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Allen B. Zerfoss

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1980-81]

REVISION, NOT REJECTION, IS THE WAY TO MODERNIZE
THE CODE OF PROFESSIONAL RESPONSIBILITY

ALLEN B. ZERFOSS †

WHILE EVERY ONE OF THE 500,000 ATTORNEYS practicing in the United States today¹ has a compelling personal and professional interest in which code of ethics will govern his or her practice, perhaps no single group has a more focused, day-to-day concern with the Code than the National Organization of Bar Counsel (NOBC). This organization consists of attorneys who are engaged primarily in disciplinary and ethical standards enforcement work throughout the United States.² Because of their particular legal specialty, these lawyers deal daily with the present American Bar Association (ABA) Code of Professional Responsibility³ as an enforceable standard of conduct for lawyers. They apply and interpret the rules in the prosecution of charges, and deal with them in the routine discharge of their duties, and so are much more familiar with the Code and its disciplinary rules than are most lawyers. Their interest in any revisions of the Code, naturally, is far from academic, and reflects instead their familiarity and personal involvement. The NOBC is concerned that whatever rules are adopted, they be the best rules to guide lawyers, to guide clients and to guide the public. If the controlling court of a particular jurisdiction adopts disciplinary rules which are vague, inconsistent or impossible to enforce, the problems of administration fall initially on disciplinary counsel, but thereafter are shared by the hearing committee, the Disciplinary Board, the Supreme Court, and ultimately all members of the bar.

The present Code of Professional Responsibility evolved from a six-year exhaustive study begun in August, 1964 by an ABA Spe-

† Chief Disciplinary Counsel, Disciplinary Board of the Supreme Court of Pennsylvania, Harrisburg, Pennsylvania. B.S., Pennsylvania State University, 1940; M.S., George Washington University, 1965; J.D., Dickinson School of Law, 1970; Mr. Zerfoss was President of the National Organization of Bar Counsel for the term September, 1980 to August, 1981.

1. Schwartz, *The Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1270 (1980).

2. The National Association of Bar Counsel consists of more than 200 lawyers representing 46 jurisdictions in 37 states and the District of Columbia.

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as ABA CODE].

(1177)

cial Committee on Evaluation of Ethical Standards which was charged to examine the former Canons of Professional Ethics and to make recommendations for changes.⁴ Initially adopted by the ABA house of delegates in August, 1969,⁵ the Code contains nine Canons,⁶ 130 Ethical Considerations,⁷ and 39 Disciplinary Rules,⁸ which supersede the previous 12 Canons of Professional Ethics.⁹

Paralleling these activities of the ABA Special Committee on Evaluation of Ethical Standards, were those of an ABA Special Committee on Evaluation of Disciplinary Enforcement created in February, 1967.¹⁰ This Special Committee, which became known as the Clark Committee, developed recommendations for improvement in disciplinary enforcement of ethical standards which were approved for distribution by the ABA House of Delegates in August, 1970.¹¹ As a result of the work of these two special committees, vital groundwork was laid for a reform movement in lawyer discipline which has swept the nation. The new Code provided meaningful Disciplinary Rules capable of application and enforcement through the use of disciplinary sanctions. Improved enforcement agencies provided the resources and capabilities necessary for accomplishing these ends.¹²

4. *Preface, ABA CODE, supra* note 3.

5. *Id.* The Code was amended by the House of Delegates in Feb. 1970, Feb. 1974, Feb. 1975, Aug. 1976, and Aug. 1977. *Id.*

6. The authors of the Code define Canons as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Consideration[s] and Disciplinary Rules are derived." *Preamble and Preliminary Statement, ABA CODE, supra* note 3.

7. According to the Code, "Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many situations." *Id.*

8. The Code provides that:

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

Id.

9. *Preface, ABA CODE, supra* note 3. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 28-30 (1976).

10. *Proceedings of the House of Delegates*, 53 A.B.A.J. 374, 385 (1967).

11. *Proceedings of the House of Delegates*, 56 A.B.A.J. 984, 989 (1970).

