2003

What I Think That I Have Learned about Legal Ethics

Richard H. Underwood

University of Kentucky College of Law, runderwo@uky.edu

Click here to let us know how access to this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Legal Ethics and Professional Responsibility Commons

Recommended Citation


This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
WHAT I THINK THAT I HAVE LEARNED ABOUT LEGAL ETHICS

RICHARD H. UNDERWOOD* 

TABLE OF CONTENTS

I. INTRODUCTION ......................................................... 246
II. THE WAY WE WERE .................................................. 251
   A. The Camera Eye (1) ............................................. 251
   B. The Camera Eye (2) ............................................. 253
   C. The Camera Eye (3) ............................................. 253
III. OF PROFESSORS AND PRACTITIONERS ..................... 255
   A. The Camera Eye (4) ............................................. 256
   B. The Camera Eye (5) ............................................. 256
   C. The Camera Eye (6) ............................................. 256
   D. The Camera Eye (7) ............................................. 257
IV. IN SEARCH OF A PROFESSIONAL CONSENSUS .......... 258
V. PROBLEM RULES ..................................................... 261
   A. The Camera Eye (8) ............................................. 261
VI. A FUNNY THING HAPPENED ON THE WAY TO THE
    KENTUCKY RULES ................................................ 264
   A. The Camera Eye (9) ............................................. 264
   B. The Camera Eye (10) .......................................... 265
   C. The Camera Eye (11) .......................................... 266
VII. WHAT WILL THE FUTURE BRING? .......................... 268
   A. The Camera Eye (12) .......................................... 268
VIII. CONCLUSION ....................................................... 271
   A. The Camera Eye (13) .......................................... 271

* Spears-Gilbert Professor of Law, College of Law, University of Kentucky; B.S (1969), J.D. (1976) Ohio State University; Co-author of TRIAL ETHICS (Little Brown & Co. 1988), MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK (2d ed. Aspen 2001); Co-editor, KENTUCKY ETHICS OPINIONS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (UK/CLE). Professor Underwood served as the Chairman of the Kentucky Bar Association's Model Rules Committee. That Committee was charged with the responsibility of reviewing the ABA Model Rules and making recommendations for their modification and adoption. He also served as the Chairman of the Kentucky Bar Association's Ethics and "Hotline" Committees from 1984 to 1998, and the Kentucky Bar Association's Unauthorized Practice Committee from 1984 to 1994. See Richard Underwood, Confessions Of An Ethics Chairman, 16 J. LEGAL PROF. 125 (1991). Needless to say, the views expressed in this short piece are not the views of the Kentucky Bar Association or of the College of Law.
I. INTRODUCTION

I am pleased to have this opportunity to contribute a short, informal piece to this symposium issue of the Idaho Law Review. I write from a particular and somewhat limited perspective. While I practiced law for a time, I have spent most of my 26 years as a lawyer teaching at a state university law school (so far I have “lucked out”). I teach a variety of courses—I am something of a utility infielder. I have never held myself out to be an academic superstar, or even a “specialist” in legal ethics; although, over the years, I have advised hundreds (possibly thousands) of practicing lawyers, helping them deal with “ethics questions.” Having pled guilty to this, I am happy to

1. Perspective seems to be everything. One commentator agrees with me that there is a “disjunction” between legal education and the legal profession, but he does not seem to think it is getting better. That is, he contends that fewer professors have practical experience than before. Then again, he refers to the elite law schools. I would not know about that. That is not the way it is in my neck of the woods. He also contends that, in the actual practice of law, the rules of ethics are irrelevant. See Patrick J. Schiltz, Legal Ethics In Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney, 82 MINN. L. REV. 705 (1998). If he means that practitioners do not instinctively look at the rules, I might agree. But in my fourteen years as a state bar ethics chairman, not a week went by in which I did not discuss the content of the Kentucky Rules of Professional Conduct with at least one lawyer with an ethics question. See infra note 3 and accompanying text. Perhaps the conclusion that we should draw, if we are not completely full of ourselves, is that generalizations are hazardous.

2. The largest one day sale of my book RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS (1988), was made the day our librarian re-ordered the six copies that had been stolen from our law library.

3. I provided this advice “free” as a member of a bar association ethics committee. I have been informed that I am just about the only academic that has had anything good to say about bar association ethics committees. See Bruce A. Green, Bar Association Ethics Committees: Are They Broken?, 30 HOFSTRA L. REV. 731, 740 (2002). I suspect that may be because few academic lawyers offer to serve on such committees. We have had better law school bar association cooperation in Kentucky. All three state law schools have provided committee members. Idaho’s new Dean, Don Burnett, served as Ethics Chairman when he was a Dean and Professor of Law at the University of Louisville.
say that I have managed to avoid serving as an expert witness or private ethics consultant for hire. 4

In this short piece I want to say a few things that other academics teaching legal ethics may find disturbing. I say this because I believe that I may be swimming against the current academic fashion. Of course, it is possible that I do not have a very good handle on the current academic fashion. I hope I am not setting up a straw person to knock down, but I may be. 5 If I am, I am sure someone will call me to task.

What I am going to say is this: contrary to popular belief (among practitioners, at least) law teaching is probably better than it used to be, especially in the areas of legal ethics and professionalism; 6 and law students and practicing lawyers probably have a better understanding of the content of the professional codes than they used to have. Things may not be like they used to be in that late, great Golden Age that some allude to, but then again, they probably never were. I think that all of this can be attributed to better teaching of the “rules” (or if you prefer, the “Rules”) in law school, and better Continuing Legal Education, as well as the interest in the rules that was generated as the Model Rules were formulated and adopted, first at the ABA level, and then at the state level. I am one of those who believe that it is best to concentrate on “the nuts and bolts of the rules of professional con-

4. I did give expert testimony once in a “foreign” case—a case in a neighboring state. That was enough for me. As chairman of the Kentucky Bar Association Ethics Committee I had an “official stamp” which I did not think should be used, for my profit, either for or against a Kentucky Lawyer. I have also learned, over the years, that when people want to pay for my opinion, they usually don’t want my opinion at all. They want affirmation, and they want to buy my name. For now let me say that I consider the professorial expert on the law to be a negative development in litigation. I do not see why experts on the law cannot make their points in written briefs. While there may be some need for expert testimony on the standard of care in malpractice cases, I am not sure why we need a whole cottage industry—the cottage being infested by moonlighting professors of law. Wow—am I going to get it for saying that! But at least I am not as critical as Judge Cleland. See Cicero v. Borg-Warner Auto., Inc., 163 F. Supp. 2d 743 (E.D. Mich. 2001) (telling us what he thinks about professorial ethics experts; ouch!).

5. Lawyers and academics often employ the “fallacy of distortion” by setting up a “straw person.” See Richard Underwood, Logic and the Common Law Trial, 18 AM. J. TRIAL ADVOC. 151, 180-81 (1994); Jack Landau, Logic for Lawyers, 13 PAC. L.J. 59, 95 (1981). The lawyer or academic “talking head” employing this techniques will (1) falsely characterize his opponent’s position, and then having thought up the false position and passed it off as the opponent’s position, will (2) proceed to knock that position down. You see this a lot on shows like “Nightline.” Unfortunately, the technique is also used in law review articles. I was recently on the receiving end of this ploy, but I won’t mention any names. Why draw attention to an article that no one will read otherwise.

