

## FOUNDATIONS OF LAWYER ETHICS

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Reprinted from *Bench & Bar of Minnesota* (December 1993)

On the 50<sup>th</sup> anniversary of *Bench & Bar*, it may be appropriate to reflect a moment on the changes in the legal ethics codes over the past 50 years, and on how those changes, and their causal background, might have come to influence the concept of “professional responsibility.” The article is intended as a reminder. If lawyers are to continue to deserve the respect traditionally accorded a “profession,” professional responsibility requires more than compliance with a set of rules.

A profession to be worthy of the name must inculcate in its members a strong sense of the special obligations that attach to their calling. One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. His work must find its direction within a larger frame. All that he does must evidence a dedication, not merely to a specific assignment, but to the enduring ideals of his vocation.

The legal profession has its traditional standards of conduct, its codified Canons of Ethics. The lawyer must know and respect these rules established for the conduct of his professional life. At the same time he must realize that a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility.[Ftn 1](#)

The law of lawyering is in a constant state of regeneration. Perhaps because the profession is inherently analytical, critical and evaluative, introspection, and hence evolution is inevitable. As the profession has expanded in the last 50 years from the “brotherhood” of a few to an industry employing thousands in this state alone, it has also diversified and enlarged the role it plays in society. Yet today, as yesterday, lawyers struggle for understanding of a common purpose.

The ethical codes are viewed by many lawyers as the cornerstone of that common purpose - the primary source of ethical guidance and obligations. Over the past 50 years, the ethical codes have shifted from a loose collection of aspirations premised on professional solidarity to a set of black letter standards of practice, somewhat akin to a criminal code. This shift toward clear statements of minimal standards has been of critical importance in terms of the use of ethical codes as the standard against which a lawyer’s conduct will be judged in professional disciplinary proceedings. Established notions of due process and fundamental fairness require no less. But avoiding discipline does not automatically translate into professional responsibility.

It is useful for our profession to understand how the codes of ethics have changed over time, and why, so that it can continue to carry out its professional obligations in the future, whatever form the ethical code might take. To do that, a step into the past is required ....

The American Bar Association adopted the Canons of Professional Ethics (“Canons”) in 1908, as a “common statement of professional norms that presumably would reflect the values of most lawyers.”[Ftn 2](#) There were originally 32 Canons; with amendments, they eventually grew to 47. As originally drafted, the Canons were not intended to *regulate* the profession’s conduct, but were instead a position of “professional solidarity - an assertion by elite lawyers in the ABA of the legitimacy of their claim to professional stature.”[Ftn 3](#) The Canons were largely aspirational in nature, setting out what a lawyer *should* do, not what a lawyer *must* do.[Ftn 4](#) Nonetheless, as time passed, violations of guidelines contained in the Canons came to be viewed by various bar associations as a basis for discipline. Because they had been drafted only as a general guide, however, the Canons were necessarily vague, often contradictory, and did not serve this purpose particularly well.

The drafters of the Canons recognized that “[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life.”[Ftn 5](#) Over time, the Canons were heavily criticized, primarily because they were seen as having virtually no relationship to the realities of practice that faced lawyers, even around the turn of the century. Their point of reference was almost exclusively the litigation setting and the relationship between lawyer and client, or lawyer and lawyer. They paid little attention to the relationship of lawyers to clients in nonlitigation settings or to the bar or society.[Ftn 6](#) Legal commentators dismissed them as largely irrelevant and described them as “vaporous platitudes.”[Ftn 7](#)

The Canons were adopted by the Minnesota State Bar at least by the early 1930s, and were recognized by the Minnesota Supreme Court as “afford[ing] a very commendable guide for professional conduct.”[Ftn 8](#) However, they were not considered binding in disciplinary proceedings until 1955, when the Minnesota Supreme Court formally adopted the Canons.[Ftn 9](#)

After nearly 60 years where little had happened to change the substantive law of professional responsibility under the Canons, the 1960s arrived. Revolution was in the air - even for the seemingly staid subject of legal ethics. The Canons were viewed by many as outdated and inadequate because, among other basic short-comings, they did not “lend themselves to practical sanctions for violations; and ... changing conditions in our legal system and urbanized society require new statements of professional principles.”[Ftn 10](#) The Canons were on the way out.

