



1984

The A.B.A. Model Rules of Professional Conduct

M. Peter Moser

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Moser, M. Peter (1984) "The A.B.A. Model Rules of Professional Conduct," *University of Baltimore Law Forum*: Vol. 14: No. 2, Article 3.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol14/iss2/3>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

The A.B.A. Model Rules of Professional Conduct

A Selective Commentary

by M. Peter Moser

In August, 1983, the American Bar Association adopted the Model Rules of Professional Conduct (Model Rules)¹ to replace the Model Code of Professional Responsibility (Model CPR)² as the standards governing the ethical practice of law by American lawyers. The Model Rules were developed by the A.B.A. Commission on Evaluation of Professional Standards during six years of analysis and public debate in response to criticisms of the standards in the Model CPR.

The Commission, popularly called the "Kutak Commission" after its chairman, Robert J. Kutak, was composed of both lawyers and non-lawyers. Its Final Draft (Proposed Model Rules),³ issued on May 31, 1981, was amended during three A.B.A. House of Delegate sessions and finally was overwhelmingly adopted last summer by voice vote at the A.B.A.'s Annual Meeting held in Atlanta. State high courts and bar associations across the country, including the Maryland State Bar Association, now are considering the Model Rules as a replacement for state CPR's. Until adopted by the Court of Appeals of Maryland, the Model Rules have no binding effect on the conduct of lawyers in Maryland.

This article provides commentary on some of the issues that Maryland and other states will consider. It compares the different formats of the Model Rules and the Model CPR and highlights some of the advantages of the Model Rules' format. In addition, some of the issues that generated the most controversy during the A.B.A.'s consideration of the Model Rules are examined in relation to both the Model CPR and the Maryland CPR.



Format

The format of the Model Rules is similar to the formats of the American Law Institute Restatements and the Uniform Commercial Code. Each Rule states a principle and is followed by an official comment. "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.... The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."⁴ Research notes are to accompany each Rule and be kept up to date as the Model Rules are interpreted by courts and ethics committees.

In contrast, the Model CPR has a three-tier format with nine Canons stating "axiomatic norms" under which are grouped "aspirational" Ethical Considerations and "mandatory" Disciplinary Rules.⁵ Although the drafters of the Model CPR intended that disciplinary

action should be taken against a lawyer only for violations of the Disciplinary Rules and that the Ethical Considerations should be regarded only as goals to be achieved, some courts have utilized Ethical Considerations and Canons as the foundation for discipline.⁶

The more fundamental Ethical Considerations (those stating duties that clients and the public expect lawyers always to fulfill) are mandatory Model Rules. The CPR Canons, which often inaccurately describe the disciplinary standards grouped under them, are entirely eliminated. As a result, the Model Rules are clearer, and practitioners are less likely to be misled about the minimum standards to which they must adhere.⁷

The Model Rules are organized under eight functional headings that are more descriptive and logically categorized than the Canons in the Model CPR. This format makes the answers to specific questions easier to find. A lawyer seeking to resolve a problem can locate the applicable Model Rule by turning to the heading that best describes the context in which the problem arises. Under the heading "Client-Lawyer Relationship," Rules 1.1 through 1.16 set out the general obligations of all lawyers to their clients. Additionally, in the separate headings of "Counselor" and "Advocate," the Model Rules distinguish between the lawyer's duties when acting as a counselor and when serving as an advocate.⁸ The obligations of lawyers in other transactions are grouped under other appropriate headings. This more rational framework of the Model Rules provides clearer and more comprehensive guidelines for lawyer conduct. Consequently, lawyers can resolve

ethical dilemmas more quickly and accurately using the Model Rules than they can using the Model CPR.⁹

Substantive Issues

The most hotly debated issues in the Model Rules concern client confidences and the regulation of lawyer advertising and solicitation. These Rules are the ones whose counterparts in the Model CPR vary substantially from state to state. Because of these and other local variations, consideration of the Model Rules in each state should include careful analysis of local interpretations of the state's existing CPR in order to determine which of the Model Rules should be amended to conform to state policy.

