How Vulnerable is the Code of Professional Responsibility

John F. Sutton Jr.

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The Code of Professional Responsibility was adopted by the American Bar Association in August 1969. The adoption process was essentially a political one. Two earlier drafts of the proposed Code were exposed to public view, and the reactions of lawyers to those drafts were given considerable weight during the preparation of the final draft. The views of lawyers were considered to be highly important because the Code could be adopted only if it met the approval of the House of Delegates of the American Bar Association.

At the time the Code was being written, lawyers were troubled over impending changes in methods of supplying legal services. Group legal services, prepaid legal service plans, legal clinics, nontraditional legal aid plans and organizations, increasing use of subtle solicitation of clients, and growing tolerance of advertising were on the scene but were loathed by many influential lawyers. The August 1969 version of the proposed Code reflected much of the prevailing reluctance of lawyers to depart from old, familiar standards. The easy acceptance of the Code by the House of Delegates in August 1969 was due in no small part to its generally conservative approach. The politicized, conservative viewpoint that prevails in the Code is particularly evident in its provisions relating to the marketing of (or the availability of) legal services.

Largely as a consequence of the influence upon the Code of the political adoption process, the ABA Code at the outset contained several flaws obvious to many commentators.[1] The provisions regarding advertising,[2] solicitation of clients,[3] specialization, group legal services,

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1. *See generally* Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970).

2. In 1977, two different approaches to the regulation of advertising were suggested to the ABA House of Delegates. Proposal A, which was adopted in an amendment of DR 2-101, used the "laundry list" approach: all advertising is inferentially prohibited unless it falls into one of the many categories found on the check-list or laundry list. Proposal B, which has been followed in a

and other marketing problems were at best inadequate and at worst obstreperous and obstructionistic.[4] Many problems relating to the representation of clients were dealt with insufficiently; these included the representation of differing interests,[5] the financing of litigation,[6] and the duty to act competently.[7] Other rules requiring serious revision include those relating to trial publicity[8] and preservation of client confidences when the client is unreasonably endangering others or invading the rights of others.[9]

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few jurisdictions, prohibits only public communications that contain a false, fraudulent, misleading or deceptive statement or claim; following the prohibition is a list of seven kinds of statements or claims that are per se violative of the basic proscription. *See House of Delegates Adopts Advertising D.R. and Endorses a Package of Grand Jury Reforms*, 63 A.B.A.J. 1234 (1977). It would seem that Proposal B eventually will prove the better approach.

3. Proposal B included suggested amendments to DR 2-103(A), relating to in-person contacts. *Id.* at 1236.

4. *See* Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR 2-103(D)(5): Stale Wine in New Bottles*, 48 TEX. L. REV. 334 (1970); Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,"* 48 TEX. L. REV. 285 (1970); Wallace, *The Code of Professional Responsibility—Legislated Irrelevance?*, 48 TEX. L. REV. 311 (1970).

5. *See* Gibson, *ABA Code Canon 5—Professional Judgment*, 48 TEX. L. REV. 351 (1970).

Regulation of conflicting interests presents a particularly difficult problem. In drafting the Code an attempt was made to broaden ethical disqualification by broadening the concept of conflicting interests. Thus, the rules require, generally speaking, that the lawyer refrain from representing "differing interests," which was defined to encompass not only directly conflicting interests but "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Definition (1). Nevertheless, lawyers continue to represent differing interests when they should not. Many aspects of the loyalty and differing interests problems should be reconsidered. For example, as a matter of professional practice recommended for normal usage, a lawyer should not undertake to represent two defendants in a single criminal prosecution. EC 5-17 is inadequate in this respect. An excellent discussion of the problem of joint representation of defendants in criminal matters appears in United States v. Garafola, 428 F. Supp. 620 (D.N.J. 1977).

Also there are indications that DR 5-101(A), EC 5-5, and EC 5-6 give insufficient guidance when the lawyer is to be named in the client's will as executor, trustee, beneficiary, or lawyer for the estate. A new statement in the ethical considerations outlining recommended normal practices might be of more assistance to both the bar and the public. A statement of recommended normal practice surely would frown upon a lawyer including an in terrorem clause to enforce a suggestion in the client's will that the lawyer be employed as the lawyer for the estate. *See generally* New York County Lawyers' Ass'n Comm. on Professional Ethics, *Question No. 628*, 97 N.J.L.J. 799 (1974).

6. Certain problem areas related to the financing of litigation include (1) the refund of unearned prepaid fees, (2) financial assistance to the client, and (3) the insurer's payment of legal fees for counsel of the insured's own choosing. DR 2-110(A)(2) and (3) require a lawyer, upon withdrawal from employment, to refund unearned prepaid fees and to deliver to the client "all papers and property to which the client is entitled." Should prepaid fees be deposited until earned in a trust fund in compliance with DR 9-102? *Texas Ethics Opinion 391*, 41 TEX. B.J. 322 (1978), states that such fees, unless clearly not refundable, should be held in trust and any unearned portion should be repaid to the client upon withdrawal of the lawyer.

Nearly ten years have passed since the adoption of the Code. It has been widely adopted and enforced and has been relied upon by the courts in deciding several thousand cases. During this decade, numerous additional difficulties in the Code have been recognized, and vexing questions have been raised concerning many specific provisions of the disciplinary rules. Uncertainties exist because the philosophy underlying certain disciplinary rules and ethical considerations was not sufficiently refined and complete. Unexpected results have occurred because various provisions of the Code have been used in ways not

Should the lawyer be entitled to assert a possessory lien on the client's litigation papers, even though the papers are of no economic value to the lawyer? Or should the lawyer be required to deliver such papers to the client upon withdrawal? The better practice may be to deny the lawyer a possessory lien in the litigation situation. *See* Academy of Cal. Optometrists, Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975); *In re* Kaufman, 93 Nev. 452, 567 P.2d 957 (1977). These questions should be dealt with expressly in the Code.

DR 5-103(B) forbids the lawyer to advance or guarantee financial assistance to the client, with certain exceptions, and it probably has served to cause clients represented by ethical lawyers to accept, out of economic necessity, unduly low settlement offers. DR 5-103(B) was omitted in Texas when the Code was adopted; the omission has occasioned little adverse comment. DR 5-103(B) should be modified and tempered, if not dropped altogether. *See also* Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396, *cert. denied*, 379 U.S. 931 (1964); TEXAS ETHICS OPINION 230 (1959).

