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ABA Code of Professional Responsibility: In Defense of Mediocrity

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ABA CODE OF PROFESSIONAL RESPONSIBILITY: IN DEFENSE OF MEDIOCRITY†

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INTRODUCTION

After five years of toiling, with three meetings each month, a distinguished committee of the American Bar Association has conceptualized the first general revision of the Canons in this century, including a complete set of Ethical Considerations and Disciplinary Rules. Since the adoption of the Code of Professional Responsibility by the ABA in August, 1969, effective January 1, 1970, three minor amendments were approved in 1970. Although the Code is technically binding only upon members of the ABA, it has already been enacted in twelve states and is actively under consideration in numerous other jurisdictions.[1] Because of the sweeping changes proposed by the new Code, every attorney has an obligation to familiarize himself with its terms, not only as a matter of self-interest, but for the benefit of the profession itself and the society it serves.

At the same time, in spite of its prestigious credentials, the Code is fairly subject to critical appraisal as a whole and in its detailed provisions.[2] While some bar associations may mistakenly gloss over the proposal in brief hearings before unrepresentative committees, it should

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1. As of June 15, 1970, of the 12 states that have adopted the Code as the standard governing the practice of law to date, the following states have adopted it without change: New Hampshire, Maine, New York, Pennsylvania, Kentucky, Arkansas and Oklahoma. The following states have adopted it with certain amendments: Illinois, Wisconsin, Nebraska, Kansas and Colorado.

In Nebraska the only change that was made in adopting the Code was the exclusion of Disciplinary Rule 2-103(D)(5) which was referred to the state Judicial Council for further study. In Kansas the Code was adopted without change except that the Ethical Considerations were approved in principle rather than adopted.

In the following states the Code has been approved by the state bar association without change and recommendation for adoption has been made to the state supreme court: Vermont, Connecticut, Rhode Island, South Carolina, Ohio, Indiana and Minnesota.

In the following states the Code has been approved by the state bar association with certain changes and has been recommended for adoption to the state supreme court: Arizona, Florida, Massachusetts, District of Columbia and Virginia.

2. *See, e.g., Symposium—The American Bar Association Code of Professional Responsibility,* 48 TEXAS L. REV. 255 (1970) [the articles cited from the *Texas Law Review* below are contained in this Symposium]. Perhaps after five years of deliberation, the Association felt impelled to act, but the number of unresolved issues would appear to indicate that the action was premature.

be emphasized that much more is demanded since the adoption of the Code by court decree will have the effect of binding legislation. As such, the judiciary should first afford the widest latitude to analysis and criticism by every member of the bar as well as by bar associations.

It would indeed be difficult to quarrel with the platitudes contained in the newly stated Canons as each of them simply describes a noble goal, namely:

Canon 1: A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.
Canon 2: A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.
Canon 3: A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.
Canon 4: A Lawyer Should Preserve the Confidences and Secrets of a Client.
Canon 5: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.
Canon 6: A Lawyer Should Represent a Client Competently.
Canon 7: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.
Canon 8: A Lawyer Should Assist in Improving the Legal System.
Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

Each of the Canons is then followed by a series of "Ethical Considerations" consisting of numbered paragraphs with discursive exposition of the generalities stated in the respective Canon.[3] There then follow the Disciplinary Rules themselves, which speak in statutory form and obviously lay the basis for judicial review of professional misconduct with a view toward censure, suspension or even disbarment for their violation.

Perhaps most significantly, there are no procedural provisions to indicate the manner in which the Canons may be implemented and the forum to which resort may be had. Similarly, there are no provisions for judicial review. Perhaps it was intended that each state should adopt its own procedures, either directly or indirectly, through statewide or

3. To a large extent, the Ethical Considerations are synopses of rulings or comments under the prior Code of Ethics. Where the Canons represent a substantial modification, the Ethical Considerations are of problematic value.

local bar associations, the attorney general, district attorneys, special court proceedings or by the highest court of each state. As will be seen, the substantive features of the Disciplinary Rules are such as to make the procedural matters of crucial importance. Significantly, in the thirty states which have adopted the "Unified Bar," it is conceivable that matters of discipline may well repose in completely non-judicial, as well as non-governmental, forums.[4]

Although it would hardly be feasible to review all of the forty-eight pages which comprise the Code in this article, it should be stressed that much of its content deserves the staunch support of every member of the bar. The criticism contained in this article should therefore be considered individually rather than as a broad attack upon the Code in its entirety. Nevertheless, some specific matters raise such serious questions of morality and judgment that, without major revisions, the Code is not to be commended for adoption.

