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THE CURRENT FORMAT OF THE CODE OF PROFESSIONAL RESPONSIBILITY SHOULD BE AMENDED, NOT ABANDONED, TO ACCOMMODATE THE NEED FOR CHANGE

ALEXANDER UNKOVIC †

IT IS A PRIVILEGE TO PARTICIPATE in this Symposium on professional ethics with such well-recognized experts as Robert MacKay, former member of the ABA's Kutak Commission; Monroe Freedman, Reporter for the American Trial Lawyer's Commission on Professional Responsibility, and Allen Zerfoss, Chairman of the National Organization of Bar Counsel's Special Committee. Having heard from these authoritative and zealous proponents of three approaches to revision of the Code of Professional Responsibility, it seems appropriate now to hear from a neutral observer. My role is to examine the more practical aspects of this issue, drawing on my experience, as a practicing attorney, and especially as Chairman of the Disciplinary Board of the Supreme Court of Pennsylvania.<sup>1</sup> I will address the everyday realities of administering any code, including the three proposed here today. In addition, I will reflect on some of the principles and philosophies which underlie our profession's decision to be governed by a code of ethics at all. Perhaps the most logical way to start is to set out the mechanics and statistics of the Pennsylvania Disciplinary Board.

Pennsylvania's Disciplinary Board was organized in January, 1972.<sup>2</sup> Since that date the Board has received in excess of 14,000 complaints.<sup>3</sup> Complaints average approximately 1,750 per year.<sup>4</sup>

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1. Mr. Unkovic served on the Disciplinary Board of the Supreme Court of Pennsylvania from 1973 through 1979, and was its Chairman from 1977 through 1979.

2. See Nurick, *First Annual Report of the Disciplinary Board of the Supreme Court of Pennsylvania*, 44 PA. B.A.Q. 685 (1973).

3. Statistics included in the letter report from Charles V. Henry III, Chairman, Disciplinary Board of the Supreme Court of Pennsylvania, to the Honorable Henry X. O'Brien, Chief Justice of the Supreme Court of Pennsylvania (Sept. 23, 1980) (copy on file at the Villanova Law Library) [hereinafter cited as 1980 Report].

4. *Id.*

(1191)

The Board has a paid staff of thirty-three full-time employees as well as a number of part-time legal interns.<sup>5</sup> The paid staff consists of twelve lawyers, seven investigators and thirteen executive and clerical persons.<sup>6</sup> On a voluntary basis, 108 lawyers serve on the thirty-six Hearing Committees scattered throughout the state.<sup>7</sup> Four District Offices in various geographic locations serve the public.<sup>8</sup>

In 1980, 2,079 complaints were filed, with the Board disposing of 2,021. The resolutions included twelve disbarments, eighteen suspensions, one public censure, five private reprimands and ninety-eight informal admonitions.<sup>9</sup> In addition, of eleven Petitions for Reinstatement received by the Pennsylvania Supreme Court, six were granted and five were denied.<sup>10</sup>

The system is supported by a \$40 assessment paid by all members of the Pennsylvania Bar,<sup>11</sup> which generates over \$1 million.<sup>12</sup> Similar systems operate in other jurisdictions, and more than two-thirds of the states have adopted, in substantial form, the ABA Code of Professional Responsibility approved by the House of Delegates in August 1969.<sup>13</sup> Thus, professional disciplinary systems involve considerable concentrations of time, money and resources in virtually every jurisdiction.

Perhaps the most compelling question facing us this afternoon, though the one often overlooked, is why should our profession be governed by a code of ethics at all? The answer is simple and is contained in the question. We are members of a *profession*, and as such must necessarily adhere to a code of ethics.<sup>14</sup> Ethics may be defined as a system of moral principles,

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5. See Employment Records, on file with the Office of the Secretary of the Disciplinary Board of the Supreme Court of Pennsylvania, Harrisburg, Pa. 17108.

