Professional Responsibility

After the 1999 Code Amendments: The Future of Ethics

*by Steven C. Krane**

On July 14, 1999, the presiding Justices of the Appellate Division of the New York Supreme Court issued a comprehensive set of amendments to the Disciplinary Rules of the Lawyers' Code of Professional Responsibility. The amendments, which were effective immediately, help clarify and update existing provisions of the Code and eliminate or modify rules that no longer comport with the reasonable and legitimate expectations of clients, lawyers and society in general. Having spent the better part of seven years working toward the adoption of these amendments, I will leave to others more objective than I the task of their description and analysis. With the millennium approaching, however, it would seem appropriate to undertake a more fundamental examination of the way in which the legal profession is regulated and to try to develop a new framework that takes into account the broad and diverse nature of lawyers, clients and the practice of law.

It was initially believed that the American Bar Association was embarking on precisely such a study when it announced in 1997 that a Commission was being formed to undertake the ABA's first comprehensive review in nearly 20 years of the rules governing the professional conduct of lawyers. It appeared that, having produced the Canons of Professional Ethics in 1908, the Model Code of Professional Responsibility in 1969 and the Model Rules of Professional Conduct in 1983, and having amended each of those works from time to time in the intervening years, the ABA was ready to develop a regulatory scheme that would be more reflective of "developments in the legal profession and society . . . ."[1] ABA President Jerome J. Shestack, who created the Commission, expressed his "hope that the committee will not just examine our rules of conduct but help bring us to a higher moral ground. . . . Ethics is not a system to look for loopholes or ways out but a system of right conduct that is part of the calling of a profession that I regard as a noble and learned profession."[2]

Observers were led to believe that the members of the Commission, all of whom are distinguished members of the bar and nationally renowned experts on ethical issues, would take an expansive look at the fundamental nature of the rules governing attorney conduct — if not the fundamental nature of attorney regulation itself — and with the benefit of heightened perspective and an attempt at "futuring" create a framework for attorney conduct that would not only be reflective of the realities of the practice of law today, but that would be sufficiently progressive to provide a workable structure to govern the legal profession well into the next century.

The possibilities were limitless. With the combined imagination and expertise of the members of the Commission, a thorough reexamination of these matters could have led anywhere. However, that was not to be. Early on, it became apparent that the Commission, dubbed "Ethics 2000," did not intend to do more than tinker with the existing platform provided by the Model Rules of Professional Conduct. The expressed attitude of the Commission was "if it ain't broke, don't fix it."[3] As a result, what is emerging from the Commission is not a proposed regulatory scheme for the next century, but merely an updating of the existing set of Model Rules, driven to a great extent by the view that the substance of the American Law Institutes' recently completed Restatement of the Law Governing Lawyers should be imported into the Rules.[4]

The Model Rules have been adopted by more than four-fifths of the disciplinary jurisdictions in the United States in the 16 years since their approval by the ABA House of Delegates. Although they are the direct lineal descendants of the Canons of Professional Ethics and the three-tiered Model Code of Professional Responsibility, their ancestry can be traced back to the mid-1800s. George Sharswood's celebrated Essay on Professional Ethics, published in 1854, is generally viewed as the first serious attempt at synthesizing the axiomatic norms governing the conduct of American lawyers. To Sharswood, the lawyer's paramount duty was to the client. While expressing the view that lawyers also have certain responsibilities to courts, other lawyers and society, Sharswood declared that lawyers are not responsible for the social utility of their client's cause. Prudence, restraint, civility and fairness were Sharswood's watch cries. These principles found their way virtually intact into the Canons of Professional Ethics, developed by a small committee of the ABA elite. Designed in large part for the upper echelons of the already stratified legal profession, the Canons prohibited advertising and all forms of solicitation, thereby impinging on the ability of working-class lawyers with working-class clients to make their presence known or to educate potential clients as to their need for legal services. The Canons permitted contingent fees, however, in a striking divergence from Sharswood, who viewed them as tending to "corrupt and degrade the character of the profession."[5]

Over 50 years passed before efforts began to replace the Canons with a more modern code of conduct. By

the 1960s, it was apparent that the Canons no longer addressed the realities of the practice of law, which not surprisingly had changed dramatically since 1908. What emerged from the American Bar Association was the Model Code of Professional Responsibility, a three-tiered codification of overarching ethical principles ("Canons"), minimum standards of professional conduct ("Disciplinary Rules"), and principles of conduct to which all lawyers, it was hoped, would voluntarily adhere ("Ethical Considerations"). In a political and cultural environment more receptive to the needs of society's underclasses, the new Model Code recognized the legal profession's responsibility to make legal services available to all Americans. Still, the ABA restricted advertising to "reputable" law lists that it deigned to sanction, and otherwise prohibited structures (such as group legal service plans) that would allow lawyers to make good on their promise to provide access to justice for all those in need.