THE CODE'S DUTY TO BE AN INFORMER

In the Disciplinary Rules under Canon 1, it is broadly stated that a lawyer shall not "Violate a Disciplinary Rule."[5] Having thus incorporated all of the extensive Disciplinary Rules by reference, it is then ordered that:

> A lawyer possessing unprivileged knowledge of a violation shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.[6]

Although the rule is limited to "unprivileged information," it nevertheless adopts an affirmative duty of reporting all "knowledge of a violation," any violation of which will in itself subject the non-reporter to the discipline of the Code. There would thus be enacted an informer system with each attorney legally bound to police his brother attorney.[7] Such a rule would go far beyond the bounds of "guilt by association"

4. Where continued membership in the local bar association is a prerequisite to the right to practice under the "Unified Bar" system, suspension by the local bar may raise serious constitutional questions. *See* Lough v. Varsity Bowl, Inc., 14 Ohio App. 2d 175, 237 N.E.2d 417 (1967), which held a corporate by-law that would foreclose resort to the courts constitutionally void.

5. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 1, Disciplinary Rule 1-102(A)(1) [hereinafter Disciplinary Rules will be cited DR].

6. DR1-103(A).

7. Assuming that policing requires professional cooperation, the infamous Gestapo system would appear less effective than a requirement of cooperation on request and an affirmative obligation to assist laymen in the prosecution of complaints. *See* Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEXAS L. REV. 267, 282 (1970).

since there is no limit as to the source of such "knowledge" so long as it emanates from "unprivileged information."

For example, a later rule provides penalties for the negligent practice of law.[8] Apparently, if an attorney observes the incompetent argument of a motion or trial of a case while innocently sitting in a courtroom waiting for his own matter to be reached, it will be incumbent upon him to volunteer a full report of the "knowledge" so obtained since failure to report will subject the observer to disciplinary action. While such a risk can be discreetly avoided by remaining in the courtroom corridor, such a burden cannot be escaped when it is based on observations made during the negotiation of a lease or other contractual matter in which one's opponent displays an apparent lack of "competence." Inefficient reporting of such incompetence may in itself constitute negligence.

Since the obligation to report violations pertains to all of the Disciplinary Rules, every attorney would be well advised to study the rules meticulously because it will surely be held that every attorney is "presumed to know the law," both as a prime offender and as a nonreporter of violations by others.

Before leaving the objective consideration of this Rule, it may also be asked whether it is a violation for Attorney A to fail to report that Attorney B failed to inform on Attorney C. The standard of conduct now requires that Attorney B fulfill his obligations as an informer.[9] It is clear that many such questions are left unanswered by the Code.

The Code's Duty To Be "Competent"

Perhaps the most interesting innovation is the command that a lawyer shall not "neglect a legal matter entrusted to him."[10] In disarmingly simple language, the rule would now expose all counsel not only to civil liability for neglect, but also to the risk of disbarment. The hurried conveyancer who overlooks a last minute real estate attachment can no longer find solace in prompt coverage from his personal funds, particularly since the negligence must be reported by the attorney for the attaching creditor lest the latter himself be in violation. The commercial practitioner had best become aware that many bankrupt estates are potential claimants under the antitrust laws and that overlooking the filing of such a claim could lead to counsel's disbarment. Though the

8. DR6-101(A)(1-3).
9. Coupled with the requirements on "competence," discussed *infra*, the reporting obligation may be an invitation to harassment of one's adversary, particularly if he is a neophyte.
10. DR6-101(A)(3).

degree of the negligence could mitigate the punishment, the rule itself would brook no exceptions.

