

## FROM CHARACTER TO COMPETENCE

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### THE LAWYER'S DUTY IN ITS LAST ANALYSIS

. . . But above all a Lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

(Canon XXXII, adopted by the ABA August 27, 1908.)

The ABA Canons of Professional Ethics, which served until about 1970 as the statement of standards for the legal profession, were concerned with the character of lawyers as well as their professional behavior. Canon XXIX exhorted lawyers to "strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law, but the administration of justice."

The Code of Professional Responsibility effective in Minnesota from 1970 until September 1, 1985, also resonated with such concerns. "Maintaining integrity" came first in the disciplinary rules, including DR 1-102(A)(6) which stated, "a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law." DR 1-102(A)(3), (4), and (5) forbade a lawyer to engage in other forms of broadly defined conduct: "illegal conduct involving moral turpitude"; "dishonesty, fraud, deceit, or misrepresentation"; and "conduct that is prejudicial to the administration of justice." Similarly, Canon 9 of the Code stated as a general norm that "a lawyer should avoid even the appearance of professional impropriety."

The new Rules of Professional Conduct show a marked shift in emphasis from character to competence. The rules, to be sure, maintain most of the specific requirements that flow from such general principles as loyalty to clients, fidelity to the court, and honesty in all things. In several notable ways, however, the new rules eliminate requirements that have to do with personal uprightness and shift emphasis toward a businesslike competence in professional dealings.

The new rule 8.4(B) [which supplants DR 1-102(A), cited above, and comes nearly last among rules] provides, "it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The word "illegal" has been replaced by "criminal". Conduct that adversely reflects on a lawyer's fitness to practice law but is not criminal, and not specifically proscribed by some other rule, may not be disciplined. The comment to Rule 8.4 sets forth the rationale: ". . . A lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to law practice." Matters of "personal morality" are excluded. Nor are actions reflecting adversely on the profession forbidden as such. [Compare the recently applied disciplinary standards of the dental profession: *In re Schultz*, (Minn. App. October 8, 1985)]

suspended a dentist's license for misconduct including violation of the statutory standard. "Conduct unbecoming a person licensed to practice dentistry."] The rules still forbid "dishonesty, fraud, deceit, or misrepresentation" without regard to whether such conduct occurs in the practice of law.

The format of the new rules also implicitly reduces the emphasis on character and general ethics. Under the Code the general norms stated as Canons and the aspirational-interpretive Ethical Considerations stated general and high standards for attorney conduct. The Canons and Ethical Considerations were apparently scrapped, in part, on grounds that a lawyer could not always tell what conduct was specifically proscribed – as opposed to frowned upon. The new rules have comments, which explicitly do not add further obligations, and which do not have the ringing and exhortative tone of the old Canons and Ethical Considerations.

The overall tone of the new rules is not that of ringing statements of the code of an ancient and honorable professional, but that of businesslike rules of behavior. "Maintaining the Integrity of the Profession" is the last set of rules, while the very first rules can be summarized as follows:

Rule 1.1 Competence. A lawyer shall provide competent representation to a client . . .

Rule 1.3 Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4(a) Communication. A lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information.

During David Doty's presidency of the MSBA he raised the question of what it means to be a legal "professional", and asked whether there has been a decline of professionalism. In a recent *Hennepin Lawyer*, John Gordon raises the concern again. The minimum standards of professional conduct have been carried over in all essential aspects from the old Canons and the superseded Code. Beyond the minimum requirements, however, the new rules, even with their comments, are less of a guide to the larger questions of what it means to be a good lawyer in the fullest sense and how to integrate one's professional and personal lives.

These observations are not meant to evidence nostalgia for the days when an attorney's sexual preferences, taste in advertising, profanity, or sharp comment to the press could spark professional inquiry and discipline. Whether the narrowing in focus of the new rules is necessary or for the good, it should be noted and the question raised: what will stand in place of the ringing old statements of professional character?