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Legal Ethics: Legal Rules and Professional Aspirations

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ADDRESS

LEGAL ETHICS: LEGAL RULES AND PROFESSIONAL ASPIRATIONS

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THE BAR IS NOW GENERALLY AWARE that a revised set of Rules of Professional Conduct has been proposed to, and is being considered by, the American Bar Association.[1] These proposed Model Rules, if endorsed by the ABA, will be presented for adoption in the several states. If adopted in a state, the Model Rules would replace the present Code of Professional Responsibility.

I. LEGAL RULES

A key initial question is whether the bar really needs a comprehensively revised set of rules, as distinct from revisions of the present Code. The answer is clearly "yes." My own belief in this regard may be colored by the fact that I am Reporter to the ABA Commission on Evaluation of Professional Standards (the "Kutak Commission"), which drafted the proposed Rules. However, the case for adopting the Model Rules as a whole is overwhelming, even if one disagrees with the resolution in the Model Rules of certain necessarily controversial issues.[2] If there are different views on such issues, the solution is to adopt the Model Rules while modifying their resolution. Thus, the case for comprehensive revision goes beyond the merits of specific issues dealt with in the new Model Rules.

The point, very simply, is that comprehensive revision is required because the structure of the present Code has turned out to be

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[1] *See* Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A.J. 1116 (1981); ABA Comm. on Evaluation of Professional Standards, *Final Draft of the Model Rules of Professional Conduct*, 67 A.B.A.J. 1298 (*Additum* 1981) [hereinafter cited as *Model Rules*].

[2] For example, consider the issue of whether trial counsel who knows that his client is committing perjury is required to do anything about it. *See generally* Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 AM. BAR FOUND. RES. J. 964.

disasterous. This is not the fault of the Code's draftsmen, but is the result of subsequent developments in interpretation of the Code. The essence of the problem lies in the present Code's three-level structure.

The components of the three-level structure are as follows: At the most general level are nine Canons, drafted in very broad language. For example, Canon 4 says that: "A lawyer should preserve the confidences and secrets of a client."[3] Canon 6 says that: "A lawyer should represent a client competently."[4] Canon 9 says that: "A lawyer should avoid even the appearance of impropriety."[5] The second level in the Code consists of Ethical Considerations. These are much more specific than the Canons. However, like the Canons, they are written in precatory language (using the word "should") rather than language of obligation ("shall"). For example, with regard to conflicts of interest, EC 5-15 states as follows: "If a lawyer is requested to undertake or to continue representaton of multiple clients having potentially differing interests, he . . . should resolve all doubts against the propriety of the representation."[6] With regard to competence, EC 6-3 says that "a lawyer generally should not accept employment in any area of the law in which he is not qualified."[7]

The third level consists of Disciplinary Rules, written in black letter and using the term "shall" in stating obligations. For example, DR 7-102(A)(4) provides that a lawyer "shall not knowingly make a false statement of law or fact,"[8] and DR 4-101(C) provides that a lawyer "may reveal the intention of his client to commit a crime. . . ."[9]

The original conception of the Code was that the first two levels—Canons and Ethical Consideratons—were to be aspirational standards, and that only the Disciplinary Rules were obligatory.[10] Thus, it was intended that the Code retain the ethical aspirational character of the old Canons of Professional Ethics of 1908, which the Code replaced, but add rules of law in black letter.

This original conception of the Code was an intelligent experiment—an attempt to legislate rules of minimum conduct while at the same time expounding higher principles of professional ethics. But

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[3] ABA CANONS OF PROFESSIONAL ETHICS No. 4.

[4] *Id.* at No. 6.

[5] *Id.* at No. 9.

[6] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (1980).

[7] *Id.* at EC 6-3.

[8] *Id.* at DR 7-102(A)(4).

[9] *Id.* at DR 4-101(C).

[10] *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979), in which it is stated that "[t]he Cannons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers. . . . The Ethical Considerations are aspirational in character. . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." *Id.* at 1.

the experiment has turned out to be a failure, with very adverse consequences for the practicing lawyer.