The following issues are discussed in this commentary: (1) the extent to which communications between lawyers and clients should remain confidential in cases of client crimes and fraud;¹⁰ (2) duties of lawyers when representing organizations, such as corporations;¹¹ (3) restrictions on advertising and soliciting by lawyers seeking to perform professional services for profit and the use of tradenames;¹² (4) requirements concerning lawyers' fees, such as the use of written fee agreements;¹³ and (5) conflicts of interest, including certain transactions with clients that are singled out in the Model Rules for specific limitations.¹⁴

Client Confidences

Provisions of the Model Rules that relate to "client confidences"¹⁵ evoked the greatest controversy. Lawyers' revelations of client confidences in order (i) to comply with law, (ii) to prevent client crimes and frauds, and (iii) to rectify the consequences of a client's misuse of the attorney-client relationship to perpetrate crimes and frauds are the areas where lawyers' duties to their clients and to the public directly conflict and require a careful balancing of competing interests.

Compliance With Law The Kutak Commission's Proposed Model Rule 1.6(b)(5) permitted a lawyer to reveal client confidences to the extent believed necessary "to comply with the Rules of Professional Conduct or other law." Although Model CPR DR 4-101(C)(2) says essentially the same thing, the A.B.A. House of Delegates nevertheless deleted clause (b)(5) from Rule 1.6. This deletion creates needless confusion in resolving conflicts between duties imposed by other Rules.

Model Rule 1.2(d) says, "[a] lawyer

shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...." Rule 8.4 provides that "professional misconduct" for which lawyers will be disciplined includes criminal conduct adversely reflecting "on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects";¹⁶ conduct that involves "dishonesty, fraud, deceit or misrepresentation";¹⁷ or conduct "that is prejudicial to the administration of justice."¹⁸ How can a lawyer in whom a client has confided information that is criminally or fraudulently incriminating honor that client's confidence as required by Rule 1.6 without

**When read together,
Model Rules 1.6 and
3.3 require a lawyer
to reveal past client
perjury where the
lawyer has
represented the client
in court, but not
where the client is
about to consummate
a criminal fraud
through the use of
the lawyer's work
product.**

violating Rules 1.2(d) or 8.4? The only sensible construction of these competing Rules is to require the lawyer to reveal client confidences if necessary in order to comply with Rules 1.2(d) or 8.4, even if such compliance violates Rule 1.6. Cautiously worded support for this construction is found in the Comment to Rule 1.6, which states:

The lawyer must comply with the final orders of a court... requiring the lawyer to give information about the client, [but first the lawyer must invoke the attorney-client evidentiary privilege]....

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the repres-

entation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Rule 1.6 would provide clearer guidance if it simply specified that disclosure of a client confidence does not violate Rule 1.6 if the lawyer is required by another Rule, other law or a court order to disclose client confidences.

Prospective Client Crimes and Frauds

In DR 4-101(C)(3), the Model CPR permits a lawyer to disclose "the intention of his client to commit a crime and the information necessary to prevent the crime." The Kutak Commission's Proposed Model Rule 1.6(b)(1) limited permissible disclosures to those necessary to prevent the client from committing "a criminal or fraudulent act... likely to result in death or substantial bodily harm, or substantial injury to the financial interests or property of another [emphasis added]." The A.B.A. House of Delegates limited permissible disclosures further by deleting the italicized language and amending the Rule so that disclosure is permitted only to the extent the lawyer, "reasonably" believes is necessary to prevent "imminent death or substantial bodily harm."¹⁹ Some people have criticized this additional limitation, claiming that it subverts the public interest by requiring lawyers to allow their clients to perpetrate serious crimes and frauds which lawyers should be given the discretion to prevent.

M. Peter Moser is a partner in the Baltimore law firm of Frank, Bernstein, Conaway and Goldman; A.B., *The Citadel*, 1947; LL.B. Harvard University, 1950; Member and former chairman, A.B.A. Standing Committee on Ethics and Professional Responsibility; Member, A.B.A. House of Delegates; Member, Special Committee on Professional Responsibility, Maryland State Bar Association; Chairman, Attorney Grievance Commission of Maryland. Opinions expressed are solely the author's.