12. Franck, *Setting New Standards for Practicing Lawyers*, 6 BARRISTER 42 (Fall, 1979); Steele & Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUNDATION RESEARCH J. 917, 935-46 (1976). ABA statistics gen-

Subsequent to the developments outlined above, and as a result of the disciplinary enforcement systems set up across the nation, a significant national body of law has developed in lawyer discipline which is directly derived from, or related to, the present ABA Code of Professional Responsibility. The Code's Disciplinary Rules are continually cited in thousands of court cases, advisory opinions, law review articles, and other resource materials.¹³ Fully one-half of the 500,000 attorneys practicing today graduated from law school after 1970,¹⁴ and the vast majority of these post-1970 graduates studied the present Code in law school.¹⁵ The rest have practiced under the present Code for a decade, and so have in general become increasingly familiar with the Code's contents and interpretation. Hundreds of attorneys involved with lawyer discipline have become intimately familiar with the disciplinary rules as presented in the Code, with their application, and with the means of interpreting them in the context of the realities of modern practice. One need only glance at cases keyed under "attorney and client" in any advance sheet to get a flavor for the extent of interpretive case-law developing in this area. This body of precedent as well as legal analysis and general familiarity is invaluable, and should be reinforced and expanded, not abandoned.

NOBC has followed as closely as possible the work of the ABA Commission on Evaluation of Professional Standards (Kutak Com-

erally show a startling increase in the numbers of disbarments and suspensions over the past few years. ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND THE NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY, STATISTICAL REPORT RE: PUBLIC DISCIPLINE OF LAWYERS BY DISCIPLINARY AGENCIES, 1975-78, Chart IV. Whether these statistics indicate increased effectiveness in the disciplinary process, or more frequent unethical behavior by attorneys is open to question.

13. For a compendium of representative case analyses of the Code's development, see AM. B. FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

14. More than 350,000 attorneys were admitted to the bar between 1970 and 1980. ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE U.S. — FALL 1979, at 64 (1980) [hereinafter cited as REVIEW OF LEGAL EDUCATION] (statistics for the year 1980 were added to the published statistics).

15. ABA legal education standards now mandate that accredited law schools teach legal ethics or professional responsibility as a required course. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS 302(a)(iii), ratification reported in *Proceedings of the House of Delegates*, 60 A.B.A.J. 1207, 1213 (1974). For commentary on the incorporation of mandatory study of ethics into the study of law, see Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978). For an analysis of the status of the teaching of professional responsibility in the United States as of 1977, see *Pre-Conference Materials*, 1977 NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY (S. Goldberg ed. 1977).

mission) since its establishment. Upon receiving the Kutak Commission's January, 1980 Discussion Draft of the Model Rules of Professional Conduct, NOBC appointed a Special Committee to study the draft and report its findings to the membership.¹⁶ Based on this report, the membership of NOBC, at its February, 1980 meeting, voted to recommend to the ABA that the present Code of Professional Responsibility is the preferred instrument and that it should not be abandoned or rejected, but should be amended and revised to incorporate the desirable changes contained in the Kutak Commission's proposal. The resolution read as follows:

WHEREAS, members of the National Organization of Bar Counsel ("NOBC") are vitally involved on a continuing daily basis in enforcing, interpreting and advising on the present Code of Professional Responsibility through the work of lawyer disciplinary and other agencies; and

WHEREAS, each member of the NOBC brings to his or her work a fundamental commitment to improve the standard of professional conduct; and

RECOGNIZING the objective of the ABA Commission on Evaluation of Professional Standards the (the "Kutak Commission") as mandated by President Spann contemplated overall study and determination of the means of updating and improving the ethical code of our profession, from which the Commission has developed a discussion draft of a new code to serve the legal profession;

THE NOBC HEREBY DECLARES that the present Code of Professional Responsibility is a preferred instrument as to form and style, and that what should be done is to restate or amend where necessary those present Canons, Ethical Considerations and Disciplinary Rules to comport with the changed practices of the legal profession; and