Lest such threat be narrowly constured, the companion rule specifies that a lawyer shall not

> [h]andle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.[11]

Under this rule, it would be no defense that the matter was successfully concluded without negligence. There are, of course, some other pitfalls in the rule such as the unspecified standards for "competence,"[12] not merely in the attorney's self-analysis, but also in that of selecting an associate. Since "competence" must depend on the difficulty of the client's problem, presumably young attorneys will of necessity spend much time seeking confirmation of their competence and even more to canvassing experienced attorneys until they find one of sufficient self-assurance to gamble on his own competence.

Presumably "competence" will be considered in the dynamic sense, not merely in the attorney's static ability.[13] The skill of a neophyte willing to make a thorough research of the law as well as an exhaustive analysis of the facts may have to be balanced against that of the leader of the Bar who may first receive the case the night before trial with an investigator's sloppily prepared file. On the other hand, such a liberal interpretation may not be feasible if "competence" is to be judged in the abstract, as in some Orwellian file of every attorney's capabilities.[14]

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11. DR6-101(A)(1).

12. Competence is related to a specialization in the practice of law, and the lawyer who accepts employment outside of his speciality is subject to disciplinary action.

Wallace, *The Code of Professional Responsibility—Legislated Irrelevance*, 48 TEXAS L. REV. 311, 323 (1970). Such a myopic definition would assure the fragmentation of the practice, consolidate the dominating position of major law firms with their panorama of specialists and demoralize the general practitioner as well as the neophyte. *Cf.* the prohibitions on fee splitting, DR2-107(A)(1-3), *with* the risk of client-stealing by the specialists to whom a client may be referred. The inherent pressure to induce lawyers to specialize could constitute a disservice to the public; even though the general practitioner cannot "know all the law," neither can the specialist provide a balanced, all-around viewpoint.

13. Although the Ethical Considerations would direct an attorney to decline "employment in a matter in which he is not and *does not expect to become* so qualified," Ethical Consideration 6-3 (emphasis added), the Code would not appear to permit reliance on such an expectancy.

14. For a complete discussion of specialization, including the absence of any standards or procedures for certification, continued qualification and notice, see Wallace, *The Code of Professional Responsibility—Legislated Irrelevance*, 48 TEXAS L. REV. 311 (1970).

Finally, the rules would specifically preclude any contractual provision for exoneration[15] so that no matter how enthusiastic or confident the client may be, and no matter how insistently he may want the particular attorney, the latter must boldly decline to accept the engagement if any lurking doubt exists. Such limitation on exoneration should be contrasted with the customary limitations provided in many formal trusts, particularly where a bank or similar institution assumes fiduciary obligations. Although such full-blown trustees usually require exoneration except for wilful neglect or fraudulent self-preference, the attorney who might so provide would thereby violate a rule, even the "attempt" at exoneration being proscribed.

The supposed justification for the compentency rules is quite revealing. In the notes, reliance is placed on the fact that with "concentration within a limited field . . . greater . . . proficiency and expertness . . . can be developed,"[16] quoting from the *Report of the Special Committee on Specialization and Specialized Legal Education.*[17] Such a thrice "special" pronouncement would appear difficult to contest were it not for the fact that a general disenchantment with the merits of specialization has at last begun to reach not only the legal, but the medical profession as well. Yet, while general practitioners are content to let specialists live in their own rarified atmosphere, apparently the specialists have now decided to preempt the entire field.

The *non-sequitur* in the final justification for this rule apparently escaped the editorial committee when it simply quoted figures from the *Annual Report of the Committee on Grievances of the Association of the Bar of the City of New York* to the effect that "of the 828 offenses against clients . . . 452, or more than half of all such offenses, involved neglect."[18] Apparently, that simple quotation from a newspaper summary justifies the outlawing of "neglect" and the ostracism of any attorney guilty of such conduct. Whether such "neglect" was aggravated or consisted of excusable oversight will never be known; the rule does not permit any such distinction. It is as revealing as another blind conclusion to the effect that "[i]f the attorney is not competent to skillfully and properly perform the work, he should not undertake the service," citing a civil liability case, not a disbarment proceeding.[19]