6. *Id.*

7. Official Roster, Hearing Committee (July 1, 1980) (copy on file at the Villanova Law Library).

8. PA. R. DISCIPLINARY ENFORCEMENT 202(a).

9. 1980 Report, *supra* note 3.

10. *Id.*

11. Order of Supreme Court of Pennsylvania, Nov. 13, 1979, at No. 238 Disciplinary Docket No. 1.

12. Report of Auditors, Main Hurdman & Cranstown, June 30, 1980 (copy on file with the office of the Secretary of the Disciplinary Board of the Supreme Court of Pennsylvania, Harrisburg, Pa. 17108).

13. *Preface*, ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as ABA CODE].

14. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 18 (1976); Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639, 642 (1977).

and more particularly, the rules of conduct recognized with respect to a particular class of human actions or a particular group or culture.<sup>15</sup>

A profession, in the historical sense, is an organization which provides highly specialized intellectual services and has three principal characteristics:<sup>16</sup>

1. A body of erudite knowledge, a set of attitudes and a technique which is applied to humanity through an educated group.<sup>17</sup>
2. A standard of success measured by accomplishment in serving the needs of a people rather than by personal gain,<sup>18</sup> and
3. A system of control over the practice of the calling and the education of its practitioners through associations and a code of ethics.<sup>19</sup>

The free and democratic society we enjoy in the United States depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his or her capacity, through reason, to participate in self-government. Lawyers and the legal system play a crucial role in maintaining the system's vitality. It follows, then, that it is the obligation of every lawyer to maintain the highest standard of ethical conduct. To guide this conduct, it is necessary that we have a set of ethical principles. The principles embodied in the Code provide aspirational standards for which to reach, as well as minimum standards by which to judge the transgressor.<sup>20</sup>

In effecting a disciplinary system, it is necessary to have a written set of rules, commonly referred to as a code of professional responsibility or professional conduct. But administrative problems are inherent in administering any such system. In this case they include: interpreting with specificity and clarity the as-

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15. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

16. See *id.* See also Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704-05 (1977).

17. See Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 502-04 (1979).

18. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30.

19. See Sutton, *supra* note 17, at 501.

20. See *Preamble and Preliminary Statement*, ABA CODE, *supra* note 13, at 1.

pirational and mandatory provisions;<sup>21</sup> structuring a system to enforce the Code and providing adequate staff;<sup>22</sup> educating the legal profession as to the Code's content;<sup>23</sup> informing the public as to the rights of clients and the availability to them of the disciplinary process;<sup>24</sup> providing procedures which assure due process to the lawyer while providing an effective forum for redress of client grievances;<sup>25</sup> encouraging a tribunal to be willing to impose appropriate discipline to protect the public and preserve the integrity of the legal profession;<sup>26</sup> designing procedures to revise and amend rules, and provisions to allow for adapting the Code to changing developments in the law.<sup>27</sup>

Just over ten years ago, the Pennsylvania Supreme Court adopted the ABA Code of Professional Responsibility.<sup>28</sup> Prior to that time, disciplinary enforcement in the Commonwealth was haphazard and ineffectual. However, since adoption of the Code in 1970, and establishment of the Disciplinary Board of the Supreme Court of Pennsylvania in 1972,<sup>29</sup> the Pennsylvania approach has become a standard — a model system after which numerous other jurisdictions have patterned their own disciplinary pro-

21. Ethical Considerations are contemplated as being aspirational in character. Disciplinary Rules on the other hand are mandatory, and represent a minimum level of ethical behavior. A lawyer whose conduct falls below these standards can be subject to discipline. *Id.* However, the Disciplinary Rules are not always clear. For example, DR 7-102B(1) requires that 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" must reveal the fraud, "except when the information is protected as a privileged communication." DR 7-102B(1). The confidentiality rule defines "confidence" and "secret," but not "privileged communication." DR 4-101(A). It is unclear whether a privileged communication would refer only to that information covered by the applicable evidentiary standard, or to the broader scope of information included in DR 4-101 as confidential.

