Chapter 29: ABA Code of Professional Responsibility

Harold Brown
CHAPTER 29

ABA Code of Professional Responsibility

I. IN DEFENSE OF MEDIOCRITY

HAROLD BROWN

§29.1. Introduction. After five years of toiling, with three meetings each month, a distinguished committee of the ABA has conceptualized the first general revision of the Canons in this century, including Ethical Considerations and Disciplinary Rules. Since the adoption of the Code of Professional Responsibility by the ABA in August, 1969, to become effective January 1, 1970, three minor amendments were approved in 1970. Although the Code is technically binding only on members of the ABA, it has already been enacted in 12 states and is actively under consideration in numerous 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 subjective to critical appraisal as a whole and in its detailed provisions. While some bar associations may mistakenly gloss over the

HAROLD BROWN is senior partner in the firm of Brown and Leighton, Boston. He is the author of numerous legal articles and of Franchising: Trap for the Trusting (1969, 1970 Appendices). The views herein expressed are those of the author and do not necessarily represent the position of the Annual Survey of Massachusetts Law or its publisher, Little, Brown & Company.

§29.1. 1 As of June 15, 1970, of the 12 states that adopted the Code as the standard governing the practice of law, 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 that it was adopted without DR 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 a 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: District of Columbia, Virginia, Florida and Arizona.
proposal in brief hearings before unrepresentative committees, it should 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 in the newly stated Canons themselves, each of which 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 Canon is followed by “Ethical Considerations” consisting of numbered paragraphs with discursive exposition of the generalities stated in the respective Canon. There then follow the Canon’s “Disciplinary Rules,” 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, the forum to which resort may be had, and the provisions for judicial review, if any. Perhaps it was intended that each state should adopt its own procedures, whether directly or indirectly through statewide or 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 states which have adopted the “Unified Bar,” of which there are over thirty already and more in the offing, it is conceivable that matters of discipline may well repose in completely nonjudicial, as well as non-governmental, forums.

A copy of the entire Code (including the Canons, the Ethical Considerations, the Disciplinary Rules, and lengthy annotations), consisting of 48 pages, can be obtained directly from the ABA in Chicago.
or possibly from various state bar associations. Although it would hardly be feasible to review all of such material in this chapter, it should be stressed that much of its content deserves the staunch support of every member of the bar. The criticism contained in this chapter should therefore be considered individually, rather than as a broad attack on the Code in its entirety. Such specific matters nevertheless raise such serious questions of morality and judgment that, without major revisions, the Code is not to be commended for adoption.

§29.2 Disciplinary Rules. In support of Canon 1, it is broadly stated that a lawyer shall not "Violate a Disciplinary Rule." 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.  

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 nonreporter to the discipline of the Code. Perhaps for the first time in the annals of Anglo-American jurisprudence, there would thus be enacted a true "gestapo" informer system, with each attorney legally bound to police his brother attorney. Such a rule would go far beyond the bounds of "guilt by association," 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, to be discussed further below. 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 apparently displays a lack of "competence." And since one must be certain to report accurately, hereafter the attorney should make a double set of notes, one on the matter at hand, the other on the conduct of one's opponent, since the reporting attorney should be careful to maintain his standing as a grade-A spy. Inefficient reporting of such incompetence may in itself constitute negligence.

Since such obligations of an "official informer" are based on all of

§29.2. 1 DR 1-102(A)(1).
2 DR 1-103(A).
3 DR 6-101(A)(1)-(3).
the Disciplinary Rules, several of which will be discussed below, every attorney would be well advised to study the rules meticulously, since 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. Short of committing all the rules to memory, at the very least, copies should be carried in one’s brief case.

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. After all, the standard of conduct now requires that attorney B fulfill his obligations as an informer. On the other hand, it is quite possible that such an extension of one’s prime obligation as an informer does not require an investigation as to whether attorney B actually filed a report. It would, however, appear the better part of discretion at least to list the names and addresses of all the other attorneys in the courtroom who observed the incompetence of attorney A, though it is not quite clear as to whether this protective measure should be adopted prior to the observation of attorney A’s incompetent conduct.

Because of the general unfamiliarity of so many attorneys with the intricacies of “information,” it might also be helpful to request a report from some with direct experience in such roles under the Nazi regime, some of whom might be willing to expostulate, albeit anonymously. A somewhat less efficient source of instruction would be recent college graduates whose experience with “honor codes” included similar reporting obligations. After all, every effort should be made to help attorneys to learn how to avoid “conduct that is prejudicial to the administration of justice,”4 because “even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession.”5

As previously suggested, perhaps the most interesting innovation is the command that a lawyer shall not “neglect a legal matter entrusted to him.”6 In disarmingly simple language, the rule would now expose all counsel not merely to civil liability for neglect, nor the salutary requirement of adequate insurance to cover professional liability, but now as well 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 degree of the negligence could mitigate the punishment, the rule itself would brook no exceptions.

4 DR 1-102(A)(5).
5 EC 1-5.
6 DR 6-101(A)(3).
Lest such threat be narrowly construed, the companion rule specifies that a lawyer shall not:

Handle 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.\(^7\)

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," 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 canvass 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. 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.

Finally, the rules would specifically preclude any contractual provision for exoneration,\(^8\) 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 willful 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 these rules is even more revealing. In one of the notes, great reliance is placed on the fact that with "concentration within a limited field, the greater the proficiency and expertness that can be developed."\(^9\) 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. But while general practitioners are content to let specialists live in their own

---

\(^7\) DR 6-101(A)(1).

\(^8\) DR 6-102(A).

rarified atmosphere, apparently the specialists have now decided to pre-empt 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\(^\text{10}\) to the effect that “of the 828 offenses against clients, . . . 452, or more than half of all such offenses, involved [sic] neglect.” Obviously, 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. Nor does the rule permit any such distinction. It is as revealing as another blind conclusion to the effect that “If 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.\(^\text{11}\)

Rather than pursue this inquiry into the competence of the reporters or their obvious preference for the specialist, almost necessarily one 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.”\(^\text{12}\) Perhaps a few comments by an experienced general practitioner may broaden the scope of inquiry.