Courts continue to fumble and sidestep in seeking a solution to the conflicting interest problems arising so frequently between an insured and the insured's liability insurer. *See, e.g.*, Employers Cas. Co. v. Tilley, 496 S.W.2d 522 (Tex. 1973) (interesting concurring opinion). A proper solution has been indicated by a few cases: the insured selects his or her own lawyer, and insurer pays the legal fee. *See* United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932 (8th Cir. 1978); Storm Drilling Co. v. Atlantic Richfield Corp., 386 F. Supp. 830 (E.D. La. 1974). That solution should be incorporated into the Code, probably as part of a recommended normal professional usage.

7. *See* Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 273 (1970).

Competence, the subject of canon 6, seems to lie at the very heart of professional responsibility. Nevertheless, much work is required before the Code's standards become nonpareil. *Acting* competently, rather than *being* competent, is the touchstone. On a disciplinary level, the standard should be intentional, gross and habitual neglect. *See* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1273 (1973). Due care is too harsh for use as a disciplinary rule because we use hindsight in litigation in judging due care, whether or not we admit that we do. A disciplinary rule involving due care is almost certain to be enforced selectively and raggedly. But due care is a proper standard to be included in a statement of recommended normal usage.

Competence requires adequate preparation, yet a lawyer must guard against becoming overly prepared. To the client paying the bill, detailed preparation on the minutiae of a legal matter may cost more than it is worth; that degree of preparation should not be required by professional standards. An obligation to participate in continuing legal education programs, however, should be included in a statement of professional practices recommended as normal usage.

Whether standards should be lower for legal aid clinics troubled by inadequate finances and heavy caseloads is another difficult question. Curtailing the acceptance of too many cases is not a commendable answer if that action means some individuals will receive no representation at all. *See* Comment, *Caseload Ceilings on Indigent Defense Systems to Ensure Effective Assistance of Counsel*, 43 U. CIN. L. REV. 185 (1974). *See also* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 334 (1974); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1359 (1976).

contemplated by those who wrote it. Furthermore, many lawyers have felt that they were inadequately informed and guided by the Code; this feeling of uncertainty perhaps is largely due to the absence of examples, the lack of elaboration in the ethical considerations, and failure of the Code to distinguish sharply the several purposes served by the ethical considerations.

Beyond question, a substantial review and revision of the Code is needed. The timing is favorable, for lawyers are willing now to accept a more modern, progressive set of norms than they were willing to accept in 1969. Today the real question is not whether the Code should be amended, but the nature and extent of the revision. This question can be answered accurately only after considering the purposes that are served or that should be served by an ethical code for lawyers, and after

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8. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), *noted in* 54 TEX. L. REV. 1158 (1976).

9. The broad ethical protection of client confidences probably includes almost everything the lawyer learns during the course of the relationship—or, at least, a "prudent lawyer would not take it upon himself to guess whether something would be sufficiently innocuous to pass this test." G. HAZARD, ETHICS IN THE PRACTICE OF LAW 23 (1978). Few lawyers and scholars argue, however, that the duty to preserve confidences and secrets is or should be absolute. DR 4-101(C) recognizes four exceptional situations in which the lawyer "may reveal," but is not required by DR 4-101(C) to reveal, the information. In some situations, should the lawyer be required—and not merely permitted—to reveal the information that should be revealed if the countervailing interests of another are to be protected? Do the exceptions (whether they are to be "may" or "must" exceptions) cover all the situations that should be covered? If a lawyer representing a mother in a divorce case in which she seeks custody of a small child learns that the mother in the past has abused the child and if the lawyer reasonably fears she will abuse the child in the future (even though there is no reasonable proof that she presently has the "intention" to do so), should the lawyer be permitted (or required) to reveal that information? New Jersey Advisory Comm. on Professional Ethics, *Opinion No. 280*, 97 N.J.L.J. 361, *supplemented*, 97 N.J.L.J. 753 (1974), struggled to reach the result that the information must be provided to the New Jersey Children's Bureau. *See also* People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

The question that remains partially unsolved is this: To what extent should there be a duty upon a lawyer to volunteer to tell the truth when the truth was obtained from a client, is likely to be detrimental to the client, and is something that the client thought would never be used against him? The answer to this question involves the scope of any revision of DR 4-101 and DR 7-102(B). Helpful guidance may be obtained from Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976) (containing specific suggestions for revision); Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783 (1977). It must be kept in mind also that in some states lawyers are forbidden by statute to reveal a confidence of a client. *See, e.g.*, TEX. CODE CRIM. PRO. ANN. art. 38.10 (Vernon Supp. 1978).

Resolution of the problem is particularly difficult in the situation in which a client in a criminal prosecution has committed perjury or has insisted upon taking the stand and is going to swear falsely, to the lawyer's knowledge. *Compare* Comment, *Attorney-Client Confidentiality: New Approach*, 4 HOFSTRA L. REV. 685 (1976), *and* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975), *with* ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.7. *See also In re* A, 276 Or. 225, 554 P.2d 479 (1976) (failure to disclose in divorce action; withdrawal deemed proper course of action).

contemplating the specific ways in which the Code fails to serve those purposes fully.

STANDARDS FOR LAWYERS

The main purpose of a professional code is to state standards for the profession. There are several kinds of standards, and any professional code will prove confusing and inadequate unless it makes clear the particular kind or kinds of standards it contains.