RESOLVES to encourage the Kutak Commission not to abandon the present Code, but to revise and amend it. Rather than pursue its present radical departure in form, style and substance as presented in its discussion draft of January 30, 1980, the Commission should incorporate

16. In February, 1979, then NOBC President Herbert Rosenthal formed a committee to review and report on the Kutak Commission Model Rules Draft. On that Special Committee were Chairman Allen Zerfoss, Robert M. Davis, Charles W. Kettlewell, and Jack Weiss. Phone conversation, May 19, 1981, with Charles W. Kettlewell, Secretary, NOBC. The Special Committee made its initial report to the February 1980 Chicago meeting of the NOBC. Minutes for Jan. 1, 1980, NOBC meeting, Chicago, Ill., Jan. 31, 1980-Feb. 2, 1980.

the many excellent concepts proposed in the draft into the present Code to strengthen it. Those changes not clearly strengthening it which are now under consideration should be rejected. The NOBC will submit its views to the Commission with specificity at an early date.

THIS RESOLUTION INCLUDES the pledge of the NOBC to assist wherever possible in the successful completion of the Commission's work.¹⁷

Having presented the resolution, NOBC followed up on its pledge of assistance, and charged the special committee which had reviewed the Kutak proposal with specifying NOBC's objections and recommendations.¹⁸ The Special Committee continued its review of the Discussion Draft, and presented a tentative draft of its report to the members attending the August, 1980 meeting. Every one of the eighty-seven recommendations proposed by the Committee were subjected to knock-down, drag-out debates. Ultimately the recommendations received the concurrence of the membership. The Report in its final form was printed and distributed generally in September, 1980. The Report is broken down into five sections as follows:

Section I lays out the background materials;

Section II states NOBC's objection to the proposed change in format;

Section III describes the NOBC's method of approach;

Section IV sets forth the present Code with amendments or revisions which are drawn, for the most part, from the Kutak Commission's Model Rules;

Section V contains those parts of the proposed Model Rules which the NOBC does *not* recommend for adoption, supported by reasons for these suggestions.

As mentioned above, NOBC's first and controlling conclusion is that the current Code should not be scrapped, but should be retained and revised. In the third paragraph of the preface to their Model Rules,¹⁹ the Kutak Commission stated that it "soon realized that more than a series of amendments or a general re-

17. NOBC Res. (Feb. 2, 1980), reported in Minutes for Thurs., January 1, 1980 NOBC meeting, Chicago, Ill., Jan. 31, 1980-Feb. 2, 1980.

18. NATIONAL ORGANIZATION OF BAR COUNSEL, REPORT ON A STUDY OF THE PROPOSED ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH RECOMMENDATIONS (1980) [hereinafter cited as NOBC REPORT].

19. *Preface*, ABA MODEL RULES OF PROFESSIONAL CONDUCT I (Discussion Draft, Jan. 30, 1980) [hereinafter cited as MODEL RULES].

statement of the Model Code of Professional Responsibility was in order. The Commission determined that a comprehensive reformation was required."²⁰ With no further explanation of why, the Commission went on not only to change the substance of the rules, but also to completely abandon the format and approach of the current Code. NOBC knows of no reason that would justify such a dramatic departure from the structure of the current Code. Such a change would seriously impair the effectiveness of the Code, and would substantially undermine the significant strides made by applying and working with the current Code of Professional Responsibility.

While recognizing that substantial time and expertise have been expended in developing the Model Rules, the NOBC still maintains that the serious objections it has with the plan compelled rejection of the proposed format of the Model Rules. Eight reasons, which are set out below, surface as NOBC's primary criticisms of the Commission's proposal.