© 1983 M. Peter Moser

Crime or Fraud Using Lawyers' Services In Proposed Model Rule 1.6(b)(3), the Kutak Commission proposed that a lawyer be permitted to disclose client confidences to the extent believed necessary "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."²⁰ The A.B.A. House of Delegates deleted this provision, yet it refused to amend Rule 3.3 (Candor Toward the Tribunal), which "requires disclosures of information otherwise protected by Rule 1.6" if a lawyer comes to know that material evidence that the lawyer has offered is false, and other remedial measures fail. Rule 3.3 is narrower than DR 7-102(B)(1) of the Maryland CPR, which requires disclosure of any fraud by the client and not merely disclosure where the lawyer has offered false evidence.

When read together, Model Rules 1.6 and 3.3 require a lawyer to reveal past client perjury where the lawyer has represented the client in a court, but not where the client is about to consummate a criminal fraud through the use of the lawyer's work product, in which case the lawyer is required only to withdraw from providing legal services and to keep silent. The Comment to Rule 1.6 explains, however, that

[n]either this Rule [1.6] nor Rule 1.8(b) [prohibiting use of client confidences to client's disadvantage] nor Rule 1.16(d) [protection of a client's interest after withdrawal] prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like [emphasis added].²¹

One may question whether withdrawal or disaffirmance of the lawyer's work product would sufficiently protect the lawyer against charges of criminal or civil fraud in all cases. Moreover, Model Rules 1.2(d) and 8.4 may require the lawyer to disclose client confidences, depending on the circumstances. Clearer guidance would be afforded if the Kutak proposal had been retained.²²

The A.B.A. House of Delegates' amendment to Proposed Model Rule 1.6 was said to be necessary to further the policy that encourages clients to reveal all of the relevant facts in order to obtain effective representation. This policy requires that information the client gives the lawyer to assist in the

representation must be kept in strictest confidence.

Basing the change on this worthy policy seems misplaced. When the client lies or misrepresents the transaction to the lawyer in order to advance the client's own criminal or fraudulent purpose, the false information interferes with the lawyer's lawful representation of the client. By lying or misrepresenting the facts, the client intends to gain the lawyer's unwitting assistance to further the client's illegal or fraudulent pursuits in a way that would be unavailable if the client had been truthful with his lawyer in the first place. The client knows that the lawyer may not knowingly help to commit a fraud or crime.

**Model Rule 1.13
now provides
necessary guidance
for practitioners
when representing
corporations and
other organizations
whose employees act
illegally and against
the organization's
interests.**

If the client nevertheless retains the right to prohibit the lawyer from disclosing the facts even after the lawyer learns that the relationship has been abused, then the client is encouraged to lie initially to his lawyer until the crime or fraud has been consummated, comfortable in the knowledge that the lawyer's lips are sealed. This arrangement actually subverts the policy of encouraging a full and frank disclosure by clients of all of the relevant facts and instead encourages clients to misuse lawyers' services.

Perjury by Criminal Defendants Differences among the states' judicial determinations and the lack of definitive statements by the Supreme Court create special problems in the case of the perjurious client on trial for a crime. Although Rule 3.3 is workable in the context of civil litigation, it furnishes inadequate guidance to the lawyer in a criminal case.

Disclosures of a criminal defendant to his lawyer are likely to be protected by the Sixth Amendment and by the Fifth and Fourteenth Amendments as well.²³ The Comment to Rule 3.3 recognizes the possibility that these constitutional rights may prevail over the lawyer's duty to disclose described in the Rule. But neither the Rule nor the Comment provides ethical guidance for a criminal defense counsel in cases of sudden perjury or where the accused insists on testifying falsely. Clearer guidance might be provided by specifically incorporating in either Rule 3.3 or the accompanying Comment the substance of the A.B.A. Criminal Justice Standards. Rule 3.3 might then read as follows:

(e) Notwithstanding subsections (a) through (d), a lawyer for a defendant in a criminal case shall not disclose that the client has perpetrated a fraud or testified falsely. However, if the lawyer knows that the client will testify falsely, the lawyer shall:

(1) counsel the client against such testimony; and

(2) not assist the client in preparing such testimony; and

(3) not assist the client in testifying except to the extent necessary to avoid revealing to the fact finder the lawyer's knowledge that the testimony is false; and

(4) not refer to such testimony in the lawyer's argument to the fact finder unless the circumstances of the case require such a reference in order to avoid revealing to the fact finder the lawyer's knowledge that the testimony is false.²⁴

Representing An Organization

Model Rules 1.13(a), (d) and (e) define the lawyer's relationships with organizations (such as corporations) that the lawyer may represent and the lawyer's relationships with its officers and other constituents more clearly than EC 5-18 in the Model CPR.