Rather than pursue this inquiry into the competency of the re-

15. DR6-102(A).
16. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6, Note 2.
17. 79 ABA REP. 582, 589 (1954).
18. N.Y.L.J., Sept. 12, 1968, at 4, col. 5.
19. Degen v. Steinbrink, 202 App. Div. 477, 481, 195 N.Y.S. 810, 814 (1922), *aff'd*, 236 N.Y. 669, 142 N.E. 328 (1923).

porters or their obvious preference for the specialist, who is almost necessarily associated with a large law firm, it would appear perfectly clear that the rules on "competence" are completely unworkable, excessively harsh and ill-designed to accomplish the obviously desirable goal that "[a] lawyer should represent a client competently."[20] Perhaps a few comments by an experienced general practitioner may broaden the scope of inquiry.

It may be assumed that perhaps ninety percent or more of all attorneys would classify themselves as general practitioners,[21] perhaps by choice and possibly to reflect the nature of the legal services most generally required in the broad stretches of the nation. But even in the urban centers where large firms abound with a plethora of specialists, it has become quite obvious that the absence of a correlation of the "specialist's" services is a serious problem which has been compounded by the fact that the availability of such services is severely restricted by the financial limitations of most clients. If this would appear to be a defense of mediocrity, let it be known that in each attorney's sphere of activity, there may well be the finest sense of accomplishment and professionally rendered service.

Without categorizing questions of competence as a disbarrable offense, perhaps there are other avenues for achieving that goal. Commencing with higher standards in the law schools or even a radical revamping of their curricula, one might more closely examine the standards for admission to the Bar and even a more general requirement of clerkships after admission. Perhaps lawyers should be encouraged to emulate the medical profession where it is customary for the experienced and specialists to donate a substantial portion of their time to instruct

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20. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6.

21. The general practitioner usually handles a sampling of torts, collections, conveyancing, divorce, corporations, estates and criminal matters. Other than in the classical specialties of patents, trademarks and admiralty, there are a limited number of complex matters requiring a specialist and the clients who require and can afford such services are even fewer. The fact is that tens of millions never consult an attorney. This is not because they do not need one but because of lack of finances or recognition of their rights. *Cf.* Wallace, *The Code of Professional Responsibility—Legislated Irrelevance*, 48 TEXAS L. REV. 311, 312-17 (1970), particularly the author's unsupported assertion that the sentiment of the legal profession in America is represented by the conclusion of the Special Committee on Specialization that

> an increase in the number of lawyers who specialize in and of itself would improve the overall quality of total services rendered by lawyers to their clients, simply because those lawyers who specialize will have an opportunity to concentrate their experience and their continuing legal education.

ABA Special Committee on Specialization, Rep. 33, at 6 (Jan. 1969). Clients seldom seek advice on an isolated matter and the wide range of skills of a general practitioner are probably of a greater value to most clients than specialists deign to acknowledge.

and assist neophytes.[22] Rather than relying on the secret and privately administered rating system of the leading law list, with extensive advertising allowed by those who somehow achieve such ratings,[23] thought might be given to community acknowledgement of professional achievement in plans administered on a purely objective basis by bar associations or even governmental authority. For example, in England law lists are severely restricted with regard to ratings, advertising and exclusivity in their listings, and it is the government which designates outstanding members of the Bar as "Queen's Counsel." The encouragement of excellence by appropriate incentives would enhance the image of the Bar and increase its capacity to serve the community.

Such a constructive approach should be contrasted not only with the capital threat of disbarment and demoralization of a Bar compelled to inform on itself, but also with the practical result that every disgruntled client will have immediate power to blackmail his attorney on fee matters no matter how fairly established or willingly paid in advance. With fifty percent of most litigants losing their cases, the extent of disappointment may easily turn to wrath for counsel's supposed incompetence.

The Code and Legal Fees

The principal fiat on fees is the prohibition of an agreement, charge or collection of "an illegal or clearly excessive fee,"[24] the existence of which would be found when "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."[25] Because numerous state and local bar associations also provide minimum fee schedules, the rule should be considered in the light of such local arrangements. Contrary to the advice of the ABA under the previous Canon 12 that such "minimum fee schedules can only be suggested or recommended and cannot be made obligatory,"[26] many pressures undoubtedly are exerted to enforce such schedules, particularly in the thirty or more states which have adopted the "Unified Bar."[27]

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22. *See* ABA Code of Professional Responsibility, Canon 1.