The Model Code was not without its deficiencies. It focused almost exclusively on the professional responsibilities of litigating attorneys, ignoring the many lawyers who are perfectly happy never to see the inside of a courtroom. It barely touched on the obligations of lawyers representing organizational clients, or of those who work in large bureaucratic public and private firms. Instead, the Code continued to proceed from the outdated paradigm of the individual lawyer representing an individual client. While these shortcomings alone may eventually have been sufficient to topple the Model Code from its throne, a cataclysmic event for the legal profession precipitated an early fall. That event was the Watergate scandal, in which lawyers played key roles, and it served as the catalyst for a movement to revisit the standards governing attorney conduct less than a decade after the Model Code emerged from the ABA halls.

The ABA formed a Commission on Evaluation of Professional Standards in 1977. The Commission spent three years studying lawyer ethics and, in 1980, presented a draft of the Model Rules of Professional Conduct. The Commission urged some far-reaching changes to the nature of the attorney-client relationship, including rules requiring lawyers to disclose illegal activities by clients and instituting mandatory pro bono publico service. Many of the Commission's proposals were rejected by the ABA House of Delegates during the three years of study and debate that followed.

The Model Rules of Professional Conduct, in the form in which they were ultimately adopted by the ABA, differed in significant ways from the Model Code of Professional Responsibility. Gone was the three-tiered structure and, most notably, any mention of aspirational standards or "better practice" guidelines. Instead, black-letter rules for the imposition of discipline were supported by official commentary. The Model Rules made an effort to address some of the ethical issues faced by transactional and other non-litigating attorneys, and otherwise tinkered with some of the ethical precepts that had been in the Model Code. Essentially, however, the Model Rules, while a step forward in many respects, did not constitute a fundamental reworking of the profession's ethics rules. Perhaps as a result, and in direct contrast to the almost immediate and unanimous acceptance of the Model Code, states proceeded deliberately in deciding whether to adopt the Model Rules, and a handful of states, such as New York, rejected the Model Rules outright.

The Model Rules of Professional Conduct can perhaps be analogized to a modest house built in the early 1960s. The kitchen and bathroom were updated in the late 1970s, and the garage was converted into an extra room, but otherwise the house has remained unchanged. By the late 1990s, however, it became apparent that the occupants of the house had — along with their neighborhood — changed dramatically. The house no longer meets their needs. Clearly, what is needed is a new house for the occupants to live in. Instead, the ABA is planning only on redecorating.

It has perhaps, then, fallen to the interested bystanders to take the "steps back" that the ABA chose not to take, and to consider what sort of code of conduct lawyers need today, on the threshold of the Third Millennium.

The first step back involves a consideration of whether the legal profession needs a code of ethics at all. As discussed above, the subtext of the early codes of ethics was an effort by the Brahmins of the Bar to squelch undesired competition from less privileged lawyers or, worse yet, competition from those outside the legal profession. While there may be elements of our profession who continue to view these as valid goals of regulation, the courts have taught lawyers over the past three decades that codes of ethics cannot be used for anticompetitive purposes.[6] Today, the principal purpose served by a code of lawyer ethics is to prevent lawyers from running roughshod over the rights of their clients, the justice system, and the public. Rules are needed to ensure, among other things, that when hiring counsel clients make an informed choice, untainted by false or misleading statements, undue influence or duress, that clients are not gouged for unconscionably exorbitant fees, that lawyers do not under the banner of loyalty facilitate their clients' frauds or illegal conduct, and that lawyers maintain the sanctity of information they receive from their clients. We need to do this because we wish to retain our status as a self-regulating profession, relatively free from the intrusive oversight of politicians and lay bureaucrats. Likewise, we rein in the aggressive tendencies of attorneys in order to prop up our profession's public image, which is always fragile and often besmirched. A code accomplishes these purposes by establishing where the floor is, setting minimum standards of conduct below which lawyers may not fall without risk of losing the privilege of practicing law or suffering other forms

of professional discipline.