Model Rules 1.13(b) and (c) detail the steps that must be taken by a lawyer who represents an organization when an officer or employee acts illegally and where his action might be imputed to the organization and cause it substantial injury. If the organization's "highest authority" refuses to act to rectify the problem, then the lawyer "may resign in accordance with Rule 1.16." According to the Comment to Model Rule 1.6, the lawyer may disclose the organi-

zation's confidences only in accordance with Rule 1.6.

Proposed Model Rule 1.13(c) would have permitted a lawyer to disclose certain confidences of an organization client notwithstanding the limitations of Rule 1.6, when the lawyer reasonably believed that the organization's highest authority acted contrary to the organization's interests and that disclosure was in the organization's best interests. Some critics of this proposal claimed that it would result in lawyer whistleblowing, which would grossly interfere with accepted standards of corporate governance. Amendments adopted in February, 1983 to cure these alleged problems rendered Rules 1.13(a) and (d) essentially impossible to apply.²⁵ These imperfections were corrected at the August, 1983 House session. Rule 1.13 now provides necessary guidance for practitioners when representing corporations and other organizations whose employees act illegally and against the organization's interests. Controversy may continue nevertheless over whether the Kutak Commission's proposal permitting disclosure notwithstanding Rule 1.6 should be substituted for the House's more limited version.

Advertising And Soliciting

Model Rules 7.1 through 7.3, governing advertising and solicitation, have essentially the same literal effect as DR 2-101, DR 2-103 and DR 2-104 of the Maryland CPR. False or misleading advertising and solicitation of professional employment for pecuniary benefit are prohibited. The term "solicit" includes not only in-person contact, but also written communications directed to specific recipients to recruit them as clients in particular matters. Thus, general mailings are permitted, but targeted mailings are not. Such a prohibition could impair a lawyer's First Amendment rights.

In MSBA Ethics Opinion 81-21 (February 16, 1981), the Maryland State Bar Association Ethics Committee enunciated guidelines that have had the effect of permitting not only general mailings but also letters and advertisements seeking employment in specific legal matters as well.²⁶ This Opinion anticipated the Supreme Court's analysis of lawyer advertising articulated in *In re R.M.J.*²⁷ decided in 1982, a year later. The lawyer in *R.M.J.* had mailed announcements of the opening of his new office to persons outside the group consisting of "lawyers, clients, former



Drawing by Lorenz; © 1983 The New Yorker Magazine, Inc.

clients, personal friends, and relatives," to whom such announcements may be sent under DR 2-102(A)(2). The Court noted that the state policy of preventing false or misleading advertising might just as well be achieved by requiring lawyers to file copies of all mailings with the state's disciplinary committee. The Court pointed to the Kutak Commission's less stringent requirement set forth in Proposed Model Rule 7.2(b), which required lawyers to retain written communications for one year.³² Since the record failed to disclose why less restrictive limitations would not suffice to achieve the governmental purpose of preventing false or misleading advertising, the state's absolute prohibition under DR 2-102(A) was held to be an invalid restraint upon the lawyer's First Amendment rights. Disciplinary charges against the lawyer were therefore dismissed.

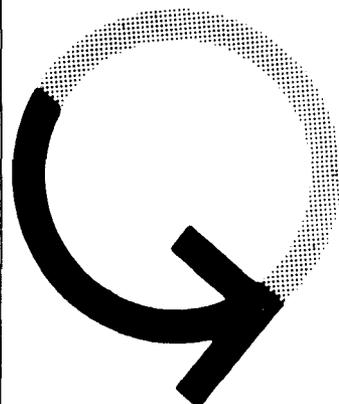
Although the Comment to Rule 7.3 rationalizes that "direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition," it states no reason why direct mail solicitation without subsequent

personal contact cannot be as effectively regulated as general mailings, as the Supreme Court suggested in *R.M.J.* Accordingly, before adopting an absolute prohibition against all direct mail solicitation, the states should determine if a lesser restraint will not suffice to effectuate the underlying policy. States should be prepared to justify the more stringent regulation if it is to be applied.