Three kinds of standards are relevant to the legal profession: regulatory laws; standards of normal professional practices; and ethical norms of aspirations and professional objectives. Any statement of lawyers' professional responsibilities necessarily is incomplete unless it involves all three kinds of standards. To a considerable extent, each kind of standard encroaches upon the other two, and not all commentators will agree upon the scope or meaning of each of the three.[10]

Regulatory laws are increasingly being used to control almost all occupations. Not unusual is the regulatory climate in Texas, where more than sixty-five occupations are licensed and regulated by law. The practice of law is one of these regulated occupations. The practice of law is also regulated by law in every other state. Some of the regulations are found in statutory law, and other regulations appear in court rules. The disciplinary rules of the Code constitute an important part of the regulatory law enforced by the states against lawyers. In every state, the disciplinary rules have been adopted by statute or court rules, or have been enforced by courts without formalization into statutes or court rules.[11] The disciplinary rules were intended to be used solely as regulatory rules governing lawyers; those rules are penal in nature, and a lawyer is to be penalized for violation of any of those regulatory

10. An interesting comparison is found in Geoffrey C. Hazard's excellent discussion of legal ethics. *See* G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978). He refers to "the concept of a profession as a regulated vocation," *id.* at 17, and in that sense the profession's ethics is "properly a matter of positive law of the same character as laws governing a regulated business," *id.* at 5. But a code of legal ethics need not be merely regulatory law, or "need not be a legal definition of terms on which the profession may be practiced. It can be merely an admonition that there should be compliance with definitions supplied by precept and example." *Id.* at 15-16. A code of legal ethics may also be—as used in the Code's ethical considerations—"guides that a lawyer may consider in making the ethical assessments that are within his personal discretion." *Id.* at 6.

11. In most states, varying modifications appear in the ABA Code's disciplinary rules. Extensive modifications were made in California when the disciplinary rules were incorporated into statutory law. *Compare* Rules of Professional Conduct of the State Bar of California, CAL. BUS. & PROF. CODE foll. § 6076 (West Cum. Supp. 1979), *with* ABA CODE OF PROFESSIONAL RESPONSIBILITY.

rules.[12]

In one sense, the practice of law is merely one of many occupations. It differs from other regulated occupations in being more nearly self-regulated; in the past lawyers have been able to act almost alone in preparing the regulations with which they are required by law to comply. If the practice of law is nothing more or less than a regulated occupation, the only standard needed in a code is a body of regulatory law, such as the disciplinary rules. But lawyers think of themselves as professionals and think that there is some real significance attached to being a professional, a significance that distinguishes the legal profession from other regulated occupations such as bartenders, barbers, boxers, auctioneers, cottonseed growers, commercial fishermen and draymen. If being a professional does have some added significance, the significance may lie only in the added education and skill involved in the profession. More likely, the significance involves professional morale, or the feeling both within and without the legal profession that lawyers' goals involve more than mere adherence to regulatory law.[13]

12. No distinction is made in the present disciplinary rules regarding the punishment to be assessed for minor matters as distinguished from serious violations. The situation is comparable to a penal code in which anything from overparking to murder and treason can be punished by a fine of $1.00 or more, by imprisonment for any period of time, or by death. Probably it would be worthwhile to attempt to divide the disciplinary offenses into two or three categories with a more appropriate range of punishment for each.

Another problem with the disciplinary rules involves the enforcement mechanism. To what extent can we reasonably expect a lawyer voluntarily to police the profession? Is it realistic to expect the lawyer to seek out disciplinary authorities and inform on himself and other lawyers and judges? Should the young associate be required, under penalty of discipline, to "blow the whistle" on his seniors in the firm? If so, what standard of scienter should be required? Knowledge beyond a reasonable doubt that the erring lawyer has violated a disciplinary rule? Suspicion that evidence could be found that would be sufficient to raise a fact issue of misconduct? Answers to these questions will indicate the direction to be taken in any revision of DR 1-103(A) and (B) and, possibly, DR 7-108(G). Also affected are EC 1-3 and DR 1-101(B).

13. To what extent should the Code regulate the private life of a lawyer, or the lawyer's activities that do not involve legal services? Perhaps the Code should include disciplinary rules that will result in discipline of a lawyer for activities in the lawyer's private life if those activities would be a proper basis for excluding an applicant for admission to the bar. Otherwise, the Code should not attempt to regulate the activities of a lawyer when the lawyer is serving in a capacity not involving the work of a lawyer. Therefore, the Code would not be applicable to a person (even though the person is a lawyer) who is serving as governor, legislator, or truck driver, although it would apply to an attorney general or counsel to the governor. With these reflections in mind, revision of DR 1-102 and DR 8-101 should be considered.

There has been some criticism of the "moral turpitude" standard of DR 1-102(A)(3). *See* Weckstein, *supra* note 7, at 276-78. Subdivision (4), or "conduct involving dishonesty, fraud, deceit, or misrepresentation," deals with the kinds of misconduct that reflects a lack of good moral character; therefore, subdivision (4) should apply to all conduct of a lawyer.

Subdivisions (5) and (6), while relevant in theory, are too vague in scope. *See id.* at 275-76. These two provisions do not give fair notice and should be revised. Unfortunately, courts are upholding the constitutionality of these two provisions. *See, e.g., In re* Rook, 276 Or. 695, 556 P.2d 1351 (1976).

If so, a professional code should deal with other standards, in addition to the standards of regulatory law.

Each occupation has its own standards that typically are observed by, or should be observed by, members of that occupation. These standards or norms may be written or unwritten, and they may have developed as a matter of custom. In any event, however, there is a standard of conduct that one member of the occupation generally expects of another person engaged in that same work. Some of these customary or normal occupational practices will have become so important to the proper functioning of the occupation that, if the occupation is a regulated occupation, those important normal occupational practices will have been embodied into the regulatory laws; but many will not have.

Examples of occupational norms can be found in every line of work. Normally a cowboy will train a horse to be mounted from the left, and a member of that occupation will think ill of a cowboy who trained a horse to be mounted only from the right. Even though no regulatory law requires that standardized conduct, it is a standard or normal practice in the occupation. Similarly, the derrickman and the floorman on an oil drilling rig will expect each other to conform to standard practices in racking drillpipe; if the standard is not met, someone likely will be injured. A member of an occupation must conform to the standards of normal practice in that occupation if the occupation is to function properly. Indeed, a failure to conform to the standard practices of a profession or other occupation may constitute actionable negligence if the failure to conform is so substandard that an unreasonable risk of harm to another's person or property is created.

An occupation involving only simple, routine tasks has little need for a formalized written statement of normal occupational practices. For those occupations, the usual training and apprenticeship provide ample awareness of normal practices. In more complicated occupa-

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Consideration should be given to a restatement of subdivisions (5) and (6) that changes the present rules to state that a lawyer shall not engage in conduct involving the obstruction of justice or other conduct that demonstrates the lawyer presently lacks the good moral character requisite for the practice of law.