6. If you don’t want to take my word for it, see Ronald D. Rotunda, Teaching Legal Ethics a Quarter of a Century After Watergate, 51 HASTINGS L.J. 661 (2000).
duct” in a basic course on professional responsibility, rather than attempting to teach “morality or personal ethics,” or “values ethics,” or whatever. I am saying this because I have the sense from many of the articles I am reading (again, I may be wrong) that a lot of academic lawyers are taking up the position that focusing on the rules: (1) necessarily leads students and practitioners to conclude that there is nothing more to legal ethics than a minimal set of disciplinary rules, (2) leads students and practitioners to conclude that if something is not explicitly prohibited by the rules then anything goes, and even (3) leads students and practitioners to the view that focusing on the enforcement of such rules may not even induce ethical “behavior” because it “removes [the] rules from the realm of conscience . . . . [T]hat principles cease to be moral when they become laws.”

The last of these propositions seems to me to be false. I disagree with the other two propositions to this extent. First of all, no one ever said that the rules were all there is to legal ethics. I don’t know anyone that teaches that. I don’t see why careful consideration of “the rules as they are,” and even a certain amount of parsing of the lan-

---

10. I am concurring in part and dissenting in part. Lawyers do, in fact, narrowly construe ethics rules to rationalize their conduct, both before, and after, they take action. In this regard, see *infra* Part VII.A for my discussion of the drift toward practice in limited liability companies. Of course, judges narrowly construe the rules of judicial ethics too. See Caudill v. Judicial Ethics Comm., 986 S.W.2d 435 (Ky. 1998). This is a ridiculous opinion which allowed Kentucky judges to employ their wives as secretaries. Under the Kentucky version of the Code of Judicial Conduct in effect at the time (it has since been amended), the court noted that Canon 3B(4) merely said that judges “should... avoid nepotism.” *Id.* at 436. It did not, like the ABA 1990 version, say the judge “shall avoid nepotism.” *Id.* at 436 n.1. However, the court ignored the fact that the commentary to the ABA Code of Judicial Conduct upon which the Kentucky Code was based said that although “should” is used, the language is still language of discipline. See E. WAYNE THODE, *REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT* 5 (1973) (arguing that the canons and text establish mandatory standards unless otherwise indicated); LISA MILAORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 8 (1992); JEFFREY SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS* 5 (3d. ed. 1990).
11. Referring to the Model Code distinction between “ethical considerations” and “disciplinary rules,” Philosopher John Kultgen quips that “ethics for the AMA is what is enforced; for the ABA, what is not enforced.” See KULTGEN, *supra* note 9, at 228.
Language of the rules, precludes serious consideration of "values." Secondly, we all know, and we all teach, that many practices are implicitly prohibited by the rules, and by other law, including procedural law, the common law and other forms of judicial control. If practitioners operate on the assumption that anything goes when it is not explicitly prohibited by a Code Disciplinary Rule or a Model Rule, that is not so much the fault of the drafters of the Code or Rules or the fault of the law teachers, as it is the "fault," or a consequence, of our adversarial system.

In any event, in my legal world—which I think is the real world—there are a surprising number of lawyers who do not follow even the basic, blackletter rules. As far as I am concerned, if we could get everyone more or less on board, and get them to follow the rules, that would be something. I don't think that we've gotten to that point yet. Until we do, I'll leave the more philosophical work to others.

12. In the context of discipline, is it not legitimate for the respondent and his counsel to argue for strict construction? If a highly conscientious lawyer reads duties into them rather than from them, should we necessarily use that lawyer's interpretation as a basis for disciplining others? Is there a due process issue here? Cf. In re A, 554 P.2d 479 (Or. 1976). I have been surprised by the willingness of courts to turn interpretive advisory opinions into disciplinary "law."

13. This is a variation on the theme that I hear a lot of trial lawyers pushing—that if something can be done for the client, then it must be done. I certainly don't teach that, and I frequently warn my students that this kind of "ethics" may lead to some very bad tactics.

14. Cf. KULTGEN, supra note 9, at 327. Kultgen characterizes the ABA's ethical standards as defining the lawyer's central obligations as procedural—"to make the system work." Id. at 239. As a result of this "legalistic attitude," some important values may, on occasion, be "relegated... to subsidiary rank." Id. at 327. For some interesting comments regarding the professions faith in the adversarial system, see Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 596 (1985) ("Lawyers are concerned with the production of belief, not of knowledge. Why assume, to paraphrase Macaulay, that the fairest results will emerge from two advocates arguing as unfairly as possible on opposite sides.").

Actually, if the concern is that the shift to a blackletter law of lawyering invites lawyers to narrowly construe professional rules to favor their own interests, in the same way that they might narrowly construe the language of contracts or statutes in a way that favors their clients, there may be something to it. But rationalization of one's conduct, and strained and narrow construction of professional rules, motivated by the lawyer's self-interest, may actually be more common in "office" or corporate practice than in litigation. In "office" practice the financial rewards of "cheating" may be huge and the lawyer's conduct may not be open to inspection by an opponent, a judge, or a regulator.

15. See Rhode, supra note 14, at 598-99 ("In a national survey of 1500 large-firm litigators, half of those responding believed that unfair and inadequate disclosure of material information prior to trial was a 'regular or frequent' problem. Similarly, 69% of surveyed antitrust attorneys had encountered unethical practices in complex cases; the most frequently cited abuses were tampering with witnesses' responses and destroying evidence.").
I do want to point out some problems that I have had with the way the rules have been enacted and interpreted. Some individuals and interest groups have had more say than others. I hope I can discuss this without being accused of inciting class warfare. I also want to suggest that some of the rules, and some of the "core values" of the profession, will continue to come under attack, and that future attacks will likely come not from the fringes of the profession, but rather from the "elite" law firms. One of my themes will be that the reevaluation of the Model Code, and the adoption process for the Model Rules, educated a lot of lawyers about what the professional rules actually were. Many lawyers had only a limited knowledge of what was in the Model Code. For the most part, this education, or reeducation, of the bar was a good thing. On the other hand, not everything about it was necessarily good. Lawyers discovered that they didn't like many of these rules, and that the rules imposed some serious opportunity costs. While the traditional note sounded at Law Day was, and continues to be, that "the law is not a mere money getting trade," the blues sung on less ceremonial occasions is "why can't we do what everyone else [accountants, investment bankers, etc.] is allowed to do." Lawyers also learned how easy it was to change the Rules. Some of the changes were not for the better, and I fear that "we ain't seen nothin' yet."

At this point I should probably warn the reader that my evidence might be characterized as "anecdotal." In response, let me say that these days this word (like so many other words) is over-used, and even misused. It is dismissive. Let me give you an example of what I mean. Every once in a while I attempt to teach Bioethics with my chums over at the medical school. Some years ago I participated in a collection of presentations given on the occasion of the publication of Dr. Sherwin Nuland's wonderful book *How We Die: Reflections on*
Dr. Nuland honored us with a lecture, and in the Q&A one of the young (well, not really very young) people in the audience took offense at his evaluation of the performance of hospital ethics committees, based on his experience—that is, the listener was upset that Dr. Nuland said something she disagreed with (she was a proud member of a hospital ethics committee). She condescendingly opined that his observations were based on "anecdotal evidence." When he sagely pointed out that all evidence, all data, all observations, are, in a sense, anecdotal, she was genuinely taken aback. There is, indeed, a fallacy of anecdotal evidence—one should not put faith in an example or two that run against the bulk of data supporting an unwelcome proposition. But Dr. Nuland's experiences and observations were worth hearing, and might have benefited a listener with an open mind. But I digress. On with the anecdotes. Just for fun, I will present them in the style of Dos Passos, through The Camera Eye.21

II. THE WAY WE WERE

As I was saying, law teaching is probably better than it used to be, especially in the areas of legal ethics and professionalism; and law students and practicing lawyers probably have a better understanding of the content of the professional codes than they used to have (although that may not be saying much?).