Specialty Designations Model Rule 7.4, which prohibits a lawyer from stating or implying that he is a specialist, is more restrictive than DR 2-105 of the Maryland CPR, which has the effect of permitting a lawyer to advertise as a specialist, so long as the lawyer can prove that the claim is truthful.

Tradenames Model Rule 7.5 expressly permits lawyers to practice under tradenames, so long as the tradenames are not false or misleading. A tradename also must not imply connection with a governmental agency or a public or charitable legal services organization, presumably because use of such a name would be misleading *per se*.

Quickee Offset
inc.



- Specializing in Xerox Copies
 - Regular Xeroxing
 - Fabulous Xerox 9400 Duplicating
 - The NEW Xerox COLOR Copier
- Wedding Invitations and Announcements
- Organization Newsletters, Rule Books, Programs and Tickets
- Fast Photo Offset, Phototypesetting, Duplicating, Printing & Bindery Services
- Fine color printing

2310 N. Charles St.
(Customer Parking)
Baltimore, Md. 21218
• 467-5800

Disciplinary Rule 2-102(A) of the Maryland CPR prohibits practicing under a tradename, but permits the continued use in firm names of the name of any deceased or retired member of the firm or a predecessor firm in a continuing line of succession. The Court of Appeals of Maryland upheld the constitutionality of the tradename proscription in *In re Corporate Name-Oldtowne*,²⁹ in which an admitted purpose for using a tradename rather than the firm name at a new location was to prevent regular clients of the firm from knowing about the connection between the practices at the two locations. In this case, the Maryland court adopted the reasoning of the Supreme Court in *Friedman v. Rogers*,³⁰ which upheld a Texas statute prohibiting optometrists from practicing under tradenames.

In deciding whether to abandon the absolute prohibition of tradenames in DR 2-102(A), states should consider amending the Comment to Model Rule 7.5 or promulgating guidelines to specify additional types of tradenames that are misleading *per se*.³¹ States should also consider imposing a requirement that the name of at least one lawyer admitted to practice in the state be clearly identifiable as the lawyer responsible to clients for the legal services rendered under the tradename.

Lawyers' Fees

One improvement made by Model Rule 1.5 is the requirement that lawyers' fees be "reasonable" rather than not "clearly excessive" as provided in DR 2-106(A) of the Model CPR. The factors to be considered under Rule 1.5 in determining the reasonableness of a fee are the same as those set out in DR 2-106(B).

Much of the A.B.A. House of Delegates debate over fee provisions centered on whether fee agreements must be in writing, as the Kutak Commission proposed. Fee disputes are, of course, a major source of complaints by clients to bar associations and disciplinary agencies. Rule 1.5(b) as adopted provides that where a lawyer has not regularly represented the client, the lawyer must communicate the basis or rate of the fee to the client, "preferably in writing."

The House of Delegates added to Proposed Model Rule 1.5 the DR 2-106(C) prohibition against contingent fees in criminal cases, as well as a prohibition against contingent fees in certain

domestic relations matters, a restriction that was not specified in the Model CPR. The wisdom of these prohibitions continues to be a subject of debate.

Both Model Rule 1.5(e) and Model CPR EC 2-22 permit the division of fees among lawyers. However, the Model Rule requires a written agreement with the client where the division is based on joint lawyer responsibility, rather than on the specific services rendered by each lawyer. In all cases, the total fee must be reasonable.

Conflicts of Interest

Model Rule 1.7, which sets out the general conflict of interest rules, is clearer and simpler than its Model CPR counterparts. For example, Rule 1.7(b) specifies that, even if the client consents, a lawyer shall not represent the client where the representation may be materially limited by the lawyer's own interests, unless the lawyer reasonably believes that the representation will not be adversely affected. Compare DR 5-101(A). Rule 1.7(b), unlike its CPR counterparts, also applied where the conflict arises after the lawyer has been engaged, as well as where the conflict exists before representation commences. Compare DR 5-105.

***The factors to be
considered under
Rule 1.5 in
determining the
reasonableness of a
fee are the same as
those set out in
DR 2-106(B).***

Model Rule 1.9 improves upon the Model CPR because it establishes a lawyer's duties to former clients in terms that go beyond simply maintaining client confidences. Compare EC 4-6; EC 4-5.