Empirically, it may be assumed that about 90 percent of all attorneys would classify themselves as general practitioners, perhaps by choice and possibly to reflect the nature of the legal services most generally required in the board stretches of this 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 correlation of such services is a serious problem, 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 disbarable 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 en-

\(^{10}\) Canon 6, n.6, citing N.Y.L.J., Sept. 12, 1968, at 4, col. 5.


\(^{12}\) Canon 6.
couraged to emulate the medical profession, where it is customary for
the experienced and specialists to donate a substantial portion of their
time to instruct and assist neophytes.\textsuperscript{13} Rather than reliance on the
secret and privately administered rating system of the leading law list,
with extensive advertising allowed by those who somehow achieve
such ratings,\textsuperscript{14} thought might be given to community acknowledge-
ment 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 ca-
pacity to serve the community.

Such a constructive approach should be contrasted not only with the
capital threat of disbarment and the demoralization of a bar comp-
pelled to inform on itself, but also the very practical result that every
disgruntled client will have immediate power to blackmail his attor-
ney on fee matters no matter how fairly established or willingly paid
in advance. With 50 percent of most litigants losing their cases, the
extent of disappointment may easily turn to wrath for counsel's sup-
posed incompetence.

Nor can there be ignored the direct effect of the "spying" and "com-
petence" rules on fee matters in general. Depending on the general in-
competence of the bar in the particular locality, the self-appointed
competent attorney may well have to contemplate the loss of as much
as 10 percent of his available hours spent in observing, documenting,
reporting, and testifying against brother counsel. The incompetent
attorney will have to allocate from 10 to 20 percent of his time to
defending against charges of incompetence, seeking out competent
associate counsel, and lucubration designed to eliminate his own
incompetence. Such resulting loss of income must therefore be con-
sidered in the light of the rules on the subject of fees.\textsuperscript{15}

The principal fiat on fees is the prohibition of an agreement, charge,
or collection of "an illegal or clearly excessive fee,"\textsuperscript{16} the existence of
which would be found when "a lawyer of ordinary [sic] prudence
would be left with a definite and firm conviction that the fee is in
excess of a reasonable fee."\textsuperscript{17} 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

\textsuperscript{13} Canon 1.
\textsuperscript{14} See DR 2-102(A)(6).
\textsuperscript{15} DR 2-106 and 2-107.
\textsuperscript{16} DR 2-106(A).
\textsuperscript{17} DR 2-106(B).
fee schedules can only be suggested or recommended and cannot be made obligatory,"18 many pressures undoubtedly are exerted to enforce such schedules, particularly in the 30 or more states which have adopted the "Unified Bar."

Ethical considerations aside, all of such measures concerning minimum or maximum fees must be considered in the 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, both minimum19 and maximum20 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.21 Although the violation is even stronger where attorneys are subject to reprimand or censure for infractions, concerning price-fixing violations the United States Supreme Court has also cast doubt on the mildest arrangements by condemning "consciously parallel action."22 Apparently unimpressed by either ethical or economic considerations, the Government has recently instituted injunctive suit against a real estate brokers' association and its members where the latter agreed not to accept multiple listings except at the "recommended" commission rates.23 Aside from the minimum fee schedules of local associations, the ABA Code not only prohibits "clearly excessive fees" but affirmatively requires the policing of such maximum fees by all other attorneys.24

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 their own antitrust laws either directly or through enactment of a "Baby" FTC Act.25 Although the antitrust law adopted in 1970 by New Jersey would specifically exempt nonprofit associations in recommending fee schedules as guidelines,26 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, lawyers should do all in their power to "avoid even the appearance

18 ABA Opinion No. 302 (1961).
22 American Tobacco Co. v. United States, 328 U.S. 781 (1945); Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), cert. denied, 343 U.S. 929.
23 Prince George's County Bd. of Realtors, Inc., 1969 Trade Cas. ¶45,069.
24 DR 1-103(A).
25 E.g., G.L., c. 93A.
26 1970 Trade Cas. ¶33,301.

http://lawdigitalcommons.bc.edu/asml/vol1970/iss1/32
of professional impropriety," in the exact words of Canon 9. Perhaps the draftsmen of the Canons will excuse this possible impugning of their competence under Canons 6 and 9, since it would appear obligatory under Canon 1 and Disciplinary Rule 1-103(A).

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.27 Since the rule would permit the division of fees only "in proportion to 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 be 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 knowingly consents and the total fee is reasonable. This is particularly crucial among many trial counsel whose practice consists primarily of referral work. 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.

Serious questions are also inherent in the rule concerning representation of a client within the bounds of the law, with regard to the disclosure of a client's fraud on a person or tribunal.28 Under that rule, a lawyer who receives information clearly establishing that

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. [Emphasis added.]29

It would appear that the underscored portion of the rule creates an affirmative duty of disclosure with problems akin to those requiring that an attorney report any violations 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

27 DR 2-107(A)(1)-(8).
28 DR 7-102(B)(1).
29 Ibid.
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 such an affirmative duty of reporting a client's conduct of a treasonous nature. Weighing such a new principle against the well-established doctrine of absolute confidence between client and attorney, it is to be doubted that such a drastic remedy 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. 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 ethical conduct.

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 offices or organizations designed to provide legal services for its members. 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 allowed by the Supreme Court in a series of recent cases involving the provision by labor unions or certain social services organizations of free personal legal services for their members.

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 activities, 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.

30 Cf. Canon 2 regarding the duty to "make legal counsel available."
31 DR 2-103(D).
(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the 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.\(^\text{33}\)

Such begrudging concessions to the Constitution itself, 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 vulture. 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 additional 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 rulings in this highly sensitive area.