A. The Camera Eye (1)

I entered law school in 1973, after a four year stint in the army. I figured that law school had to be better than Viet Nam, and most days it was. Back then the newly admitted student was fingerprinted and given an appointment with the Character and Fitness Committee. I recall going to the digs of a law firm that specialized in real estate work. The building that it was housed in was almost all glass, like the Death Star. A very young partner (associate?) attempted a rather stern interrogation. Since I had been trained in interrogation and other, even blacker arts, I found his demeanor rather silly. He asked me what kind of civic contributions I had made to my community lately. I told him that I had been out of the country for a while. He then asked me how I voted in the last Presidential election (I don't think I am making this up. I know he asked me if I voted). I told him...

21. The obscure literary allusion is to his trilogy U.S.A. (1930-36).
that although I had left the army with the rank of captain, the last such election was only the second, no, maybe the first that I was old enough to vote in, but that I was not able to get an absentee ballot in the place that I was stuck in at the time. "That's no excuse!", he snorted. Fortunately, I still managed to pass his character and fitness test.

If you started law school around the same time I did you probably remember Watergate. Many of the scoundrels were lawyers. They would have been scoundrels anyway, even if they had been produce managers from the local grocery. But the presence of so many lawyers on the list of malefactors was "shocking . . . shocking!" The upshot of it all was that the ABA decided that if we had a mandatory ethics class in law school, lawyers would be more ethical in the future, and Watergates would not happen, or at least there would be ethical lawyers to "say no," or even blow the whistle early on. So we had to go to a two-hour mandatory ethics class. I guess this would have been in 1975 or 1976. We were given a copy of the ABA Model Code, and we bought a casebook (I don't remember which one but there weren't many then), and we were told to memorize the Code. There would be a true-false test on its contents at the end of the class. The newest member of the faculty was assigned to teach the class. He was awful. He almost never referred to the casebook. He spent most of his time talking about his one-year stint at a New York law factory. As far as I could tell he spent the entire year of his practice career playing a very minor role in one extended tender offer battle. Most of us had no idea of what a tender offer was. As I recall, he was denied tenure. He probably ended up being the Dean of a more prestigious law school. In any event, I passed the course (how hard could that be?); but I didn't learn much about legal ethics.

Later, in practice at a large and prestigious firm (and it was an excellent law firm), I don't recall participating in many discussions about ethics, although I found a lot of things about practice troubling, and looking back, I can see that I was thinking about ethics. I know I resented the lack of professional autonomy that I had as a young associate. Was I really going to have to spend the rest of my life

---

22. A true-false test in a professional school? How serious can this be?
23. I did find out what tender offers were.
handling cases that partners dumped on me that seemed to have just enough merit to get past the laugh test?24

B. The Camera Eye (2)

Years later I am at the Ringside Bar25 in Columbus, Ohio, having a brew with my former supervising partner and one of his side-kicks. My former mentor is now serving as a Commissioner for the Ohio Supreme Court, dealing with issues of ethics and professional discipline. I am the Chairman of the Ethics Committee of the Kentucky Bar Association. We are talking about the state of the profession. I expressed the view that things seem to be getting worse. He tells me I am crazy! Have I hurt his feelings? He tells me that "Things are much better now, but you can't see it, because you don't know how bad it used to be. Your problem is that you expect too much."

Looking back, I think what he said was probably right.

C. The Camera Eye (3)

I am in the chambers of Judge David S. Porter, United States District Judge, Cincinnati, Ohio. Judge Porter is an avuncular man, and a raconteur. He is self-effacing. He likes lawyers. He is slow to

24. See Model Rules of Prof'L Conduct R. 3.1 (2002). My favorite case, in retrospect, was the one I had to push, brought on behalf of a farmer—a devotee of "sweet corn," as I recall. It went something like this: Old McDonald, we will call him, had a farm in the middle of a state forest. The state decided to import beaver into the area for whatever reason (possibly there was a good reason). Beaver had been run out of the area for at least fifty years. The beaver reproduced like crazy, which beavers will do (I addressed this in one of my briefs to the court, if you are interested). They flooded out the farm. One of the partners in my firm, who did not do litigation (as I recall he was a "corporate twinkie"), decided this was a "taking" by state beavers, and that the state owed the farmer just compensation. The partner filed the case, and then passed it to a junior partner, who passed it to an associate, who dumped it on me before he left the firm (he was not happy in his work). I survived a motion to dismiss, establishing as a matter of law that there could be a taking by beaver. We found the trapper who brought in the beaver, and I thought I might have actually pulled this one off. Unfortunately, the court ultimately decided that I failed to meet my burden of proof because, the judges hypothesized, these particular beaver could have wandered in from Indiana. This possibility had never occurred to me, because these beavers were not that big and not that stupid. In any event, I am not making this up.

Oops—I almost forgot. One of the two state attorneys on the case married the court reporter who took the deposition of the trapper. I do not remember being invited to the wedding even though I had brought them together, but I am told that they exchanged little silver beavers. Sad.

25. This joint has a cool painting of boxers that looks like a George Bellows, depending on how many brews you have consumed. Bellows was from Columbus, but I do not think the painting is a Bellows.
anger. But today he is pretty pissed off. We clerks have been working the motion docket. I have brought him a complaint, a motion to dismiss, the reply, etc. The complaint demands that Judge Porter, the U.S. District Judge, order the Attorney General of the United States to indict the Justices of the Supreme Court for violating the Declaration of Independence (because every fetus has the right to life, liberty, and the pursuit of happiness) by issuing their opinion in Roe v. Wade.\(^2\) I have recommended that the case be dismissed (for any number of reasons that I did not think needed to be enumerated).\(^2\) Judge Porter approves the recommendation, but pens in additional language to the effect that the complaint is frivolous and was no doubt filed for publicity. His opinion is journalized and a copy is placed in the "public" or "press" box in the clerk's office. Later a reporter picks it up and reports on the dismissal of the frivolous and publicity seeking pleadings. Within a short time a series of lawyers and a law professor hit the radio waves stridently condemning the dismissal, opining that the pleading sought a good faith modification or reversal of existing law, and that any publicity attendant to the matter was the fault of the judge.

