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Impressions on a New Code of Ethics

by Professor William I. Weston

On January 1, 1987, members of the Maryland Bar will be governed by an entirely new code of ethics called the MARYLAND RULES OF PROFESSIONAL CONDUCT, Maryland Rule 1230 (1986). These rules are radically changed both as to format and substance from the ethical rules they replace.

After more than five years of study, research, review, hearings and drafting, the Commission on Evaluation of Professional Standards (often known as the Kutak Commission for its former chairman, the late Robert Kutak, Esquire), recommended the adoption of the MODEL RULES OF PROFESSIONAL CONDUCT (Model Rules) to the House of Delegates of the American Bar Association. This was not the first time that the House had considered these rules. The first consideration by the House occurred in February 1982 when a motion was approved by the House replacing the former code with a draft of the new Model Rules. Proposed final drafts of the rules were considered at the 1982 Annual Meeting and at the 1983 Mid-Year Meeting. After debate and revision, the House voted to adopt the new code, preamble, scope, terminology and comments and on April 2, 1983, the new MODEL RULES OF PROFESSIONAL CONDUCT were adopted by the House of Delegates.

Since then, little more than a dozen states have adopted the Model Rules including Maryland. On April 15, 1986, the Court of Appeals of Maryland ordered the adoption of the Model Rules after consideration of a favorable report by their own Select Committee to Study the ABA MODEL RULES OF PROFESSIONAL CONDUCT. The effective date of the order is January 1, 1987.

The implementation of the Model Rules on January 1, 1987 will result in changes in the substantive rules which govern attorney conduct as well as the format by which the rules are promulgated. Gone is the tripartite system of canons, disciplinary

rules and ethical considerations, the distinctions between which were never fully understood and were often misapplied. The tripartite system has been replaced with a direct, black-letter approach in which the standards of practice and conduct are written in language which is open and direct. Each topic is considered in a relatively unified fashion and the organizational format and numbering system are less cumbersome than those of the tripartite system. Thus, entry into the Model Rules is not as forbidding and confusing as under the former code.

Because the only applicable and enforceable language is contained in the rules themselves, the aspirational and philosophical language is only reposed in the commentaries where it rightfully belonged all along. The text of the Model Rules itself is authoritative and comprehensible.

The more than fifty rules in the Model Rules are divided into eight substantive categories each dealing with aspects of the role of an attorney and the relationship of that role to a variety of individuals and institutions. The groups are:

- the client-lawyer relationship
- the lawyer as a counselor
- the lawyer as advocate
- transactions with persons other than clients
- law firms and associations
- public service
- information about legal services
- maintaining the integrity of the profession

The Client-Lawyer Relationship

The greatest amount of consideration is given to the client-lawyer relationship. Every aspect of that relationship from attorney competence to terminating the relationship is considered. Many of the rules in each of the eight sections are restatements or improved statements of the prior rules. In addition to restating the existing rules, the drafters also effectively com-

bined the substance of the canons, ethical considerations and disciplinary rules to produce a consistent, black letter statement reflective of the prior rule.

There have been substantial changes in the areas of fees, communication between the attorney and the client, confidentiality and attorney advertising/soliciting. It is interesting to note that the first Model Rule is a statement on lawyer competence. Although largely a restatement of the concept contained in MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1980), the new rule is phrased in the positive rather than suggesting when an attorney ought not to handle the matter. Moreover, Rule 1.1 specifically defines the elements of competent representation by an attorney. The rule also envisions proper preparation by the attorney as part of competent representation.

Rule 1.2(a) is a definitive statement of what had previously been thought to be the rule—that the client controls the substance of a case; the attorney the conduct. But even as to the conduct of the case, the attorney is directed to consult with his or her client. Finally, the decision as to whether or not to accept a settlement offer or a plea bargain lies strictly with the client. Although MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 and 7-8 allowed the attorney to make decisions as to some unspecified aspect of the conduct of a case, the issue was not addressed as part of the disciplinary rules. The clarification and codification of this aspect of the attorney-client relationship is a strong and positive step toward defining the responsibility of the attorney toward his or her client.

Rule 1.3 again, is a direct and clear statement as to the attorney's obligation to act with diligence and promptness in a legal matter. There is no similar counterpart in the prior code although general language in DR 6-101 has often been construed to include diligence as part of the fiduciary duty owed by an attorney to a client. Dila-

tory conduct by an attorney remains the singular most frequent complaint raised by clients.