Plainly, a regulatory scheme is needed to establish the parameters of the often complex relationships among lawyers, between lawyers and their clients, between lawyers and the courts, and between lawyers and the public. However, a code of conduct can and should accomplish more. Much has been said in recent years about the declining "professionalism" of the bar. An inherently vague and amorphous term, professionalism means different things to different people.[7] Perhaps it is as simple as courtesy and civility to other lawyers, or as basic as the axiom that our obligations to our clients must always be placed ahead of our self-interest in income generation, or as lofty as the phrase "officer of the court." No matter what professionalism is, ethics codes can impel lawyers toward a higher plane of conduct by advising them that certain actions or inactions, while not so reprehensible as to warrant professional discipline, are nonetheless not acceptable for members of the bar. Whether couched as "aspirational standards," expressions of the "better practice," or otherwise, this second tier of rules helps send a clear message to lawyers and the public that we take seriously our special role in modern civilization, and that as among ourselves we do not believe that conduct falling just this side of the disciplinary line is good enough.

The legal profession lost something important when the Model Code of Professional Responsibility, with its motivational Ethical Considerations, were supplanted by the sterility of the Model Rules of Professional Conduct. By not even speaking of the existence of a layer of unacceptable conduct above the bare minima, we effectively told lawyers that they could properly and in good conscience practice at the margins of propriety, and thereby denigrated the many statements of bar associations and other leaders of the profession urging "professionalism." We lost the notion that there is a category of non-sanctionable conduct of which we, as a profession, simply disapprove and will not accept among our own.

Perhaps for the next century we need to make greater efforts as a profession to restore our own dignity, at least through the promulgation of some form of aspirational guideposts. We will apparently need to do so without the help of the ABA.

Even as to the minimum standards expressed in the black letter rules, much could be done to ready the attorney conduct code for the future. The Ethics 2000 Commission is interested chiefly in fine-tuning the Model Rules, filling gaps, clarifying ambiguities and so on, and is foregoing the opportunity to engage in a truly comprehensive re-examination of fundamentals of legal ethics. Such an undertaking could lead to the creation of a code of conduct that is truly reflective of where the attorney-client relationship and the legal profession are today and will be in the near future. Much has been said about the future of the practice of law, and many analyses have been made of the possible courses the practice may take. We should be critically re-examining the century-old principles of legal ethics in light of these changes, some of which are already taking place. Why should lawyers be required to adhere to a duty of undivided loyalty, when that is no longer a reasonable or legitimate expectation of clients who themselves balkanize their legal work among dozens of firms? What must be done to permit lawyers to practice effectively by making maximum use of the new technologies that their clients are using, if not developing? Must we continue to shoe-horn our profession and our relationship with clients, the courts and the public into rules that are, to a significant extent, protectionist, self-serving and outdated?

There is every reason for our profession to explore these and other issues that will or are about to confront the legal profession. And, indeed, the Ethics 2000 Commission has taken some progressive steps in this regard, at least with respect to specific issues and trends nowhere addressed in the current version of the Model Rules. The Commission's work plan includes, for example, the implications of multi-disciplinary practice groups and the practice of law over the internet, two trends of fundamental and immediate significance to the legal profession. How and whether these issues are resolved by the Commission, and ultimately by the ABA House of Delegates, remains to be seen, but the profession will surely benefit from the discussion alone.

But the time has come to go further and undertake a reexamination of the basic structure of the Model Rules of Professional Conduct. The Model Rules are premised on the fallacy of the monolithic attorney-client relationship. In an approach at least as old as the 1908 Canons, each rule purports to address an issue for all walks of lawyer, regardless of the nature of their practice or of the clients they represent. While the commentary to each rule often diverges and discusses the application of the basic, black-letter rule in different contexts, the overarching principle in each case remains the same. But lawyers are not all the same. While a core of general practitioners remain, specialization is rapidly increasing. Likewise, lawyers work in a wide variety of practice settings, from government law offices to large law firms to corporate legal staffs to storefront offices to legal assistance organizations. Correspondingly, their clients are very different, with different needs, different expectations, and different relationships with their lawyers.