For it is obvious that aside from services for the wealthy and possibly the poor, the broad spectrum of middle America has been economically foreclosed from reasonable access to competent legal services of a general practitioner, let alone the services of the specialist given such deference in Disciplinary Rule 6-101(A)(1) discussed above. 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, or an estate, tens of millions never see a law office in their lifetime. Persons with annual incomes of $7500 to $20,000, probably with a spouse 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.

Quite possibly, this economic problem may require a restructuring of established patterns, ranging from extended credit plans to prepayment insurance programs or even legal clinics supported in whole or in part by governmental funds. 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. And rather than panic at the thought of such an imagined threat to the profession, lawyers might well find a severe shortage of counsel to meet the demands of such tens of millions of new clients. One may also speculate that from a completely selfish viewpoint, the rapid growth of the custom of having salaried corporate counsel may presage far more

\(^{33}\) DR 2-103(D)(5).
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 12 states, undoubtedly with many more to follow, would become legally binding except for congressional action or a constitutional ruling by the Supreme Court. It may well be asked whether such conduct by the bar constitutes a per se violation of Canon 9, requiring that "A lawyer should avoid even the appearance of professional impropriety."

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 are 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.

II. INTRODUCTION OF THE CODE INTO THE MASSACHUSETTS ENVIRONMENT AS PRESENSITIZED BY MATTER OF BAILEY

JERRY COHEN

The first regular attorney practicing in Massachusetts was Thomas Lechford. He had been educated for the bar in England.

JERRY COHEN is a patent attorney for Norton Company and a member of the Board of Governors of the Boston Patent Law Association. Mr. Cohen is representing the Civil Liberties Union of Massachusetts in opposition to certain provisions of the Code. He is also a member of the American, Massachusetts and Boston Bar Associations. These affiliations are cited to reveal possible bias; but the opinions expressed in this article are not necessarily shared by any of the organizations named, except to the extent specifically attributed to them.
He came in 1637 and settled in Boston. It is said that he argued and disputed with the magistrates so much that he rendered himself unpopular. In 1639, he was disbarred, his offense being that he went to the jury and pleaded with them out of court—what we should call tampering with the jury. Owing to his misconduct, the profession fell into disrepute and a law was passed in 1641 prohibiting the payment of a fee or reward for the services of an attorney.*

In 1689 the secretary to the Governor of Massachusetts wrote to England asking for “two, or three, honest attorneys (if any such thing in nature).”†

§29.3. Introduction. Two events of the 1970 Survey year have evoked active reconsideration of ethical standards for lawyers in Massachusetts. The Boston Bar Association played a catalytic role in both events. The first was what may be termed an exercise in natural law ethics.1 In a lawyer discipline proceeding initiated by an information2 filed by the Boston Bar Association, the respondent was censured for several incidents of unethical conduct occurring over the past six years.3 The information recited facts relating to several acts of pretrial, pending trial and posttrial publicity by respondent and asked the Court to take such action as it deemed meet and just under the circumstances. The second event was the filing by the Boston Bar Association of a petition with the Supreme Judicial Court4 to adopt the Code of Professional Responsibility as adopted by the American Bar Association [ABA] House of Delegates in August, 1969 or with such modifications as the Court might deem advisable.

* H.R. Bailey, Attorneys and Their Admission to the Bar 12 (1907). The “law” cited is Article 26 of the Body of Liberties and has since been repealed.
† Warren, A History of the American Bar 73 (1911).

§29.3. 1 “This expression, ‘natural law,’ or jus naturale, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral, and physical constitution.” Black’s Law Dictionary 1177 (4th ed. 1951).

2 A lawyer discipline proceeding “is commenced not by a petition for disbarment but rather by an information wherein the matters there set forth are brought to the attention of the court with a prayer, not for disbarment or other specific disciplinary action, but rather for such action as the court may deem fit.” Matter of Santosuosso, 318 Mass. 489, 491, 62 N.E.2d 105, 106 (1945).

3 In the Matter of F. Lee Bailey, Supreme Judicial Court for the County of Suffolk, No. 69924 Law (Sept. 16, 1970).

4 Petition to Adopt the Canons and Disciplinary Rules in the Code of Professional Responsibility Adopted by the American Bar Association, Supreme Judicial Court for the County of Suffolk, No. 69760 Equity [hereinafter cited as Code Petition].
§29.5 ABA CODE OF PROFESSIONAL RESPONSIBILITY

That Code, if adopted, would provide a "positive law" framework for resolution of all questions of legal "ethics."

§29.4. Natural law ethics. In Massachusetts the principal basis of ethical standards has been assumed to be a common set of right-reason values to which all right-thinking attorneys would naturally subscribe. This view of ethics reduces to redundancy or irrelevance statutes or official rules proscribing certain impermissible conduct and can reduce the burden of due process—in regard to notice of an offense—to be carried by the enforcing authorities. Massachusetts has never officially adopted the old ABA Canons of Professional Ethics, although the old Canons were adopted in 1964 by the Massachusetts Bar Association (MBA), a voluntary association (Massachusetts does not have an integrated bar). The old Canons are informal guides in disciplinary proceedings in court, but are not relied upon as the basis for finding a violation of ethical norms.

§29.5. Pre-emption of common law ethics by positive law ethics: Procedural due process. It is likely that some variation of the ABA Code will be adopted in Massachusetts. It is also likely that, with

5 "Law actually and specifically enacted or adopted by proper authority for the government of an organized jural society." Black's Law Dictionary 1324 (4th ed. 1951).