Model Rule 1.8 provides specific prohibitions and limitations in certain kinds of transactions which, by their very nature, involve conflicts of interest. Under Rule 1.8(c) lawyers are prohibited from preparing an instrument for a client giving the lawyer or a member of the lawyer's immediate fam-

ily a substantial gift, unless the client is related to the donee. Compare EC 5-5.

Disciplinary Rule 5-103(B) of the Model CPR prohibits lawyers from advancing or guaranteeing financial assistance to clients other than advancing court costs and expenses of investigation or medical examinations, and then only if the client remains ultimately liable for these expenses. This prohibition has proven impractical where indigents are involved and where, in class action representation, side agreements for payment of fees or expenses are prohibited. Some lawyers have resorted to the subterfuge of making written agreements that clients will reimburse expenses regardless of outcome, without ever intending to enforce the agreements. Rule 1.8(e) sensibly permits lawyers to advance court costs and expenses of litigation, the repayment of which "may be contingent on the outcome," and allows lawyers to advance these expenses for indigent clients without expectations of reimbursement.

Model Rule 1.8(a) sets out meaningful requirements for lawyers entering into business relationships with their clients. These requirements are clearer than those set out in DR 5-104(A). The Model Rules require that the terms of such relationships must be fair and reasonable to the client and fully disclosed in writing. The client must have a reasonable opportunity to consult independent counsel and must consent in writing to the arrangement. It is questionable, however, whether these stringent requirements should also be made applicable to cases where a lawyer simply acquires a pecuniary interest that may be adverse to a client's interests, especially when the lawyer's representation of the client is unrelated to the pecuniary interest being acquired.

Conclusion

The Model Rules were developed largely as a response to recent concerns expressed by lawyers and the public about how to deal with some of the more difficult issues in the field of professional responsibility. The Model Rules adopted by the A.B.A. provide clearer guidelines than the Model CPR and are more helpful in resolving the ethical problems that confront many lawyers. Nevertheless, before adopting the Model Rules, the states should consider making appropriate changes to reflect important variations in disciplinary policies that have gained local acceptance. ⚖️

Notes

- ¹ 52 U.S.L.W. 1 (August 16, 1983) [hereinafter cited as MODEL RULES].
- ² THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY, which was adopted by the A.B.A. in 1969 to replace the Canons of Professional Ethics, became effective in Maryland in 1970. See MD. R. P. 1230 and App. F. But see Maryland CPR Canon 2 and DR 7-102(B)(1).
- ³ PROPOSED FINAL DRAFT MODEL RULES OF PROFESSIONAL CONDUCT, A.B.A. COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS (1981) [hereinafter cited as PROPOSED MODEL RULES].
- ⁴ See MODEL RULES, *supra* note 1, Preamble: A Lawyer's Responsibilities.
- ⁵ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement (1980) [hereinafter cited as MODEL CPR].
- ⁶ See Note, *Lawyer Disciplinary Standards: Broad v. Narrow Proscriptions*, 65 IOWA L. REV. 1386 (1980).
- ⁷ Ambiguities in the MODEL CPR that are eliminated in the MODEL RULES include: (i) adding Rule 1.4 (Communication) (which requires a lawyer to keep the client reasonably informed about the status of a matter) in place of EC 9-2; (ii) including Rule 1.8(c) (a prohibition against preparing an instrument for a non-relative client that gives the lawyer a substantial gift) in place of EC 5-5; and (iii) eliminating the nebulous concept of "appearance of impropriety" (Canon 9), which has sometimes been used unfairly to discipline lawyers.
- ⁸ Compare *e.g.*, MODEL RULES 2.1, 2.2, and 2.3 and MODEL RULES 3.1 through 3.9.
- ⁹ See Moser, *The Model Rules: Is One Format Better Than Another?* 67 A.B.A. J. 1624 (Dec. 1981) (supporting the Model Rules); Kettlewell, *Keep the Format of the Code of Professional Responsibility*, 67 A.B.A. J. 1628 (Dec. 1981); and *Brief in Support of Retention of CPR Format*, National Organization of Bar Counsel (November 23, 1981).
- ¹⁰ See MODEL RULES 1.6 (Confidentiality of Information), 3.3 (Candor Toward the Tribunal) and 4.1 (Truthfulness in Statements to Others). Rule 1.13 (Organization as Client) "does not limit or expand the lawyer's responsibility" to maintain client confidences. MODEL RULES 1.13 Comment (Relation to Other Rules). Cf. PROPOSED MODEL RULES. See also MODEL RULES 1.2(d). Related provisions of the MODEL CPR appear under Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), Canon 7 (A Lawyer Should Represent a Client Zealously Within the Bounds of the Law), and Canon 1 (A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession).
- ¹¹ See MODEL RULE 1.13 (Organization as Client) and MODEL CPR EC 5-18.
- ¹² See MODEL RULES 7.1 through 7.5. The MODEL CPR provisions are DR 2-101 (Publicity), DR 2-102 (Professional Notices, Letterheads and Offices), DR 2-103 (Recommendation of Professional Employment), DR 2-104 (Suggestion of Need of Legal Services), and DR 2-105 (Limitation of Practice). DR 2-101, DR 2-102, DR 2-104(A)(2) and DR 2-105 of the Maryland CPR differ substantially from the related DR's in the MODEL CPR.
- ¹³ See MODEL RULE 1.5 (Fees). The MODEL CPR provisions are principally DR 2-106, DR 2-107 and the related EC's.