As a law clerk I saw only a very small slice of professional life. On the other hand, what I did see often left much to be desired. It was not uncommon to encounter deceptive briefs which omitted, or grossly distorted, existing law.\(^2\) Perjury sometimes reared its ugly head, in both civil and criminal cases. While it was rare, lawyers sometimes appeared drunk, or engaged in bizarre or volatile behavior. It is hard to generalize, but I didn't see anything different then than I see now. Judge Porter pushed my lawyerscope back even further in time. He was a great story teller. Years before he had served as a member of a county bar disciplinary committee in Eastern Ohio. He recounted some shocking (but perhaps amusing) incidents. There was the lawyer whose m.o. was to take divorce cases for women, initiate proceedings, and then refuse to file critical paperwork unless his clients had sex with him. When called to task, he actually expressed shock that the members of the hearing panel did not do this. "Gentlemen," he said, "you have missed out on one of the finest emoluments of the legal pro-

\(^{26}\) 410 U.S. 113 (1973).
\(^{27}\) I suspect that since I have said something about abortion I will be blasted; so let me enumerate. My problem with this lawsuit was that it ignored the role of the Court in interpreting the Constitution, assumed that the Declaration of Independence is law, assumed that natural law can be turned into federal criminal common law, assumed away separation of powers, and assumed away judicial immunity. Don't blast me until you can explain all of this away. Perhaps you can, but I cannot.
\(^{28}\) Why lawyers engage in this kind of deception is beyond me. Law clerks actually read and double check the authorities cited in briefs, and do independent research. In short, the odds are great that the lawyer will be caught and lose his or her credibility.
fession." The Judge told me of his days as a state common pleas judge. Although he did not drink himself, he kept a bottle of whiskey in his chambers in the event that one of several local lawyers who appeared before him had an episode of the D.T.s during a trial. None of this proves anything, of course, but it explains why I am skeptical as to whether that Golden Age ever existed.

But let's get back to the present. If it is true that students and practicing lawyers have a better understanding of the content of the professional codes than they used to have, why is that? Again, I think it can be attributed to a greater concentration on the teaching of the Code and Rules in law schools and in CLE programs. It is probably not because of the publication of lengthy, philosophical think pieces in prestigious law journals, which practicing lawyers do not read. Here I am going to take a bit of a detour, and probably infuriate my colleagues, but I cannot resist.

III. OF PROFESSORS AND PRACTITIONERS

I have a sense that law teaching is not only better, but also more "practice oriented" than it used to be. It is much more likely these days that new recruits joining the faculty will have had some substantial experience in the practice. Clinical legal education is now respectable. Practice skills courses in trial practice, negotiation, legal writing and drafting, abound. Specialty courses, sometimes interdisciplinary courses, are available in specific areas of the law. Still, the law faculty and the bar are separated by a rather high wall. Professors write for each other, and speak to each other—sometimes in a language of their own.\footnote{To this extent I agree with Judge Harry Edwards. See Harry T. Edwards, \textit{The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript}, 91 MICH. L. REV. 2191 (1993); Harry T. Edwards, \textit{The Growing Disjunction Between Legal Education and The Legal Profession}, 91 MICH. L. REV. 34 (1992).} Some academics eschew the practice and practitioners. If academic lawyers are going to isolate themselves from the practice, it is hard to see how they are going to have much impact on the ethics of the "denizens of the bar."\footnote{This is the sort of language you hear at meetings of the Association of American Law Schools.}

In the unlikely event that this piece is read by someone who is not a law professor, let me give you an idea of how a typical, collegial discussion might go in the faculty lounge.
A. The Camera Eye (4)

Professor # 1: (Tentatively) I think I understand your position. Are you trying to say (blah, blah and blah)?

Professor # 2: (Painfully) That's not exactly what I'm trying to say (blah, blah and blah).

Having failed to express himself in a way that could be understood, Professor # 2 begins to talk about what John Rawls might say about whatever it was that he had been trying, unsuccessfully, to get across. This does not help much either.

B. The Camera Eye (5)

Meanwhile, we are back at the faculty lounge. I am talking to one of my colleagues, who is also on the bar association's Ethics Committee, about a draft opinion. Another faculty member who has just come into the lounge inserts himself into the conversation to inform us that when he practiced (for a short time) some years ago (many years ago by my standards) in a New York firm, a senior partner told him that people on bar association ethics committees are usually the most unethical lawyers of all. The possibility that this might insult us probably does not occur to him.

Of course, practicing lawyers are just as contemptuous of academics as academics are of practitioners. There is plenty of fault to go around.

C. The Camera Eye (6)

It is Fall, and it is time for the Visiting Committee to, well, visit the law school again. For those of you who are not familiar with visiting committees, let me explain how this works. Deans appoint prominent law alumni to a visiting committee. They come to a school and listen to a series of presentations by "The Administrators"—the faculty is usually not involved in any meaningful way. The visitors are encouraged to hold forth on all of the things the school ought to be doing to get those goofy, impractical professors on the right track. Then the Dean takes the visitors over to the President of the University to tell him how he is not providing adequate support for the law school. This is the real purpose of a visiting committee. Then the visitors leave, go back to work, and presumably forget all of the things that they recommended. This is just as well, because we usually end up ignoring all of their advice anyway.
This year the hot topic for discussion is "Who should be the next University President." At the "Faculty Luncheon" I am sitting with the Associate Dean. Across the table are two former Bar Presidents. I have worked extensively with both of them during my tenure as ethics chairman. They are both excellent and highly successful lawyers. The subject of the new University President comes up. They ask us who we think might be a good pick. Since we have no meaningful input to the selection process, we haven't invested much time thinking about it, we don't have much to offer up. Then one of the lawyers gives us his pick. He does so after a long, dramatic moment of silence. "Jack Welch," he says slowly and reverently. I am bemused. He is serious. Why would Jack Welch want to "graze in the Bluegrass." Then I remember. Jack's wife, Jane, is one of our graduates. Great, I think, she actually knows us, which cannot be good for us, and she would probably start meddling in our affairs too. No way Jack! Of course, we did not get Jack Welch for President. Anyway, after floating the Jack Welch trial balloon, one turns to the other and says, "In any event, we don't want an academic." The possibility that this might insult us probably does not occur to either of them.

D. The Camera Eye (7)

I am chairing a meeting of the bar association's Unauthorized Practice Committee. The Committee has been presented with a draft opinion, which has been prepared by an ad hoc committee of real estate lawyers. They are concerned that title companies are doing closings. Our Supreme Court Rules contain an extremely broad definition of unauthorized practice.\(^{31}\) Under the rule, it is unauthorized practice for a corporation to provide legal services to a member of the public, even through a licensed lawyer-employee. The arguments become more and more convoluted. The lawyer presenters go so far as to argue that no real estate closing should be allowed unless the parties have lawyers. Surely they do not mean that the parties to a real estate transaction can be forced to hire lawyers if they do not want them? Yes, they are on a roll (indeed, they are carried away), and they go so far as to subscribe to that view. They are getting testy with my reluctance to rubber stamp their offerings. One of them mutters under his breath that my skepticism is "anti-lawyer." The possibility that this might insult me probably does occur to him.

\(^{31}\) KY. SUP. CT. R. 3.020.
IV. IN SEARCH OF A PROFESSIONAL CONSENSUS

The early lawyer codes were drawn up by high-minded and self-appointed gentlemen, based on earlier treatises written by teachers of the law. The first code that was actually adopted by a "bar association" was based on George Sharswood's work. This early code, referred to disparagingly in academic circles as the "Confederate Code" because it was first adopted in Alabama, was adopted by the Kentucky State Bar Association (a voluntary association) in 1903. The 1908 ABA Canons were more or less based on this earlier code. They were not incorporated into Kentucky law until 1946. Commentators observe that these Canons were more or less the assertions of "elite lawyers in the ABA." The ABA Canons were not replaced until 1969 by the ABA Model Code. This new Model Code was adopted in Kentucky in 1971, and had been adopted by all but three states by 1972.