§29.4. "[M]embers of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. . . . It . . . includes conduct which all responsible attorneys would recognize as improper for a member of the profession." In the Matter of F. Lee Bailey, Supreme Judicial Court for the County of Suffolk, No. 69994 Law (Sept. 16, 1970), 5, Kirk, J., quoting from Justice White's concurring opinion in In re Ruffalo, 390 U.S. 544, 555 (1968). See generally Adlow, Lemuel Shaw and the Common Law, 41 B.U.L. Rev. I (1961), for an interesting analysis of the essential harmony between natural and positive law shaped by the Supreme Judicial Court in the nineteenth century. But for another view on the utility of right-reason, see Holmes, Natural Law, 32 Harv. L. Rev. 40 (1918).

2 The question of reliance on statutory standards goes deeper since the exercise of disciplinary control by the legislature is apparently the exercise of judicial power contrary to the proscription of the Declaration of Rights, art. 30. A constitutional crisis over this separation of powers issue is finessed by characterizing the statutes as being in aid of the judicial branch. See Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932). See also Wigmore, All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276 (1928).

3 An integrated bar is one in which membership is mandatory and to which the bar as supervising authority delegates much power. In 1947 the Supreme Judicial Court dismissed without prejudice a petition to establish an integrated bar in the Commonwealth. Matter of an Integrated Bar, 321 Mass. 747, 74 N.E.2d 140 (1947). Although the MBA, along with other bar organizations, opposed this concept, it has recently filed a petition to establish an integrated bar. On December 3, 1970, the Supreme Judicial Court issued an Order of Notice addressed to all attorneys soliciting their views.

4 The old Canons are said to provide "illumination" of the views of the bar although they have no "statutory force." Matter of Cohen, 261 Mass. 484, 487, 159 N.E. 495, 496 (1928). Cf. Opinion of the Justices, 289 Mass. 607, 613, 194 N.E. 313, 317 (1935): "They [attorneys] are bound by canons of ethics . . . which are enforced by the courts" (citing Cohen).
limited exceptions, the specific provisions of the Code's disciplinary rules will pre-empt the Bailey standard of what all lawyers should know.

In Bailey, the special counsel designated to manage the proceeding argued that such proceeding was in the nature of an inquest and that technicalities of legal procedure were inappropriate. The Court agreed, notwithstanding the recent Kennedy decision which made it clear that at least some elements of due process are appropriate for inquests. The Bailey situation would seem even more compelling than the Kennedy situation for in Kennedy, the respondent could expect that, at worst, the inquest would be followed by a trial affording full due process protections. In Bailey, however, inquest and trial (and punishment) were compressed into a single proceeding. The single Justice, with the aid of designated counsel, found that the facts alleged in the information (which respondent had admitted were true) constituted a breach of an allegedly extant standard of "prima facie impropriety." The Justice, as a consequence of this finding, denied respondent's motions for a bill of particulars; barred respondent from introducing opinion evidence of leading Massachusetts attorneys as to the prevailing ethical standard; found that respondent did not overcome the "prima facie impropriety" shown in the information; and imposed punishment. The charge of Star-Chamber may be too harsh, but it is fair to say that this type of proceeding is the stuff of which Kafkaesque nightmares are made.

The instant case emphasizes the need for reconsideration of the procedural aspects of disciplinary hearings. Foundations are being established for a future holding that the rigorous procedural requirements of a criminal proceeding be made applicable to a disciplinary proceeding. In In re Gault, the United States Supreme Court applied fundamentals of due process to a juvenile proceeding of a "quasi-criminal" character. In Spevack v. Klein, the Court reversed a lawyer

§29.5. 1 The exceptions would be vague provisions within the Code itself, e.g., "moral turpitude" (DR 1-102(A)(3)). Such standards could conceivably be applied in a wide variety of situations. See, e.g., State v. Bieber, 121 Kan. 536, 247 P. 875 (1926), wherein an attorney was disbarred for operating a home still during prohibition.

2 The role of designated counsel was anomalous. The petitioner (Boston Bar Association) was not a party to the proceeding. See Boston Bar Association v. Casey, 211 Mass. 187, 97 N.E. 751 (1912). Nor did designated counsel represent the Commonwealth, the bar, the "people" or the court. Counsel could take discovery without yielding any.


5 387 U.S. 1 (1967).

discipline ruling based on a lawyer's failure to answer bar committee questions. The next step was *In Re Ruffalo*, holding that a lawyer could not be disbarred as the result of a proceeding which gave inadequate notice of the standard of conduct violated, the charge having been made midway in the proceeding. There is, however, another aspect of due process which was inadequately treated by the *Ruffalo* majority. This is the problem of due notice of a standard of conduct so that all prudent men can order their affairs to avoid any practice which might expose them to punitive sanctions. The concurring opinion of Justice White in *Ruffalo* did reach this question:

[1] . . . a federal court may not deprive an attorney of . . . his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.

[2] . . . members of a bar can be assumed to know that certain kinds of conduct . . . will be grounds for disbarment . . . . [This] also includes conduct which all responsible attorneys would recognize as improper . . . .

[3] I express no opinion about whether . . . specific rules . . . could proscribe the conduct for which petitioner was disbarred.10

Part [2] of the foregoing was applied in *Bailey*, but the possible application of part [1] was treated superficially and part [3] was ignored.

7 Depending upon the lawyer-defendant's answers to a bar committee, he could have been prosecuted criminally by tax authorities. But the Court did not rest on this narrow factual ground; rather the decision was based on the "quasi-criminal" character of the disbarment proceeding per se and the loss of reputation and livelihood which would result from disbarment. Hence the punitive nature of the proceeding required allowance of the Fifth Amendment right of silence.

8 390 U.S. 544, 555-556.

9 The Court reversed the disbarment of an Ohio lawyer from Ohio federal court practice for lack of due process. The disbarment was based, inter alia, on the lawyer's having paid a moonlighting B & O railroad employee for assistance in the investigation of railroad accident cases, including some involving the B & O railroad. The Ohio Supreme Court, acting in a parallel state court disbarment proceeding and speaking in obvious high dudgeon at the respondent's failure to acknowledge the wrongful nature of his action, said: "[O]ne who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar." Mahoning County Bar Assn. v. Ruffalo, 176 Ohio St. 263, 269, 199 N.E.2d 396, 401 (1964). No statute, rule or canon was cited; the proposition was self-evident to the Ohio court.

