Ethics.

The question of whether a lawyer’s ethical duties and responsibilities vary depending on the role the lawyer plays has already drawn blood in the legal community and there is likely to be substantial debate on the issue generating, as debates of this sort often do, more heat than light.

The Model Rules concept of different standards for different roles, however, is one that Dean Patterson has embraced for some time and

the NOBC’s concern may be grounded in the fact that the Model Rules approach is from the viewpoint of the practicing lawyer instead of from that of the organized bar and its disciplinary machinery. To the extent that the Model Rules can help the lawyer *before* ethical problems develop, this organization of the material may be a factor.

113. Roscoe Pound-American Trial Lawyer’s Foundation, THE AMERICAN LAWYER’S CODE OF CONDUCT 1 (1980) [hereinafter cited as ATLA CODE].

114. ATLA CODE, *supra* note 113, at 7. The whole concept of the lawyer having *any* duty to anyone other than the client is an anathema to the American Trial Lawyer’s Foundation. In the Introduction to the American Lawyer’s Code of Conduct, ATLA President Theodore I. Koskoff asserts that the Model Rules of Professional Conduct would make the lawyer “the agent of the state, not the champion of the client, in many important respects.” ATLA CODE, *supra* note 113, at iii.

115. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 7 (1978). As Commission Chairman Kutak put it,

[T]oday lawyers represent estates, trade unions, corporations, and other organizations; lawyers function primarily outside the courtroom as advisers, mediators, negotiators and evaluators; lawyers handle client problems through administrative agencies and appear before legislative assemblies; lawyers increasingly associate in law firms rather than function as sole practitioners; and lawyers move into and out of the government at a steadily growing rate.

ABA Standing Committee on Professional Discipline, Workshop on Disciplinary Law and Procedures, Scottsdale, Arizona 5-6 (June 5, 1980).

as the legal consultant to the Kutak Commission, he may well be the father of the idea, at least insofar as its inclusion in the Model Rules is concerned.

In a 1971 article in the American Bar Association Journal, Dean Patterson described the roles of a lawyer as (1) Adviser; (2) Advocate; (3) Agent; (4) Private Adjudicator; and (5) Law maker.¹¹⁶ By 1980 he had reduced this number to three: (1) Adviser; (2) Advocate; and (3) Agent.¹¹⁷ The whole idea of different standards for different roles is based on the proposition, as Dean Patterson explains it, "that the rights and duties of the lawyer in acting for the client are derived from the rights and duties of the client."¹¹⁸

It is difficult to quarrel with this proposition. Lawyers exist today, as they have throughout the profession's history, to represent or "stand in" for clients. Clients are permitted to represent themselves before judicial tribunals and in dealing with others, but the structure of our legal system is complicated and a specialized language has grown up around it. So clients come to lawyers—a class of people learned in the language, procedures, and technicalities of the law—and lawyers go before judicial tribunals to argue the client's cause. But surely a lawyer has no greater, or lesser, rights than does the client!

In the role of counselor, for example, the lawyer has the duty of advising the client on the law, what it is, what it is likely to be, and recommending a course of action based on the law. The lawyer's duty here is almost totally to the client.¹¹⁹

In the role of advocate, however, the lawyer also owes a duty to the tribunal as it searches for the truth and to the opposing party not to mislead it. And these duties to the court and to the opposing party are *not contrary to the client* nor do they exist because the lawyer is a lawyer. They are duties the *client owes as a citizen* seeking to use the court system. The lawyer, as representative of the client, assumes those duties along with the privilege of appearing for the client.

Thus where the lawyer advises the client and there is no one else *now* involved who may be affected by the lawyer's conduct, the lawyer has greater freedom, as does the client, and there is a lesser duty. But when the lawyer appears as advocate, there now being others involved who may be affected by the lawyer's conduct, a higher duty is demanded of the lawyer. And even with the Model Rules "division" there are many

116. Patterson II, *supra* note 93, at 640.

117. Patterson I, *supra* note 79, at 662.

118. Patterson I, *supra* note 79, at 647.

119. Patterson I, *supra* note 79, at 662-63. (There is a duty to society not to give advice to the client that would harm society, but in the advisory role that is minor.)

duties that interrelate—for instance an advocate can find him or herself acting as an adviser and vice versa. Moreover, as noted earlier, this concept is not entirely new to the Model Rules, having been raised by EC 7-3. Nor did the idea spring full-blown into EC 7-3 from nowhere. In 1953 the late Chief Justice Arthur T. Vanderbilt of the Supreme Court of New Jersey, described what he called “The Five Functions of the Lawyer.”¹²⁰ These he defined as: (1) Counselor; (2) Advocate; (3) Improving the Profession, the Courts and the Law; (4) Leadership in Molding Public Opinion; and (5) Holding Public Office.

