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Model Rules of Professional Conduct A Perspective

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The American Bar Association is considering a comprehensive revision of its rules of professional conduct. The revision is embodied in the proposed Model Rules of Professional Conduct. If adopted, in August or later, the Model Rules would be recommended to the states, in most instances to replace the present Code of Professional Responsibility. The proposed revision, as it is submitted, accomplishes important objectives without compromising the fundamentals of the lawyer-client relationship or of the adversary system. The ABA’s Commission recommends favorable consideration.

The present Code of Professional Responsibility was promulgated by the American Bar Association in 1970. The Code was subsequently adopted in most states, in many instances as suggested, and in some cases with significant amendments. The Code was a pioneering effort to establish legal rules of professional conduct to replace the preexisting Canons of Professional Ethics. These Canons, adopted in 1908, were extremely vague, internally incomplete and had an ambiguous legal status. It was never clear whether the Canons were simply admonitions or fixed rules. The courts had treated them in both ways.

The Code of Professional Responsibility was a major step forward from the old Canons. The Code undertook, at least in part, to state rules of professional conduct as legal rules and not simply as exhortations or pieties. However, the Code itself had five serious defects, which became apparent in the decade after 1970:

- Several key problems of professional ethics were either left unresolved or were addressed in conflicting ways. On the highly controversial subject of client perjury, the present Code has been interpreted to suggest three different results: that the lawyer must reveal the perjury, that the lawyer may reveal the perjury, and that the lawyer may not reveal the perjury. The same is true of a situation where a client has committed fraud, or where the client committed a crime in which the lawyer’s services had been used in some way. A lawyer looking at the present Code for an answer to these questions may get two or three conflicting answers.
- The Code resolved several key problems of professional ethics in ways that are simply unrealistic or harmful to effect service to clients. This is particularly true of ethical problems arising in office counseling as distinct from
courtroom advocacy. Thus, the present Code does not clearly address the situation where a lawyer acts for two or more clients in putting together or conducting a joint enterprise, even though this is common and proper practice. The Code also does not clearly address the function performed by a lawyer in rendering a title opinion, or similarly evaluating a legal situation for the information of third parties, even though this is also a common and approved practice.

- The Code has several different but concurrent standards regarding conflicts of interest. Under one interpretation of the Code's conflict of interest rules a lawyer must decline representation of a client if there is any possibility of conflict with a prior client. This interpretation, if accepted, radically restricts a lawyer's right to serve multiple clients and to build up a practice.

- The Code handles the problem of referral fees in an ambiguous way, so much so that several states, including Illinois, have adopted a different rule.

- The Code says nothing about the ethical responsibilities or conduct of lawyers who practice in the same firm. The Code presently speaks as though it were addressing only single practitioners.

These deficiencies in the Code were widely recognized. There were other deficiencies as well. The Code provisions on advertising and solicitation in several respects violate Constitutional standards as defined by the Supreme Court after the Code's adoption. The Code has no specific rules on problems of conflict of interest between present and former clients, or on conflicts of interest where a lawyer moves between private practice and service in a public agency.

In the good old days (if any), these defects might not have made much difference. Law practice, perhaps, was not as complicated as it has now become, disciplinary enforcement was rare (as Mr. Justice Clark's committee observed) and legal malpractice litigation and motions to disqualify were practically non-existent. All that has changed, if it were ever wholly true, as every practitioner knows. The bar cannot afford a set of rules that is internally inconsistent, silent, or ambiguous on fundamental issues of professional conduct that arise every day. Any lawyer who thinks the present Code is "working well" is living in a dream world.

These are the reasons why, in the opinion of the ABA's Commission, a comprehensive revision of the rules of professional conduct is necessary.

The ABA Commission on Evaluation of Professional Standards has been working on the proposed revision for four and one-half years. It has produced several drafts and circulated them for outside comment. It has produced two drafts for general dissemination—a Discussion Draft in January, 1980, and a proposed Final Draft in May, 1981. Comments and suggestions are still being addressed to the ABA Commission and will be considered by it before any final action is taken by the ABA House of Delegates. In fact, the Commission has issued a marked-up copy of its final report.
indicating how many of the comments may be accommodated if the ABA House of Delegates so elects.