10 390 U.S. 544, 555-556, discussed in Kaufman, The Lawyers' New Code, 22 Harv. L.S. Bull. 19, 37 (1970): "[T]here are some categories of conduct for which there can be disciplinary action even though there is only a general prohibitory rule in the [old] Canons, or no rule at all, but when one gets into a doubtful area there must be specificity — and *Ruffalo* is such a case." It is likely that practices in the "doubtful area" occur more frequently than those blatant violations of common law ethical standards.
In Massachusetts, fundamental procedural fairness is reluctantly conceded as a minimum requirement for proceedings of the type conducted in *Bailey*. However, the standards of due process are far below those that obtain in a criminal proceeding. The line is drawn at those procedural rights accorded civil litigants—and there with some qualifications. The basic trend of the above cited United States Supreme Court decisions appears to be towards application of the due process requirements of a criminal proceeding to a bar discipline proceeding.

The new ABA Code contains many specific provisions covering the full range of ethical questions from fraud and chicane to letterheads and calling cards. It should provide a vehicle for such basic tenets of due process as notice of the standards of conduct to be observed and of the nature of a specific offense when a charge is filed.

§29.6. Drafting, approving and adopting the new Code. From 1964 through 1969 the ABA’s Special Committee on Evaluation of Ethical Standards examined the old Canons and concluded that revision was necessary in four particulars:

(1) . . . There are important areas involving the conduct of lawyers that are [inadequately covered by the old] Canons;

(2) Many Canons that are sound in substance are in need of editorial revision;

(3) Most of the Canons do not lend themselves to practical sanctions for violations; and


12 Matter of Keenan, 313 Mass. 186, 197, 47 N.E.2d 12, 22 (1943): “Though this court has consistently described . . . proceedings for disbarment as proceedings at law, it has with equal consistency . . . recognized that proceedings for disbarment are not in the strict sense actions at law subject to all the procedural requirements applicable to such an action.” See also Matter of Santosuosso, 318 Mass. 489, 491, 494-495, 62 N.E.2d 105, 106, 108 (not civil, not equity). In Bailey, respondent argued unsuccessfully that Ruffalo required an overruling of Keenan and a holding that the appropriate standard of proof is “beyond a reasonable doubt” rather than “preponderance of the evidence.” In the Matter of F. Lee Bailey, Supreme Judicial Court for the County of Suffolk, No. 69934 Law (Sept. 16, 1970), Memorandum (of Designated Council) In Opposition to Dilatory Pleadings (of Respondent).

13 The decisions noted above speak in terms of fundamental legal protections. However, the definition of *fundamental* is seen to move toward the full protection of procedural fairness, notwithstanding the pejorative appellations, namely, “legal niceties” and “technicalities,” or “formal requirements.” See Malinski v. New York, 324 U.S. 401, 414 (1945): “The history of American freedom is, in no small measure, the history of procedure” (separate opinion of Frankfurter, J.).
§29.6  ABA CODE OF PROFESSIONAL RESPONSIBILITY

(4) Changed . . . conditions in our legal system and urbanized society require new statements of professional principles.1

The committee also concluded that mere amendment would not suffice.2 "A new Code of Professional Responsibility could be the only answer." 3 The committee drafted such a Code and after extensive consultation and prudent compromise secured passage of the Code by the ABA House of Delegates in August, 1969.4 Another special committee was appointed to secure approval and adoption of the Code in all states.5

The Code is structured in three separate major parts: (a) nine Canons which are statements of axiomatic norms; (b) 138 separate paragraph statements of Ethical Considerations, subsumed under the various canons and elaborating the issues involved therein; and (c) 39 numbered Disciplinary Rules (with lettered subdivisions expanding the actual number of regulations to several hundred) also subsumed under the various canons and expressing mandatory minimum standards of acceptable conduct. Ancillary to these basic features are a preface, a preamble, a set of definitions, and a preliminary statement. There are also 361 footnotes keyed into the Ethical Considerations and Disciplinary Rules.

As of the end of 1970, the Code has been adopted in 24 states through specific action of the respective state supreme courts acting in their rule-making capacity or through automatic approval under integrated bar rules.6 It has been approved by the major bar associations in an additional twelve states and the District of Columbia as a prelude to official adoption there. In addition, the California Supreme Court acted on new rules proposed by the integrated bar of that state respecting availability of legal services—a major issue of the ABA Code. Twenty-one of the states made no changes to the Code (other than the minor amendments made to conform to amendments made in 1970 by the ABA) while 15 states and the District of Columbia made significant modifications.7

In Massachusetts, the Boston Bar Association received a report


7 Code Petition Proceeding, Substitute Statement of Agreed Facts, Supreme Judicial Court for the County of Suffolk, No. 69760 Equity at 2-3, and Appendix B. The 1970 amendments by the ABA are set out in Appendix A of the same document.

http://lawdigitalcommons.bc.edu/asml/vol1970/iss1/32
from its Grievance Committee on January 8, 1970, favoring adoption of the ABA Code of Professional Responsibility. On February 5, 1970, the governing council for the association voted to file a petition in the Supreme Judicial Court praying that the Court adopt the Canons and Disciplinary Rules (but not the Ethical Considerations) with such modifications as the Court might deem advisable. These efforts paralleled consideration of the Code by the Massachusetts Bar Association (MBA). As a feature of its mid-winter meeting, the MBA held a panel discussion on the Code on January 30, 1970. The MBA also called a special meeting on the Code for January 31, 1970. Rather than approve the Code at that time, the special meeting voted to have the president appoint an ad hoc committee for further review, which was done on February 12, 1970 when President Sisk appointed a committee on professional responsibility, to be chaired by Professor A. James Casner of the Harvard Law School. In April the committee made its report, recommending adoption of the Code with certain amendments. The June 6, 1970 annual meeting decided not to endorse the committee report, but rather to refer it to a postcard poll of the MBA membership. The meeting also rejected motions (a) to reject the Code with or without changes (21-48 vote); (b) to refer the matter back to committee; and (c) to review each canon of the Code. (The postcard poll results were 928 favoring adoption with the committee’s proposed amendments, 161 favoring adoption without amendment, and 155 opposing adoption under any circumstances.)