It is true that Chief Justice Vanderbilt did not discuss different standards of conduct for these different roles, nor did he suggest that there might be any difference. Nonetheless he saw, with the practiced eye of a judge who had done a good deal of thinking about the legal system and its problems, the lawyer’s role as something less than monolithic. It was a beginning of a realistic reappraisal of the lawyer’s role.

In the Report of the Joint Conference on Professional Responsibility in 1958¹²¹ the “legal profession” was said to “perform three major services.” These the report defined as (1) “the lawyer’s role as advocate and counselor;” (2) “the lawyer as one who designs a framework that will give form and direction to collaborative effort;” and (3) “his third service runs not to particular clients, but to the public as a whole.” The first of these three services was then treated in the report as two separate roles—advocate and counselor—and the report noted that “these *two roles* must be sharply distinguished.”¹²² That same year (1958) the ABA was asked to reappraise the Canons of Ethics to distinguish the function of counselor from that of the advocate,¹²³ and the Association of American Law Schools suggested that recognition of these two functions was necessary to the training of law students.¹²⁴

The Report of the Joint Conference on Professional Responsibility, moreover, recognized that the ethical responsibilities are often different depending on the nature of the lawyer’s role.¹²⁵ “In the duties that the lawyer must now undertake,” the Report said, “the inherited traditions of the Bar often yield but an indirect guidance. Principles of conduct applicable to appearance in open court do not, for example, resolve the issues confronting the lawyer who must assume the delicate task of me-

120. Vanderbilt, *The Five Functions of a Lawyer*, 23 UTAH B. BULL. 173, 173-81 (1953), reprinted in 40 A.B.A. J. 31, 31-34 (1954).

121. 44 A.B.A. J. 1159 (1958) [hereinafter cited as *Report*].

122. *Id.* at 1161.

123. McCoy, *The Canons of Ethics: A Reappraisal by the Organized Bar*, 43 A.B.A. J. 38 (1958).

124. Association Am. L. Schools Program and Report of Committees 111-27 (1958).

125. See generally *Report*, *supra* note 121.

diating among opposing interests.”¹²⁶ The Report concluded with a special plea for guidance for the lawyer: “a lawyer stands today in special need of a clear understanding of his obligations and of the vital connection between those obligations and the role his profession plays in society.”¹²⁷

“Any revision of the Canons,” one writer said in 1961, “must take into account and speak to this new and now predominant function of the lawyer” as a counselor.¹²⁸ And so the Code of Professional Responsibility did—in a “glancing reference” in EC 7-3, but nowhere else.

Now, at last, in the Model Rules, we are offered a set of ethical rules for lawyers that take into account the different roles of the modern lawyer and the different ethical demands of those roles. One should not underemphasize the importance of this change in approach. It signals something fundamental in our understanding of the lawyer’s professional role—that lawyers are not a monolithic body of professionals, all doing the same thing in the same way and for the same purpose. To be sure, there are those who disagree, who argue that lawyers are lawyers and the rules never change. But there is a compelling logic to the concept which one who must deal with ethical complaints against lawyers in all areas of the practice must find refreshing. But the battle has only begun on this question.

As significant as these changes in organization of the Model Rules are, however, they are for the most part overshadowed by changes of substance in certain of the ethical rules themselves. These changes reflect, on the whole, an effort to place the profession’s ethical guidelines in line with modern business practices and socio-economic developments as well as to reflect the most recent thinking on the role of lawyers in American society and to bring our ethical rules into agreement with recent court rulings. The changes are not without controversy. Model Rule 1.5(d), regarding fee splitting, is a good example.

FEE-SPLITTING

The Code of Professional Responsibility permits a division of fees between lawyers who do not practice together only if the share of each lawyer is in proportion to the responsibility assumed *and* services only rendered by each.¹²⁹ But Model Rule 1.5(d) would allow a division of fees between lawyers who are not in the same firm if: (1) the division

126. *Report, supra* note 121, at 1160.

127. *Report, supra* note 121, at 1160.

128. Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 578 (1961).

129. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107, EC-34.

is in proportion to services performed by each lawyer *or* the lawyers agree in writing to assume responsibility for the representation; (2) the client consents to participation by all the lawyers involved; and (3) the total fee is reasonable.

Presumably the Commission felt that no harm could come to the client by permitting fee splitting since it would encourage a lawyer to refer a complicated matter in an area in which the referring lawyer did not feel competent to a lawyer in whose competence the referring lawyer had confidence. Without a fee for the referral, the lawyer first employed by the client would have lost all potential fee for the matter and would have had no reason, other than the requirements of DR 2-107, to refer the matter elsewhere. Moreover, Rule 1.5(d) requires that the total fee be reasonable and so that in theory at least, it costs the client nothing for a referral. In addition, *all* the lawyers involved are *totally* responsible to the client thus “assuring” that the referring lawyer will refer the matter to a competent lawyer.

