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I am delighted to have this opportunity to be at the University of Oklahoma College of Law to discuss the proposed ABA Model Rules of Professional Conduct. As you might imagine, as chairman of the ABA Commission that drafted the Model Rules, I have spent many hours during the past year on the road speaking at bar associations and law schools much like this one to explain their scope and rationale.

In my travels I have been fortunate to have been in contact with a wide cross-section of the profession and academia and to hear their concerns about legal ethics and self-regulation in our profession. Of course, I have discovered a great diversity in the profession—diversity in the kinds of practice lawyers are involved in, diversity in the way lawyers organize to practice, and diversity in expectations about the future of the profession. But I also discovered a few constants that relate to the work of the Commission. By and large, lawyers in this country are truly dedicated to practicing law in the finest traditions of the profession. Contrary to what one reads in biting or bitter columns that appear in the papers from time to time, the members of this profession are willing and able to work together to regulate themselves in the public interest.

I have also had confirmed in my travels that most lawyers and scholars do not find the 1969 ABA Code of Professional Responsibility to be a satisfactory tool of self-regulation or a useful guide to professionally responsible conduct. They find it difficult to use the current Code to resolve specific problems—the real-life dilemmas that arise in the daily practice of law. They find the current Code's three-part structure of Canons, Ethical Considerations, and Disciplinary Rules cumbersome and confusing. They find the current Code's tendency

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to focus so heavily on less important matters—such as the prohibition about advertising the practice of law—disappointing.[1]

Nevertheless, I have also found that most lawyers are instinctively skeptical of a new set of rules. I attribute this in part to the instinct for caution that is characteristic of the bar. It is an instinct that has always dictated thorough study, debate, and multiple drafts before any document is given final approval, whether it be new public law or private law as expressed in a contract.

Why did the American Bar Association Commission produce a new set of rules in the first place? Would not an appropriate series of amendments have been sufficient? These are legitimate questions and certainly appropriate ones to ask before we consider the merits of the Model Rules and explore the thinking which lies behind them. Therefore, before discussing some of the proposed new rules, let me attempt to remove the skepticism with which they may be initially greeted by explaining the motives of those who drafted them.

The simplest way to do this is to review the record—the history—of our profession's efforts at developing rules of self-governance. By the way, many others—I think particularly of Professor Forrest Bowman—have done so in recent months. The insights are revealing.[2]

We start as far back as the 1830s, when a Baltimore lawyer, David Hoffman, published his "Fifty Resolutions." These were high-minded statements of what we today would recognize as ethical principles. Written in a kind of preachy, victorian tone, they were, according to Hoffman, to be recited twice each year by lawyers, an exercise that would presumably raise the ethical level of conduct of those who undertook it. As naive as all this sounds today, it was by and large then the only source material with regard to professional responsibility.

In the 1850s, however, a Philadelphia judge and professor at the University of Pennsylvania's law school, George Sharswood, set about to remedy this situation. This was, it will be recalled, some years before Christopher Columbus Langdell came to Harvard and made our lives vastly more complicated by the publication of his casebook on contracts. Before then, legal education—where it was found in a university setting at all—had been largely a matter of lectures. Judge Sharswood's approach to legal ethics therefore took the form of a lecture, or actually a series of lectures, which through several editions,

1. *See, e.g.*, McGrew, *ABA Evades Duty to Update Code of Responsibility*, LEGAL TIMES, Oct. 18, 1981, p. 13.

2. Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?*, 13 PAC. L.J. 273 (1982). See especially pp. 274 to 286 for the historical materials in text at n.2.

had a large impact on that portion of the bar that concerned itself with professional ethics.

One member of the bar who must be counted among them was Thomas Jones of Alabama. Governor Jones—as he eventually became governor of Alabama—read his Sharswood well. But he took Sharswood out of the classroom and brought him, in a sense, to the courtroom by drafting what was to become the first true code of ethics in the United States: the Alabama Code of 1887.

Other states got into the spirit of things, and by 1906, ten had adopted, with minor variations, the 1887 Alabama Code. By 1908 the American Bar Association, following the work of a committee of the ABA among whose members was Governor Jones, proposed for adoption the ABA Canons of Ethics, founded largely on the 1887 Alabama Code.