23. *See* DR2-102(A)(6) which even permits such advertisements to list the names of clients regularly represented. "It can scarcely be denied that permitting publication of your name in *Martindale-Hubbell Law Directory* with a rating of 'a v i g' is a form of self-laudation." Smith, *Canon 2*, 48 Texas L. Rev. 285, 295 n.51 (1970).

24. DR2-106(A). For a more complete discussion of fee problems see Brown, *Some Observations on Legal Fees*, 24 Sw. L.J. 565 (1970).

25. DR2-106(B).

26. ABA Comm. on Professional Ethics, Opinions 302 (1961).

27. While holding that a minimum fee schedule can never be mandatory and that a lawyer can never be subject to disciplinary action merely because he fails to

Ethical considerations aside, all of such measures concerning minimum or maximum fees must be considered in light of the letter, as well as the spirit, of the federal antitrust laws and various state statutes of similar import. Under the federal statute,[28] both minimum[29] and maximum[30] price maintenance constitutes a per se violation. Wherever attorneys have subscribed to such schedules, there is an express contract, combination or conspiracy in restraint of trade. The violation is even greater where attorneys are subject to reprimand or censure for infractions, and, as with price-fixing violations, the Supreme Court has cast doubt on even the mildest arrangements by condemning "consciously parallel action."[31] Apparently unimpressed by either ethical or economic considerations, the government has recently instituted an injunctive suit against a real estate broker's association and its members where the latter agreed not to accept multiple listings except at the "recommended" commission rates.[32] Aside from the minimum fee schedules of local associations, the ABA Code prohibits not only "clearly excessive fees," but affirmatively requires the policing of such maximum fees by all other attorneys.[33]

There is no known or readily suggested basis for exempting legal services from the impact of the antitrust laws. Although some may suggest that many legal matters do not come within the "flow of interstate commerce" now used as the jurisdictional test for the federal statute, such would hardly appear true for most corporate and commercial transactions. Even as to wholly intrastate matters, many states have adopted antitrust laws patterned after either the Sherman Act or

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follow a minimum fee schedule, in its most recent pronouncement in ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS 323 (1961) the Standing Committee on Ethics has nevertheless quoted with approval ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS 302 (1961) in the following language: "[T]he habitual charges of fees less than those established by a minimum fee schedule . . . *may* be *evidence* of unethical conduct . . . ." Furthermore, the Committee quoted from and reaffirmed ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS 585 (1962):

> [E]vidence that the lawyer whose conduct is under scrutiny had habitually charged fees less than those suggested or recommended by a minimum fee schedule adopted by his local bar association . . . would be admissible as being material and relevant [and] . . . might be evidence of unethical conduct.

28. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (1964).

29. United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

30. Albrecht v. Herald Co., 390 U.S. 145 (1968).

31. American Tobacco Co. v. United States, 328 U.S. 781 (1945). *See also* Milgram v. Loew's, Inc. 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

32. United States v. Prince George's County Bd. of Realtors, Inc., 5 TRADE REG. REP. ¶ 45,069, at 52,740 (D. Md. Dec. 18, 1969); United States v. Cleveland Real Estate Bd., 5 TRADE REG. REP. ¶ 45,070, at 52,774 (N.D. Ohio July 29, 1970).

33. DR1-103(A).

the Federal Trade Commission Act.[34] Although the antitrust law adopted in 1970 by New Jersey would specifically exempt non-profit associations that recommend fee schedules as guidelines,[35] neither such action nor state adoption of the ABA Code would provide exemption from the federal statute. Rather than quibble as to the applicability of such anticompetitive regulations, it would seem that of all businessmen the legal community should do all in its power to "avoid even the appearance of professional impropriety," in the exact words of Canon 9.