continued on page 16



Executive

Stationery

Products

"EVERYTHING FOR THE
NEW LAW OFFICE"

LETTERHEADS
LEGAL PAPER

ATTORNEY TIME
CONTROL SYSTEMS

COMPLETE ATTORNEY
CHECKS AND
BOOKKEEPING SYSTEMS

WORD PROCESSING
SUPPLIES
RIBBONS AND DISKETTES

LEGAL FORMS AND
RED FILE POCKETS

WE CAN ALSO FILL ALL YOUR
OFFICE SUPPLY NEEDS WITH A
COMPLETE LINE OF ALL THE
BASIC ITEMS

320 East 25½ Street
Baltimore, Maryland 21218

(301) 467-6177

their dependencies and often celebrate their release at the closest bar or with a fix.

A Program For Young People and First-Time Offenders of Non-Violent Crimes

What kinds of offenders ought to be imprisoned? I suggest that the way of enlightened punishment is to incarcerate only those convicts who have shown themselves to be a danger to the public or to themselves and whose acts have been so reprehensible that the judicial system must demonstrate in the only way it can — by imposing a sentence involving the loss of liberty — that society will not tolerate such conduct. Murderers, rapists, arsonists, child molesters and armed robbers deserve prison sentences. As for the rest, I suggest that no judge or magistrate should sentence an offender to jail unless there is no reasonable alternative.

First-time, non-violent offenders or those who commit victimless crimes ought to expiate their sins in better ways than serving prison sentences.

First-time, non-violent offenders or those who commit victimless crimes ought to expiate their sins in better ways than serving prison sentences. We can, as I mentioned earlier, sentence those who commit non-violent alcohol and drug-related offenses to neighborhood rehabilitation facilities. We can compel other non-violent offenders to:

- Make restitution to the victim.
- Complete a reasonable educational program of public school equivalence, so that they can at least read and write.
- Undergo psychiatric or other appropriate counseling.
- Receive vocational testing and counseling.
- Maintain full-time employment and support their dependents.
- Remain trouble-free for a prolonged period of time.
- Perform community service for a specific length of time.

Community Service As an Alternative to Imprisonment

Community service is an effective way for offenders to repay their debts to society. Most responsible probation officers provide judges with pre-sentence reports that outline the offender's life and habits. These reports indicate, among other things, the offender's hobbies, interests and talents.

An appropriate alternative sentence might be to assign the offender to work with retarded or disabled children for seven to eight hours every weekend for a year or longer. Performing community service is one way the offender can utilize his abilities to do some good for society.

If the offender is a competent reader, he can be required to record texts or read to the blind every Saturday or Sunday for a few years. If he is handy with tools, he can be assigned to work at homes for the aged and infirmed that sorely need carpenters, brick masons and handymen. If he is a church-goer or interested in religion, then perhaps he could drive disabled congregants to their Sabbath worship or to meetings or deliver their meals in the evenings. There are untold community needs that can be fulfilled by first-time, non-violent offenders. It is only a matter of matching the resources to the needs.