In 1969, the ABA adopted the Code of Professional Responsibility. On August 4, 1970, the Minnesota Supreme Court adopted the Minnesota Code of Professional Responsibility, based on the ABA Code. The Code differed markedly from the Canons, both in format and function. The 32 Canons were reduced to nine and defined their purpose in the Preamble and Preliminary Statement as “axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers ... .” The Code also contained both legally binding Disciplinary Rules, which “state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action,” and Ethical Considerations, defined as “aspirational in character, “ “represent[ing] the objectives toward which every member of the profession should strive.”

Criticism of the Code, however, began even before it was adopted. Despite the inclusion of the mandatory Disciplinary Rules, critics still felt that the Code was too vague, and did not provide realistic standards against which to adjudicate disciplinary proceedings. Calls to revise or revamp the Code into the form of a restatement of the law of lawyering began almost immediately. The call for clearer standards was also influenced by the times. One commentator noted that shortly after the passage of the Code, the country’s attention was riveted on lawyer ethics, or lack thereof, at the highest level of government.[Ftn 11](#)

The public perception of lawyers plummeted in the mid-1970s.<sup>Ftn 12</sup>

By 1977, the ABA appointed a committee to study the Code. The goal was to provide a clear set of standards, devoid of the ambiguity and vagueness that had plagued earlier codes. Earlier codes were adopted with relative ease, but work on the new set of rules provoked much controversy and more and more diluted drafts. The Commission's work was completed by 1983. The result was the Model Rules of Professional Conduct. In 1985, the Minnesota Supreme Court adopted the Minnesota Rules of Professional Conduct ("MRPC"). The MRPC are based on the ABA Model Rules of Professional Conduct, but are not identical.

The Rules describe themselves as "partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role."<sup>Ftn 13</sup> But do they? Yes, but only in part.

No code of ethics can realistically address the thousands of everyday realities of practice that involve ethical decisionmaking. The Rules, as with the predecessor codes, intend only to provide a framework for ethical decisionmaking. But in the attempt to provide bright line standards for discipline, the Rules abandoned notions of aspirations and ideals as unenforceable. Without articulated statements of the best to which the profession should aspire, the Rules themselves do not provide a full understanding of why the restraints are necessary.

The Preamble to the Rules tells us that they are not the end of the search for professional responsibility, but the beginning. They act as the foundation or floor on which to build professional responsibility. As a profession, we should aim to build on that foundation, not rest on it.

## NOTES

<sup>1</sup> *Professional Responsibility: Report of the Joint Conference*, 44 Am. Bar Assn. Journal 1159 (1958) (as printed in Pirsig, *Professional Responsibility 1* (1970)).

<sup>2</sup> Wolfram, *Modern Legal Ethics* 54 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> For example, the Canons provided that, "Money of the client . . . coming into possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him" (Canon 11); "In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them" (Canon 12); and "[L]awsuits with clients should be resorted to only to prevent injustice, imposition or fraud" (Canon 14).

<sup>5</sup> *Canons of Profession Ethics, Preamble*.

<sup>6</sup> Wolfram, *Modern Legal Ethics* at 54.

<sup>7</sup> *Id.* ("...[The Canons] have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room," and "glittering generalities which, as someone has said, lack a 'body to kick and a soul to condemn'").

<sup>8</sup> *In re Greathouse*, 189 Minn. 51, 248 N.W.2d 735, 740 (1993).

<sup>9</sup> *Id.* at 740; *Minnesota Supreme Court Order of May 2, 1955*, 241 Minn. at xvii (1955).

<sup>10</sup> *Annotated Code of Professional Responsibility, American Bar Foundation*, xv (1979), reporting a statement by the ABA "Special Committee on Evaluation of Ethical Standards."

<sup>11</sup> Robert H. Aronson, *Professional Responsibility* 31 (1985). Mr. Aronson's reference, of course, is to Watergate and the some 29 lawyers who were the subject of disciplinary proceedings in its aftermath.

<sup>12</sup> Hazard and Rhodes, *The Legal Profession: Responsibilities and Regulation*, 27 (2d Ed.) ("Gallup polls between the mid-1970s and 1980s consistently indicated that over one-quarter of surveyed Americans rated lawyers 'low' or 'very low' in honesty and ethical standards, while only four to six percent rated them very high.") (Citations omitted).

<sup>13</sup> *Annotated Model Rules of Professional Conduct, American Bar Association*, 9 (1984).