Perhaps the other most salient fee matter in the Code is its prohibition of referral fees among lawyers even though the client consents after full disclosure and the total fee does not clearly exceed reasonable compensation.[36] Since the rule would permit the division of fees only "in proportion of the services performed and responsibility assumed by each" attorney, at the very least it must be recognized as a radical departure from widespread custom of long duration. Even if the Code is not adopted in a particular jurisdiction, forwarding counsel would do well to avoid entrapment either under the aegis of the ABA or in the state of the receiving attorney where such a provision of the Code may have been adopted.

There may, of course, be some question as to whether this entire provision constitutes undue meddling, at least where the client knowledgeably consents and the total fee is reasonable. This is particularly crucial among the trial counsel whose practice consists primarily of referral work.[37] Such specialists have become increasingly necessary because of the notorious contraction in the number of able trial advocates. Limiting the division of fees in "proportion to the services performed and responsibility assumed by each" would necessarily be a matter of hindsight, would complicate the negotiations after the fact and would compound the business aspects by the ethical considerations introduced by the Code.

The Code's Duty To Inform on the Client

Serious questions are also inherent in the rule concerning the disclosure of a client's fraud on a person or tribunal.[38] Under that rule, a lawyer who receives information clearly establishing that

34. *See, e.g.*, Mass. Gen. Laws ch. 93A, §§ 1-10 (Supp. 1969).
35. Antitrust Act § 5(b)(5), N.J. Rev. Stat. § 56:9-5 (2 N.J. Sess. Laws 1970 at 229).
36. DR2-107(A)(1-3).
37. Inversely, the general practitioner who is induced by the Code to refer a client to a specialist may well find most of his cases and income disappearing since theoretically there are specialists in every field of the law.
38. DR7-102(B)(1).

> [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, *he shall reveal the fraud to the affected person or tribunal.*[39]

It would appear that the italicized portion of the rule creates an affirmative duty of disclosure with problems akin to those requiring that an attorney report any violation of the rules by another attorney.

Aside from the fact that an attorney's duties as an "informer" relate to a client's fraud, as compared with a brother attorney's negligence, even "fraud" is such an all-encompassing term that one may question if, in fact, society's welfare requires such policing of a client by his own attorney. By contrast, it may be recalled that large segments of the Bar voiced grave protest when the Director of the FBI suggested that attorneys had an affirmative duty to report a client's conduct of a treasonous nature. Weighing the new principle against the well established doctrine of absolute confidence between client and attorney, it is doubtful whether such drastic action should be required even in case of a serious fraud. There will be many who would suggest that, at most, an attorney's duty at that juncture would call for his termination of representation, lest he become a participant in the fraud. Even so, it might then be asked whether the proposed rule would not effectively bar a fraudulent client from obtaining competent legal services.[40] At the very least, clients would be entitled to a forthright declaration of such a stringent rule prior to their entrapment by the only expert whom society has provided for confidential disclosure and advice. Although some may differ, a balancing of such considerations would appear to indicate that this rule has exceeded the fair limits of required ethical conduct.

The Code's Implications for Organizational Legal Services

Finally, in the broadest frame of reference, the drafters of the Code have seemingly sought to legislate on a matter of grave importance to society as a whole, namely, the means of providing efficient and reasonably priced legal services for the great majorities in the middle class. While taking cognizance of the fact that the wealthy are well represented and that direct or indirect provision of services for the needy are laudable, the rules would severely restrict a lawyer's participation in organiza-

39. *Id.* (emphasis added).
40. *See* Canon 2 regarding the duty to "make legal counsel available."

tions designed to provide legal services for its members.[41] While excepting from the prohibition such offices as legal aid, public defender, military legal assistance and bar association referral services, the crucial exception for the general public would hew as closely as possible to the exemption required by the Supreme Court in a series of recent cases involving the provision by labor unions or certain social service organizations of free personal legal services for their members.[42]

The narrow scope of this permitted exception is most evident in the severity of the condition that such activity will be allowed

> only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service, and only if the following conditions, unless prohibited by such interpretation, are met:
>
> a. The primary purposes of such organization do not include the rendition of legal services.
> b. The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to primary purposes of such organization.
> c. Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
> d. The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.[43]

Such begrudging concessions to the Constitution, limited to the interpretation in effect at the time of the rendering of the legal services and with the clearly implicit hope of a narrowing of the doctrines already enunciated, reflect a bare bones approach that would shame a carrion. Not content with the severity of the self-interest evident in the general statement of the rule, the drafters sought to foreclose any seepage by providing the four additonal conditions. It is, indeed, difficult to escape the impression that, given the power, the ABA would have reversed the Supreme Court, heedless of the broad social implications of the Court's constitutional rulings in this highly sensitive area.