Conclusion

Good sentencing calls for an accurate perception of both the offender's place in the criminal spectrum as well as society's need to protect itself against violence. There is no easy way to reduce the cost of crime by means that will be both punitive and rehabilitative. Jailing costs more than any other form of social control. Even if we do need more jails, jails alone are not enough.

In his address to the American Bar Association in 1981, Chief Justice Warren Burger emphasized that "[w]e must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short-term benefits." When you cut your finger you do not necessarily have to go to the hospital to be bandaged. Maybe jails, like hospitals, should confine only those for whom there is no reasonable alternative. ⚖️

Model Rules Notes

continued from page 13

¹⁴ See MODEL RULES 1.7, 1.8 and 1.9. The related MODEL CPR provisions are DR 5-

101(A), DR 5-104, DR 5-105, DR 5-106 and DR 5-107. See also EC 5-5, EC 5-6, EC 5-7 and EC 5-8.

¹⁵ This term is used in this commentary to mean "information relating to representation of a client." See MODEL RULE 1.6(a), a broader concept than that used in the MODEL CPR. Cf. DR 4-101(A).

¹⁶ MODEL RULE 8.4(b).

¹⁷ MODEL RULE 8.4(c).

¹⁸ MODEL RULE 8.4(d).

¹⁹ MODEL RULE 1.6(b)(1).

²⁰ Cf. DR 7-102(B)(1) of the MODEL CPR, which provides:

A lawyer who receives information clearly establishing that:

- (1) His 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, [except when the information is protected as a privileged communication] [brackets added].

The bracketed language, added by an A.B.A. amendment in 1974, has never been adopted in Maryland. See Attorney Grievance Commission of Maryland v. Sperling, 296 Md. 558, 463 A.2d 868 (1983). See also Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Irresponsibility*, 67 GEO. L.J. 991 (1979).

²¹ Added as a last-minute compromise, this comment is intended to protect lawyers from complicity in criminal or civil fraud. See S. Taylor, Jr., *The Law: A Case History*, N.Y. Times, January 9, 1983, §6 (Magazine), at 31 (recounting the involvement of law firms in the notorious O.P.M. equipment leasing frauds and the civil suits that followed).

²² See also MODEL RULE 4.1(b). But cf. PROPOSED MODEL RULES 1.2(d).

²³ See e.g., Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).

²⁴ Cf. 1 A.B.A. STANDARDS FOR CRIMINAL JUSTICE Proposed Standard 7.7 (2d ed. 1980) (Testimony by the defendant, approval of which was withheld pending consideration of the MODEL RULES by the A.B.A. House of Delegates. Former Standard 7.7 has been implicitly followed in at least one case, Thornton v. U.S., 357 A.2d 429 (D.C.C.A. 1976), cert. denied, 429 U.S. 1024 (1976). For an analysis of this problem, see Comment, *Proposed Client Perjury: A Criminal Defense Attorney's Alternatives*, 12 U. BALT. L. REV. 248 (1983).

²⁵ See 3 BUSINESS LAW MEMO (A.B.A. Section of Corporations, Banking and Business Law, No. 4, March/April 1983) at 1.

²⁶ Opinion 81-21 and the guidelines followed the approach of an earlier Kutak Commission Model Rules draft that allowed targeted mail solicitations. See also MSBA Ethics Opinions 84-37 (October 17, 1983), 83-36 (April 20, 1983), and 82-49 (April 22, 1982) generally to the same effect.

²⁷ 455 U.S. 191 (1982).

²⁸ The Kutak Commission's Proposed Model Rule 7.2(b) was adopted by the A.B.A. House of Delegates with one modification: written communications must be retained for two years, not one year as proposed.

²⁹ 285 Md. 132, 138, n.4, 400 A.2d 1111, 1115 n.4 (1979).

³⁰ 440 U.S. 1 (1979).

³¹ This approach was adopted by the Pennsylvania Disciplinary Board following the decision in *In re R.M.J.*, 455 U.S. 191 (1982). The guidelines are available through that agency or the Attorney Grievance Commission of Maryland.