What has happened is that the Canons and the Ethical Considerations—although supposed to be only aspirational—have been relied on by courts and disciplinary committees as though they were black letter rules. This reliance has occurred in disciplinary proceedings and in other contexts such as malpractice suits against lawyers and motions to disqualify on the ground of conflict of interest. The result is that the present Code has come to contain at least two potential rules governing the same lawyer conduct (and sometimes three potential rules).[11]

Three examples may be given of this legal double-speak under the Code. First, regarding the lawyer's obligation to serve a client diligently, the black letter of the Code, DR 6-101(A)(3), says that a lawyer shall not "neglect a matter entrusted to him."[12] This standard implies at most a requirement that a lawyer use the diligence that a reasonably careful lawyer would use, and may imply that a lawyer violates the rule only through conscious or willful neglect. On the other hand, it has been held in decisions that the proper standard for assessing diligence is Canon 7, which states that "A lawyer should represent a client zealously. . . ."[13] The term "zeal" implies all-out effort so that a lawyer could be said to violate the Code if he gives anything less than such an effort.

The second example is the standard for avoiding conflicts of interest—the circumstances in which a lawyer must decline a new matter because of previous representation of another client. Under DR 5-105(A), the lawyer may accept the new matter unless "his professional judgment . . . reasonably may be affected. . . ."[14] On the other hand, there are holdings that the proper standard is Canon 9, so that a lawyer may not accept a new matter if it will involve "the appearance of impropriety."[15]

A third example concerns the circumstances under which a lawyer must reveal to the court that perjured evidence has been presented, particularly perjury by his client. Under the present Code it is plausible to conclude that any of the following is the rule: that the lawyer must reveal the perjury by reason of DR 7-102(B)(1) and the requirement under Canon 7 that he act "within the bounds of the law"[16]; that he may reveal the perjury by reason of DR 4-101(C)(3) and the requirement of Canon 9 that he avoid the "appearance of impropriety"[17]; and that he may not

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[11] For a detailed analysis, see Note, *Lawyer Disciplinary Standards: Broad v. Narrow Proscriptions*, 65 IOWA L. REV. 1386 (1980). *See also* Hazard, *Rules of Legal Ethics: The Drafting Task*, 36 THE RECORD 77 (1981); Moser, *The Model Rules: Is One Format Better Than Another?*, 67 A.B.A.J. 1624 (1981).

[12] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (1980).

[13] ABA CANONS OF PROFESSIONAL ETHICS No. 7.

[14] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1980).

[15] ABA CANONS OF PROFESSIONAL ETHICS No. 9.

[16] *Id.* at No. 7.

[17] *Id.* at No. 9.

reveal it by reason of DR 4-101(B) and Canon 4 stating that "[a] lawyer should preserve the confidences and secrets of a client."[18]

Let us be quite clear about the significance of these examples. They are examples of problems that arise in the ordinary practice of law; they are not exotic fortuities or academic exercises. Furthermore, they present lawyers with very strongly conflicting inclinations and hence entail inherently tough decisions. And the Code as interpreted resolves each of these problems in two different ways simultaneously.

The double-speak of the Code cannot be cured by amendment. It results from the Code's very structure, that is, by its attempt to speak simultaneously about rules of aspiration and rules of obligation.

In contrast, the proposed Model Rules are cast in the familar and much more reliable form of the restatements. Accordingly, on any given subject, the Model Rules provide a black letter rule and an explanatory comment. The Rules, in other words, seek to be rules of the lawyer's legal obligations and not expressions of hope as to what a lawyer ought to do.

The practicing lawyer needs and is entitled to *legal rules* that are not confounded by appeals for moral regeneration. The practice of law is technically and morally a difficult task. Technically, law practice is difficult because the law is complicated—as every practitioner is aware. Morally, law practice is difficult because the lawyer generally works at the edge of legal rights and wrongs. There is no getting around this moral peril. The law itself—the stuff lawyers work with—defines legal rights and wrongs.

A lawyer should not have to operate under inherent moral peril with a rule system that is inherently ambiguous. But that is his situation under the present Code as it has come to be interpreted. That is why the new Model Rules are preferable to the Code, quite apart from how substantive issues of professional conduct might be resolved.

II. PROFESSIONAL ASPIRATIONS

While the legal profession requires rules of professional conduct that are unequivocally legal rules, it also needs to project high professional aspirations. Professor Murray Schwartz has developed some of the implications of this need.[19] He observes that the proposed Model Rules abandon any attempt to state aspirational norms and limit themselves to being law. Professor Schwartz approves this approach but points out that it also leaves a large vacuum. This is the same vacuum that the Wright committee noticed, that is, both Professor Schwartz and the Code realize that we can formulate legal rules for professional deport-

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[18] *Id.* at No. 4.