It is obvious that, aside from services for the wealthy and possibly the poor, it is the broad spectrum of middle America which has been

41. DR2-103(D).
42. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 371 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).
43. DR2-103(D)(5).

economically foreclosed from reasonable access to competent legal services of a general practitioner, let alone the services of the specialist given such deference in Rule DR6-101(a)(1). In a society of ever increasing sophistication, it is distressing to note that, except in such necessitous circumstances as a criminal charge, an auto tort, a conveyance of an estate, tens of millions never see a law office in their lifetime. Persons with annual incomes of $7,500 to $20,000, probably with a wife and two or more children headed for college, can hardly afford cash fees of $500 or more, frequently the minimum requirement for competent advice even on business matters with limited complications.

This economic problem may require a restructuring of established patterns ranging from extended credit plans,[44] prepayment insurance programs or even legal clinics supported in whole or in part by governmental funds.[45] It can hardly be thought that the need of such citizens for legal services is any less than that of the labor union members covered by the Supreme Court decisions. Rather than panic at the thought of such an imagined threat to the profession, lawyers might well find that a severe shortage of counsel will result from the demands of this new mass of potential clients. From a completely selfish viewpoint, some might speculate the rapid growth of the custom of having salaried corporate counsel may presage far more financial damage to independent practitioners; yet, no murmur has been heard on that front.

The basic criticism of the rule lies in its foreclosure of discussion and debate by all of society, comparable to that which occurred in recent efforts to solve similar medical cost problems. The almost unheralded adoption of the rules by the ABA and already by twelve states, undoubtedly with many more to come, would become legally binding except for congressional action or a constitutional ruling by the Supreme Court.

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44. The ABA Committee on Professional Ethics has ruled that such a payment method would be unethical. ABA COMM. *on* PROFESSIONAL ETHICS, INFORMAL OPINIONS 1120 (1969). The use by lawyers of a special version of Bankamericard has been approved by the Oregon State Bar Association. *Bankamericard for Attorneys Approved*, ORE. S. BAR BULL., Feb., 1970, at 11.

45. For a superb discussion of the need for group legal services, see Nahstoll, *Limitations on Group Legal Services Arrangements Under The Code of Professional Responsibility, DR2-103(D)(5): Stale Wine in New Bottles*, 48 TEXAS L. REV. 334 (1970). Nahstoll, a member of the ABA Special Committee on Availability of Legal Services since its inception, concludes that this provision of the Code is "unrealistic, inadequate, irresponsible, and unprofessional. It disserves both the public and the bar." *Id.* at 350. An alternative proposal was submitted by the Committee on Availability of Legal Services but was rejected by the ABA House of Delegates after it had been informed by the Chairman of the Committee on Evaluation of Ethical Standards "that the lawyers of America are not prepared to have group legal services extended." *Id.* at 348 n.35. Such a disgraceful display of self-preference may well disclose motivation sufficient to vitiate the very basis of the Code itself.

It may well be asked whether such conduct by the Bar constitutes a per se violation of Canon 9 which requires that "[a] lawyer should avoid even the appearance of professional impropriety."

CONCLUSION

Although this discussion has been confined to some of the more controversial provisions of the new Code, to large segments of the Bar there would appear ample justification for vigorous action to defeat its adoption and certainly to subject it to drastic amendment. But much more would seem to be involved.

While proponents of the Code might consider this exposition little more than a defense of mediocrity, the illustrations intended to highlight the deficiencies of the Code were in defense of tenets fundamental to the protection of a free society. Though few could quarrel with the Canons themselves, their implementation in the Disciplinary Rules demonstrates such insensitivity to the basic rights of both attorney and client that many will demand a total revision. For those who may now or hereafter be subject to such rules of conduct, this discussion will have served a useful purpose if only to make them aware of its Draconian concepts.

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