The Supreme Judicial Court acted quickly on the petition of the Boston Bar Association; the Court referred the petition to a single Justice who issued an Order of Notice on April 9, 1970, inviting any member of the bar to show cause, at a hearing set for October 22, 1970, as to why the petition should not be granted. It also instructed petitioner and clerks of the Superior Court in each county to serve notice of the order on all members of the bar. The MBA contributed yeomanlike service to the effort to notify the bar, with the result that virtually all lawyers in the Commonwealth were provided with a copy of the Order of Notice and a copy of the ABA Code of Professional Responsibility. The Supreme Judicial Court’s prompt action on the petition caught the MBA somewhat short and forced an acceleration of, and loss of flexibility in, what had been up to the time of issuance of the Order of Notice a commendable course of speedy but careful consideration of the Code.

---

8 Id. at 9.
9 In contrast, the Court withheld consideration of the contemporaneous petitions of the MBA and Massachusetts Law Reform Institute for approximately nine months before reactivation.
10 The upshot was open dispute between the MBA and the Boston Bar Association, which will probably result in delay of adoption of the Code. In contrast, joint presentation by the two associations of a compromise version of a prospec-
There was very little response to the Order of Notice. In addition to the counsel and the presidents of the Boston Bar Association and the MBA, only four other attorneys appeared at the October 22, 1970 hearing. The distinguished counsel for petitioner felt that the response was adequate and suggested in informal colloquy in open court that the diversity of interests represented by those appearing would be sufficient representation if the instant proceeding were analogized to a class action. The counsel for the Civil Liberties Union of Massachusetts suggested the need for a quasi-legislative rather than a judicial approach to the proceeding. Another party suggested the need for "expert" testimony on the public policy issues underlying the Code. The "case" then progressed substantially in the form of a matter in equity.

A "Statement of Agreed Facts" narrating the actions by the ABA and the two leading Massachusetts bar associations in approving the Code, and actions of other states in approving and/or adopting the Code, was prepared by those appearing in the proceeding, with technical assistance from the ABA Special Committee to secure adoption of the Code. The single Justice, treating the Statement as a "case stated," reported the case to the full bench for hearing in 1971.

The MBA, the largest bar association in Massachusetts, seeks to modify the Code by: (a) eliminating DR 7-102B and DR 1-103A requiring every attorney to inform on fraud by his client and on rule-breaking or other undesirable conduct by his brother attorneys; (b) eliminating DR 2-102B, which states that the name of a lawyer who leaves his firm for a limited time to serve in public office must be deleted from the firm name; (c) modifying the rules imposing sanctions for the charging of exorbitant fees (DR 72-106B) and governing contingent fees (DR 2-106C); (d) reducing the duty of care of the lawyer regarding acts of his employees relating to clients' confidences (DR 4-101D); (e) reducing the scope of DR 5-101B and DR 5-102A which bar a lawyer from representation where he may be called as a witness in a case; (f) omitting DR 6-101 imposing sanctions for lawyer incompetence; (g) omitting DR 7-106C4 which proscribes an attorney's expressing his personal opinion to court or jury as to the justness of his cause, credibility of a witness, culpability of a court litigant or guilt or innocence of a criminal accused; and (h) modifying DR 2-107A2 concerning fee-splitting.11 The petitioner (Boston Bar Association) in effect amended its petition to the extent of joining with the MBA wholly as to points (b) and (c) and partially as to points (a) and (e).

11 Code Petition Proceeding, note 7 supra, Memorandum of the Massachusetts Bar Association. The MBA also advanced the 1970 ABA Amendments and other minor changes.
to points (a) and (e) and disagreeing with the MBA wholly as to points (d), (f), (g) and (h).\(^\text{12}\)

It is interesting to note that several of the MBA's pleas for amendment represent a retrogression from the standards of the present Canons of Professional Ethics. The Boston Bar Association was quick to point this out in opposing the amendments,\(^\text{13}\) but was judicious enough not to raise the point that the MBA had itself approved the present Canons of Ethics in 1964. This contradiction merits note here to show that the Code drafting and adoption actions have injected controversy and searching concern into what had been a dormant issue in the Commonwealth. The Bailey case had the same effect.\(^\text{14}\)

**§29.7. The public policy issues of legal ethics: Substantive due process.** The broad police powers of a state to regulate professions in their economic aspects,\(^1\) buttressed by the compelling interest in the orderly administration of justice,\(^2\) can support properly promulgated regulations which limit the exercise of the liberty and property rights of lawyers.\(^3\) However, the scope of police power is more circumscribed when it impinges on clients' constitutional freedoms. This is illustrated by the example of the evolution of that body of law in the area which produces most ethical questions—the bringing together of lawyer and client.

Proposals for increasing the availability of legal services to the middle class include more efficient law practices, larger practice units, specialization, use of paraprofessionals, recovery of lawyers' fees by

\(^\text{12}\) As for the other parties, Harold Brown, Esq., opposes adoption of the Code; Professor Livingston Hall of Harvard Law School and Elwynn Miller, Esq., support adoption. Messrs. Brown and Hall oppose the informer rule, while the latter supports the ban on an advocate's personal opinion. The Civil Liberties Union of Massachusetts opposes the Code's restrictive approach to group legal practice, trial publicity and zealous advocacy.