If disciplinary regulation should not apply to a lawyer's conduct that is unconnected with his legal services (except as provided in DR 1-102), revision of DR 8-101 will be necessary. Since the disciplinary rules are often adopted as rules of court and thus become regulatory law, the separation of powers doctrine indicates that regulation of the conduct of lawyers when serving as legislators or administrators is unwise. *See generally* SPECIAL COMM. ON CONGRESSIONAL ETHICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONGRESS AND THE PUBLIC TRUST (1970).

tions—for example, electricians, plumbers, commercial pilots—carefully prepared statements of normal occupational practices are needed. The occupational literature of those occupations usually will suffice.

Most professions involve the performance of a variety of highly complicated tasks. A member of such a profession has a great need to be able to refer from time to time to a written detailed analysis of the normal professional practices of that profession. There is, however, a correspondingly great difficulty in preparing a statement of the standards of normal practices for a complex profession. For example, a statement of normal practices for physicians would be incomplete unless it was virtually an encyclopedia of the state of the art in medicine, surgery and psychiatry. The legal profession is complex, involving the performance of a variety of highly complicated tasks. A statement of the standards of the normal professional practices of lawyers must consider, in order to be complete, the diversity of the problems encountered in, for example, the practice of criminal law, corporate security law, tax law, admiralty, and personal injury practice, and must consider the diversity of the work of corporate house counsel, patent lawyers, prosecutors, and government lawyers. The preparation of a comprehensive, detailed statement of the standards of normal professional practice for all lawyers is a formidable task. Nevertheless, the scant attention paid by the Code to a statement of standards of normal professional practices—as distinguished from standards of regulatory law—is a main source of dissatisfaction with the Code.

The standards of normal professional practice for the practice of criminal law have been stated in detail and with considerable clarity in two reports prepared by the American Bar Association Project on Standards for Criminal Justice. The Standards Relating to the Prosecution Function and the Standards Relating to the Defense Function contain both "black-letter" statements and commentary regarding the professional practices that are recommended for normal usage. Those two Standards have been exceedingly helpful as guides for lawyers and courts. They have been cited in many opinions as accurately reflecting proper standards of professional practice for lawyers to follow in criminal matters.

Necessarily, statements of standards for normal professional practice to an extent will overlap regulatory law in the area, even though the purpose of regulatory law is to "define socially intolerable con-

duct,"[14] which must be penalized in order to protect society, rather than to guide lawyers toward the practices that seem most suitable in carrying out lawyers' tasks. The Standards Relating to the Prosecution Function and Standards Relating to the Defense Function carefully mark the distinction between standards of regulatory law (disciplinary rules) and standards of normal professional practices. In each Standard it is pointed out that the discussions relate to standards of normal professional practices except when the existence of controlling regulatory law is red-flagged. In the Standards, the term "unprofessional" is used to indicate conduct violative of regulatory law:

> The standards proposed in these reports on The Prosecution Function and The Defense Function also seek to avoid some of this confusion by stating, whenever possible, that, subject to special circumstances of justification or mitigation, certain types of conduct characterized as "unprofessional" should result in disciplinary action against the lawyer. Where this is not stated, these standards are intended to serve as guides to honorable practice.[15]

Any revision of the Code likewise should distinguish between standards of regulatory law, the violation of which "should result in disciplinary action against the lawyer," and standards of normal professional practice, which "are intended to serve as guides to honorable practice." Regulatory law serves to rid society of lawyers who have proven to be unfit to act as fiduciaries and trusted advisers and representatives. The utility of standards of normal, professional practices is quite different. Statements of normal professional practices serve to educate law students, the bar and the bench in regard to the specifics of "honorable practice." Statements of normal professional practice also tell the public what normally may be expected of honorable, competent lawyers. A lawyer whose conduct falls below the standards suggested by statements of normal professional practices accordingly may be adjudged to be incompetent or negligent, or "unethical" or something less than "honorable," even though the conduct has not fallen below the minimum level of disciplinary rules or other regulatory law.[16]

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14. Discipline of lawyers is penal in nature. A lawyer may be barred, permanently or temporarily, from practicing law and earning a living. Even a public reprimand may have seriously detrimental effects on a lawyer's practice. Thus, the purpose of the regulatory law for lawyers can be said to be "to define socially intolerable conduct, and to hold conduct within limits which are reasonably acceptable from the social point of view." R. PERKINS, CRIMINAL LAW 4 (2d ed. 1969).

15. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND STANDARDS RELATING TO THE DEFENSE FUNCTION 10.

16. DR 2-106(A) and EC 2-17, relating to fees for legal services, demonstrate the difference between a standard stating professional practices that are recommended for normal usage and a

Even though the drafters of a professional code will have difficulty in punctiliously distinguishing regulatory law from standards of normal professional practices, a failure to differentiate between the two has had and will continue to have unhappy consequences. If a professional code fails to observe this distinction, it is likely to contain statements conceptualized on the level of normal professional practices but used for unduly harsh disciplinary purposes; such standards will be enforced unevenly and discriminatively. Similarly, a code that does not distinguish regulatory standards from standards of normal practices is likely to contain some standards conceptualized as regulatory rules but assumed by lawyers to be "guides to honorable practice" with the result that normal professional practices may deteriorate.

Ethical norms of aspirations and professional objectives are closely akin to standards of normal professional practices. In one sense, they are the same. If one is correct in thinking of "ethics" as being an area of free choice, where one is free to follow one's own conscience, a professional code containing regulatory law (or standards that will result in penalties unless followed) necessarily leaves to the lawyer's conscience all matters not controlled by the regulatory standards. Thus, in the Code, all matters not controlled by the disciplinary

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standard of regulatory law. The professional practice that is recommended for normal usage is to charge a fee that is reasonable under all the circumstances. EC 2-17, which states the practice that is recommended for normal usage, provides that "a lawyer should not charge more than a reasonable fee." (It is impossible to make a check list of every factor that might, in any given situation, logically affect the reasonableness of a fee; DR 2-106(B) lists eight factors commonly present, but both DR 2-106(B) and EC 2-18 recognize that the list is incomplete.)