This new Code was interesting and important for at least three reasons. First of all, the format was new, and might have been selected by a philosopher, because the document contains minimum requirements (disciplinary rules) as well as aspirational ethical considerations. While the document appears somewhat byzantine, and makes for difficult reading, it reinforces the notion that the disciplinary law (that which is enforced) is not all there is to ethics. Secondly, the document followed careful study by a committee, and it was presented to a "representative body" of the ABA (the House of Delegates) for adoption. That is, while it was still handed down from above, a lot of lawyers got to look at it and see what they liked and disliked. Thirdly, the Code sowed the seeds of its own destruction in that it focused a great deal on economic issues and what we might call "dignity" issues. Elaborate rules on advertising, business getting, and trial publicity were imposed by the "elite." It was not long before the ABA was drawing disciplinary lines in the sand. In my early days, these dignity rules were strictly enforced, if nothing else was. A showdown was inevitable. The courts were not sympathetic to the efforts of the state bar associations to exert what was perceived as economic control


33. Oops! What is that? Oh, dear! At the end of the Code there is a small line that signals "that's the end." Then, on the other side of the line, there is a racist joke. Indeed, the whole journal is peppered with racist jokes and advertisements for mens' clothing. See 3 Ky. L.J., No. 1, 18 (1914).

34. See Charles Wolfram, Modern Legal Ethics 54 (1986).
over their members, and struck much of this regulation. What the ABA did was fight the wrong battle. Elements of an increasingly diverse bar learned that the ethics rules, previously imposed from above, could be bucked.

In comparison with the 1908 Canons, the Model Code had a relatively short shelf life. The ABA appointed a study commission to come up with a new code. However, by this time the diverse elements of the bar had become more vocal, and demanded participation. The work product of the committee (the Kutak Commission) was subjected to public and professional scrutiny and criticism as a work in progress, and no amount of scholarly research and persuasion could prevent the successive drafts of the new Rules from being watered down.

Was there ever a professional consensus of what the ethics of the profession should be? If one looks at the language of the lawyer Codes from the late 1800s up to the present time, one might think so. I, for one, am struck by the similarities more than I am struck by their differences. There is a comforting sense of continuity. Indeed, even with its Restatement format, the Model Rules emerged as something not all that radically different from what went before. Indeed, a new law graduate weaned on the Model Rules would find George Warvelle's 1902 text, *Essays In Legal Ethics*, easy reading. Its content would be familiar territory. But how much professional consensus was there really? How much do we really agree on today? My adventures in legal ethics have taught me that there is less consensus than one might hope for. I fear that many of the rules, and even some "core values" of the profession, are up for grabs.

35. See Rotunda, *supra* note 6, at 667-68 (stating that when "[t]he ABA successfully required law schools to teach legal ethics . . . the lawyers . . . turned to the legal rules, [and] discovered that they did not often like what they saw. What followed from that revelation has been a series of law suits successfully challenging ethics rules and invalidating them on constitutional or statutory grounds."); KULTGEN, *supra* note 9, at 215 ("The disciplinary utility of codes is limited because enforcement mechanisms are weak. . . . [T]he efforts of courts to limit the control of associations over the economic behavior of their members deter them from strengthening their ethical influence.").


37. Perhaps the most vociferous professional interest group opposing the Model Rules was the Association of Trial Lawyers of America, which went so far as to publish a counterproposal styled the American Lawyer's Code of Conduct. The preamble to this interesting document bristles with the language of professional class struggle—the civil plaintiffs' bar and the criminal defense bar versus the corporate lawyers (at the service of the malefactors of great wealth) and government lawyers. However, there were other critics, including scholars and lawyers who felt that the Restatement format of the new Rules (which omitted the aspirational ethical considerations), while perhaps more reader friendly, would lead lawyers to think of the ethics rules as mere minimums—a compendium of sanctions.
I say this as one who thinks that professional codes are valuable, even if they are not the whole of legal ethics. As Professor Kultgen notes, "The sense of common values is enhanced when codes are taught in professional schools." Furthermore:

The most obvious function is guidance for those practitioners who have not thought through moral issues. Codification would be otiose if the obligation of professionals were always obvious and could be met without sacrifice, if professionals never faced difficult dilemmas or always did what was right as a matter of course or could handle every question on the basis of common morality. ... [An ideal code would relieve us] of the burden of ethical inquiry [because our] primary responsibility is to ... counsel ... not to puzzle over ethical questions.

No one says that codes can eliminate the need for personal judgment and no code can make decisions mechanical. "Every code must be treated as a hypothesis to be tested and adapted while following it." It is also true that the ABA Model Rules, like other professional codes, contain provisions that seem to conflict. Which provision takes priority? A single provision can be cited in isolation to rationalize dubious behavior. Still, that does not mean we should give up on codes of ethics.

38. I am told that in the old days at the University of Kentucky College of Law, the ancient, aristocratic, and hard-drinking professor who taught the legal ethics course would continuously opine that "a gentleman does not need a code of ethics." That may explain why several generations of graduates didn't learn much about the subject. They did learn how to drink, though. I am told that this popular professor would get drunk with his students (virtually all male in those days), and they would then take him home and put him in a tub of water, with a large floatation device around his neck to prevent his drowning. In the morning he would be ready to go again. He died in his 90s. One of his colleagues gave the eulogy, observing that "we told him that all that drinking would kill him, and it did."

When I make CLE presentations (I've got to stop doing these!), I still take pot shots from older (Hell, I'm old. They're ancient.) gentlemen of the bar who express disgust at my cynicism. Why don't I think that lawyers will just do the right thing? Maybe it's because this is a state in which lawyers have drafted mineral leases for unsophisticated land owners, giving the lawyers contingent fees. That is, the lawyer gets so much per ton for any minerals extracted in the future, to compensate him for this form lease. This sort of thing is defended as "customary."

39. KULTGEN, supra note 9, at 213.
40. Id. at 216.
41. Id.
42. Id. at 226.
WHAT I THINK THAT I HAVE LEARNED ABOUT LEGAL ETHICS

V. PROBLEM RULES

A. The Camera Eye (8)

I am at an Annual Meeting of the Kentucky Bar Association. I have made a short presentation on the progress of the ABA Model Rules. One of the speakers is the managing partner of the law firm where I spent a couple of years before donning the veil of poverty (before entering law teaching). He is truly an amazing and forceful character. He was even selected to be the President of the American College of Trial Lawyers. The firm, which is very much the "House that [he] built," represents scores of big corporate clients. We are both surprised to run into each other, and comment on what a "small world" it really is. During my presentation I had referred to several Rules as "lawyer favorable." He was amused by that. Looking back, I think that it would have been better if I would have described these Rules as "client favorable," and "lawyer unfavorable." I think of him, because I suspect that he may have been instrumental in shaping the Rules.43