Now, without doing damage to the historical record, one may jump ahead, from 1908 to the mid-1960s, when the then President of the ABA, Mr. Lewis Powell—now, of course, Mr. Justice Powell—called for a revision of the Canons and was answered with the 1969 Model Code of Professional Responsibility.

The "new" Code certainly *looked* new. It propounded its contents in a three-part division. That is, it had Nine Canons—general maxims, really—each followed, as you know, by a number of statements called "Ethical Considerations," which in turn were followed by the statute-like Disciplinary Rules.

Contained in the Disciplinary Rules of the 1969 Code was a real achievement. For the drafters of that Code, by separating out the general maxims of the Canons and the hortatory, aspirational Ethical Considerations had, in the Disciplinary Rules, brought the bar to the realization that, within the broad arena of legal ethics and professional responsibility, there was a fundamental level where one could find not exhortations to goodness and a high-toned morality but actual law, the law of lawyering, rules of conduct that look like, sound like, and perform like any other body of law.

But, it must be said, the potential force of that achievement was not fully realized in the 1969 Code. For, it has been noted, despite its radically different appearance from the documents that preceded it, the 1969 Code actually changed the 1908 Canons in only four points of substance.[3]

The implications of this are extraordinary. For it means that the 1969 Code was still essentially the 1908 Canons. The Canons, in turn, were an outgrowth of the 1887 Alabama Code. And the Alabama Code may

3. *Id.* at 286.

be read in great part as a codification of lectures in the 1850s by a fine old judge in Philadelphia who presumably thought the bar could do better than reciting, twice a year, the Resolutions of David Hoffman.

One would look long and hard and futilely for another body of law that had seen so much and apparently changed so little. The record of the bar in adopting and adapting its governing rules has not been, as one commentator has said, "a record of unseemly haste."[4]

That is the situation, or was the situation, the Commission discovered as it undertook its assignment. We have a Code that does not respond to the realities of the modern-day practice nor to the needs of the public, as well as the needs of our profession.

Our response to such realities—to those needs—is found in what is now called the revised final draft of the Model Rules of Professional Conduct. We submitted the draft to the House of Delegates on June 30, 1982, after virtually five years of studying, writing, listening to comments and criticisms, restudying, rewriting, and, of course, eventually publishing our text.

As submitted, the revised final draft consists of a Table of Contents, a Preamble, a Scope Note, and the text of the Rules and accompanying comments. All of this has been published in the November, 1982 issue of the *American Bar Association Journal*, along with a comparison of the provisions of the current Code of Professional Responsibility to aid readers who wish to compare the text of a Model Rule with its counterpart section in the 1969 Model Code.

As members of the ABA House of Delegates, the profession, and the public at large continue to review the Model Rules, a note about what the Model Rules are and are not is in order.

The Model Rules are, first and foremost, intended to serve as a national model of the regulatory law—enforceable standards of conduct—governing the practice of law. As a "national model," the Model Rules have been drafted to articulate the consensus of the profession on a wide range of issues of professional conduct—from competence and communication to corporate representation and client confidentiality. Consensus, however, rarely if ever speaks with the voice of unanimity. Differences in emphasis are to be expected, as are strongly held and sometimes irreconcilable differences of view. A national model law can never accommodate all such differences and remain internally consistent and coherent. Moreover, some latitude must remain for adaptation of the national model to local tradition, outlook, and practice. The test for evaluating a national model must be whether, given inevitable local adaptation, the document taken as a whole reflects what

4. Frankel, *Review*, 43 U. CHI. L. REV. 874 (1976).

should and will be acceptable as the prevailing view in the vast majority of jurisdictions.

As "regulatory law" the Model Rules are, at a very minimum, intended for use in carrying out the disciplinary side of our profession's self-regulatory process. Accordingly, the Model Rules consist of enforceable standards presented in the form of a series of directives and prohibitions, accompanied by discretionary standards marking out "safe harbors," areas in which a lawyer may safely make reasoned judgments without fear of regulatory penalty. There can be no question but that our profession—perhaps more so than any other—is seriously committed to self-regulation and the enforcement of its professional standards.