A regulatory law (a disciplinary rule) could state that a lawyer is subject to discipline for charging a fee in excess of a reasonable fee. But a regulatory rule to that effect would be excessively harsh. Whether a fee is reasonable is a question that cannot be answered with mechanical precision. A dozen lawyers are likely to have a dozen different opinions on what is a reasonable fee in any given situation. Nevertheless, when the question is litigated, whether in an action involving the allowance of a fee or in a disciplinary action, the question must be answered. Often the amount of fee set or requested by a lawyer will be deemed higher than reasonable, even though the lawyer set the fee in good faith. In short, it is unduly harsh to discipline a lawyer merely because he set a fee that in retrospect at the time of the hearing appears to be unreasonably high. A disciplinary rule regulating fees should be based on bad faith. But bad faith exists, even though the lawyer testifies he thought the fee was reasonable, if the fee is so obviously and clearly excessive that a fact finder would be justified in finding bad faith despite the lawyer's denial. Thus, the regulatory law of DR 2-106(A) differs from the recommended professional practice set out in EC 2-17. Even though a lawyer should not charge more than a reasonable fee, the penalty of disciplinary action will not be visited upon the lawyer unless the fee is "clearly excessive."

To use the standard of EC 2-17 as a regulatory law would be a mistake. To consider the standard of DR 2-106(A) as the level of recommended normal usage likewise would be a mistake. The two standards serve different purposes. The standard of DR 2-106(A) is not helpful as a guide to normal practice, and it is not needed insofar as enforcement of the fee contract is concerned because contract law controls; nevertheless, it serves a necessary function as a disciplinary standard. *But see* G. HAZARD, *supra* note 10, at 99. *See also* Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975).

rules involve situations in which the lawyer is free to follow his or her own conscience without fear of formal sanctions. Thus, statements of normal professional practices are truly statements of ethical norms except to the extent that the statements of normal professional practices are identical with, or also identified as, regulatory law.

In another sense, however, ethical norms are distinguishable from standards of normal professional practices. The lawyer with high professional morale and a strong belief in his own capabilities, and who is highly motivated and confident of the excellence of our legal system and of the importance of lawyers to society, will strive to achieve an excellence far beyond the reach of the average lawyer. That inspired lawyer may seek to achieve acclaim as a strong protector of the poor or as the outstanding trial lawyer of the community. That lawyer's goals may be far higher than goals inferentially suggested by the regulatory rules and the standards of normal professional practices. In seeking to gain insight into the legal profession's appropriate values and aspirations, that lawyer can use more assistance than can be obtained by studying the profession's penal requirements or the profession's standards for normal practices. Instead, that lawyer desires to know the reasons underlying the regulatory laws and underlying the standards of normal professional practices, and wants to "reflect on the special services his profession renders to society and the services it might render if its full capacities were realized."[17] For that lawyer, a professional code that states only regulatory rules and standards of normal professional practices is insufficient. To meet the needs of the inspired lawyers with high professional morale, the professional code also should contain statements of the profession's aspirations and the "objectives toward which every member of the profession should strive."[18] To the extent that statements of ethical norms contain guidance toward the profession's aspirations and objectives, the statements are essentially unlike either regulatory law or standards of normal professional practices.

A great shortcoming of the prior Canons of Professional Ethics was its failure to distinguish between regulatory rules and ethical

17. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

18. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement. For example, EC 2-24 and EC 2-25 recognize that every lawyer should participate in rendering legal services to those who have unusual difficulty in obtaining the services of a lawyer. Those statements are not particularly inspirational, however, and the problem does not lend itself to solution by use of disciplinary rules. Development of a statement of normal standards, or standards recommended for normal usage, for acceptance by each lawyer of a fair share of *pro bono* work is desirable.

norms of aspirations.[19] The Code of Professional Responsibility makes clear that the regulatory rules (or disciplinary rules) are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action,"[20] whereas the ethical norms of aspirations (or ethical considerations) "are aspirational in character and represent the objectives toward which every member of the profession should strive."[21]

Yet the Code has its own Achilles' heel. The Code is equivocal regarding standards of normal professional practices. Some regulatory provisions of the disciplinary rules coincide with normal professional practices, but the conduct permitted under some regulatory rules is less commendable than one would expect if the disciplinary rules had been designed as standards of normal professional practices. Since the disciplinary rules were designed as regulatory law, the Code should have indicated clearly the situations in which conduct complying with those regulatory rules would nevertheless be substandard when measured against the recommended professional practices. That indication could have been made in the ethical considerations, but the ethical considerations vacillate between being statements of normal professional practices, ethical norms of aspiration and mere explanatory amplifications of the regulatory rules. Considerable confusion has resulted. The Code furnishes poor guidance regarding the conduct normally expected of a lawyer and is inadequate as a teaching tool concerning the conduct to be expected of an honorable lawyer in a variety of situations.[22]

A not unlikely reaction to this deficiency of the Code would be to revise it so that it becomes nothing more than a statement of normal professional practices. Another similar reaction might be to simplify the Code by making it merely a set of regulatory rules for use in penalizing erring lawyers. Either course would be unwise. Difficult as it is to deal adequately with all three kinds of standards, a complete professional code must do so, unless the resulting complexity will defeat its

19. *See* Weckstein, *supra* note 7, at 272-73.

20. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

21. *Id.*

22. The Code obviously contains many statements on the level of professional practices that are recommended for normal usage. To the extent that those statements duplicate disciplinary rules, considerable repetition between the ethical considerations and the disciplinary rules is involved. Yet the Code's normal usage statements are incomplete, particularly because of the omission of illustrations regarding various kinds of legal work. A complete text of recommended normal usage would be voluminous, comparable to the numerous volumes of standards prepared by the American Bar Association Project on Standards for Criminal Justice.

usefulness. The Code presently is quite complex,[23] but nevertheless it inadequately states standards of normal professional practices. Perhaps lawyers desire to have in the Code only a statement of normal professional practices. If so, the Code should be revised in the form of the Standards Relating to the Prosecution Function, making it clear that its standards are not designed to be used as regulatory rules. As a consequence, the legislature and courts of the several states would have to formulate their own regulatory rules governing the legal profession.

Possibly, lawyers may desire to have only regulatory rules (perhaps with interpretative commentary) in the Code. If so, the Code should be revised in the form of regulatory rules and explanatory commentary, expressly eschewing any intent to state normal professional practices. In that event, lawyers seeking information regarding normal professional practices can look to law review articles and to court opinions involving such issues as incompetence of counsel and lawyers' tort liability; or perhaps even another bar committee can be induced to prepare standards for honorable professional practice similar to the Standards Relating to The Defense Function, which cover standards of normal professional practices in criminal law.