[19] *See generally* Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. BAR FOUND. RES. J. 953.

ment, but would also like to say something in the way of guidance or inspiration or aspiration about how lawyers could and fittingly should deport themselves in the large domains of professional conduct that lie within the boundaries of the law. In other words, the black letter provides a legal boundary beyond which a lawyer should not go, but there remains a large area of permissive or discretionary conduct. In this area some patterns of behavior are more commendable—more desirable, more "professional"—than others. How are these commendable patterns to be described and recommended?

The problem is how to talk about patterns of behavior so as to commend some as preferable to others, without by implication condemning the other as legally wrong. The Code tried to do this by using the word "should" instead of the word "shall," but still employed the medium of general propositions about behavior, *e.g.*, "[a] lawyer should avoid even the appearance of impropriety."[20] As indicated above, this attempt yielded the adverse consequence that "should" often was interpreted to mean "shall." That is, general propositions about appropriate behavior tend to be converted into legal rules.

As a consequence, if the bar uses general propositions to speak about desirable professional practice, it runs the risk of legislating inadvertently. General normative propositions ("shoulds") are unavoidably vulnerable to transformation into legal rules ("shalls"). In short, the medium of generalization is inappropriate to convey the message of professional aspiration, as distinct from the message of legal obligation.

But there are other media. The problem is to recognize that the form in which we speak to express professional aspiration—the rhetoric—ought to be different from the form of rhetoric in which we speak of obligation.

There is ample precedent for another kind of rhetoric. The medium that we could use for identifying exemplary behavior is the commendable, or honorific—or, if you will, heroic—example. Instead of trying to describe exemplary conduct in general normative propositions—for example, "avoid the appearance of impropriety"—we can give an illuminating instance where a lawyer has avoided the appearance of impropriety and then say: Do thou likewise.

If we reflect on our cultural tradition, we recognize immediately that this is a classical form of normative instruction. The Old Testament is full of ethical instruction cast in the form of illuminating anecdotes or instances—the stories of David and of Solomon, for examples. These are vivid "cases" drawn from life in which an actor's behavior is used to exemplify a conduct that is commended or condemned, as the case may be. In the Christian tradition, Jesus' teaching usually took this form. Jesus occasionally invoked generalizations, for example, "love thy neighbor as

[20] ABA CANONS OF PROFESSIONAL ETHICS No. 9.

thyself." However, Jesus' principal vehicle was the specific case—the good Samaritan, for instance. Over and over again, he presented examples of behavior that exemplified good conduct as he defined it and sought to persuade others to accept.

A similar method is used in the Greek tradition. *The Iliad* and *The Odyssey* are tales of exemplary conduct—again, either commended or condemned—to illustrate and define the good or the bad or the foolish. A similar teaching apparatus is exhibited by Aesop's fables.

There are many other illustrations of the use of this technique. Indeed, much of biography, much of fiction, and much of poetry, consists of education through illuminating example. In this technique, no effort is made to define in precise—"legalistic"—terms what is good about the conduct. Indeed, it is often left for the audience to deliberate about the essence of the goodness, or badness, illustrated in the example.

Modern society uses the same technique. A Nobel Prize to a scientist teaches what a good scientist is by singling out an exemplary case and bestowing commendation, to the accompaniment of great public fanfare and exposition of the feat. Even more directly relevant to lawyer's ideals is the Nobel Peace Prize. The prize offered to Martin Luther King, for example, teaches us how one person acted "zealously within the bounds of the law," to borrow a phrase from our own ethical lore. Conferring award for exemplary acts is a public pronouncement of that which is desirable and esteemed.

The same sort of thing is done by professional groups, including the bar. We confer awards and citations for professional excellence. A similar process is involved in the selection of bar leaders on the basis of professional standing, and in continuing legal education, where excellent practitioners are invited to describe their technique.

These forms express aspirations. The medium is at least as evocative and powerful as generalizations about goodness. Indeed, it may be more so because it is not impeded by concern for technicality of definition. It recognizes that education through example—with the invitation to emulate—is a better means of evoking exemplary behavior than a penal code.

The only problem with this technique is that is is not "legal." But this only reminds us that in seeking to achieve ideal ethical behavior in our profession we may have to use some technique other than legal control as such. Legal rules, of course, have a place. The proposed Model Rules testify to that. The point is simply that general normative propositions have a limited place, and that we should not try to force them to use beyond that place. I believe this is what we have done with the Canons and Ethical Consideratons in the present Code.

I support the sentiment of those who wish somehow to continue the aspirational aims of the Canons and Ethical Considerations. My argument is only that we are using the wrong medium if we try to do so in rules, even if the rules are formulated in the terms of the verb "should."