The comment to Rule 1.5(d) asserts, “[a] division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. . . .” In the “Legal Background” to Rule 1.5 it is pointed out that Rule 1.5(d) “restores Canon 34 of the Canons of Professional Ethics, which stated: ‘No division of fees is proper, except with another lawyer, based upon a division of service *or* responsibility.’”¹³⁰ But neither comment really explains why the change was made. However, the comment to the Discussion Draft of the Model Rules had suggested that the Code of Professional Responsibility limitation, that a division of fees could only be made if the share of each lawyer was in proportion to the responsibility assumed *and* the services rendered by each lawyer, was “often ignored in practice and can be artificial.”¹³¹ These, however, are poor reasons for changing the rule.

It is difficult to imagine that allowing a referral fee will *not* result in a higher overall fee to the client. Assuming that the lawyer who does the work is not already unethically overcharging for his or her time, a piece of work will ordinarily be worth so much money. At a minimum, the lawyer cannot afford to charge significantly less than what the work is worth in order to allow the referring lawyer to receive a fee for simply “directing” the case to the working lawyer. As the Committee on Professional & Judicial Ethics of the Association of the Bar of the City of New York put it: “Fee splitting is perceived by the public as a form of

130. MODEL CODE OF PROFESSIONAL CONDUCT, MODEL RULE 1.5, Notes, Subsection Legal Background 37.

131. ABA MODEL RULE 1.6, Comment (Discussion Draft).

exploitation and, in our view, usually results in higher than necessary charges."¹³² And a basic question remains: Why should a lawyer receive a fee for merely being a good advertiser or being in the right place at the right time? The very possibility of approved referral fees conjures up visions of a new class of "lawyers," in a profession already becoming crowded, who are adept at clever advertising, move with ease through the local news columns, appear at the scene of all major accidents, call at the funeral home during the viewing of persons with significant estates, and earn a living by simply gathering up cases and referring them to others.

Furthermore, what of the possibility that Lawyer A—hungry, inexperienced and without clients—will offer a higher "finder's fee" than Lawyer B, who is an established lawyer of demonstrated competence with plenty of clients? Surely the temptation is there for the "referring lawyer" to refer a client to Lawyer A. The principle is the same as the one behind the rule prohibiting the sale of a law practice—that the seller will be influenced to select the highest bidder, not the lawyer who might be best for the client.

Curiously, the NOBC accepts this change without question, noting that referral fees are in existence throughout the country despite the fact that they are prohibited. The new rule, the NOBC report blandly notes, "seeks to regulate rather than prohibit them."¹³³ That referral fees are common today is surely no reason to approve them if they are wrong. The sale of a law practice is common in certain areas of the country¹³⁴ but it is still unethical.¹³⁵

Model Rule 1.5(d) is an abrupt departure from a sound rule that was itself a tightening of former practice. As noted earlier, Canon 34 of the 1908 Code prohibited a division of fees for legal services except where the division was "based upon a division of service *or* responsibility," leaving open the possibility of splitting fees if the referring lawyer was willing to assume part of the responsibility to the client.¹³⁶ This was a change from a practice of long standing whereby a referring lawyer was allowed, as a matter of course, a "finder's fee" regardless of whether any service was performed or responsibility assumed by the referring

132. *Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, Reports on the January 30, 1980, Discussion Draft of Model Rules of Professional Conduct* 77.

133. NOBC REPORT, *supra* note 104, at 28.

134. At least it is a fairly common practice among solo practitioners in parts of West Virginia.

135. It is violative of ABA Code of Professional Responsibility DR 2-103(B) (which prohibits paying another to recommend or secure employment as a lawyer); DR 2-107(A) (which prohibits fee splitting) and DR 4-101(B) (which prohibits a lawyer from revealing confidences and secrets of his/her clients).

136. ABA CANONS OF PROFESSIONAL ETHICS No. 34 (emphasis added).

lawyer.¹³⁷

Drinker, in his work on legal ethics, said that the purpose of Canon 34 “should not be frustrated by construing the necessity of ‘responsibility’ as being satisfied by the bare recommendation.”¹³⁸ In fact this was the repeated holding of the ABA Committee on Professional Ethics. DR 2-107, by requiring any division of a fee to be “made in proportion to the services performed and responsibility assumed” by the lawyers involved, effectively eliminated ethical fee splitting except where the referring lawyer also did some of the work. This was a sound rule. Model Rule 1.5(d) is not an improvement.

In contrast, the ATLA Code provides: “Lawyers who are not openly associated in the same firm shall not share a fee unless: (a) the division reflects the proportion of work performed by each attorney and the normal billing rate of each; OR (b) the client has been informed pursuant to Rule 5.2 of the fact of fee-sharing and the effect on the total fee, and the client consents.”¹³⁹ Note, then, that there is no requirement here that the total fee charged to the client be no higher than if a referral were not made—thus fee-splitting under this rule would most certainly result in a higher fee overall, except where the contingent fee is utilized.