But, as disciplinary committees and bar counsel would be the first to acknowledge, self-regulation of a profession having more than 500,000 members demands more than enforcement through disciplinary proceedings. The primary mechanism for effective self-regulation must be widespread voluntary compliance with the profession's standards of conduct. And widespread voluntary compliance in turn requires clear, workable, common-sense standards by which individual lawyers can regulate their own conduct. The Model Rules provide such standards in an integrated text organized for convenient reference by the lawyer who is not an expert in legal ethics.

The Model Rules have not, however, been written solely with a view toward application to those few lawyers who are unwilling to adhere to professional standards or those additional few who would not act professionally absent the threat of disciplinary penalty. Our profession's standards must be more than a penal code, for they have an equally vital informative role to perform. Although there will always be a few who look to the profession's standards to determine how to avoid or minimize their exposure to disciplinary liability, it must be recognized that the overwhelming majority of lawyers look to those standards to determine the right course—the professionally responsible course—of action in response to a specific question arising in their daily practice.

Generalized norms, such as a lawyer should avoid the "appearance of impropriety,"[5] should "exercise independent professional judgment,"[6] or should "represent a client zealously within the bounds of law,"[7] offer little assistance to the conscientious lawyer. By setting forth the law and the best of professional traditions in discrete and specific standards identifying the matters that the conscientious lawyer

5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE], Canon 9 (1979).
6. *Id.*, Canon 5.
7. *Id.*, Canon 7.

would consider in resolving a question of professional responsibility, the Model Rules truly provide a handbook of good lawyering—a guide to those many lawyers who earnestly seek to practice in a professionally responsible way.

Taken as a whole, the revised final draft now before the ABA House of Delegates reflects on every page the thoughtful study and hard work of the sections and committees of the Association, and of state and local bar organizations throughout the country. The Model Rules are thus truly national in derivation. As proposed national model standards, the Model Rules, like all model legislation, will be subject to any necessary modification at the level of local implementation. But at the national level, the Model Rules speak from a broader perspective developed during thirty months of public reaction to successive drafts, and reflect the leadership the American Bar Association has exercised for some seventy-five years in recommending national standards of professional responsibility.

What are the Model Rules not about? Despite generalized and somewhat emotionally charged claims of a few, the Model Rules are most assuredly not an attempt to dilute the fiduciary relationship that exists between lawyer and client. Indeed, it may fairly be said that never before has there been a more client-centered code. Time and again, in areas of paramount importance to clients—competence, promptness, diligence, communication, fees, and loyalty—the Model Rules are drafted in a manner purposefully designed to strengthen fundamental obligations to the client.

Nor do the Model Rules make sweeping, radical, or dangerous changes in the traditional rules of confidentiality. The most effective way to answer a charge that they do make such changes is to ask readers to compare the language of the Model Rules with existing law and existing standards of professional responsibility. On the basis of such comparison it can fairly be said that the Model Rules actually take a more conservative approach to confidentiality and a more restrictive approach to disclosure than do existing codes of professional responsibility adopted in the vast majority of jurisdictions.

As to confidentiality, the starting point in the Model Rules is expansion of the scope of the general obligation. The Model Rules do not use the existing code classification of "confidences" and "secrets" and the related distinction regarding information "embarrassing" to the client.[8] The Model Rules assume that clients initially expect that *all* information relating to the representation will be protected.[9] With regard

8. *Id.*, DR 4-101(A).

9. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(a) (1982) [hereinafter MODEL RULES].

to exceptions to the principle of confidentiality, the Model Rules, like the 1969 Code, like every predecessor code, and like every scholar who has written on the issue, recognize that the general obligation of confidentiality has outer limits where transcendent values must prevail over secrecy.

The Model Rules are different primarily in that exceptions to confidentiality are more narrowly drawn. For example, existing codes in 38 states require a lawyer to disclose any unrectified fraud committed by a client in the course of representation.[10] In contrast, the Model Rules recognize that the critical question for purposes of mandatory disclosure is not whether a crime or fraud was committed during the course of representation, but whether disclosure by the lawyer is necessary to avoid assisting that crime or fraud—law does not permit lawyers to serve as co-conspirators with clients, nor to aid and abet crime or fraud.[11]

The Model Rules also effectively narrow the scope of discretionary disclosure provided in the 1969 Code. The 1969 Code permits disclosure of any intended crime, including the crime of fraud.[12] The Model Rules seek to replace that broad grant with a rule permitting disclosure of otherwise confidential information only to the extent necessary to prevent a crime or fraud that is likely to result in grave personal injury or death or substantial economic loss.[13] Thus, the simplistic test of the 1969 Code is replaced by a more restrictive formula requiring, first, an analysis of the nature of the client's conduct; second, an assessment of the likely consequences of that conduct; and third, an evaluation of the extent to which disclosure is necessary to prevent those consequences.

