The Commission on Evaluation of Professional Standards was appointed in the summer of 1977 by former ABA President William B. Spann, Jr. Chaired by Robert J. Kutak until his death in early 1983, the Commission was charged with evaluating whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law. For the most part, the Commission looked to the former ABA Model Code of Professional Responsibility, which served as a model for the majority of state ethics codes. The Commission also referred to opinions of the ABA Standing Committee on Ethics and Professional Responsibility, as well as to decisions of the United States Supreme Court and of state supreme courts. After thoughtful study, the Commission concluded that piecemeal amendment of the Model Code would not sufficiently clarify the profession’s ethical responsibilities in light of changed conditions. The Commission therefore commenced a drafting process that produced numerous drafts, elicited voluminous comment, and launched an unprecedented debate on the ethics of the legal profession.

On January 30, 1980, the Commission presented its initial suggestions to the bar in the form of a Discussion Draft of the proposed Model Rules of Professional Conduct. The Discussion Draft was subject to the widest possible dissemination and interested parties were urged to offer comments and suggestions. Public hearings were held around the country to provide forums for expression of views on the draft.

In the year following the last of these public hearings, the Commission conducted a painstaking analysis of the submitted comments and attempted to integrate into the draft those which seemed consistent with its underlying philosophy. The product of this analysis and integration was presented on May 31, 1981, as the proposed Final Draft of the Model Rules of Professional Conduct. This proposed Final Draft was submitted in two formats. The first format, consisting of blackletter Rules and accompanying Comments in the so-called restatement format, was submitted with the Commission’s recommendation that it be adopted. The alternative format was patterned after the Model Code and consisted of Canons, Ethical Considerations, and Disciplinary Rules. In February 1982, the House of Delegates by substantial majority approved the restatement format of the Model Rules.
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The proposed Final Draft was submitted to the House of Delegates for debate and approval at the 1982 Annual Meeting of the Association in San Francisco. Many organizations and interested parties offered their comments in the form of proposed amendments to the Final Draft. In the time allotted on its agenda, however, the House debated only proposed amendments to Rule 1.5. Consideration of the remainder of the document was deferred until the 1983 Midyear Meeting in New Orleans. The proposed Final Draft, as amended by the House in San Francisco, was reprinted in the November 1982 issue of the ABA Journal.

At the 1983 Midyear Meeting the House resumed consideration of the Final Draft. After two days of often vigorous debate, the House completed its review of the proposed amendments to the blackletter Rules. Many amendments, particularly in the area of confidentiality, were adopted. Debate on a Preamble, Scope, Terminology, and Comments, rewritten to reflect the New Orleans amendments, was deferred until the 1983 Annual Meeting in Atlanta, Georgia.

On March 11, 1983, the text of the blackletter Rules as approved by the House in February, together with the proposed Preamble, Scope, Terminology, and Comments, was circulated to members of the House, Section and Committee chairs, and all other interested parties. The text of the Rules reflected the joint efforts of the Commission and the House Drafting Committee to incorporate the changes approved by the House and to ensure stylistic continuity and uniformity. Recipients of the draft were again urged to submit comments in the form of proposed amendments. The House Committees on Drafting and Rules and Calendar met on May 23, 1983, to consider all of the proposed amendments that had been submitted in response to this draft. In addition, discussions were held among concerned parties in an effort to reach accommodation of the various positions. On July 11, 1983, the final version of the Model Rules was again circulated.

The House of Delegates commenced debate on the proposed Preamble, Scope, Terminology, and Comments on August 2, 1983. After four hours of debate, the House completed its consideration of all the proposed amendments and, upon motion of the Commission, the House voted to adopt the Model Rules of Professional Conduct, together with the ancillary material as amended. The task of the Commission had ended and it was discharged with thanks.

Throughout the drafting process, active participants included not only the members of the Commission but also the Sections and Commit-
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teers of the American Bar Association and national, state, and local bar organizations. The work of the Commission was subject to virtually continuous scrutiny by academicians, practicing lawyers, members of the press, and the judiciary. Consequently, every provision of the Model Rules reflects the thoughtful consideration and hard work of many dedicated professionals. Because of their input, the Model Rules are truly national in derivation. The Association can take immense pride in its continued demonstration of leadership in the area of professional responsibility.

The Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct. Although the Commission endeavored to harmonize and accommodate the views of all the participants, no set of national standards that speaks to such a diverse constituency as the legal profession can resolve each issue to the complete satisfaction of every affected party. Undoubtedly there will be those who take issue with one or another of the Rules’ provisions. Indeed, such dissent from individual provisions is expected. And the Model Rules, like all model legislation, will be subject to modification at the level of local implementation. Viewed as a whole, however, the Model Rules represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other law, such as constitutional, corporate, tort, fiduciary, and agency law.

I should not end this report without speaking of the Commission’s debt to many people who have aided us in our deliberations, and have devoted time, energy, and goodwill to the advancement of our work over the last six years. It would probably be impossible to name each of the particular persons whose help was significant to us, and it surely would be unfortunate if the name of anyone were omitted from the list. We are, and shall remain, deeply grateful to the literally hundreds of people who aided us with welcome and productive suggestions. We think the bar should be grateful to each of them, and to our deceased members, Alan Barth of the District of Columbia, who we hardly had time to know, Bill Spann, who became a member after the conclusion of his presidential term, and our original chair, Bob Kutak.

The long work of the Commission and its resulting new codification of the ethical rules of practice demonstrate, it is submitted, the commitment of the American lawyer to his or her profession and to achievement of the highest standards.

Robert W. Meserve
September 1983

HON. E. NORMAN VEASEY, Chair
Wilmington, Delaware

MARGARET C. LOVE
Washington, D.C.

LAWRENCE J. FOX
Philadelphia, Pennsylvania

SUSAN R. MARTYN
Toledo, Ohio

ALBERT C. HARVEY
Memphis, Tennessee

DAVID T. MCLAUGHLIN
New London, New Hampshire

GEOFFREY C. HAZARD, JR.
Swarthmore, Pennsylvania

RICHARD E. MULROY
Ridgewood, New Jersey

HON. PATRICK E. HIGGINBOTHAM
Dallas, Texas

LUCIAN T. PERA
Memphis, Tennessee

W. LOEBER LANDAU
New York, New York

HON. HENRY RAMSEY, JR. (Ret.)
Berkeley, California

HON. LAURIE D. ZELON
Los Angeles, California

LIAISONS

JAMES B. LEE
Salt Lake City, Utah
Board of Governors

SETH ROSNER
Greenfield Center, New York
Board of Governors

REPORTERS

NANCY J. MOORE
Boston, Massachusetts
Chief Reporter

Washington, D.C.

CARL A. PIERCE
Knoxville, Tennessee

CENTER FOR PROFESSIONAL RESPONSIBILITY

JEANNE P. GRAY
Chicago, Illinois
Director

CHARLOTTE K. STRETCH, Counsel
Chicago, Illinois

SUSAN M. CAMPBELL, Paralegal
Chicago, Illinois

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Commission on Evaluation of the
Rules of Professional Conduct ("Ethics 2000")

Chair’s Introduction

In mid-1997, ABA President Jerome J. Shestack, his immediate predecessor, N. Lee Cooper, and his successor, Philip S. Anderson had the vision to establish the “Ethics 2000” Commission. These three leaders persuaded the ABA Board of Governors that the Model Rules adopted by the ABA House of Delegates in 1983 needed comprehensive review and some revision, and this project was launched. Though some might have thought it premature to reopen the Model Rules to such a rigorous general reassessment after only fourteen years, the evaluation process has proven that the ABA leadership was correct.

One of the primary reasons behind the decision to revisit the Model Rules was the growing disparity in state ethics codes. While a large majority of states and the District of Columbia had adopted some version of the Model Rules (then thirty-nine, now forty-two), there were many significant differences among the state versions that resulted in an undesirable lack of uniformity—a problem that had been exacerbated by the approximately thirty amendments to the Model Rules between 1983 and 1997. A few states had elected to retain some version of the 1969 Model Code of Professional Responsibility, and California remained committed to an entirely separate system of lawyer regulation.