Lawyers are unlikely to desire to have the Code cover only the ethical norms of aspirations and professional objectives. If any of the three kinds of standards are to be omitted in a revision of the Code, the ethical norms of aspirations are the most likely candidates. In that event, lawyers can look to other writings for inspiration regarding our professional aspirations and objectives.

THE NATURE OF LAWYERS' ETHICAL PROBLEMS

A lawyer normally acts in a representative capacity.[24] Whether the lawyer is serving as adviser, advocate, negotiator, or scrivener, or is acting in some other capacity, he is normally working on behalf of a client. Usually, however, lawyer and client are not the only ones involved. Also involved are opposing parties, witnesses, judges, other

23. *See* G. HAZARD, *supra* note 10, at 19.

24. Since I am a proceduralist, it is not strange that my present view is that the central function of the lawyer—the function that he alone is capable of fulfilling in our complex democracy—is to stand beside his client and protect him as an individual. The kernel of the American lawyer's ethos is, I believe, a fierce independence and will to protect the client whose welfare is entrusted to him.

Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 457 (1972).

lawyers, other persons engaged in the negotiations, those who are affected indirectly, and, in a very real sense, society itself.[25] Therefore, most professional standards have as their primary purpose the solving of tensions created by the juxtaposition of the needs of the clients and the needs of others (including the lawyer).[26]

Generally speaking, the tensions are alleviated by providing professional standards that delineate with reasonable accuracy the extent to which the lawyer's obligations to client are limited by the needs of the others.[27] The areas of tension between clients and other persons can be categorized with moderate accuracy. The professional standards should be concerned primarily with the extent of, or the limitations upon, the lawyer's obligations to the client in accepting employment, acting competently, maintaining confidentiality, being loyal, and pursuing zealously the goals desired by the client.[28]

There are other lesser tensions. Ethical aspirations and objectives of the profession include constant improvement of law, of the legal profession, of the legal system, and thus of society. An individual lawyer's desire to follow those ethical norms of aspirations on occasion may create tensions with clients.[29] A professional code should seek to identify and rectify these lesser tensions.

FORMAT OF A PROFESSIONAL CODE

The Code of Professional Responsibility is now divided primarily into nine parts. Each part is called a canon. Each of the nine parts might well have been considered as a chapter. Of the nine parts (or canons or chapters), six or seven deal with areas of tension identified above. Thus, canon 2 pertains to accepting employment; canon 6 relates to acting competently, canon 4 involves maintaining confidentiality; canon 5 covers conflicting interests of lawyers and clients and of two or more clients as well as related topics, which in the aggregate can be classified as questions of loyalty; canon 7 deals in detail with the zealous pursuit of the client's goals; and canons 1 and 8 tend to resolve

25. These "others" who may be affected are not well identified in the Code. *See* G. HAZARD, *supra* note 10, at 8.

26. For an interesting discussion of the pressures at work upon the lawyer, see Weinstein, *supra* note 24, at 459-67.

27. To the extent that a lawyer owes affirmative duties to one not a client and in opposition to some interest of the client, standards must state the nature and extent of the affirmative duty to others, in addition to stating the limits of the lawyer's duty to client.

28. *See also* G. HAZARD, *supra* note 10, at 20.

29. *See* EC 7-17, 8-4.

the lesser tensions involved in the profession's ethical objectives of improvement of law, the legal profession, the legal system, and society. The intent of those who drafted the Code was to deal separately and in detail with each area of tension affecting the attorney-client relationship.

The Code's format is akin to a "problem" approach. Each chapter (or canon) is concerned with alleviating the tensions in the attorney-client relationship caused by a particular problem or issue. For example, to what extent should a lawyer be zealous on behalf of a client in opposition to the recognizable needs of others?[30] To what extent should a lawyer be protective of the confidences and secrets of a client when the needs of others clearly would be served by disclosure?

Unfortunately, the organization of the Code is flawed by the inclusion of two canons that appear to be related more to professional self-protection than to lessening tensions in the attorney-client relationship. These are canon 3, "A Lawyer Should Assist In Preventing The Unauthorized Practice Of Law,"[31] and canon 9, "A Lawyer Should Avoid

30. The basic thrust of canon 7 is necessary for the proper functioning of the adversary system as it exists in the United States today. (This is not to say that canon 7 should not be reexamined in regard to the lawyer's work in roles other than that of advocate.) This basic rule of duty under canon 7 is that the lawyer is "To Represent His Client Zealously Within The Bounds Of The Law," and is enforced by disciplinary rules and professional regulations. EC 7-1. DR 7-101(A)(1) virtually the same standard on a disciplinary level.

Each litigant usually feels that justice is on his or her side. The litigant feels that a lawyer who would do anything to aid the other side—unless the aid is required by law—is a traitor bent on undermining justice. Advocates, too, get caught up in the emotions of the battle. The litigant's lawyer likely will find it difficult to maintain objectivity. The advocate who is really fighting for his client is not in a position to make—or be required to make—delicate ethical decisions. The limitations upon the advocate's zeal should be spelled out in precise rules and law. The advocate must be permitted to urge his client's cause zealously within the bounds of the law, and should not be required to pawn off his own values onto the client. If it were otherwise, litigants would lose their belief that our legal system permits any individual to fight hard for his cause in our courts. If that belief were to be lost, the feeling that our system serves justice also would be lost.

Insofar as the advocate is concerned, the only problem with the basic thrust of canon 7 is that it subjects the lawyer to the charge that he serves merely as a "mouthpiece." Not so. The adversary system can be modified, and the conduct of the advocate regulated, in whatever respect seems advisable. The regulations, however, must be specific and binding and not hortatory. One binding regulation, DR 7-102(A)(1), (2), specifies the test for the kind of litigation a lawyer may handle and the kinds of positions the lawyer may take in handling the litigation. The standard forbids the taking of any steps for a client if the purpose is merely to harass or maliciously injure a person, and forbids the presentation of a claim or defense in litigation that the lawyer cannot support in good faith. The same standard appears in DR 2-109. While the standard appears to be a proper one, it has been criticized. Because of the criticism, the standard should be reexamined, even though the right of access to our courts is so important in our political system that neither a litigant nor his lawyer should be penalized for presenting a nonfrivolous claim or defense that proves eventually to lack merit.