22. See notes 5-8 and accompanying text *supra*.

23. See AMERICAN BAR ASSOCIATION, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS v, vii (1978).

24. See *Introduction, Symposium on Professional Responsibility*, 57 N.C. L. REV. 495 (1977).

25. As an example, see a discussion of the self-incrimination concerns in disciplinary proceedings, Note, *Self-Incrimination: Privilege, Immunity, and Comment in Bar Disciplinary Proceedings*, 72 MICH. L. REV. 84 (1973).

26. FINAL DRAFT, ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1-4, 7-9 (1970); Marks & Cathcart, *Discipline within the Legal Profession*, 1974, U. ILL. L.F. 193, 203-221 (1974).

27. Patterson, *supra* note 14.

28. 438 Pa. xxv (1970) (Supreme Court Rules Docket No. 1), cited in PENNSYLVANIA BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY (3d ed. 1977).

29. See Nurick, *supra* note 2.

grams. Based on Pennsylvania's experience with the Code of Professional Responsibility, I am perplexed by the numerous statements denigrating the efficacy of those systems using the ABA Code as a base. I have read the ABA Report,<sup>30</sup> and have heard Professor McKay's enumeration of such factors as new Court decisions and changing expectations.<sup>31</sup> I have also read the ATLA suggestions<sup>32</sup> and heard Professor Freedman's criticisms.<sup>33</sup> While I agree that it is necessary to be constantly alert to the need for modification, and to remain ready to study, review and debate suggested changes, nowhere have I seen a real study or comparison of present systems operating under the Code with the respective predecessors. I am not aware of any facts that would sustain comments such as those in the Preface to The American Lawyer's Code of Conduct which states: "The need for a new code of professional conduct for lawyers is manifest . . . . The legal profession cannot continue to function, however, under disciplinary rules and ethical considerations that are, as even the ABA has acknowledged, incoherent, inconsistent, and unconstitutional."<sup>34</sup> I do not see any reason why, with the success of the current Code, we are in 1981 starting all over again.

As was Mr. Zerfoss, I too was encouraged to see Robert J. Kutak's December 5th letter to the ABA membership suggesting that the next discussion draft of his Commission on Evaluation of Professional Standards will "be circulated 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."<sup>35</sup> I see no reason to discard the current format which would easily accommodate the sort of revision that would answer the concerns expressed by both the Kutak Commission and the ATLA.

Having worked with the Pennsylvania system for over six years as a member and Chairman of The Disciplinary Board,<sup>36</sup> it

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30. ABA MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980).

31. See McKay, *In Support of the Proposed Model Rules of Professional Conduct*, 26 VILL. L. REV. 1137 (1981).

32. THE AMERICAN LAWYER'S CODE OF CONDUCT (1980) [hereinafter cited as ATLA CODE]. See especially, *Forward* at i, *Introduction* at ii-vi, *Preamble* at 1-2 and *Preface* at 3-8.

33. Freedman, *The Kutak Model Rules v. The American Lawyer's Code of Conduct*, 26 VILL. L. REV. 1165 (1981).

34. *Preface*, ATLA CODE, *supra* note 32, at 1.

35. Letter from Robert J. Kutak to members of the ABA (Dec. 5, 1980).

36. See note 1 *supra*.

is my strong belief that the present format should not be abandoned. Necessary changes in the Code of Professional Responsibility can be accomplished in a simple and precise manner by amending provisions. The Constitution of the United States embodying seven Articles was adopted on September 17, 1787. A few short years later in 1791 great changes were made, not by destroying the document and starting anew, but by ratifying the first ten amendments known as the Bill of Rights.<sup>37</sup> When necessary to meet changing conditions and changing times, the orderly process of adoption of amendments to the Constitution has been followed and has been proven effective. The same orderly and cautious approach should be taken to revise the Code of Professional Responsibility.

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37. U.S. CONST. amend. I-X.