Two of the Rules that I had alluded to as "lawyer favorable" were Rules 1.6 and 1.13. I used those adjectives because it seemed to me that in the area of corporate practice, at least, the practicing bar pushed for, and got, Rules that gave their clients the maximum in terms of protection of what we used to call "client confidences and secrets"—or in the new parlance, protection of "information relating to the representation." The Rules, as they emerged after a working over by the House of Delegates, would, at least insofar as the corporate practice is concerned, choose (dare I say it) client interests over the public interests. Now there is certainly nothing unusual about professional code writers choosing to look askance at "practices that might jeopardize the professional's position ... [like] whistle-blowing.... Codes choose self-interest over the interest of the public."44 But I find


44. KULTGEN, supra note 9, at 226.
the approach of the ABA Model Rules fascinating for a couple of reasons.\textsuperscript{45}

First of all, the House of Delegates was persuaded to adopt positions of Candor to the Tribunal, that is, the requirement that criminal defense lawyers disclose client perjury to the court, that were hotly opposed by the criminal defense bar. Then, at the urging of the private corporate bar, the House hijacked the concept of zealous advocacy, and incorporated it into the Rules in the form of the zealous corporate lawyer.\textsuperscript{46} While a criminal defense lawyer must disclose perjury, the corporate lawyer cannot make disclosures to correct or prevent corporate fraud or crime. This may or may not be another illustration of professional class struggle,\textsuperscript{47} but it is another illustration of "who makes the rules."

What is even more intriguing is that in rewriting the proposals to "protect their client," and arguably serve their own interests, the corporate lawyers may have actually accomplished just the opposite. Rule 1.13, as it was adopted, does a good job of telling us who corporate counsel does not represent (not the CEO or other officer or constituent), but it does not do a very good job of telling us what interests corporate counsel really is supposed to serve. Certainly, the public interest is not to be served in any immediate sense—whistle blowing is verboten. Counsel may shout fire in a crowded board room, but otherwise mum's the word. Professor Gillers points out that by requiring the lawyer to go no further than the Board, the Rule will, in some

\begin{itemize}
\item \textsuperscript{45} I admit that as a state Model Rules Chairman, I made no proposals for modifying Rule 1.13. I am not a corporate lawyer, and I did not really have a handle on the implications of the Rule. The corporate counsel I appointed to my committee apparently felt that the Rule provided the right answers. Indeed, there was very little discussion of Rule 1.13 in the committee, and no comment on it at the public hearing on the Rules.
\item \textsuperscript{46} See Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 606 (1985).
\item \textsuperscript{47} Prior to a recent reworking of Rule 1.5 by the Ethics 2000 Commission, plaintiffs' lawyers could be disciplined if their contingent fee contracts were not in writing, but corporate lawyers did not have to have written fee agreements. Remember advertising and trial publicity. Historically, advertising has been the life blood of the plaintiffs' personal injury bar; trial publicity has been the lifeblood of the criminal defense bar. The corporate bar has had the country clubs.
\end{itemize}
cases at least, tell the lawyer that he or she is "not authorize[d] [to make a] disclosure of confidential information where the client [the entity? the shareholders?] is the victim of [a constituent's— the CEO's or the CFO's] wrongdoing, even where the [constituent] is the client's fiduciary." In terms of the triangular relationship among counsel, the client, and the client's agents [the Board], the first must always accept the decision of the third." In other words, if the interests of the shareholders are paramount, and are to be served by their fiduciary constituent—this is what corporation law says, or at least what corporate lawyers say it says—then there is something wrong with Rule 1.13. As Professor Gillers says:

The client's interests are what we sacrifice. Instead we honor the interests of a presumptively corrupt highest authority to whom the lawyer owes no duty. And, transparently, we honor the interests of lawyers themselves. One need not be a professional cynic to discover in Rule 1.13 a resolution that will ingratiate lawyers to the very corporate officers who decide the terms and conditions of their employment or retainers, predictable costs to the client notwithstanding.61

After Enron everyone asked, "Where were the lawyers?" Recently two of my colleagues answered, "[r]ight where the Model Rules said they should be." Arguably, the Rule strips the corporate lawyer of power. On the other hand, that may be what corporate counsel want.

Proposals for amendment of Model Rules 1.6 and 1.13 were recently offered to the House of Delegates by the Ethics 2000 Commission. The proposals were, by and large, rejected. But in the meantime something is happening that should be a cause for alarm. Federal regulators, and Congress,53 are stepping in to do what the ABA refuses to do. If the bar loses its privilege of self-regulation, will it still

48. One suspects from Enron and WorldCom that Directors are often dominated by CEOs, who, because of the importance of share prices, are often dominated by CFOs.
49. Stephen Gillers, Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure, 1 GEO. J. LEGAL ETHICS 289, 302-03 (1987).
50. Id.
51. Id. at 304.
52. Rutheford Campbell, Jr. & Eugene Gaetke, Abstract: The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers (a paper delivered at a law school) (on file with author).
be worthy of calling itself a profession? Must we chase down this blind alley in pursuit of the accountants?

VI. A FUNNY THING HAPPENED ON THE WAY TO THE KENTUCKY RULES

Codes and Rules are, in fact, helpful. But the way they are made can be distressing and amusing. How were the Rules "made," or rather modified and adopted at the state level? Making Rules is like making sausage: it's not pretty.

A. The Camera Eye (9)

I am participating in Continuing Legal Education events across the state. My role is to familiarize local lawyers with the proposed ABA Model Rules. There is some hostility to the Rules, and there is something of a grass roots movement against their adoption.54 Certainly, the ATLA and its state affiliates have led a campaign against them. The complaint I get the most is that Rule 3.3(a)(2), which requires a lawyer to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel,"55 is new and alien, and inconsistent with an adversary system of law. A number of lawyers also become indignant when they see Rule 3.4(e) prohibiting assertions of personal opinion or belief. They actually think that I made this up. When I point out the fact that the "new" rules are identical to DR 7-106(B)(1) and DR 7-106(C)(4) of the Model Code, which have been the prevailing disciplinary standards in the state for many years, my audiences are incredulous.56

Remember lawyer Tom Hagen in the movie The Godfather? He had only one client—a "special client." There are lawyers like that today. They work exclusively for the Titanic Insurance Company.57 Ok, I'm kidding around a little, but my point is that professional independence, a "core value" of the legal profession, seems to be the last thing on lawyer's minds these days. From "managed law"58 to business...
ness-getting kickback schemes (with stockbrokers and financial analysts, referral services, fee splitting with paralegals), to partnerships with non-lawyers (including joint ventures with expert witnesses), this core value, and Rule 5.4, are under attack.

B. The Camera Eye (10)

I am appointed the Chairman of our state's Model Rules Study Committee. The Committee is made up of well known and active practitioners, two law professors, and even a federal judge. The areas of specialization represented include family law, personal injury, estate planning, corporate, insurance defense, and criminal defense. None of these lawyers are particularly hostile to the Model Rules, although one corporate counsel opines that he likes the ATLA American Lawyers' Code the best. Things proceed pretty smoothly during our meetings. Occasionally there are some odd proposals, and on several occasions I am in the minority. One big surprise comes as we are reviewing Model Rule 5.4. One of the more sophisticated of the members gets pretty excited about Rule 5.4(d)(2), which provides that "[a] lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: ... (2) a nonlawyer is a corporate director or officer thereof . . . ." He wants this deleted, because "[w]e ought to be able to do what everyone else can do." The others agree, and as I recall the vote was overwhelming. We ended up with a very eccentric Rule if you ask me. Why would

---

59. Collection lawyers have proposed taking all of a creditor's collection work for a flat fee, even agreeing to pay all of the expenses of litigation without reimbursement. Along the same lines, plaintiffs' personal injury lawyers have argued that the rules should be changed to permit them to purchase work by agreeing to pay litigation expenses without reimbursement, and even lending clients money for living expenses.