Nearly half of all practicing attorneys studied the present Code of Professional Responsibility while in law school,²¹ and the remaining half practiced under the present Code for ten years. Thus, most attorneys are familiar with the Code and its applications. Additionally, the study and analysis provided by students and law professors has contributed a great deal to the effective interpretation and administration of the Code. Along these lines, a wealth of case law related to the present Code has been developed since its adoption. Virtually every section has been subjected to judicial scrutiny and interpretation.²²

Reported cases and legal scholarship have been indexed to the present Code sections using topic sections such as conflicts and confidentiality.²³ The proposed change in format would

20. *Id.*

21. According to ABA statistics, over 350,000 of the 500,000 currently practicing attorneys joined the bar since 1970. REVIEW OF LEGAL EDUCATION, *supra* note 14, at 64. See note 14 *supra*. Since the Code has been in force since 1970 and is now incorporated into the bar examination in many jurisdictions, it is assumed that some study of it either would occur in a specifically designated ethics course, or would be woven throughout the entire law school curriculum. In 1974, the ABA amended its standards for legal education to include as a mandatory requirement preparation in professional responsibility. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS 302(a)(iii), ratification reported in *Proceedings of the House of Delegates*, 60 A.B.A.J. 1207, 1213 (1974). See note 15 and accompanying text *supra*.

22. For a compilation of some of the many interpretive opinions, judicial and extra-judicial, of the Code provisions, see AM. B. FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

23. See *Index*, ABA CODE, *supra* note 3, at 38-42.

necessitate selection of new indexing topics — advocate; advisor, negotiator²⁴ — with overlapping traditional subtopics. Those jurisdictions with computer systems or other recording systems based on key numbers geared to the present Code would face significant costs in changing over to a completely new access system. More importantly, however, the proposed indexing of topic areas creates a false illusion that different ethical standards apply to the various areas of practice.²⁵

Looking to everyday application of the Code by the practicing lawyer, the Model Rules draft does not lend itself to ready identification of recognized areas of concern. For example, issues dealing with conflicts of interest could be resolved by examining the Disciplinary Rules and Ethical Considerations associated with Canon Five.²⁶ The proposed Model Rules cover similar issues in sections 1.5-1.9, 1.16, 2.1, 3.9, 3.11, 5.1-5.2, 7.5 and 8.2.²⁷ The scattering of these critically related directives throughout the Model Rules makes it far more difficult for the practitioner faced with a problem to gather all the appropriate information necessary to resolve the issue. The economic aspect of indexing a Code so arranged becomes again apparent in this context.

Perhaps the strongest evidence of the validity of the points made above is the fact that despite the vast amount of analysis, criticism and evaluation of the current Code's content, virtually no suggestion has been made to change the format, other than by the Kutak Commission.²⁸ This absence of any other significant effort to change the structure would seem to evidence a working satisfaction with the present arrangement, particularly with regard to the Disciplinary Rules.

The Kutak Commission, in its pamphlet *Dilemmas in Legal Ethics: A Celebration and Critique of the Code of Professional*

24. See subheadings, *Table of Contents*, MODEL RULES, *supra* note 19.

25. The Model Rules organize the various ethical obligations of the attorney under role headings such as Advisor (Rules 2.1-2.5); Advocate (Rules 3.1-3.12); Negotiator (Rules 4.1-4.3); and Intermediary between Clients (Rules 5.1-5.2). See *Table of Contents*, MODEL RULES, *supra* note 19.

26. Canon Five states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." ABA CODE, *supra* note 3, at 19. Ethical Considerations 5-1 to 5-24 deal with personal interests of a lawyer which might affect his judgment (EC 5-1 to 5-13), the problems involved with representation of multiple clients (EC 5-14 to 5-20), and the desires or pressures of third persons (EC 5-21 to 5-24). Disciplinary Rules 5-101 to 5-107 deal more concretely with prohibitions on a lawyer relating to these areas of concern. *Id.* at 21-22.

27. See *Table B, Tables of Related Sections In The ABA Model Code of Professional Responsibility*, MODEL RULES, *supra* note 19, at 143-144.