Rule 1.4 takes another step toward establishing in clear language the parameters of the attorney-client relationship and the obligations owed by an attorney to his or her client. As with Rule 1.3, the language seems almost simplistic in requiring an attorney to keep a client reasonably informed about the status of a matter and providing reasonable explanations of the matter being handled by the attorney. Failure to communicate as to the progress of the case and as to the nature of the case represent consistent complaints by clients. Rule 1.4 establishes a level of informed consent analogous to that obligation owed by a physician to his or her patient. Although based on a different premise (the physician's duty is based on the right of each person to hold his or her body inviolate while the attorney's obligation is based on the fiduciary relationship), the premise is identical. The client, like the patient counterpart, makes the relevant decisions and the professional is bound to satisfy the concept of materiality—providing sufficient quantity and quality of information for the client to make the substantive decisions.

Attorney Fees

The subject of attorney's fees has undergone substantial clarification under the Model Rules. Section 1.5 of the new rules replaces the emphasis in the prior code on illegal or excessive fees with a requirement that fees shall be reasonable. Rather than a cumbersome reliance on the definition of a clearly excessive fee, attorneys can look to the application of enumerated factors in determining the reasonableness of a fee. The second substantial change is the creation of a dichotomy between a new and a former client with regard to the determination and explanation of an attorney's fee.

Under Section 1.5(b) an attorney is required to tell the client the rate of the fee, preferably in writing shortly after the commencement of the attorney-client relationship. The failure of attorneys in general to reduce fee agreements to writing and to discuss fees early in the relationship is an issue of constant concern both to organizations which engage in arbitration of attorneys fees and to courts which are asked to pass on the appropriateness of an attorney's fee. One would think that common sense would obviate the necessity for this provision; but the failure of attorneys to discuss fees with their clients and the failure of attorneys to reduce parole fee agreements to writing recurs.

As a further step toward written fee

agreements, the new rules require contingent fee agreements to be in writing and require that such an agreement set forth the method by which the fee will be determined including the percentage to be charged by the attorney from the ultimate settlement, the fee involved in trial and/or appeal, the costs to be deducted and when such a deduction will take place and finally, the attorney is required to produce a written settlement statement in the case of a contingent fee arrangement.

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Section (d) of the same provision prohibits fees which are contingent upon the outcome in domestic relations cases. Unlike the prohibition against contingent fees in criminal cases which was contained in DR 2-106 (C), the similar prohibition in domestic relations cases was referred to obliquely in EC 2-20. The wording of the new section is curious in that the section does not use language which is consistent with section (d)(2) prohibiting contingent fees in criminal cases. Rather, the lawyer is not to charge a fee in a domestic relations case which is contingent upon the securing of a divorce or the amount of alimony, support or property distribution. Because there is no *res* as in a personal injury action from which the fee could be taken and because the role of the lawyer in a domestic relations case is quite different, there are legitimate concerns about any fee which appears to be result oriented.

The attorney in a domestic relations matter is dealing with issues as to the future welfare of the parties he or she is representing. While there are economic consequences involved in domestic relations, the framers of the Model Rules expect the attorney to go beyond the purely economic issues involved in obtaining a particular result to the human issues of dealing with the needs of the client. One of the strongest basis upon which property and alimony are awarded is the need of the party re-

questing the award, such as, emotional needs, physical needs and economic needs. Thus, the attorney is restrained from using a result orientation in setting a fee for a domestic relations client.

The final change with regard to fees concerns the division of fees. A fee may be divided between attorneys not in the same firm if the client is advised of the arrangement, consents to it, and the two attorneys either divide the work or share the responsibility; and the total fee is reasonable for the work performed by both attorneys.

Under the former code both actual work and responsibility were required before a fee could be divided; the model rules allows division if either occurs. The continued receipt and payment of referral fees by attorneys without satisfying the requirements of either the new section or its predecessor is a recurring problem. There is a myth among attorneys that when one refers a case, that gratuitous act, performed in the best interests of the client, warrants the payment of a referral or finders fee by the second attorney. In most cases, the first attorney has done nothing more than what he or she is ethically obligated to do. It has always been the rule that in order to collect a fee from a client, the attorney must assume some responsibility for the conduct of the case. To collect a fee for referral absent either work or responsibility or both is by definition unreasonable and should not be part of the popular conduct of attorneys.

Client Confidentiality

Rule 1.6 deals with confidentiality where several changes were made to the prior model code section dealing with confidentiality (DR 4-101). The first change is the elimination of the secrets/confidences dichotomy in the old code. The distinction between these two was poorly defined and the two were often combined when evaluating attorney conduct. The Model Rules require that an attorney not reveal information relating to the representation of the client. In the comments, the attorney is reminded of his or her duty to hold inviolate confidential information of the client. The Model Rules broadens the prior code by creating an umbrella of information which deals with the representation of the client rather than creating pidgeonholes in the form of confidences and secrets in which the attorney must fit the data obtained. The new rule is also broader in that the source of the protected information is de-emphasized in favor of the umbrella of information theory mentioned above.