The Commission has, we think, been meticulous in giving full consideration to comments and accordingly, in making revisions. Ironically, this very care has made the revision process controversial; if the revision had been done in secret there might have been less controversy but also much less participation by the practicing bar.

Developments in American law since 1969-70 have been particularly important in the area of ethics. The dichotomy between the theory that the lawyer is the alter ego of the client, on the one hand, and an officer of the court, on the other, has intensified problems in the many ethical areas where public responsibility and loyalty to the client come into conflict.

In general, no one is going to be satisfied with the Model Rules resolution of this age-old conflict, but, without anticipating the ultimate decay of the adversary system, it is apparent that many courts and public bodies are rendering decisions and interpretations which push hard in the direction of recognizing public responsibility.

On the other hand, resentment of pervasive inroads on privacy strengthen the resistance of many people to limitations on the lawyer's privilege. The new rules address this area of conflict, as they must, and their resolution will never be satisfactory to those who remember a more simple era.

We believe that virtually every lawyer who has taken the time to read the proposed Final Draft of the Model Rules, without preconception, has come away generally satisfied with it. This was not true in the beginning of the revision process. Much of the controversy arose over a few disputed provisions—such as that requiring mandatory pro bono service—which have been withdrawn and other controversies which have been resolved. The proposed Final Draft, in general, reflects a broadly held consensus.

In preparing the Final Draft, it seemed self-evident that lawyers exist and are defined primarily in their relationships with clients. Thus, the parameters of the client-lawyer relationship were the starting point. They remain the opening theme of the Model Rules. The first series of Rules, therefore, addresses the duty of competence, diligence and timely communication with clients. It defines the scope of the relationship and the professionally responsible ways to decline or terminate it. The client-lawyer relationship has an economic dimen-
sion. The professional standards, accordingly, define ethical limits on the economic terms of the relationship, and to this end they directly discuss professionally responsible fees, and in a general way, the limitations on the potential for conflicts of interest. All of these aspects of the client-lawyer relationship seemed interrelated and seemed to invite the kind of organizational development that emerged, ultimately, in the first sixteen Rules of the Final Draft.

The Final Draft addresses the two primary professional activities undertaken by lawyers: counseling clients (Rules 2.1–2.3) and advocating clients’ causes (Rules 3.1–3.9). These activities inevitably affect and involve the third persons toward whom lawyers must behave in professionally responsible ways (Rules 4.1–4.4).

After covering these fundamental issues in ethical lawyering, the Rules turn to what may be described as “housekeeping” considerations. There is a national trend for lawyers to practice in groups; Rules 5.1–5.4 address the phenomenon of group practice. Lawyers have historically exercised their skills outside of the usual client-lawyer relationship in a broad spectrum of activities generally called “public service”; Rules 6.1–6.4 establish ethical guidelines for those activities. The provision of legal services involves dissemination of information about those services; Rules 7.1–7.5 establish professionally responsible ways of disseminating that information. Finally, Rules 8.1–8.5 establish the self-regulating character of our profession, providing for ethically responsible conduct in bar admission, discipline and reporting professional misconduct.

This broad overview suggests the organizational assumptions of the Commission in its analysis of professional conduct. Clearly, within each set of Rules are many topics and issues meriting detailed study.

This is not to say that there are not some issues on which lawyers disagree. The chief areas of remaining controversy, or warm discussion, appear to be:

- Whether or not a lawyer has a duty to take action where a client has committed deliberate perjury on the stand and then refuses to correct the testimony. There may be a basis for saying that a lawyer for the accused in a criminal case should have no such duty but it is hard to see how a lawyer in a civil case can be an officer of the court without having such a duty. In any event, there is still no duty to “squeal,” or “blow the whistle,” simply because a client’s testimony is implausible or because the client merely seems to want to commit perjury, and the Model Rules so provide.
- Whether or not a fee agreement

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should be in writing when the lawyer has not previously represented the client. There is consensus that a written agreement in such circumstances is highly advisable and that a contingent fee agreement should also be in writing. The area of controversy on this point is, therefore, relatively small.