Model Rule 1.5(d), the ATLA Code and the NOBC by condoning fee splitting seem unconcerned about the effects of fee splitting. Such condonation appears to be inconsistent with high standards applied to a profession that is supposed to be concerned, above all else, with the clients it serves.

CLIENT’S PERJURY

What to do when the client wants to take the stand and commit perjury is one of the most difficult problems in legal ethics. The Code of Professional Responsibility waffled and refused to take a stand.

DR 4-101(C)(3) permitted the lawyer to reveal both the intention of his client to commit a crime and the information necessary to prevent it. This was consistent with an ABA ethics opinion which required that a lawyer disclose confidences of his client “if the facts in the attorney’s possession indicate beyond reasonable doubt that a crime will be committed.”¹⁴⁰ This duty to disclose confidences was held to extend even to revealing the whereabouts of a client who had skipped bail, *even if*

137. DRINKER, *supra* note 5, at 186.

138. DRINKER, *supra* note 5, at 186.

139. ATLA CODE, *supra* note 113, Rule 5.4.

140. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 314 (1965).

*this knowledge was in confidence from the client.*¹⁴¹

In contrast, however, DR 7-102(B)(1) states that when a lawyer learns that his client has “perpetrated a fraud upon a person or tribunal,” the lawyer must “call upon his client to rectify the same.” If the client refuses to rectify the fraud the lawyer must reveal the fraud to the affected person or tribunal “except when the information is protected as a privileged communication.”¹⁴² Is knowledge of a client’s expected perjury protected as a privileged communication? The Code of Professional Responsibility is not clear on this point.

The Model Rule on this subject, on the other hand, leaves little room for question. Model Rule 3.3 prohibits a lawyer from offering evidence that the lawyer “reasonably believes” to be false—except where constitutional requirements in certain jurisdictions require that the lawyer comply with a client’s demand to offer false evidence.¹⁴³ Moreover, a lawyer who discovers that evidence which has been presented is false is required to “take reasonable remedial measures.”¹⁴⁴

The reaction of the American Trial Lawyer’s Association to the predecessor to this proposed Rule in the Discussion Draft of the Model Rules was swift and certain. In the Introduction to ATLA’s The American Lawyer’s Code of Conduct, ATLA President Theodore I. Koskoff wrote:

The basic precept of the Code is that American lawyers serve clients, and that they serve the public interest by serving the interests of their individual clients, one at a time . . . In our secular age, the lawyer’s office is fast becoming the last confessional for the troubled individual. As such, it is under attack from those who would make it a listening post for the state, because they believe that the state must know the truth, that the highest function of a system of justice is to determine truth, and that all secrecy is inimical to truth.¹⁴⁵

That, of course, is not really what Model Rule 3.3 says. The Model Rule simply refuses to require the lawyer to participate in the client’s perjury under the guise of protecting the client’s confidentiality. Confidentiality from what? From having the judge suspect that the client intends to pervert the legal system by lying? What *right* does any client have to lie? To be sure, the lawyer *may not* disclose past perjury by the client but to *require* the lawyer to *aid* in the perjury of his client because the client has some sort of “right” to mislead the court is sheer perversion of the system and the law is very clear on this.

141. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS No. 155 (1936).

142. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1).

143. ABA MODEL RULE 3.3(c); Rule 3.3, caveat.

144. ABA MODEL RULE 3.3(c)(4).

145. ATLA CODE, *supra* note 113, at iii.

For example, in dictum in *Harris v. New York*,¹⁴⁶ the Supreme Court of the United States said, "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury . . ." ¹⁴⁷ In *Harris* the defendant had made a confession which the trial judge had ruled inadmissible because of a lack of procedural safeguards required by *Miranda v. Arizona*.¹⁴⁸ But when the defendant took the stand in his own defense later in the trial and proceeded to deny the facts he had previously disclosed to the police in his inadmissible confession, the court allowed the prosecution to use the inadmissible confession for purposes of impeaching defendant's credibility. On appeal the United States Supreme Court said, "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately."¹⁴⁹

Moreover, *Harris* was only one of a long line of cases in which the United States Supreme Court has asserted that a defendant has a duty to testify truthfully, or at least has no inherent right to perjure himself. In *Walder v. United States*,¹⁵⁰ the Court said,

Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case-in-chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.¹⁵¹

As Dean L. Ray Patterson said in a recent article in the *Mercer Law Review*:¹⁵² "Attorneys are nearing the point of recognizing that the essence of the adversary system is an opportunity to be heard and to present a claim, evidence, and argument to support the claim. It does not necessarily entail the right to present a spurious claim, false evidence, or irrelevant argument." Or, viewing the matter from the lawyer's viewpoint, Dean Patterson wrote, "while the function of the lawyer is to protect the client's interests, those interests do not include the right to have the lawyer act as either an instrument or a shield of wrong doing."¹⁵³

One practical suggestion has emerged out of this controversy that,

146. 401 U.S. 222 (1971).

147. *Id.* at 225.

148. 384 U.S. 436 (1966).