61. One of my favorite news stories was based on an interview with the wife of a popular politician. She worked as a paralegal for a law firm. She went on and on about how she enjoyed working with lawyer Smith (we will call him), and she particularly appreciated his generous fee-splitting arrangement for cases that she brought into the firm.


63. After doing the leg work to get the ABA Rules adopted in Kentucky, I assumed that it would be easy to get permission from the ABA to reprint the Rules at the end of my book TRIAL ETHICS, which was about to be published. After requesting permission, I received a letter from the ABA President, who was from my own state, who pointed out that the Rules are copyrighted, and that I would have to pay royalties. He suggested that I did not appreciate all of the expense and hard work that went into the making and adoption of the Rules—something had to be recouped. I guess I should have known that the ABA needed money.

anyone want a non-lawyer director or officer? What about professional independence? I am still puzzled. 65

C. The Camera Eye (11)

I am at the public hearing that has been scheduled so that members of the bar and the public can comment on the Proposed Kentucky Model Rules. I am nervous, because a year earlier, at an annual meeting of the bar, I had reported on the Committee's plan to consider the Model Rules, and I had provided a brief overview of the Rules. During a break, a member of the supreme court confronted me and accused me of committing fraud by recommending the Rules. He was especially hot over Rules 3.1 and 4.2. 66 I barked right back at him. He is used to dishing it out, and not to taking it. The President (or was he President-elect, who can keep track?) of the Bar Association was standing there taking it in. He was amused, but he said nothing. He represents clients before the court.

I hope that things will go smoother this time. I sit at a long, raised table peopled with selected supreme justices, Bar leaders and members of the Committee. At the other end of the cavernous room is an equally long table sparsely populated by members of the press, most of whom are dozing. There is a pretty good crowd, but they are not particularly engaged. I recall that when the ABA Rules were being considered in San Francisco, the proceedings were reportedly boisterous, and the press had a field day exploiting the fact that most of the debate, and the rancor, was about Rule 1.5 and lawyers' fees. 67 In contrast, this seems a rather staid affair.

Things go well until we come to Rule 3.3. One of the members of my committee, who voiced no opposition to the rule in committee, rises to condemn Rule 3.3(3) as a new and alien rule that runs con-


66. The original draft of Rule 3.1 would have required a lawyer to have a "reasonable basis" for filing a lawsuit. By this time, the Rule had been watered down to require only a non-frivolous basis. So what was his beef? Rule 4.2 was another matter. He wanted to maintain the earlier Kentucky view, that only speaking or managing agents are off limits. (He still hadn't gotten used to the new Kentucky Rules of Evidence, which adopted a broad definition of vicarious admissions.) His position on Rule 4.2 was, of course, perfectly defensible. In any event, I suspect that he had been influenced by the ATLA position. Every year he accepted the "Outstanding Judge" award from the state branch of the ATLA. Cf. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1516 (1986) (stating that such associations, which are associated with a particular "side of the v," should not offer such awards, and judges should not accept them).

trary to his assumptions about an adversary system of justice. Heads nod in agreement, including the head of at least one supreme court justice. I had expected a challenge to Rule 3.3(4), having to do with a duty to take reasonable remedial measures when the client commits perjury. But nothing was said about that. Are we going to rewrite the Rules in a public hearing? By the time we get to Rule 8.3, things are getting a bit worrying. A number of folks are really troubled by what they call this “snitch rule,” which requires the reporting of misconduct. I point out that the proposed rule would actually require less reporting than the current rule. This doesn’t seem to register with the audience.68

The recommendations of the Model Rules Study Committee are submitted to the court. The Committee members are not invited to meet with the court. The court has no questions for the Committee. Time passes. More time passes. Finally the new Kentucky Rules of Professional Conduct are adopted by the court, and emerge as Supreme Court Rule 3.130 (1990). But some very strange things have taken place behind closed doors. Rule 3.3(a)(3) has been deleted! It strikes me as particularly odd that the judges of the highest appellate court of the state would decide that a lawyer should have no obligation to disclose to them legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the lawyer’s client and not disclosed by opposing counsel. Has any other state made such a modification? But wait, there’s more. The duty to report

---

68. See Rotunda, supra note 6, at 663-65, for one author’s anecdotal evidence of lawyer ignorance of existing minimum standards set by their ethics codes. “[A] lawyer was asked, during her deposition, as to whether she had secured her client’s waiver of a conflict. Her response: ‘I don’t even know what a conflict waiver is, if you want to know the truth.’” Id. at 663-64. See Model Code of Prof’l Responsibility DR 5-105; Model Rule of Prof’l Conduct R. 1.7. “[O]ne of my former academic colleagues . . . was asked whether she bought malpractice insurance. . . . She responded that she did not have to buy insurance because her contract with her clients required them to waive any malpractice claims against her.” Rotunda, supra note 6, at 664. See Model Code of Prof’l Responsibility DR 6-102; Model Rule of Prof’l Conduct R. 1.8(h). For a couple of more examples from my neck of the woods, I offer the following. Every year I am told by one of my job hunting students that potential employers tell them that they will have to sign noncompete covenants when they join the firm. See Model Code of Prof’l Responsibility DR 2-108; Model Rule of Prof’l Conduct R. 5.8(a). One of my pet peeves is the way that local lawyers continue to use partnership names like “Jones & Smith,” while at the same time maintaining that they are only sharing office space. See Model Code of Prof’l Responsibility DR 2-102(C); Model Rule of Prof’l Conduct R. 7.5(d). Another partnership name issue comes up when a lawyer wants to add to his firm name the name of a lawyer with whom he has never practiced law—usually a “dead guy.” I have had several requests for advice about adding a famous “dead guy” to the letterhead, out of a desire to “honor him.” Sure—like Adams, Lincoln, Jefferson, Pound, Hand, Cardozo, and Underwood. The list goes on.
lawyer misconduct has been deleted! So much for the responsibility of the members of a self-regulating profession. Has any other state made such a modification? There are other peculiar changes. Rule 3.8 (Special Responsibilities of a Prosecutor) has been changed to delete Rule 3.8(c)! That was never even mentioned at the public hearing. Are there some former prosecutors on the court?

I am discouraged. I am even more discouraged when, later, I hear the argument advanced at a Board of Governors meeting that lawyer's can (and should) still be disciplined for nondisclosure of controlling authority under Rules 3.3(a)(1) ("a lawyer shall not make a false statement of material ... law to a tribunal") and 4.1(a) ("a lawyer shall not knowingly make a false statement of ... law to a third person."). If we are going to demand disclosure, why don't we do it straight up? Aren't we setting traps for lawyers? Is this a game? What about the lawyer's right to notice of what the rules of the game are?  

VII. WHAT WILL THE FUTURE BRING?

I have noted throughout this short piece that practicing lawyers may not be all that familiar with the contents of the Model Code and Model Rules, that Code provisions and Rules can be narrowly interpreted to serve lawyer self-interest, and that there may be no real consensus as to the "core values" of the profession. The drift toward practice in limited liability companies, and the drift toward multidisciplinary practice, illustrate this.