31. DR 3-102 and DR 3-103 prohibit the sharing of legal fees with nonlawyers and the forming of partnerships with nonlawyers "if any of the activities of the partnership consist of the practice of law." Despite the existence of three specific exceptions to DR 3-102, the rules are too

Even The Appearance Of Professional Impropriety." A professional code should be concerned with standards needed in order for the profession to perform its proper functions in society and should not be concerned with avoiding either competition[32] or unfounded criticism. These two canons do contain some worthwhile regulatory rules and ethical norms. Nevertheless, in any revision of the Code canons 3[33] and 9 should be omitted, and the meritorious standards now contained in those canons should be placed elsewhere as needed for the protection of clients and society.

Obviously, a professional code need not necessarily be organized with emphasis on the tensions to be resolved, nor according to a problem approach. At least two other alternative formats are likely to be considered by one pondering the revision of the Code. One approach is to subdivide the Code not into its present nine parts but according to the persons who are involved. A Code in that format might have separate chapters or subdivisions dealing with duties to clients, duties to judges, duties to witnesses, duties to unrepresented parties, duties to society, and so on. Aside from identifying those likely to be affected by the work of lawyers, organization of a professional code according to the persons involved has little merit and is likely to create additional confusion because of the natural tendency to state duties to one participant in a way that apparently will conflict with duties to another. Ten-

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stringent. The rules usually are justified on the basis that the bar has an obligation to protect the public from incompetent lay practitioners and that a lawyer is likely to be encouraging a layperson to practice law unlawfully if the layperson receives a financial reward from the association with the lawyer. Occasionally the justification given in support of DR 3-102 and DR 3-103 is that they prevent improper solicitation of potential clients. If that is the justification, the rules are overbroad and prohibit far more than is necessary in order to prevent the use of "runners" or other third persons who may mislead, overreach or otherwise behave improperly in attempting to obtain clients for the lawyer. If, however, the layperson is competent and if both lawyer and layperson are acting within their own areas of competency, the client may be benefited—or, at least, not harmed—by conduct that does not conform to DR 3-102 and DR 3-103. Those disciplinary rules should be restudied. *See* Blumenberg v. Neubecker, 12 N.Y.2d 456, 191 N.E.2d 269, 240 N.Y.S.2d 730 (1963); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 180 (1938). *But see* Columbus Bar Ass'n v. Agee, 175 Ohio St. 443, 196 N.E.2d 98 (1964).

An analysis of the policy considerations underlying DR 3-102 and DR 3-103 should also involve DR 5-104(A), which places severe limitations upon business arrangements between lawyer and client. Who is harmed if, for example, a lawyer and a petroleum geologist form a partnership to engage in the business of discovering and developing new oil fields, with the lawyer furnishing the legal services and the geologist the geological services? A layperson who enters into a business arrangement with a lawyer may need a degree of protection against the possibility that the lawyer will look after his own interests at the expense of the layperson while lulling the layperson into believing that there is no conflict of interests. Even so, DR 5-104(A) may be unduly restrictive.

32. *See* Sutton, *The Impact of the Code of Professional Responsibility upon the Unauthorized Practice of Law*, 47 N.C.L. REV. 633, 634-36 (1969).

33. *See* Sutton, *supra* note 1, at 259.

sions in the attorney-client relationship would be increased rather than resolved.

The second method likely to be considered is one that subdivides the professional code according to the various roles a lawyer performs: advocate, adviser, negotiator, draftsman or "one who designs the framework of collaborative effort,"[34] public servant, arbitrator,[35] administrator, and so on. That organization serves to focus attention upon the variety of functions performed by a lawyer. That form may be counterproductive, however, because at best the statements of standards will be highly repetitious, function by function, and at worst the statements under each function might contain unnecessary variations, attributable to a desire to avoid boring repetition rather than a desire to formulate different standards.

Other organizational patterns, logical or illogical, may be suggested. No one format is inherently superior to others. The best organization of a code for lawyers is the one that best aids the revisers of the code to: (1) state separately, with clear delineation, each of the three standards (regulatory rules, standards of normal professional practices, and ethical norms of aspirations); (2) state the regulatory rules with sufficient precision to give lawyers fair notice of the minimum, enforceable standards, and with sufficient restraint that disciplinary authorities will not hesitate to enforce the regulatory rules uniformly and vigorously;[36] and (3) identify and resolve all tensions arising out of the lawyer's professional work.

One negative effect of changing the format of the Code should not be overlooked. Ten years ago, lawyers were accustomed to the arrangement and language of the old Canons of Professional Ethics. Consequently, they had difficulty in locating desired material in the new Code. Lawyers and courts now are familar with the Code. Because of the general familiarity with the present format and language of the Code, changes should be made only when helpful in stating standards more accurately, more completely, or more understandably. Unnecessary changes in either format or language will be counter-

34. *Professional Responsibility: Report of the Joint Conference*, *supra* note 17, at 1161.

35. *See* EC 5-20.

36. Making dual use of standards that correctly state recommended professional practices by using them as disciplinary standards will, almost surely, result in some unduly harsh disciplinary rules. Unrealistically harsh disciplinary standards will not be enforced uniformly and vigorously. The lawyers against whom such standards are likely to be enforced are the unpopular lawyers, the lawyers with high visibility, and the lawyers who represent unpopular causes and unpopular clients.

productive, involving another long period during which lawyers will have to become acquainted with the revised Code. This is not to say that the Code should not be revised extensively. The point is that no unnecessary changes should be made.

THE CODE'S UNNECESSARY IMBROGLIOS

The Code has been described as "a complex document."[37] Part of the Code's complexity is its division into canons, ethical considerations, and disciplinary rules. The disciplinary rules are mandatory regulatory rules, but neither the canons nor the ethical considerations were intended by the Code's drafters to be enforced or to be binding. The canons are merely general concepts used as chapter headings and the ethical considerations are primarily aspirational in character. Many authorities have missed the point, however. Consequently, the canons and the ethical considerations often have been "enforced" as though they were regulatory rules or law. In particular, canon 9, "A Lawyer Should Avoid Even The Appearance Of Professional Impropriety," has been misused.[38] The nature of the canons has not been noted by some other observers who have protested a failure to define a word used in a canon, such as "zealously" in canon 7. This unnecessary confusion can be eliminated easily. The canons (that is, the general concept stated as a canon) can be eliminated from the Code, substituting one or two words indicating the scope of the particular chapter. For example, canon 2 can become chapter 2, Availability of Legal Services; and canon 4 can become chapter 4, Confidences. That minor change will make it difficult to misuse a "canon" or chapter heading.