The process by which, and the informa-

tion which an attorney may reveal have also undergone substantial change in the new rules. The prior provision which allowed an attorney to reveal information in order to collect a fee has been broadened to include any claim or defense in a controversy between the attorney and client. The provision which allowed (mandated) that an attorney reveal an intention of the client to commit a crime and the information necessary to prevent the crime has been substantially changed. Under the Model Rules, the attorney may reveal information to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm. Maryland has added language which was contained in the original Kutak report which requires an attorney to reveal information to prevent a client from committing a criminal or *fraudulent* act which is likely to result in substantial injury to the financial interests or property of another; in addition to the lawyer's duty to reveal information to prevent bodily harm. The attorney is also obligated in Maryland to rectify the consequences of the client's criminal or fraudulent act in which the attorney's services were used. Finally, an attorney is mandated to comply with the confidentiality rules, a court order or other law.

The latter statement (Subsection (b)(4)) is redundant in light of the adoption of the rules by the court of appeals which thereby mandates compliance. As an officer of the court, an attorney is already obligated to comply with a court order or "other law". The purpose and necessity of this latter provision is unclear. The application of the rectification provision is very unclear and will require substantial explanation by bar associations and the courts. Moreover, there is absolutely no guidance as to adequacy and degree of rectification which will satisfy an attorney's obligation.

The final problem with Maryland's version of the Model Rule 1.6 concerns the extension of the attorney's duty to reveal information beyond bodily harm and death to financial and property injuries. The comments adopted by the court of appeals are little more than a carbon copy of the comments provided in the ABA version of the rules. No guidance is given to explain the type of fraudulent act sufficient to warrant disclosure and/or rectification. Must the domestic relations attorney who is told by his client of the potential sale of a piece of allegedly marital property reveal the potential sale? What if the offer to buy occurred in a social setting and was not followed by documents? Finally, what definition and standard of fraud will be legally sufficient in the application of this rule in a day to day setting? This extension by

Maryland is a poorly drafted and conceived excursion in uncharted waters where the hazards are as much illusory as real.

Conflicts of Interest

Sections 1.7-1.10 deal with conflicts of interest situations. Section 1.8(e)(1) is different from the prior code in that a client need not remain ultimately liable for all expenses advanced by the attorney. Sec-

. . . the attorney may reveal information to prevent the client from committing a criminal act likely to result in imminent or substantial bodily harm.

tion 1.9 is new to the rules and the closest counterpart in the old code is the provision requiring that an attorney avoid even the appearance of impropriety. This rule abandons the impropriety approach in favor of approaching conflicts in a substantive manner. Where an attorney has represented a client, he cannot represent another person in the same matter involving adverse interests to the former client without consent of the latter. The attorney is further prohibited from using information which would disadvantage the former client.

Section 1.13 codifies the provisions of EC 5-8 which indicated that an attorney represents the entity and not the persons connected with the entity. The section clarifies the relationship of the officers and directors to the corporation and allows for dual representation of the entity and directors, officers, employees, members and shareholders if there is no conflict of interest. The substance of this section is directed to the issue of conflicts of interest rather than the concern of the code which was interference in independent professional judgment.

Attorney Dilatory Conduct

Rule 3.2 clarifies the prior code section (DR 7-102 (A)(1)) by mandating that an attorney take appropriate steps consistent with the interests of the client to expedite

litigation. Dilatory conduct by attorneys is a recurring problem and the subject of consistent complaints by clients. Although delay can occur for a variety of reasons many of which have nothing to do with the conduct of the attorney, failure on the part of an attorney to move the case forward is an all-to frequent occurrence. The language of the new rule shifts the obligation from the negative to the positive by obligating the attorney to take steps to expedite rather than prohibiting an attorney from acting in such a way as to delay.

False Evidence

Rule 3.3 takes substantial steps to prevent the introduction of fraudulent testimony and goes further than the prior code in obligating the attorney to take appropriate steps to correct the situation when he becomes aware of the fraud or the falsity of evidence. This provision and its ancillary sections in Rule 3 clearly require candor and require the attorney take appropriate steps to insure candor. The attorney is even required, in Rule 3.3 to reveal all material relevant facts in an *ex parte* proceeding whether or not they are adverse. Rule 3.4 adds the requirement of candor in the conduct of discovery so as to avoid frivolous discovery actions and to avoid unreasonable delay as to the conduct of discovery.

Trial Publicity

Rule 3.6 dealing with trial publicity is substantially changed from its predecessor section (DR 7-107) in format and in degree of specificity. The new rule also adopts as a test in trial publicity a new standard: "substantial likelihood of materially prejudicing an adjudicative proceeding." The new rule eliminates the ponderous distinctions between types of proceedings in the former code and replaces the language with a clear statement as to the obligations of an attorney and indirectly reinforces an attorney's obligations as an officer of the court despite his or her duty to zealously represent a client.

