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Introduction

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This symposium revisits basic questions that the legal profession has faced in the past, and which it must continue to face in the future. Indeed, the legal profession—or any other group—may define itself by the questions that it asks about itself. In this connection, the quality of answers is usually a function of the quality of questions. Hence, the legal profession is well defined in proportion as the questions about itself are coherent and well directed. This symposium invites attention to the adequacy and focus of the questions that the profession has asked.

Certainly one question that must be considered is the notion of professional competence. Professor Trakman suggests the search for an acceptable definition has not been rewarding, but that the search must continue. His assessment of the importance of the question is reflected in the proposed Model Rules of Professional Conduct, for the Model Rules put the matter of competence in first place among ethical questions. The premise of the Rules is that if the lawyer does not possess competence, performance of all other professional obligations—to the client, to the courts, to third persons—is necessarily in jeopardy. The pervasiveness and depth of the problem of competence are also suggested by Professor Blair and Judge Aldisert. Hence, the Model Rules seem correct in giving salience to the question of competence.

It must be acknowledged, however, that the Model Rules do not go far toward defining competence. To be sure, they represent an improvement on the present Code of Professional Responsibility. Rule 1.1 of the Model Rules requires "reasonable competence." The Code asserts as an aspiration that lawyers be competent, but in its black letter establishes a standard that is not discernably different from gross negligence. Thus, DR 6-101(A) makes it a violation of the standard of competence only if the lawyer "knows or should know" that he is not competent to handle the matter in question. But the proposed Model Rules still state the standard in very general term; greater particularization proved unfeasible. There were objections that further specification would imply a requirement of specialization and that a requirement of specialization would impugn the competence of the general practitioner. Underlying this objection, moreover, was a substan-

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tive proposition that could not be seriously disputed: Many general practitioners can do a better job with any legal problem, even one of a type they have never dealt with before, than many "specialists," however long may be the latter's experience and however extensive their formal training.

This is another way of saying that certain characteristics of intelligence, insight, purposiveness, imagination, and perhaps temperament are more important in all legal tasks than is any particular body of technical legal knowledge. If that is true, then professional competence in law practice is essentially a manifestation of personal competence in dealing with the affairs of adult life. Perhaps we would profit from considering the implications of that possibility.

One implication is the importance of the enforcement apparatus. If "competence" is a complex but nontechnical attribute, then its existence must, like beauty, lie largely in the eye of the beholder. Or, to vary the dictum as to which Justice Potter Stewart is most chagrined, we may not be able to define incompetence but "we know it when we see it." The crucial element in this formulation, of course, is the composition of "we." Is it "we" appellate judges, like Chief Justice Burger, Judge Aldisert, and Justice Todd? Or panels of lawyers and laymen constituted on a state-wide basis, along the line of development explored by Ms. Gray and Mr. Harrison? Or the members of federal agencies, as Mssrs. Block and Harris warn us may be emanent? I forecast that once the notion of enforcement of professional standards is taken seriously, as has come to be the case, there will be a lot more controversy over the constitution and province of disciplinary tribunals having jurisdiction over lawyers.

The composition of the tribunals will be important not only in issues directly involving competence, but also in issues where competence is indirectly involved. Competence is indirectly involved in professional ethics to a far greater degree than may af first be apparent, for a standard of competence is implicit in ethical rules that specify an element of knowledge. For example, the rule that a lawyer shall not "counsel or assist" a client in crime or fraud requires that the lawyer know that an unfolding transaction may indeed involve crime or fraud.[1] The rule that a lawyer shall keep a client reasonably informed of the matter in his custody requires a lawyer to recognize significant events when they occur;[2] and so on. But what standard of perceptivity is

1. *See* CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A) (7); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(d).

2. *See* CODE OF PROFESSIONAL RESPONSIBILITY, EC7-8, 9-2; MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.4.

superimposed in deciding whether the lawyer must have know the portent of unfolding events.?

Beyond the search for a mutually intelligible concept of competence is a search for mutually intelligible concepts of professional morality. That search goes beyond the drafting of rules of Mssrs. Armstrong and Kutak and myself are well aware, for we have been variously engaged in writing such rules.

One concept of professional morality assumes that the adversary system entails a dynamic equilibrium as a result of which all will be well enough. That is, the legal system will be reasonably just, in its process and in its outcomes, if people are enabled to be self-servingly contentious, with the aid of energetic advocates, both in court and out of court, subject only to the restraint of law of crime and fraud. The logic of this justification essentially parallels the justification of market economics, and underlies both the present Code of Professional Responsibility and the proposed Model Rules of Professional conduct. A rather different view pervaded the old Canons of Ethics. This view was that lawyers were in some ill-defined way custodians of the law, and therefore subject to constraints more confining than those imposed by law on the population at large. That opinion is now quiescent if not dead, but it will undoubtedly revive sooner or later. For there remain those who doubt, even if quietly, that a society can hold together primarily through the dynamics of conflict. An era of lawgiving, as distinct from lawtaking, may be ahead.