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Lloyd B. Snyder

Cleveland State University, l.snyder@csuohio.edu

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by Lloyd Snyder

Bringing Ohio's Legal Ethics into the 21st Century

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The time has come for Ohio to replace the Code of Professional Responsibility with a set of standards based on the Model Rules of Professional Conduct. There are at least seven reasons for doing so.

I. The Ohio Code does not cover some important subjects.

The Model Rules of Professional Conduct deals with the obligations of supervisory attorneys and subordinate attorneys within a law firm. Another provision in the Model Rules deals with conflicts of interest between a former client and a current client. Another deals with an attorney's evaluation for use by third parties. Ohio has no such rules, and the law in these areas must be filled in, either by pretending that its rules are the same as the Model Rules or by forcing its results onto some unrelated rule. As one example, an Ohio attorney trying to figure out whether there is a conflict of interest between a current and former client is forced to

deduce the answer from the Code's provision on confidentiality, rather than the provisions in Canon 5 that appear to deal with conflicts. Important subjects should be covered expressly.

2. The format of the Ohio Code is confusing and disorganized.

There is no logic to the structure of the Code. The individual canons do not necessarily explain the rules within the canons. For example, it is difficult to see what any of the disciplinary rules under canon 8 have to do with the canon, which states that a lawyer should assist in improving the legal system. The rules deal with abuse of public positions and false statements about judicial candidates.

The Model Rules of Professional Conduct list the rules under functional categories: the client-lawyer relationship, the lawyer as counselor, the lawyer as advocate. It is relatively easy to find the relevant rule for a given problem.

3. The Code has inconsistent provisions.

Piecemeal amendments of the Code over the years have produced some inconsistent provisions. For example, DR 5-103(B) now permits an attorney to advance litigation expenses "the repayment of which may be contingent on the outcome of the matter." DR 2-101(E)(1)(c) requires the attorney to disclose in advertisements that the client could be liable for those expenses. This means that the advertising rule requires a lawyer to provide information that may be

untrue. The lawyer must say in advertisements that in the event of an adverse verdict the client could be liable for expenses, even if the lawyer has a fee agreement provision barring collection of expenses in such cases. A comprehensive review of the provisions in Ohio would provide a vehicle for clearing up such anomalies.

4. The ethical considerations no longer serve a significant purpose.

One argument for retaining the Code format has been that it provides for aspirational ideals, rather than simply the minimal standards, of practice. Although the preface to the Ohio Code states that the Ethical Considerations are aspirational rather than mandatory, the ECs, in fact, have served two purposes, setting aspirational goals and also providing commentary on various DRs.

Since 1997, Ohio has had a separate set of provisions known as "A Lawyer's Creed" and "A Lawyer's Aspirational Ideals" that duplicate and expand upon the aspirational aspects of the Code's ethical considerations. In light of the creed and aspirational ideals, it is no longer necessary to have the same function served by the ethical considerations. The Model Rules format provides commentary that serves to explain the purposes of the Rules without confusing the commentary with aspirational provisions.

Indeed, under the current system there may be some confusion about the meaning of certain ethical considerations that deal with subject matter also covered by the creed and aspirational ideals, but using different language. As one example, the aspirational ideals state that a lawyer should "provide

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written agreements as to all fee arrangements." In the Code, EC 2-18 states that "it is usually beneficial to reduce to writing the understanding of the parties regarding the fee." It would be useful to know whether the goal in Ohio is to have written agreements in all cases, or whether the assumption is that written agreements are usually, but not always, preferred.

5. Ohio is woefully out of step with other states.

Ohio is one of only a handful of states that has not modified its ethical code significantly since the approval of the Model Rules of Professional Conduct by the ABA in 1983. Some of the few remaining code states have proposed or are in the process of drafting a new set of standards. If the Ohio Code had some significant advantage over the model rules, the failure to modify the code could be justified. Given the shortcomings of the Code, there is no advantage to remaining out of step.

There are a number of disadvantages. As the organized bar continues to debate amendments to the Model Rules to account for changes in the legal profession in the 21st century, Ohio's Code is becoming more and more out of date. The incompatibility of the formats of the two sets of standards often makes it difficult to borrow provisions from the rules and insert them into the Code. Ohio attorneys are less able to take advantage of decisions in other jurisdictions as guidelines for their conduct in serving Ohio clients.

6. Students have a difficult time attempting to comprehend both sets of standards.

In Ohio, students must pass the Multistate Professional Responsibility Exam in order to be admitted to practice. That exam is based entirely on the Model Rules of Professional Conduct. Then they must pass the Ohio bar exam which includes questions under the Ohio Code of Professional Responsibility. In essence, they must learn both sets of standards. This is extremely confusing.

In the past it was possible to teach students the Ohio Code, and note significant differences in the model rules. Now, it is necessary for them to attempt to master both at the same time. If the organized bar in Ohio is adamant that we should continue to operate under the Code, then we should eliminate the requirement that persons seeking admission to the Ohio bar pass the MPRE, a requirement that essentially compels them to show a mastery of a set of standards that does not apply to them. Granted, that would mean that Ohio law students seeking admission to the bar of other states would be at a disadvantage studying for the MPRE and the ethics questions in the foreign state's bar exam, but at least the students would not have the extremely difficult task of mastering two sets of rules at the same time.

7. It is important to begin revising the Code now

One argument for not revising the Ohio Code has been that the ABA has embarked on a serious effort to revise the Model Rules. The argument is that we should wait

until the completion of that effort to consider modifying Ohio's standards. The difficulty with that approach is that the ABA effort may take some time for completion. In Tennessee, where the organized bar recently petitioned its Supreme Court to approve a rules-based revision of the state's ethical standards, the revision process took five years.

While Ohio delays the process of reviewing its standards, the state continues to fall behind the other states. Revising Ohio's standards will take some time. We should begin the process of a comprehensive review of the Code now. We may not complete the task until the ABA finally approves its amendments, but that is not a reason for delaying the start of the process. The sooner we begin, the sooner we will be able to establish a set of standards for Ohio's lawyers that meets the requirements of the new century.

Lloyd Snyder is a member of the CBA Ethics and Professionalism Committee.

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