Attorney Advertising

The final area in which there has been substantial departure from the predecessor code is advertising. The prior section DR 2-101 was promulgated as a reluctant reaction to the Supreme Court decision of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Prohibitions against advertising date back to the American Bar Association Canons of Professional Ethics of 1908. The ABA Canons were a redraft of the Alabama Code of Ethics which was

adopted in 1887 and which also contained the prohibition against advertising by attorneys. The theory behind the prohibition was a combination of a desire for professionalism and dignity among lawyers and as a means of avoiding all-out competition among attorneys. Word of mouth was considered the most effective advertising and if there was to be any advertising, it was limited to providing a notice of location and existence of the law office through very limited mechanisms such as business cards, directory advertising and recognized law lists.

The milieu in which the original ban on advertising was promulgated became increasingly obsolete. Attorneys practiced in a mercantile and competitive atmosphere rather than the rarified atmosphere of the "noble profession". Moreover, bar associations became zealous in their enforcement of the ban on advertising to the point of absurdity. Attorneys, for example, were prohibited from placing a name and message in a local booster newspaper. Instead they were told they had to place the advertisement anonymously. The *Bates* decision was an example of the Supreme Court acting for the profession when the profession refused to take a more reasoned course. The resulting Model Rules provisions and the progeny of the *Bates* decision have effected a practice area in which just about anything goes. Only statements which are misleading or false or contain a material misrepresentation of fact or law, which create unjustified expectations as to results or which compare one lawyer to another are proscribed. The advertising attorney is required under Section 7.2 to keep a copy of advertisements for two years (instead of an indefinite period under the prior code) and attorney advertising must list the name of at least one attorney responsible for the content of the advertisement. The abolition of the list of approved advertisement vehicles (DR 2-101 (B)(1-25)) is the final step toward the elimination of any constraints as to the type of advertisement and

the medium chosen and the complete disavowal of the dignity of the profession approach contained in all of the prior versions of the code. Advertising which runs the gamut from shopping carts in grocery stores to television videos, that meets the limitations contained in Model Rule 7.1, is permitted. The payment of value for the recommendation of an attorney's services (other, of course than by another attorney) is still prohibited, thereby retaining the historical prohibitions against the use of a paid "runner" to find cases.

The prohibition against soliciting is retained in Model Rule 7.3 although the exceptions have been defined a bit more clearly than they were in DR 2-104. The new rule also prohibits the attorney from taking advantage of a person who is physically or emotionally incapable of exercising independent judgment and the provisions prohibit the attorney from employing coercion, duress or harassment in contacting a prospective client. The validity of Model Rule 7.3 has been thrown into doubt by a series of cases before the U.S. Supreme Court in which the Court allowed advertising directed either to a specific type of client (*Dalkon Shield* plaintiffs: *Zauderer v. Office of Disciplinary Counsel* 105 S.Ct. 2265 (1985); or to a specific client (direct mail solicitation to the victims and families of the Hyatt-Regency skywalk accident: *Matter of Von Wiegen*, 63 N.Y. 2d 163, 470 N.E. 2d 838 (1984), cert. denied 105 S.Ct. 2701 (1985)). One jurisdiction has upheld the regulation of electronic media advertising. Iowa's rules expressly prohibit television advertisements which contain background sounds and effects other than a single voice in a non-dramatic state. The Iowa Supreme Court in *Committee on Professional Ethics v. Humphrey* 355 N.W. 2d 565 (Iowa 1984), vacated, 105 S.Ct. 2693 (1985), upheld the restrictive rules on the basis that this type of advertising presented different and unusual problems. After the Supreme Court decision in *Zauderer*, the Iowa decision

was vacated and remanded. In a second opinion after remand, the Iowa Supreme Court adhered to its former position in *Committee on Professional Ethics v. Humphrey*, 377 N.W. 2d 643 (Iowa 1985), appeal dismissed, 106 S.Ct. 1626 (1986). The Iowa Supreme Court based its decision on the unique nature of the advertisement on television which does not afford the viewer time for contemplation or analysis but rather appeals to emotional and instinctive reactions. The U.S. Supreme Court dismissed an appeal in the case for lack of a substantial federal question. *Humphrey v. Committee on Professional Ethics* 106 S.Ct. 1626 (1986).

Conclusion

The full impact of the Model Rules will not be realized for some years as bar associations, courts and grievance commissions grapple with the plain meaning of the words contained in the rules. The quantum jump in attorney malpractice litigation will result in further evaluation of the standards set forth in the Model Rules. Even if the Model Rules result in no less litigation, no fewer ethics opinions or disciplinary proceedings, they will be a positive addition to the evaluation of attorney conduct because of their clarity, conciseness and organization.

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