Does it make sense to treat all of these lawyers, clients and relationships the same? While there is a nucleus of common ethical precepts, such as loyalty, honesty and confidentiality, stemming from the elemental need of a client to trust his or her lawyer, the same cannot be said for their application. Is the relationship between a large firm and the Fortune 500 corporation it serves the same as that between a legal services lawyer and an elderly client suffering from the early stages of Alzheimer's disease? Should prosecuting

attorneys (and perhaps also criminal defense attorneys) be freed from the general restriction on communicating directly with non-party witnesses who are otherwise represented by their own counsel? The absence of ethical guidance for lawyers in various practice areas is apparent from even a cursory review of the literature attempting to fill the gaps left by the monolithic model.[8]

This is not to say that each legal specialty should have its own, entirely separate code of conduct, as some have suggested.[9] Differences among practice areas and types of clients could be addressed through a "hub and spokes" structure, in which core ethical principles would be set forth, followed by subsidiary rules applicable only in particular contexts or practice settings. Rules that have been revealed as unworkable, unnecessary or anachronistic in various contexts could be tightened or relaxed, as necessary, to address the particular needs of the concerned parties.

The best time to prepare for the future is before it arrives. Ethics 2000 provided us with an opportunity to establish a direction for the legal profession before our ability to control our own destiny is supplanted by market forces and other extrinsic factors. It appears, however, that Ethics 2000 will not work any revolutionary changes in the way we look at legal ethics, but will continue the slow, reactive process evolution that has historically brought about subtle changes in standards of attorney conduct. By the time the Commission completes its work (presenting its report at the earliest in the summer of 2000), and the ABA House of Delegates has concluded its debates and approved amended Rules of Professional Conduct (perhaps by 2002 or 2003), it will be time for New York State to begin yet another review of its rules of professional responsibility. Perhaps we will decide to adopt the newly revised Model Rules, or perhaps we will continue to adhere to the framework of the Code. Perhaps by 2010 we will be governed by a multiple-hubbed, many-spoked document that will be vibrant and flexible for years to come. Our future is in our own hands.

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Footnotes

[1] Robert A. Stein, "Updating our Ethics Rules," ABA Journal, August 1998, at 106.

[2] Steven Keeva, "Professionalism Top Shestack Agenda," ABA Journal, October 1997, at 96.

[3] *See, e.g.,* Minutes of Ethics 2000 Commission, October 17-18, 1997, Part VI; Minutes of Ethics 2000 Commission, September 27-28, 1998, Part V ("The Commission agreed unanimously that as an operating principle it would follow a presumptive rule of making no change unless it is substantively necessary.").

[4] *See, e.g.*, Ritchenya A. Shepard, *Law of Lawyering: New ALI Restatement for Attorneys Could Affect Malpractice Liability, ABA Model Ethics Code,* ABA Journal, July 1998, at 30.

[5] George Sharswood, An Essay on Professional Ethics 159 (1854), *reprinted in* 32 A.B.A. Rep. 1 (1907).

[6] *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[7] *See generally* "Professionalism in Practice," ABA Journal, August 1998, at 48; Seth Rosner, "Professionalism and Money," ABA Journal, May 1992, at 69.

[8] *See, e.g.,* Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 Geo. J. Legal Ethics 787 (1998) (introducing symposium issue on structure of attorney regulation); Gwen Thayer Handelman, Gabriel J. Mihc, Douglas M. Selwyn and Rebecca Harrison Steele, *Standards of Lawyer Conduct in Employee Benefits Practice*, 24 J. Pension Planning & Compliance 10 (1998); Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics,* 6 Am. Bankr. Inst. L. Rev. 45 (1998); David Hricik, *The 1998 Mass Tort Symposium: Legal Ethical Issues at the Cutting Edge of Substantive and Procedural Law*, 17 Rev. Litig. 419 (1998); Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, 8 Geo. J. Legal. Ethics 439 (1995).

[9] *See* Ethics Forum and Debate, *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices,* 7 Geo. J. Legal Ethics 865 (1994) (remarks of Judge Stanley Sporkin); *see also* Mark H. Aultman, *Commentary, Response to Judge Sporkin, Cracking Codes,* 7 Geo. J. Legal Ethics 735 (1994); Steve France, *Commentary, Response to Judge Sporkin, Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 Geo. J. Legal Ethics 725 (1994).