

# Professional Responsibility

## Chapter 1: Introduction

### The Profession before the 1908 Ethics Rules

The American legal profession was significantly unregulated for most of the eighteenth and nineteenth centuries. In fact, applying contemporary definitions in which a profession is selfregulating, it is not clear lawyers' work during this time was part of a unified legal profession at all. That's not to say lawyers did not play an important role in American society. Lawyers fulfilled not just one, but two equally important roles: as advocates for their clients and agents of the court. Before the organized American legal profession with formal rules, this dual-role model of lawyering shaped how lawyers thought about their professional responsibilities and standards for their conduct.

Many lawyers' everyday work primarily concerned advocating for the private interests of clients. Eighteenth and nineteenth century clients sought out lawyers for many of the same reasons people obtain lawyers today, including settling disputes over personal property, navigating commercial matters, and resolving all sorts of other conflicts between people. Although some of the events leading people to seek lawyer's assistance may seem familiar, the social, economic, and political conditions of the nineteenth century meant even this familiar role was anything but routine.

The time period between the American Revolution and the twentieth century was full of dramatic changes in the law, the work of lawyering, and the legal profession. The law itself became more voluminous and complex, beginning with post-Revolution efforts to create orderly state and federal governments. As the country rapidly grew and industrialized, new types of activity and disputes emerged, creating new demands for legal intervention.

Lawrence Friedman's *A History of American Law* summarizes:

*What happened to American law in the nineteenth century, basically, was that it changed dramatically, fundamentally, to conform to the needs, wants, and pressures coming from the vast increase in the numbers of consumers of law. It is dangerous to sum up long periods and great movements in a sentence. But if colonial law had been, in the first place, colonial, and in the second place, paternal, emphasizing community, order, and the struggle against sin, then, gradually, a new set of attitudes developed, in which the primary function of law was not suppression and uniformity, but economic growth and services to its users.*

Instrumentalist theories about law combined with a rapidly changing industrial society contributed to the idea that practicing judges, lawyers, and scholars could actively shape the world they worked in. Often this was in response to their work for the private interests of clients, although records of conversations among lawyers show continued concern for and attention to their public responsibilities as well.

*Question:*

- Is the dual-role model of lawyers' responsibilities useful for navigating professional ethical dilemmas? Based on what you know about lawyers' work, try to think of at least one scenario in which it would be helpful and one in which it might not be.

## American Bar Association's Ethics Rules

The American Bar Association, founded in 1878, advanced its first attempt at a uniform standard of conduct for lawyers in 1908. The Canons of Professional Ethics were intended to be a general guide for lawyers, based on existing professional norms expressed in legal ethics scholarship and some state bar association literature. The ABA acknowledged the idealistic nature of the Canons, and did not intend for them to be enforceable. For an overview of the Canons, see the Preamble and the list of Canons, below, from the Final Committee Report on 1908 ABA Ethics Rules.

### Canons of Ethics

#### *Preamble*

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

#### *The Canons of Ethics*

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

1. The Duty of the Lawyer to the Courts.
2. The Selection of Judges.
3. Attempts to Exert Personal Influence on the Courts.
4. When Counsel for an Indigent Prisoner.
5. The Defense or Prosecution of Those Accused of Crime.
6. Adverse Influences and Conflicting Interests.
7. Professional Colleagues and Conflicts of Opinion.
8. Advising Upon the Merits of a Client's Cause.
9. Negotiations with Opposite Party.
10. Acquiring Interest in Litigation.
11. Dealing with Trust Property.

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12. Fixing the Amount of the Fee.
  13. Contingent Fees.
  14. Suing a Client for a Fee.
  15. How Far a Lawyer May Go in Supporting a Client's Cause.
  16. Restraining Clients from Improprieties.
  17. Ill Feeling and Personalities Between Advocates.
  18. Treatment of Witnesses and Litigants.
  19. Appearance of Lawyer as Witness for His Client.
  20. Newspaper Discussion of Pending Litigation.
  21. Punctuality and Expedition.
  22. Candor and Fairness.
  23. Attitude Toward Jury.
  24. Right of Lawyers to Control the Incidents of the Trial.
  25. Taking Technical Advantage of Opposite Counsel; Agreements with Him.
  26. Professional Advocacy Other Than Before Courts.
  27. Advertising, Direct or Indirect.
  28. Stirring Up Litigation, Directly or Through Agents.
  29. Upholding the Honor of the Profession.
  30. Justifiable and Unjustifiable Litigations.

31. Responsibility for Litigation.
32. The Lawyer's Duty in Its Last Analysis.

*Questions:*

- Do you see evidence of dual-role model of lawyers' responsibilities in the Canons? Where?
- What does the adoption of the Canons tell us about the state of the profession in 1908?