149. 401 U.S. at 225.

150. 347 U.S. 62 (1954).

151. *Id.* at 65.

152. Patterson I, *supra* note 79, at 645.

153. Patterson I, *supra* note 79, at 646.

given the proper effort by both parties to a lawsuit, has some possibilities. Professor Norman Lefstein suggests that the attorney tell the client at the very beginning of their relationship that the intent to testify falsely is not a privileged communication.¹⁵⁴ As Professor Lefstein explains it:

When a client tells the lawyer that he intends to commit perjury after the lawyer has assured the client that all of his communications are confidential, or after the client believes that they are confidential, it is difficult to justify action which is tantamount to revealing to the court the client's acknowledgement of guilt . . . Therefore, it is preferable simply to inform the client, at the outset, of the specific scope of the attorney-client privilege. If subsequently the defense attorney . . . reveals the defendant's proposed perjury, at least the client will not have been deceived into thinking that everything told to the lawyer was confidential.¹⁵⁵

But regardless of the technique adopted by the lawyer to deal with a client, there is simply no right on the part of the client to perjure himself and no duty ought to attach to the lawyer to aid in perjury. In Model Rule 3.3 the ABA has at last recognized that fact.

PRO BONO PUBLICO SERVICE

Model Rule 6.1 provides that "a lawyer should render public interest legal service." This duty can be discharged by providing professional services at no fee or a reduced fee to individuals or groups or "by service in activities for improving the law, the legal system, or the legal profession."

In the Discussion Draft of the Model Rules this rule had *required* a lawyer to render "*unpaid* public interest legal service." In discharging this public service obligation, the lawyer could count only (1) activity involving legal service to poor people, or (2) activity in programs aimed at the improvement of law, the legal system or the legal profession. And while the Rule did not specify how much time a lawyer must contribute, the lawyer was required to make an annual report concerning this service "to appropriate regulatory authority."¹⁵⁶

Response to this Rule in the Discussion Draft was, for the most part, negative and resulted in proposed Rule 6.1, which is purely aspirational. Presumably, Rule 6.1 will be acceptable to the NOBC. That organization has said of the Discussion Draft version; "The intent be-

154. Lefstein, "The Criminal Defendant Who Proposes Perjury" *Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665, 692 (1977-78).

155. *Id.*

156. ABA MODEL RULE 8.1 (Discussion Draft).

hind this rule is laudable. However, the goal sought should remain aspirational and not be mandated.”¹⁵⁷

ONE-ON-ONE SOLICITATION

In another major change from the Code of Professional Responsibility proposed Model Rule 7.3 would permit one-on-one solicitation.¹⁵⁸ The question of in-person solicitation is unfortunately caught in the cross fire between *In Re Primus*,¹⁵⁹ in which the Supreme Court of the United States held that one-on-one solicitation is protected by the First Amendment to the United States Constitution where the solicitation is by a lawyer representing a non-profit organization that engages in litigation as “a form of political expression” and “political association,” and *Ohralik v. Ohio State Bar Ass’n*,¹⁶⁰ where the Court said that a private practitioner who solicited a client in the hospital and at home could be sanctioned for such solicitations.

Clearly, what the comment to the Discussion Draft of Model Rule 7.3 called “aggressive in-person solicitation by a lawyer seeking to generate a fee-paying case” may be prohibited by the state. But what *Primus* and *Ohralik* leave unsettled is whether in-person solicitation that does not involve coercion, harassment or misrepresentation, all of which were involved in *Ohralik*, is constitutionally protected.

Mr. Justice Marshall wrote a concurring opinion to *Primus* and *Ohralik*¹⁶¹ which focused on this gray area between the extremes of the two cases. He emphasized that his concurrence in both opinions was only because these two opinions dealt with cases at what he called “the opposite poles of the problem of attorney solicitation,”¹⁶² and suggested that the First Amendment informational interests served by attorney solicitation of clients, that is of a nature which he called “benign solicitation,”¹⁶³ are “entitled to as much protection as the interests we found to be protected in *Bates*.”¹⁶⁴ Noting that blanket non-solicitation rules discriminate against those potential clients who do not “move in the relatively elite social and educational circles in which knowledge about legal problems, legal remedies and lawyers is widely shared,”¹⁶⁵

157. NOBC REPORT, *supra* note 104, at 96.

158. The Chairman of the Legal Ethics Committee of the West Virginia State Bar described it in his 1980 Report to the State Bar “what we have heretofore known as ‘ambulance chasing’” (copy on file at the *Pacific Law Journal*).

159. *In re Primus*, 436 U.S. 412 (1978).

160. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).

161. *Id.* at 468.

162. *Id.* at 471.

163. *Id.* at 472.

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

165. 436 U.S. at 475.