28. See Jones, *supra* note 15, at 960; Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 513-514 (1979).

Responsibility, states: "Largely in *that spirit*, the Commission has foregone the approach to continued piecemeal amendment of the Code and has begun drafting what it hopes is a coherent, comprehensive, and constitutional statement of professional responsibility."²⁹ "That spirit" justifying the Commission's general departure from the style, form, and much of the substance of the proposed Code apparently grew from the following seeds enumerated in the Commission's pamphlet:

- (1) A number of amendments to the Code have been required "simply to keep the Code abreast of decisions of the Supreme Court of the United States."
- (2) The profile of the "typical lawyer" is changing; there are more government lawyers and in-house corporate counsel.
- (3) There are significant changes in what clients, the public and government regulators expect of lawyers.
- (4) A statement in 1934 by Mr. Justice Harlan Fiske Stone that "Our canons of ethics for the most part are generalizations designed for an earlier era."³⁰

NOBC submits that all of these reasons are subject to challenge as adequate justification for the radical departure in form and style represented by the Commission's proposal.

Regarding the number of revisions, it must be admitted that amendments to the Code have been required, but they have been relatively few in number. Only in the case of the advertising rules and those dealing with group legal services were amendments made simply to keep abreast of decisions of the Supreme Court of the United States.³¹

As to the profile of the typical lawyer, while statistically there may be more government lawyers and in-house corporate counsel than ever before, there is still a high percentage of sole practitioners or those practicing in small firms. Even accepting as provable the statement that the profile of the typical lawyer is changing, such a development would not by itself warrant discarding a Code acceptable to a clear majority of lawyers simply as a way of deal-

29. ABA Commission on Evaluation of Professional Standards, *Dilemmas in Legal Ethics: A Celebration and Critique of the Code of Professional Responsibility*. (Brochure announcing a program on the "evolving demands of professional ethics") (emphasis added).

30. *Id.*

31. See *Ohralick v. State Bar Assoc.*, 436 U.S. 447 (1978); *Bates v. State Bar*, 433 U.S. 350 (1978). For application of *Bates* and *Ohralick*, see DR 2-101, ABA CODE, *supra* note 3.

ing with the problems of but a few. It is far better to provide for new problems arising from new professional relationships or duties by revising or amending the present Code.

Although it might be true that there have been changes in what is expected of lawyers, such a fact provides no good basis for rejecting the present Code in toto. Consumer protection for the legal profession means protection of the interests of clients as well as of the general public. The present Code manifests a serious concern with providing such protection, whether it be in its Canons,³² Ethical Considerations³³ or Disciplinary Rules.³⁴

Finally, with respect to Justice Harlan Fiske Stone's observation regarding the Canons, certainly that quote cannot be boomeranged to end up a reason to reject the very Code which it originally served to inspire.

Because of increasing mobility and the likelihood that a lawyer may practice in more than one jurisdiction, the desirability of developing a uniform approach to discipline for unethical conduct cannot be gainsaid. Failure to adopt a code which will gain ready acceptance in all jurisdictions will frustrate this goal. The current Code has been accepted, with some variations, in nearly every jurisdiction.³⁵ The absence of significant voiced need for a change in format, in combination with historical reluctance to depart from accepted and proven structures, suggests that states might be hesitant to adopt the Model Rules in their present form, and so uniformity would be lost.³⁶

32. See ABA CODE, *supra* note 3, Canons 5-7.

33. See ABA CODE, *supra* note 3, EC 5-1 to EC 5-24, EC 6-1 to 6-6, EC 7-1 to 7-37.

34. See ABA CODE, *supra* note 3, DR 5-101 to 5-107, DR 6-101 to 6-102, DR 7-101 to 7-110.

35. AM. B. FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

36. Such reluctance is demonstrated by the following statements made by agencies or bar associations after having reviewed the Kutak Commission's proposal:

The main question in the Committee's mind and that of the Board of Governors was *why* there was any need or impetus for an entirely new code of professional responsibility. . . .

The Committee and the Board as a whole have voted to unanimously reject the new format of the proposed Model Rules as not being superior, but rather being in many ways inferior to the present Code.