- Whether or not it should be explicit that a lawyer may have a duty to speak up to prevent a client from committing a fraud where the lawyer has rendered professional services in the transaction in which the fraud has occurred or is threatened. It is clear, under present law as well as under the proposed Model Rules, that a lawyer may speak up in such circumstances and that the law, in effect, compels the lawyer to speak up if remaining silent would constitute complicity in the fraud. The only issue is whether that implication should be spelled out. The proposed Final Draft does spell it out. However, many lawyers think the matter should be left to implication. Again, the area of disagreement is relatively small, but it should be remembered that the Rules are going to be public documents and that lawyers may be judged by the public by their willingness to spell out obligations.

- Whether or not a lawyer handling a contingent case can advance the client not only litigation expenses but also living expenses. The proposed Model Rules as submitted, like the present Code, permit the advancement only of litigation expenses. This remains a serious substantive issue. If the existing Code provision is to be kept, lawyers should be compelled to live by it. No hypocrisy should be accepted on this or other issues and the rule should be clear.

- Whether a lawyer for a corporation should ever be permitted to "blow the whistle" on the board of directors, where the directors have approved legally disastrous action by the corporation to protect or advance their own individual interests. The law on this point is unsettled. Under common law rules it appears that a lawyer is required to act out of a duty of loyalty to the corporate client. However, there is respectable opinion on this issue to the effect that the corporate lawyer's only proper course of action in such circumstance is to resign.

- The scope of the duty of partners in a firm for the ethical conduct of all lawyers in the firm. The proposed Model Rules provide that all partners have a duty to see that reasonable measures are taken by the firm. Critics argue that a duty of ethical supervision should rest only on partners directly involved in the matter in question.

The foregoing issues will have to be resolved by the American Bar Association in considering the proposed Model Rules although the states adopting the Model Rules can, if they wish, resolve them differently. Indeed, the format of the Model Rules makes it relatively easy to isolate these issues, which is not true of the present Code. The more fundamental point is that these issues are clear-cut and rela-
tively few in number and the Model Rules as a whole can be accepted without having to accept their resolution of these issues.

It would be a misfortune, indeed an absurdity, to reject the Model Rules because there is controversy over these or other isolated issues. These are inherently controversial issues, even under the present Code. One of the virtues of the Model Rules is that they frame these issues clearly. The other virtue is that the Model Rules have now worked out a consensus on a whole range of other issues which the present Code does not address, or addresses in ambiguous or contradictory terms.

Assuming they are promulgated by the ABA, the Model Rules should be adopted as a whole in each state. In the process, each state can individually resolve the controversial issues. Uniformity is desirable but not essential. Each state’s rules of professional conduct should be coherent and consistent with its own concepts and the traditions of the lawyer’s role.

In coming to a judgment on the Model Rules, a fair question for any lawyer to ask is “How will the Rules affect my practice?” The answer is that you will have at hand a reliable tool, coherently organized and responsive to the problems encountered by lawyers in the daily practice of law.

But will the Rules change your practice? The quick answer to that question, frankly, is “not very much.” The authors’ experiences during the past five years in developing the Model Rules has reinforced and confirmed a strong belief—a belief we think is shared by most of us who have had occasion to consider the matter—that the vast majority of lawyers take constant and strenuous pains to conform their conduct to the highest standards consistent with the profession’s unique role as officers of the courts and advisors and client advocates.

The Model Rules, far from threatening that desirable state of affairs, seek rather to enhance it by giving the profession clear, workable standards which clarify the ambiguities in the current Code of Professional Responsibility. These standards give clear guidance to the lawyer confronted with difficult choices; address, in a meaningful way, potential abuses in lawyering; and accommodate future developments in the practice of law while preserving the essential values inherent in the professional role.