Justice Marshall suggested that "legitimate interests might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation."¹⁶⁶

Model Rule 7.3 seeks to strike a balance between *Primus* and *Ohralik* and allows in-person solicitation (1) of close friends, relatives, clients and former clients; (2) under the auspices of a public or charitable legal services organization; and (3) under the auspices of a non-profit organization "whose purposes include but are not limited to providing or recommending legal services," if the legal services are related to the principal purpose of the organization.¹⁶⁷ On the other hand, a lawyer is prohibited from initiating contact with a prospective client if: (1) the lawyer should reasonably know that the "physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer," (2) the prospective client has "made known a desire not to receive communications from the lawyer," or (3) "the solicitation involves coercion, duress, or harassment."¹⁶⁸ The rule seems, on close reading, to be carefully tailored to the views expressed by Mr. Justice Marshall.

The necessity for clearly-drawn lines and precise guidelines is as great in this area as in any in the modern practice of law. Model Rule 7.3 appears to be a reasonable solution to a problem that could no longer be dealt with under rules designed for the practice of law in rural America.

The legal profession's aversion to solicitation can be traced as far back as Canon 16 of the Alabama Code of Ethics which read: "Special solicitation of particular individuals to become clients ought to be avoided." In 1908 the ABA adopted this principle as part of Canon 27, though with somewhat different wording.¹⁶⁹ But the prohibition against solicitation of clients, perfectly reasonable and even admirable in its time, can no longer meet the needs of modern society as expressed in *Primus* and *Ohralik*, and especially Mr. Justice Marshall's concurring opinion to those two cases. The proposed Model Rule on in-person solicitation appears to meet the demands of the time.

LAWYER'S DUTY TO KEEP CLIENT INFORMED

The lawyer's duty to keep the client informed is much more fully

166. *Id.* at 476.

167. ABA MODEL RULE 7.3.

168. *Id.*

169. "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

addressed in Rule 1.4 of the Model Rules than it was under the Code of Professional Responsibility.¹⁷⁰ Under the Code, only EC 9-2 addressed this subject head-on and then only in one sentence.¹⁷¹ Failure to keep the client informed is a common cause of disagreements leading to ethical complaints. Clients quite naturally tend to think of their matters as the only business requiring a lawyer's attention. When they do not hear from their lawyer they assume that the matter is being ignored. By defining the extent a lawyer is required to keep the client informed as that "reasonably necessary to permit the client to make informed decisions regarding the representation," Model Rule 1.4 may help alleviate this common source of complaints.

PROFESSIONAL COURTESY

Professional courtesy is a matter of no great moment but it should be noted that the "professional courtesy" language of EC 2-18 which had its roots in Canon 52 of the Alabama Code, is absent from the Model Rules. EC 2-18 stated: "It is a commendable and longstanding tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family." Its passing may suggest that the new Code, with its emphasis on the modern "business" of practicing law, has no room for quaint customs of the past.

ACQUIRING PROPRIETARY INTEREST IN A CASE

The suggestion of EC 5-7 and the injunction of DR 5-103 that a lawyer should not acquire a proprietary interest in the cause of his client or otherwise become financially interested in the outcome of the litigation, which was taken from ABA Canon 10, is also absent from the Model Rules.

Moreover, Model Rule 1.8(e) now permits a lawyer to advance litigation costs¹⁷² with repayment being contingent on the outcome of the matter.

170. Rule 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about a matter by periodically advising the client of its status and progress and by promptly complying with reasonable requests for information.

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

171. "In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in a matter being held for the client." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2.

172. Such advancement of litigation costs is prohibited by DR 5-102(B) of the Code of Professional Responsibility and ABA Canon 42.

Thus two old bars to a lawyer becoming financially involved in his or her client's case—bars based on the understanding of human nature that a lawyer who "owns" a piece of the case may tend to lose objectivity—have gone by the boards.

Both Model Rule 2.1 and the comment thereto recognize the desirability of independence of judgment free from concerns about disadvantages to anyone other than the client. But the Model Rules cited above seem designed to encourage lawyers to "buy into" cases and lose this valued objectivity. Moreover, like fee-splitting, being able to advance expenses to a client could lead to lawyers seeking out clients by the offer to advance expenses. It seems a dangerous precedent and sound justifications for the rule are hard to come by.

WHO IS THE "CLIENT?"

Situations involving the representation of corporations or other organizations often create confusion as to who is the client, the corporation or the persons who make up the corporation. Model Rule 1.13 clarifies the understanding of EC 5-18 that a lawyer retained by an organization represents the organization and not the directors, officers, employees, members, shareholders and other constituents. Moreover, in dealing with those in authority in an organization and its employees, a lawyer is required to explain the "identity of the client."¹⁷³

The rule also outlines measures to be taken by a lawyer for an organization when the lawyer learns that a person associated with the organization is engaged in, or intends action or inaction that is a violation of the law and which will likely result in significant harm to the organization.

The care and detail with which this rule and its comment discusses common problems of house counsel also reflects the Model Rules' concern for lawyers who are engaged in other than traditional private practice.