From the letter of Gerald Richman, Chairman of Special Study Committee on Model Rules of Professional Conduct dated October 17, 1980 to President Gilbert of the Florida Bar.

The Rules and Comments as set forth in the Discussion Draft are unacceptable for adoption in place of the Code of Professional Responsibility.

Thus, NOBC suggests that the only logical conclusion that can be drawn is that the current Code in its present format must be retained, and that improvement is best accomplished by careful and comprehensive revision. To this end, the NOBC Special Committee examined the discussion draft of the Model Rules section by section, comparing each Model Rule section with the existing portion of the current Code. Many of the proposed rules are almost identical to the present Code provisions. Where no Code provisions comparable to the Model Rules section was found, the proposed section was considered on its own merits. Those proposals which were deemed desirable were incorporated into the appropriate sections of the Code.³⁷ The most important of these provisions are as follows:

<u>Current Code DR</u>	<u>Model Rules Section</u>	<u>Item Description</u>
1-104	7.2	New responsibilities of supervisory and subordinate lawyers.
2-106	1.6	Fees: requires that fee agreements be reduced to writing and given to the client before the lawyer has rendered substantial services.
2-107	1.6(e)	Division of fees among lawyers: permits division of fees if both lawyers expressly assume responsibility as if they were partners and there is prior written disclosure and consent.
3-104	7.4	Nonlawyer personnel: the need for guidance for regulation of nonlawyer person-

The . . . Commission on Evaluation of Professional Standards should prepare an alternative formulation for all proposed changes in the form of amendments to the Code of Professional Responsibility to facilitate understanding and evaluation, encourage support for needed changes, and promote development of a better regulatory vehicle for the professional than that proposed by the Discussion Draft.

Resolution adopted by the New York State Bar Association House of Delegates, Nov. 1, 1980.

37. NOBC REPORT, *supra* note 16, at 7-69 (1980). In Section IV of its report, the NOBC presented proposed revisions of the current Code incorporating those sections of the proposed Model Rules which NOBC felt would improve the Code. Comments and the rationales for all recommendations are included as well. *Id.* at 5.

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<u>Current Code DR</u>	<u>Model Rules Section</u>	<u>Item Description</u>
		nel is well recognized. (NOBC prefers adoption of a proven rule which has been enforced in Florida.)
4-101(E)	1.7(b)	Permits disclosure of confidence when necessary to prevent death or serious bodily harm.
4-102	6.2	(New) Independent evaluation for third party: establishes duty of disclosure when lawyer has been retained to conduct an independent evaluation for the benefit of a third party and is then discharged by the client.
4-103	7.1	(New) Vicarious disqualification: would clarify disqualification when representing multiple clients or when changing law firm association, and would require full, written disclosure and consent prior to any waiver.
5-103	1.9(e)	Permits a lawyer to advance court costs and expenses of litigation with repayment contingent on the result, and to pay such expenses when the representation is not for a fee.
5-104	1.9(a)	Limiting business relations with a client: restricted to transactions which are fair and equitable to the client, and requires that terms and consent be reduced to writing.
5-108	1.13	Lawyer as corporate counsel: clarifies that corporate counsel represents the entity and not the individual, and mandates conduct when counsel determines that a person associated with the entity may act in a manner which is in violation of law and is likely to result in significant harm to the organization, including, as a final resort, permissive public disclosure.