A. The Camera Eye (12)

I am at a meeting of the Board of Governors. A former member of the Board, representing the proponents of a new Supreme Court Rule permitting lawyers to practice in the form of a limited liability company, is making his case. I have no personal, financial interest in the outcome of the decision of the Board, but I am skeptical. He asserts, among other things, that the ethical rules and ethical considerations never required a lawyer to be responsible for the acts of the lawyer's partner. That's just "tort law." The literal language of Rule 1.8(h) and DR 6-102 only prohibit limiting the liability of "the lawyer." I cannot resist pointing out the traditional justification for the rules permitting lawyers in a firm to split fees, while prohibiting lawyers who are not in the same firm from splitting fees except in proportion to the services they actually perform, was that the partners of a firm are vicariously liable for each other's malpractice. He does not seem to appreciate the point, and announces, in effect, "[t]hat has nothing to do with

69. See In re A, 554 P.2d 479 (Or. 1976).
this.” That’s all it takes. So much for the Professor. A new Rule passes. Under the new Supreme Court Rule, lawyers are no longer responsible for their partner’s malpractice. A law firm need no longer stand behind its work. It only need put up a certain amount of insurance. I am bemused. Partners in a firm may split fees while avoiding liability. Lawyers who are not in a firm presumably may not. Another example of different rules for different folks—a class system? It all depends on who makes the Rules.

Did the proponents of the new rule accurately state the history of the professional rules? I don’t think so. The tradition in England had long been that “[i]n professional practice, as in law, the responsibility of the consultant covers not merely his own acts and omissions but also those of his partners and the staff of the firm.” Lawyers in America either practiced solo or in traditional partnerships. Under partnership law the rule was vicarious liability, and it probably never occurred to lawyers that they could limit their liability, because they were not permitted to practice in a corporate form. Indeed, when the states began to allow lawyers to practice in professional service corporations (PSCs) for tax purposes, state courts refused to permit limited liability. Perhaps the realities of modern transactions, the complexity of the law, and the magnitude of potential liability call for a policy change. But policy was not discussed. But let’s turn for a moment to the local history. How did we get the new rule?

We got the new rule because the big accounting firms rammed through limited liability in the state legislature. The law firms—dare I say it, the big firms—saw the financial advantages that the accountants had, and wanted the same break. They hit the legislature and got the statutes amended to allow law firms to practice as limited liability companies. Then they simply changed their paperwork, and announced that they were LLPs and LLCs. Other firms quickly followed

---


71. F.A.R. BENNION, PROFESSIONAL ETHICS: THE CONSULTANT PROFESSIONS AND THEIR CODES 100-01 (London 1969). See also Walter W. Steele, Jr., How Lawyers Protect the Family Jewels . . . The Invention Of Limited Liability Partnership, 39 S. TEX. L. REV. 621, 623-24 (1998) (suggesting that the traditional reason lawyers practiced in general partnerships was to signal to their clients that the lawyers in the firm were fiduciaries who were offering up their fortunes and liability insurance policies to back up the quality of the firm’s work, and that the development of the PC or professional corporation was motivated by tax considerations rather than liability considerations).

suit. Later, a handful of fastidious lawyers began to ask the question of whether they could do that. The firms apparently got a little nervous, and asked the Ethics Committee for a favorable opinion. My Committee balked. This seemed to be not so much a question calling for interpretation, but rather a question of policy, calling for legislation. We recommended that the proponents of limited liability seek a Rule change. They tried and failed, and then pressed us again. We still refused, because the court had specifically rejected their proposal in an order that said that the court did not think that firms could "so limit their liability." We could not overrule the supreme court. This did not add to my popularity. But to make a long story short, the proponents finally got what they wanted (which they almost always do). Their efforts may have been boosted by an opinion of the ABA Ethics Committee. Kentucky Supreme Court Rule 3.024 now allows law firm partners to limit their liability for the malpractice of other lawyers in the firm. As part of the deal the firms must carry certain amounts of insurance. Perhaps the insurance limits are adequate. The final sentence of the statute also says that each co-owner of a limited liability law firm cannot relieve himself or herself of liability for personal acts of malpractice or for the malpractice of any person under his or her direct supervision and control.

The most interesting question of late is whether lawyers are going to be able to engage in multidisciplinary practice. Having seen what happened to Arthur Anderson and Arthur Anderson's clients, it is hard to see how the proponents of multidisciplinary practice can be so enthusiastic about it. Won't lawyers lose any semblance of professional independence? What about the conflicts? If a law firm is making big bucks from the sale of related services, how can they deliver independent and responsible legal advice? What about the potential liabilities? While interest in multidisciplinary practice is not confined to the big firms, they do seem to be the most visible advocates of MDP, at least in my jurisdiction. The usual arguments are "Why can't we do what other businesses and professions are doing?"; "Other states are allowing this and we won't be able to compete with out of state firms"; and "If we don't accept MDP we will end up working for accounting firms." Is this the wave of the future for the legal profession or is it in-

73. Professor Kultgen observes that "[t]he professions are staffed by persons of ordinary conscientiousness and limited good will; that is, people who do what they think is right if the cost is not great and they are convinced that others will do likewise." KULTGEN, supra note 9, at 217. My favorite version of this theme is that "nothing fosters belief [in a proposition] like self-interest." Richard H. Underwood, Evaluating Scientific and Forensic Evidence, 24 AM. J. TRIAL ADVOC. 149 n.32 (2000).


stead a big step on down the road to "deprofessionalization?" It is worrying.

VIII. CONCLUSION

A. The Camera Eye (13)

It is 1984, or so. I am participating as an instructor/team leader in a summer session, NITA style, trial advocacy course for practicing lawyers. We are lucky to have, as volunteer critiquers, a number of excellent, seasoned trial lawyers. One of the problems that the students are presented with is a malpractice case, which has been brought against a young general practitioner who agreed to look at a worker's compensation case. It does not occur to him that the client also has a product liability claim. The statute of limitations runs on that claim. The lawyer is sued for neglect. During the exercises which follow, possible theories of liability are presented through an expert witness. The possibility of introducing the disciplinary rules as evidence of a standard of care is explored. The older lawyers/instructors are incredulous. "The Code is not law... there was no contract... he did not agree to do the product liability claim." I have to show them the case of Togstad v. Vesely, Otto, Miller and Keefe. They seem genuinely shocked that a lawyer would face liability in such a situation. I am fairly confident that they would not be shocked if a similar negligence claim were brought against a physician, or even a railroad. "What comes around goes around."

While I am dealing out clichés, I might as well end with the suggestion that if lawyers keep on trying to be like accountants, they may end up, sadly, "getting exactly what they are asking for."

76. Cf. Daugherty v. Runner, 581 S.W.2d 12 (Ky. Ct. App. 1978) (stating that a lawyer who took a wrongful death accident case for an estate, but overlooked potential medical malpractice claim, could not use the defense that he did not contract to pursue a malpractice claim).


78. 291 N.W.2d 686 (Minn. 1980). See also Daugherty v. Runner, 581 S.W.2d 12 (Ky. Ct. App. 1978). The Code was incorporated into the law through a Kentucky Supreme Court Rule.