Narrowing the scope of mandatory and discretionary disclosure permitted by the 1969 Code requires consideration of one additional case—that of the lawyer who has been deceived by a client and unknowingly assisted the client's crime or fraud. It should be borne in mind that such cases would be treated as instances of mandatory disclosure under the 1969 Code. In the Model Rules, this problem is treated as a matter of discretionary disclosure and limited to crimes or frauds in furtherance of which the lawyer's services have actually been used.[14]

The charge that the confidentiality provisions of the Model Rules represent a radical departure from existing standards in favor of more disclosure simply cannot withstand comparison to existing codes and

10. ABA, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980).
11. *See* MODEL RULES, *supra* note 9, Rules 3.3, 4.1.
12. MODEL CODE, *supra* note 5, DR 4-101(C)(3).
13. MODEL RULES, *supra* note 9, Rule 1.6.
14. *Id.*

existing law. Likewise, the broader and even more generalized charge that the Model Rules seek to undermine the adversary system loses much of its rhetorical steam when tested against the actual text of the Model Rules and the provisions of the 1969 Code. In general, the Model Rules do no more than recognize that the adversary system is a controlled process governed by rules applicable to lawyers as well as to clients and their adversaries.

For example, strenuous objection has been made by a few to a provision (Rule 3.3(a)(3)) that requires limited disclosure of legal authority in the controlling jurisdiction known to be directly adverse and not disclosed by opposing counsel. The provision is taken directly from the 1969 Code and is neither new nor radical.[15] Similarly, the Model Rules continue existing standards that prohibit lawyer presentation of evidence known to be false, lawyer participation in obstructions of justice (jury tampering, falsification or concealment of evidence, and the like), abusive trial conduct, and assistance in fraud upon a tribunal.[16]

A response to the more generalized charges that have been leveled is not to suggest that the Model Rules are perfect, or that reasonable and principled alternatives to specific Model Rules cannot be formulated. One thing lawyers can agree upon is that no legislative document is ever really perfect. While founded on law, the Model Rules are informed by experience and, therefore, the product of compromise as well. Thirteen members of a commission, let alone 387 members of the House of Delegates, let alone 500,000 members of a profession, are bound to have disagreements and bound to discover issues that can honorably be argued on either side and honorably resolved in different ways.

For its part, the Commission has truly sought, to the extent possible within the confines of legal principle, sound public policy, and the overriding goal of formulating a national model, to accommodate the suggestions and differing views communicated by others. The best evidence of that accommodation will be found in the revisions that were made by the Commission first to the January, 1980 discussion draft and then to the 1981 proposed final draft of the Model Rules.

Despite the Commission's best efforts, some views could not be accommodated. In some instances, those views have been expressed in the form of amendments that reflect local priorities and outlooks that seem ill-suited to a national model. Others have been expressed in amendments urging directly opposing positions on issues on which the proposed Model Rule already sets forth the compromise position.

15. MODEL CODE, *supra* note 5, DR 7-106(B).
16. *See* MODEL RULES, *supra* note 9, Rule 3.4.

I dare say I am not the most objective or disinterested commentator on the proposed Model Rules. However, I propose to you that the revised final draft is an honest, forward-looking, responsible document that has emerged after a thorough testing at the hands of individual lawyers and bar associations throughout the country. It is a conservative document in the truest sense of the word, for it aims to preserve and enhance fundamental professional values in the face of a rapidly expanding and changing profession.

In reviewing the Model Rules, all of us—the Commission, the proponents of amendments, the members of the House of Delegates, lawyers across the nation—share the same goal: the achievement of the best possible national model standards of professional conduct. As chairman of the Commission on Evaluation of Professional Standards, I commend the revised final draft of the Model Rules of Professional Conduct of the American bar to you as a document worthy of a proud profession, jealous of its independence, and committed to its tradition of self-regulation.