Although the Canons were general statements of profession norms, they included some explanatory content. For example, see Canons 4, 17, and 29.

*Canon 4 - When Counsel for an Indigent Prisoner.* A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

*Canon 17- III Feeling and Personalities Between Advocates.* Clients, not lawyers, are the litigants. Whatever may be the ill feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

*Canon 29 - Upholding the Honor of the Profession.* Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and citing authorities. The lawyer should aid in guarding the Bar against admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

*Questions:*

- Are the Canons useful for navigating professional ethical dilemmas?
- How helpful is the explanatory content? Does it answer all your questions about how to apply the Canons? Can you think of a situation in which lawyers might reasonably disagree about what conforming professional conduct might look like?

The ABA Canons of Professional Ethics were an important step towards professionalizing lawyers' work. While no longer in force, the Canons guided lawyers' professional standards for a sixty year period in which the modern profession emerged. Judicial opinions and state bars often referred to the text of and principles in the Canons. Attempts to apply the Canons revealed some challenges with moving from generalized principles to enforceable boundaries, prompting the ABA to work towards the Model Code of Professional Responsibility.

## Model Code of Professional Responsibility

The ABA House of Delegates approved the Model Code of Professional Responsibility, a comprehensively revised set of rules, on August 12, 1969. The Model Code marked a significant shift from the Canons in its organization and scope. Where the Canons were idealistic and relied on external judgments to clarify conflicting priorities and refine broad goals, the Model Code contained three distinct but interrelated parts: canons, ethical considerations, and disciplinary rules. The canons stated the general rules which led to the ethical considerations and disciplinary rules. The ethical considerations were the aspirational principles. The disciplinary rules were mandatory statements about the minimum standards of conduct lawyers must adhere to in order to not face disciplinary action. Each canon might contain a dozen (or more!) ethical considerations and disciplinary rules.

For Example, explanatory content for Canon 6 includes six ethical considerations and two disciplinary rules.

### *CANON 6: A Lawyer Should Represent a Client Competently*

#### *ETHICAL CONSIDERATIONS*

##### *EC 6-1*

Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

##### *EC 6-2*

A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

##### *EC 6-3*

While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

##### *EC 6-4*

Having undertaken representation, a lawyer should use proper care to safeguard the Interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected

to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

*EC 6-5*

A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

*EC 6-6*

A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

#### *DISCIPLINARY RULES*

*DR 6-101-Failing to Act Competently.*

A. A lawyer shall not:

1. 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.
2. Handle a legal matter without preparation adequate in the circumstances.
3. Neglect a legal matter entrusted to him.

*DR 6-102-Limiting Liability to Client.*

A. A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

Questions:

- How useful is the Model Code for making decisions about professional conduct? Is the clarification between canons, ethical considerations, and disciplinary rules an improvement on the 1908 Canons?
- Is it necessary to have canons, ethical considerations, and disciplinary rules? Consider each statement's or rule's usefulness in lawyers' various roles and practice settings.

The Model Code, in various forms and versions, was the ABA's central document on professional responsibility from 1970 through 1981. While no longer in use, it's important to know about the Model Code. Many important cases decided during this time and some states' rules still contain references to and evidence of the influence of the Model Code.

## Model Rules of Professional Conduct

The shift from idealistic Canons to boundary rules in the Model Code created the need for specificity the Model Code did not always address. To deal with this challenge, the ABA tasked a lawyer named Robert Kutak with chairing a commission to study the problem. The Kutak Commission focused on developing the minimum standards of conduct for lawyers into a series of black-letter rules. The resulting Model Rules, adopted in 1983, are the basis of the current [Model Rules of Professional Conduct](#). The Model Rules have a regulatory structure, with a statement of minimum conduct and explanatory comments. The official comments are similar to other regulatory comments, in that they might contain information about the reasoning behind a rule or examples to guide application. Like other model rules, the Model Rules of Professional Conduct are not themselves binding. They are designed to be examples a state may choose to adopt into law. For an example from the Model Rules, see the Rule 1.1 on Competence, below.

### *Rule 1.1: Competence*

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

#### *Comment:*

#### Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for illconsidered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

#### Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

#### Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

#### Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

## Adoption of the Model Rules

States adopted the structure of the model rules fairly quickly. Today, almost all states' disciplinary rules follow the numbering system of the Model Rules. The content of state rules varies, so it's important to follow the law of your jurisdiction. Since the Model Rules of Professional Conduct have been so influential, lawyers can look to these Model Rules just like they might look to other uniform laws or model acts.

#### Questions:

- In Rule 1.1 above, do the comments change your understanding of the rule? How? Do you have remaining questions about what the rule means or how it might work in application?
- Compare the usefulness of the Model Rules to the Model Code and the Canons. Consider the regulatory structure of the Model Rules, the distinction between ideals and boundaries, and the content in the examples above.