\(^\text{13}\) Code Petition Proceeding, note 7 supra, Boston Bar Association Memorandum in Support of Adoption of the Canons, and, With Certain Modifications, the Disciplinary Rules of the Code of Professional Responsibility Heretofore Adopted by the American Bar Association, at 10, 18, 20, 24, 28.

\(^\text{14}\) Petitioner Boston Bar Association buttressed its argument with citation of the Bailey case at three separate points in its Memorandum. Id. at 10, 17, 20.


\(^2\) It is unusual to speak of a court's establishment of rules to expedite its operations as an exercise of "police power," but this term seems appropriate when one considers that the scope of such rules governs attorney conduct outside the court, including the attorney's personal life.

\(^3\) The right of a lawyer to practice law (so long as he behaves) is his liberty and property protected under Mass. Const. arts. 1 and 10 of the Declaration of Rights against unwarrantable interference. The lawyer cannot be deprived of it except by proceedings complying with due process of law. Matter of Sleeper, 251 Mass. 6, 18-19, 146 N.E. 269, 274 (1925). See also Ex parte Garland, 71 U.S. 333 (1866).
successful litigants, legal service insurance, subsidies, better lawyer referral services, relaxation of restrictions on business-getting activities, special law offices for clients of moderate means and "group legal services." Each offends traditional values to some degree, but none is so controversial as the "group legal services" proposal. Stated simply, the group legal services concept (also known as "intermediary arrangements") involves a third party's recommending or furnishing a lawyer to a client and/or paying the lawyer for his services to the client so referred. The bar, considering this arrangement, sees inherent dangers of conflict of interest, advertising, solicitation and ambulance chasing, champerty and maintenance, barratry, assembly-line methods, lowering of the dignity of the profession and its standards of competence, and price cutting. Such arrangements have been consistently attacked even before the supposed dangers materialized. Militant bar opposition produced injunctions against the legal service activities of automobile clubs and professional, labor and business organizations in the 1930s. Liability and title insurers survived the onslaught.

Notwithstanding this strident opposition, the seeds of regeneration of the group legal services concept were also planted in the 1930s.

4 All elaborated upon in Christensen, Lawyers for People of Moderate Means (1970), an analytical-polemical review of the problem, with copious bibliography. As to the underlying need for such services, see 43 J. State Bar Calif. 474 (1968), and 39 id. 639 (1964).

5 See generally Drinker, Legal Ethics 161-167 (1953).


7 The tendency is to posit the assumption that all these evils go with group legal services and then assume that any organization which can be semantically saddled with the term "group legal services" generates these evils. The modern development of the overbreadth or less-drastic-alternative doctrine in constitutional law has forced a shifting of the burden of proof.

8 See, e.g., Rhode Island Bar Assn. v. Automobile Service Assn., 55 R.I. 122, 179 A. 139 (1935); People ex rel. Chicago Bar Assn. v. The Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); In re O'Neill, 5 F. Supp. 465 (E.D.N.Y. 1933); Matter of Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936) (compare Matter of Thibodeau, 295 Mass. 774, 3 N.E.2d 774 (1936)); People ex rel. Courtney v. Assn. of Real Estate Taxpayers of Illinois, 354 Ill. 102, 187 N.E. 823 (1933). See also Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935) (barring legislation allowing group practice). Most of the decisions are padded out around the shibboleth that a corporation cannot practice law. This was a false issue, according to Lewis, Corporate Capacity to Practice Law—A Study in Legal Hocus Pocus, 2 Md. L. Rev. 542 (1938). See also Drinker, Legal Ethics 167 (1953): "The real argument against [approval of group legal services] by the bar is believed to be loss of income to the lawyers and concentration of service in hands of fewer lawyers. These features do not commend the profession to the public."

9 See Drinker, id. at 114: "Obviously the insertion in the policy of a provision requiring the insured to permit the insurance company's lawyer to defend is consent in advance obviating improper conflict of interest . . . ."
Decisions of courts and bar association ethics committees upheld various legal aid and other pro bono publico arrangements of a nonprofit nature, including the activities of the Liberty League, a group offering free legal services to "victims" of the New Deal. These precedents provided a logical basis for *NAACP v. Button*, in which the United States Supreme Court struck down Virginia's antisolicitation laws as applied to the civil rights litigating activities of the National Association for the Advancement of Colored People. A year later, the constitutionally protected scope of group legal services was expanded in *Brotherhood of Railroad Trainmen v. Virginia State Bar*, when the Court afforded similar protection to an arrangement in which a union arranged a discount in contingent fee arrangements and recommended lawyers to union members for prosecution of their claims under the Federal Employers' Liability Act. Those who had read *Button* and *Trainmen* merely as protections for the assertion of federal rights were disabused of this narrow reading by the subsequent case, *United Mine Workers of America, Dist. 12 v. Illinois State Bar Assn.*, protecting an arrangement in which a union's salaried attorney-employees represented union members in prosecution of their personal injury claims under state law.

This trilogy of cases substantially overlapped in time the five-year effort of the American Bar Association to modernize the old Canons of Ethics into a Code of Professional Responsibility. In January, 1969, the ABA's Special Committee on Evaluation of Ethical Standards published a preliminary draft of the Code which included provisions legitimizing the group legal service activities of:

1. legal aid or public defender offices;
2. military legal service offices;
3. lawyer referral services;
4. bar associations; and
5. a professional association, trade association or other nonprofit organization.

This was apparently too much reform for the American Bar Association. The final draft of the Code which was adopted by the ABA House of Delegates in August, 1969, legitimized the group legal service activities of the first four of the above, but modified the last to read:

Any other non-profit organization . . . but only in those instances and to the extent that controlling constitutional interpre-

---

This approach of the final draft has been characterized as at worst patently unconstitutional\textsuperscript{14} and at best "a bare bones approach that would shame a vulture."\textsuperscript{15}

It appears that the ABA's regression will be no more than a temporary setback to the cause of group legal services. California, Oregon and the District of Columbia are adopting standards corresponding more nearly to those of the preliminary draft than of the final draft. In addition, Wisconsin has been the scene of a major Judicare experiment. There has been no clear indication of the sentiment of the bar or general public in Massachusetts regarding group legal services.