ETHICAL DUTIES OF SUPERVISORY AND SUBORDINATE LAWYERS

Model Rules 5.1 and 5.2 clearly set out the duties of subordinate and supervisory lawyers under the disciplinary rules. These rules make it clear that: (1) a supervisory lawyer has a duty to see that a lawyer over whom he or she has supervisory authority conforms to the disciplinary rule; (2) a subordinate lawyer has a duty to follow the disciplinary rules notwithstanding the fact that the supervising lawyer orders other-

173. ABA MODEL RULE 1.13(d).

wise. Neither of these matters was adequately covered in the Code of Professional Responsibility. The NOBC accepts both new Rules and would include them in that organization's proposed "revision" of the Code of Professional Responsibility.¹⁷⁴

PRACTICE IN FIRM OWNED BY NON-LAWYER

Model Rule 5.4 permits practice in a firm owned by a non-lawyer, a practice prohibited by DR 3-103 and ABA Canon 33 if the terms of the relationship provide in writing that the lawyer will be free from interference with his or her professional judgment and the Rules of Professional Conduct regarding advertising, fees and confidentiality are not violated.¹⁷⁵

The NOBC rejected a former version of this Rule, stating: "Inadequate justification has been provided for the significant change in the delivery of legal services that this rule represents."¹⁷⁶ This is, of course, a sharp departure from the former practice. The prohibition against practicing law in a firm owned by a non-lawyer appears to be grounded in the areas of advertising,¹⁷⁷ confidentiality¹⁷⁸ and conflict of interest.¹⁷⁹

Canon 2 and EC 2-11 express concern that a lawyer not practice under a designation that could mislead lay persons. The concern of Canon 4 appears to be that non-lawyers will be more likely to reveal confidences and secrets of a lawyer. Canon 5 is more direct: DR 5-107(C) simply forbids a lawyer to practice law for a profit in a professional corporation or association run to any extent by a non-lawyer. The fear there, as expressed in old Canon 33, is that a non-lawyer may be held out to be a practitioner of law or that a lawyer may find himself under the direction of a non-lawyer who will replace the client as the object of the lawyer's primary concern. These concerns appear, on reflection, to be archaic, self-inflating and ungrounded.

Curiously, DR 3-102, DR 3-103 and EC's 3-5, 3-6 and 3-8 permit a lawyer to hire accountants and insurance specialists as "paralegals" instead of making them full partners or working for them. It is curious why this is currently the only acceptable way to proceed. Model Rule 5.4 is a reasonable change.

174. NOBC REPORT, *supra* note 104, at 9.

175. ABA MODEL RULE 5.4.

176. NOBC REPORT, *supra* note 104, at 93.

177. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2.

178. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4.

179. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5.

PRACTICE UNDER TRADE NAME

Model Rule 7.5, which permits a lawyer to practice under a trade name, something prohibited by DR 2-102(B) is also a reasonable change.¹⁸⁰ The present prohibition against the use of trade names is grounded in the belief that a law firm's name should inform the public with whom they are dealing, something that a "trade name" would not do. But, in fact, a great many lawyers practice under firm names that reflect only the identities of firm members long since retired or deceased. If we are to allow a law firm to use a name containing deceased members whose last names no longer appear among the list of lawyers comprising the firm, then the rationale for not allowing lawyers to practice under trade names does not hold up.

A trade name for a lawyer who wishes to use a descriptive term such as "Main Street Law Office" is just as descriptive of who is practicing in that firm as is the "trade name" of a law firm practicing under the name of lawyers long since retired or deceased.

THE "REVOLVING DOOR" PROBLEM

Model Rule 1.11 expands on the requirement of DR 9-101(B): "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee;" which was itself largely a re-wording of old ABA Canon 36.¹⁸¹ Under the Model rule, in addition to the former prohibition against representing a private client in connection with a matter in which the lawyer had been substantially involved as a public officer or employee, the "revolving door" problem is addressed from the viewpoint of a lawyer now in public service. Moreover and directly to the heart of the "revolving door" problem a lawyer in public service is prohibited from negotiating for private employment with anyone involved in a matter in which the lawyer is participating as a public officer or employee.¹⁸²

Model Rule 1.11 is a necessary rule which reflects the understanding of the drafters of the Code that lawyers are no longer merely sole practitioners engaged in litigation but perform many roles, in many facets of the profession, including entering and leaving government service.

REDUCING FEE ARRANGEMENTS TO WRITING

Model Rule 1.5(b) requires that fee arrangements be reduced to writ-

180. ABA MODEL RULE 7.5.

181. "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

182. ABA MODEL RULE 1.11(B)(2).

ing except where the fee is implied by the fact that the lawyer's services are of the same general kind as previously provided the client or the services are rendered in an emergency.