<u>Current Code DR</u>	<u>Model Rules Section</u>	<u>Item Description</u>
5-110	1.11	Government lawyer conflict of interest: deals with the revolving door problem of government lawyers and utilizes the litigated standard of substantial responsibility. NOBC strongly objects to allowance of waivers by the governmental agency since prevention of sweetheart relationships with a law firm is a prime objective of the rule.
6-101	1.1 1.4	Competence and promptness: more definitive of the problems of competency, and properly emphasizes the need for promptness and the need to keep the client timely informed of the status of the representation.
7-102	(various)	Representing a client within the bounds of the law: this section has been modified by incorporating various recommendations from the Kutak proposal, which would, <i>inter alia</i> , (1) prohibit a lawyer from allowing a tribunal to labor under a misapprehension of fact; (2) permit a lawyer in a civil action to provide opposing counsel with evidence favorable to the opposition's case; (3) recognize the principle of <i>Anders</i> briefs in criminal cases; and (4) prohibit a lawyer from failing to draw material matters to the attention of the tribunal through deliberate omissions.
7-106(D)	3.3	Expediting litigation: prohibits a lawyer from utilizing delay for financial or other improper motives which have no "substantial" purpose other than delay or increase in costs of litigation.
Canon 9		Changes title of Canon 9 from "A Lawyer Should Avoid Even the Appearance of Professional Impropriety" to "A Law-

<u>Current Code DR</u>	<u>Model Rules Section</u>	<u>Item Description</u>
		yer Should Safeguard Funds and Property of Others Entrusted to the Lawyer," so as to limit scope to these problems. The proposed rule includes responsibility for funds held in a fiduciary capacity and requires prompt payment or delivery of funds to clients when same are received and due. ³⁸

While the vast majority of the proposed rule changes represent appropriate amplifications and clarifications of the current provisions, certain of the Kutak Commission's proposals are not recommended for adoption. Often this is because the proposed rules are cumulative or repetitive of existing sections. Others, however, were affirmatively found unwise and so are specifically not recommended for adoption. Listed below are those sections and the reasons for their rejection.

<u>Model Rules Section</u>	<u>Description and Reason</u>
1.14	The Client Under A Disability: The wording of this proposed rule is vague and basically unenforceable as a standard of conduct. Its content is better suited to an ethical consideration.
1.15	Accepting Or Declining Representation: This proposed rule unduly emphasizes commercialism in selection of clients. Its aspirational content should be included as an ethical consideration.
3.6	Appearing Against An Unrepresented Party: This proposed rule is vague and may chill a lawyer's efforts to represent his or her client.
7.5	Professional Independence Of A Firm: This proposed rule would allow ownership of a law firm by a non-lawyer. Inadequate justification has been provided to warrant this change in delivery in legal services, and no assurance has been given to protecting against the resulting increase in costs which normally follow when a third-party ownership is permitted.

38. *Id.* at 9, 24, 27, 31-35, 41-42, 45, 49, 55, 61, 67.

*Model Rules
Section*

Description and Reason

- 8.1 Pro Bono Publico Service: Although laudable in purpose, the goal should remain aspirational and not be mandated. Problems of enforceability and administration of extensive reporting requirements are not offset by any likelihood of improved rendering of pro bono services.
- 9.4 Indication Of Areas Of Practice: If lawyers are permitted to release legal service advertisements with the sole prohibition that they not be knowingly false, fraudulent, misleading or deceptive, then there is no need for this section.
- 10.3 Reporting Professional Misconduct: The proposed rule basically restates DR 1-103(A) but it substantially weakens this standard by inclusion of the word "substantial." Such a change should not be permitted by a profession which desires to continue to be self-regulating.³⁹

Apparently, the suggestions of NOBC and others suggesting revision have reached the Kutak Commission. In a letter dated December 5, 1980, Mr. Kutak announced a new schedule for consideration of the Commission's proposals, which would set the previous schedule back a year. He also announced a plan to circulate the Commission's recommendations "in two formats, one employing the framework of the January 1980 Discussion Draft and one consisting of the current Code text amended to reflect the Commission's substantive recommendations. This will provide a ready basis for comparison of the two legislative styles and will enable the bar to make a fully considered judgment as to the best approach to take."⁴⁰ Perhaps our voice has been heard and heeded.

The current Code has served the profession admirably for the past ten years, and with careful revision, will continue to so serve in the future. While its substance can and should be revised to comport with the changing realities of the practice of law, its form and style are exemplary, and must be preserved.

39. *Id.* at 81-82, 87, 93-94, 96-97.

40. Letter from Robert J. Kutak to "colleagues" (member of the ABA) (Dec. 5, 1980).