The substantive issue raised in Bailey (relating to trial publicity) will probably rank second only to "business getting" as the most controversial ethics issue of this decade. It is ironic that the respondent in Bailey, disciplined for trying his defense of criminal cases in the press, has to his credit the education of this country as to standards for prosecutors through his successful "prejudicial publicity" plea in Sheppard v. Maxwell.\textsuperscript{16} After Sheppard, an ABA special committee struck an equitable balance between conflicting First Amendment and Sixth Amendment demands in its Reardon Rules\textsuperscript{17} (most of the facts complained of in Bailey happened before adoption of the Reardon Rules by any bar association or official body).

The Code extends the Reardon Rules to civil litigation and administrative proceedings.\textsuperscript{18} In these areas, First Amendment freedoms are invaded without the countervailing consideration of protecting Sixth Amendment rights. The Pandora's box thus opened contains such ingredients as a corporation lawyer's participation in drafting or editing a corporate annual report, registration statement, or news release which characterizes an insurance commission's rate freeze order as confiscatory.\textsuperscript{19} If the lawyer (or the client, aided by the lawyer) is, in the words of the favored cliche, "trying his case in the press," it is because there are two separate trials involved for the client—the court trial and the public opinion trial. The latter may, in some


\textsuperscript{15} Brown, §29.2 supra.


\textsuperscript{18} DR 7-107(G) and (H).

\textsuperscript{19} Concern over such points was expressed in the District of Columbia Bar's consideration of the Code. It rejected the publicity provisions. See Latto, 37 D.C. Bar J. 57, 62-63 (Jan.-Mar. 1970), and 2 id. 10 (April-July 1970).
cases, be as important (or even more vital to the client's interest) than the former.\textsuperscript{20}

\textsection{29.8.} \textbf{The relation of the Code to an integrated bar: Problems of interpretation and enforcement.} The Boston Bar Association's initial petition to adopt the Code provided little, if any, guidance in relating the Ethical Considerations to the Disciplinary Rules. Petitioner later clarified its prayer through a supplementary request that the Court state as part of a decree adopting the Code that the "Ethical Considerations, as published by the American Bar Association, form a body of principles upon which the Canons are to be interpreted and further, that the Ethical Considerations are proper desiderata, constantly to be borne in mind. . . ."\textsuperscript{1} No mention is made of the footnotes which do present some contradictions.\textsuperscript{2} It is also apparent that the Ethical Considerations and Canons do not provide underlying principles consistent with their respective Disciplinary Rules. Political compromises were hammered out in forming the Disciplinary Rules, without proper attention to adjustment of the corresponding Ethical Considerations and Canons, to the point that the Code can be fairly accused of a lack of truth in packaging.\textsuperscript{3} The Ethical Considerations, per se, contain a more modem set of standards than those of the Disciplinary Rules and should also be adopted (with such revisions as may be necessary to accommodate them to the Massachusetts environment). The standards contained in the Ethical Considerations are enforceable through the effective though underrated sanctions of community and peer disapproval.

There are two specific problem areas involving the role of bar associations in Code enforcement. The American Bar Association Ethics Committee has issued and will issue opinions interpreting the Disciplinary Rules and Ethical Considerations from time to time. The proper relation of these opinions to the Code as applicable in Massa-

\textsuperscript{20} Competence, neglect, fees and "misprision" are the remaining major issues treated in the Code of Professional Responsibility. These are discussed by Harold Brown, Esq., in \textsection{29.2 supra.}

\textsection{29.8.} 1 Code Petition Proceeding, Supreme Judicial Court for the County of Suffolk, No. 69760 Equity, Memorandum of the Boston Bar Association. This is a misuse of the Ethical Considerations, which are a parallel set of standards "which embody the highest conduct aspired to by the profession [while the Disciplinary Rules represent the minimum] . . . . To have omitted either part would have been undesirable . . . ." Wright, The Code of Professional Responsibility: Its History and Objectives, 24 Ark. L. Rev. 1, 10 (1970). See also the preamble and preliminary statement to the Code. It is submitted that the reluctance of the two bar associations to adopt the Ethical Considerations is the product of an unfortunate misunderstanding of the Code's structure and purpose.


chusetts will require advance clarification. Also, the actions of local bar associations in preparing an “information” for submission to the courts will have to be understood for the private, unofficial actions that they are. They can not be allowed to become a sort of administrative action to be affirmed unless lacking support on the “record” as a whole. The immediacy of this problem was indicated in the course of the clash between the MBA and the Boston Bar Association over Disciplinary Rule 6-101 regarding competence and neglect. The rule, to be backed by sanctions ranging from censure to disbarment, provides that “[a] lawyer shall not . . . [n]eglect a legal matter entrusted to him.” The MBA opposed this with the argument that the rule is too harsh. The Boston Bar Association’s rejoinder was that this argument is:

... without merit. . . . The standard of what constitutes “neglect” is one which will be interpreted by the local bar associations themselves in light of all the attendant circumstances. Such flexibility will necessarily result in a standard which reflects the minimum requirements of general professional competence on the part of the practicing bar. . . .4 [Emphasis added.]

These problem areas raise the spectre of a de facto integrated bar — indeed, a doubly integrated bar — with the judicial branch delegating rule-making powers to the national bar association and delegating application-of-rules-to-facts jurisdiction to local bar associations.5

Further consideration is needed to define the rule-making procedures of the Massachusetts judicial branch relating to professional ethics and the procedures for interpretation and enforcement of the Disciplinary Rules. This consideration should precede adoption of the Code in Massachusetts.

4 Code Petition Proceeding, Supreme Judicial Court for the County of Suffolk, No. 69760 Equity, Memorandum of the Boston Bar Association, at 22-23.