Paradoxically, the Code is at once too complex and too simplistic. Despite the Code's complexity, most difficulties encountered in the use of the Code are attributible to provisions that all too often create a false sense of simplicity by ignoring complicating factors. Examples abound; a few will be mentioned.

The disciplinary rules were intended to be just that: regulatory rules to be enforced in disciplinary proceedings. The Preliminary Statement of the Code tells us, "The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." The Preliminary Statement did not say—and hindsight indicates it should have said—that the disciplinary

37. *See* G. HAZARD, *supra* note 10, at 19.

38. This is the main reason for eliminating canon 9 and moving its worthwhile provisions to other parts of the Code.

rules are not to be used as procedural rules in civil or criminal cases. Because of this oversight, many courts have used disciplinary rules as though they were procedural rules. This misuse, or unintended use, has occurred in situations in which the disciplinary rules are ill-suited for use as procedural rules. Thus, courts have permitted advocates to use DR 5-101(B) and DR 5-102 to disqualify the opposing party's counsel.[39] That result was never intended; on the contrary, those disciplinary rules were intended to protect a client from overreaching by his own lawyer who might be willing to lessen his value to his client in order to obtain or continue employment in litigation. Most questions arising under those two disciplinary rules involve an issue of fact on whether a client will suffer substantial hardship if his lawyer, who is likely to be called as a witness, does not serve also as counsel. That fact issue should be resolved only in a disciplinary proceeding brought when there is reasonable cause for charging that the lawyer did not serve his client's best interests by being both witness and advocate. That fact issue will be resolved in a bungling fashion if—as has been done—a court permits *A* (in a lawsuit between *A* and *B*) to argue that *B*'s attorney should be disqualified because he is improperly serving *B* by acting both as witness and as advocate.[40] The presiding trial judge would better serve the system by following the advice found in *United States v. Gallagher*[41]: "When a district judge believes that a violation of the Code of Professional Responsibility may have occurred, he should, at a proper time, bring such matter to the attention of the appropriate disciplinary body."

Similarly, many courts have, in effect, converted DR 5-105 into a procedural rule used to disqualify lawyers in "conflict of interest" situations. These courts have failed to recognize that DR 5-105 was designed for use as a regulatory rule in disciplinary matters, not as a procedural rule governing disqualification of lawyers in civil litigation. Indeed, DR 5-105 does not work well as a procedural rule, and a properly worded procedural rule of disqualification probably would contain provisions differing substantially from those of DR 5-105. A concise

39. *See generally* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975); Kroungold v. Triester, 521 F.2d 763 (3d Cir. 1975).

40. As suggested in dissent in Comden v. Superior Court, 20 Cal. 3d 906, 919, 576 P.2d 971, 978, 145 Cal. Rptr. 9, 16, *cert. denied*, 99 S. Ct. 568 (1978) (dissenting opinion), the disciplinary rules are not rules of practice, and to disqualify a lawyer for the other party on the basis of DR 5-101 and DR 5-102 is not preserving the integrity of the attorney-client relationship but is destroying it, and the problems involved in enforcement of DR 5-101 and DR 5-102 should be left to the disciplinary authorities.

41. 576 F.2d 1028, 1039 n.8 (3d Cir. 1978).

statement in the Code that disciplinary rules are to be used as regulatory rules and not as procedural rules should put an end to much existing confusion.

The ethical considerations give a false sense of simplicity because their three distinct functions are not clearly delineated in the Code. The ethical considerations are in part commentary on the black-letter disciplinary rules, giving guidance to interpretation and application of the disciplinary rules in much the same way that the "Comments" in the Restatements give insight to the black-letter law. The ethical considerations also state some ethical norms of aspirations; it is this function that is described in the Code's Preliminary Statement. The third function performed by the ethical considerations—and performed lifelessly—is that of stating the standards of normal professional practices of the legal profession. If the drafters of the Code had had in mind more clearly the three discrete functions served by the ethical considerations and if they had not blended the three together in an indistinguishable (and perhaps undistinguished) mass, the standards of normal professional practices would have been stated more completely and clearly. Much of the criticism of the Code would not have occurred, for much criticism has stemmed from this deficiency in the ethical considerations.

A false sense of simplicity also results from the many specific provisions of the Code that appear, at first blush, to be sufficiently detailed when, in fact, they are not. An illustration is the recurring use in the disciplinary rules of the concept, "consent of his client after full disclosure." Full disclosure of what? Is a knowledgeable, intelligent consent required, or only a formal consent? Is consent of the client as much of a cure-all as the Code seems to indicate? For example, may consent of a governmental unit be obtained to cure any impropriety in the representation by a lawyer of the governmental unit and another whose interests differ from the interests of the governmental unit? The question whether a standard of conduct should be less onerous when the lawyer obtains "consent of his client after full disclosure" is much more complicated than the Code suggests.[42]

CONCLUSION

It is time to revise the Code, for a large number of its standards should be reevaluated. Many should be modified, amplified, or aban-

42. *See generally* Gibson, *supra* note 5.

doned. The revised Code should contain all three kinds of standards: regulatory laws, standards of recommended normal professional practices, and ethical norms of aspirations and professional objectives. The disciplinary standards should be realistic and susceptible of uniform, regular enforcement. The standards of recommended normal professional practices should be informative and should supply as much guidance as possible. The specific ethical considerations and disciplinary rules that have been mentioned herein are only some of the standards that are candidates for revision, for it is time to restudy the entire Code with revision in mind. The ABA's Special Committee on Evaluation of Professional Standards' assignment to reevaluate the Code is therefore timely. That committee's careful, scholarly and thoughtful reconsideration of all the standards now contained in the Code is sure to produce wise and useful solutions for a host of problems currently encountered in the interpretation of the Code and in the application of the disciplinary rules.