At first blush this requirement strikes one as a purely "commercial" or "business" approach to what has heretofore been a highly professional matter. Yet fee disputes are a common and frequent cause of ethical complaints¹⁸³ and the prudent lawyer always makes certain that clients understand how the fee will be arrived at and, if possible, what the general range of the fee might be.

The NOBC report states:

Our experience in representing both integrated and voluntary bar groups nationwide over many years has convinced us that fee disputes constitute a major source of attorney-client disputes . . . Our experience has also convinced us that a primary cause of fee disputes is the absence of a clearly written document outlining the duties of the parties to render services or to pay for them. It is clear that reduction of fee agreements to some form of writing is the single most useful protection for the client and the lawyer. It is also clear that the mandate to reduce the fee agreement to writing should apply to every case and that the duty to produce the first proposal for the fee agreement is appropriately that of the lawyer.

We agree with the Kutak Commission that the addition of a mandate for a written, detailed, statement of the basis for a fee would prevent numerous fee disputes and would also ease the resolution of disputes between lawyer and client as to how much the client should pay for the legal services of the lawyer.¹⁸⁴

Model Rule 1.5(b) recognizes that the practice of law has many characteristics of a business. That this is so is indisputable. Treating clients in a fair, business-like fashion should not render a lawyer any less professional.

The comment to Model Rule 1.5 lists "the client's ability to pay" among the "relevant factors in determining the reasonableness of a fee." Curiously, EC's 2-17 and 2-18 and DR 2-106, all of which deal with setting fees, do not list the client's ability to pay as a factor to be considered, although the subheading before EC 2-17 suggests it is to be covered in one of the next seven EC's. Old Canon 12, "Fixing the Amount of the Fee," did not mention the client's ability to pay as a factor nor did any of the predecessor state codes. It is clearly time that this factor, which certainly has to be one of the matters considered in setting a fee, were made a part of the Code.

183. NOBC REPORT, *supra* note 104, at 26.

184. NOBC REPORT, *supra* note 104, at 26.

CONCLUSION

The Model Rules of Professional Conduct, as a substitute for the Code of Professional Responsibility, is neither as radical as its detractors fear nor as far reaching as its supporters would hope. But the proposed Rules do represent a clear step forward in a multitude of ways: First, the Code represents the first substantive revision of "law for lawyers" in nearly a century. The 1908 ABA Code of Ethics set forth some fundamental rules that represented the thinking of the profession at that time as to what should be the fundamental conduct expected of lawyers. That the code was haphazardly organized and mixed together the mandatory with the aspirational should not detract from its important role as a substantive statement of what was expected of lawyers.

The Code of Professional Responsibility, on the other hand, made a clear distinction between the mandatory and the aspirational, but made essentially no *substantive* changes in the lawyer's ethical code. Thus, we find ourselves in the waning days of the 20th Century with an ethical Code that has its roots in Pre-World War I America. It is clearly time for a change.

Second, the proposed Rules carry forward the basic belief underlying the Code of Professional Responsibility that the ethical code binding lawyers should not consist of merely polite suggestions about behavior but should suggest a "ground floor" set of rules beneath which a lawyer cannot function without facing sanctions.

Third, the organization of the proposed Rules is one with which lawyers are already familiar and it is infinitely simpler and easier to understand than the tri-partite organization of the Code of Professional Responsibility.

Fourth, the organization of the proposed Rules according to the various duties a lawyer performs is reasonable and reflects the day-to-day world of modern law practice.

Fifth, the proposed Rules contain provisions that more clearly relate to modern practice of law than the Code of Professional Responsibility—in so many areas, in fact, that the mere revision of the present Code would not suffice. Among these areas are the rules relating to definition of a client, reducing a fee to writing, client solicitation, practice under a trade name, the duties of supervisory and subordinate lawyers, and the "revolving door" problem.

Sixth, one of the most significant provisions in the proposed rules—some would insist it is *the* most significant provision—the rule prohibiting a lawyer to participate in or further a client's perjury—is one that is mandated by the law and by concern for the integrity of our judicial

system. For too long lawyers have played at the game of pretending that the adversary system is an arena where conflicting facts and arguments are thrown together, head-on, and somehow the “truth” emerges from this process, without regard to any concern that the facts and arguments that were fed into the system were true. The goal of the adversary system is the discovery of the truth and not merely the victory of one side or the other. A lawyer has a duty to that system not to pervert it by concealing, rather than helping to reveal, the truth.

Seventh, and finally, the proposed rules reflect the thinking of the bar after review of the Discussion Draft and contains numerous changes of provisions that practicing lawyers found unacceptable in the Discussion Draft.¹⁸⁵ These changes reflect the Kutak Commission’s consistent effort to provide a workable set of ethical rules.

The proposed rules will not satisfy everyone—a task which is impossible. But the Model Rules represent a desirable improvement and deserve to be adopted.

185. Among those changes are the elimination of the mandatory pro bono rule, dropping the requirement for an annual audit of clients funds, and “tightening up” of language in the rules relating to client’s perjury and client’s confidentiality.