But it was not only the patchwork pattern of state regulation that motivated the ABA leaders of 1997 to take this action. There were also new issues and questions raised by the influence that technological developments were having on the delivery of legal services. The explosive dynamics of modern law practice and the anticipated developments in the future of the legal profession lent a sense of urgency as well as a substantive dimension to the project. These developments were underscored by the work then underway on the American Law Institute’s Restatement of the Law Governing Lawyers.

There was also a strong countervailing sense that there was much to be valued in the existing concepts and articulation of the Model Rules. The Commission concluded early on that these valuable aspects of the Rules should not be lost or put at risk in our revision effort. As a result, the Commission set about to be comprehensive, but at the same time conservative, and to recommend change only where necessary. In balancing
the need to preserve the good with the need for improvement, we were mindful of Thomas Jefferson’s words of nearly 185 years ago, in a letter concerning the Virginia Constitution, that “moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects.”

Thus, we retained the basic architecture of the Model Rules. We also retained the primary disciplinary function of the Rules, resisting the temptation to preach aspirationally about “best practices” or professionalism concepts. Valuable as the profession might find such guidance, it would not have—and should not be misperceived as having—a regulatory dimension. We were, however, always conscious of the educational role of the Model Rules. Finally, we tried to keep our changes to a minimum: when a particular provision was found not to be “broken” we did not try to “fix” it. Even so, as the reader will note, the Commission ended up making a large number of changes: some are relatively innocuous and nonsubstantive, in the nature of editorial or stylistic changes; others are substantive but not particularly controversial; and a few are both substantive and controversial.

The deliberations of the Commission did not take place in a vacuum and our determinations are not being pronounced ex cathedra. Rather, they are products of thorough research, scholarly analysis, and thoughtful consideration. Of equal importance, they have been influenced by the views of practitioners, scholars, other members of the legal profession, and the public. All these constituencies have had continual access to and considerable—and proper—influence upon the deliberations of the Commission throughout this process.

I must pause to underscore the openness of our process. We held over fifty days of meetings, all of which were open, and ten public hearings at regular intervals over a four-and-a-half-year period. There were a large number of interested observers at our meetings, many of whom were members of our Advisory Council of 250-plus persons, to offer comments and suggestions. Those observations were very helpful and influential in shaping the Report. Our public discussion drafts, minutes, and Report were available on our website for the world to see and comment upon. As a consequence, we received an enormous number of excellent comments and suggestions, many of which were adopted in the formulation of our Report.

Moreover, we encouraged state and local bar associations, ABA sections and divisions, other professional organizations, and the judiciary to
appoint specially designated committees to work with and counsel the Commission. This effort was successful, and the Commission benefitted significantly from the considered views of these groups.

In heeding the counsel of these advisors, we were constantly mindful of substantial and high-velocity changes in the legal profession, particularly over the past decade. These changes have been highlighted by increased public scrutiny of lawyers and an awareness of their influential role in the formation and implementation of public policy; persistent concerns about lawyer honesty, candor, and civility; external competitive and technological pressures on the legal profession; internal pressures on law firm organization and management raised by sheer size, as well as specialization and lawyer mobility; jurisdictional and governance issues, such as multidisciplinary and multijurisdictional practice; special concerns of lawyers in nontraditional practice settings, such as government lawyers and in-house counsel; and the need to enhance public trust and confidence in the legal profession.

At the end of the day, our goal was to develop Rules that are comprehensible to the public and provide clear guidance to the practitioner. Our desire was to preserve all that is valuable and enduring about the existing Model Rules, while at the same time adapting them to the realities of modern law practice and the limits of professional discipline. We believe our product is a balanced blend of traditional precepts and forward-looking provisions that are responsive to modern developments. Our process has been thorough, painstaking, open, scholarly, objective, and collegial.

It is impossible here to go into detail about the changes proposed by the Commission. The changes recommended by the Commission clarified and strengthened a lawyer’s duty to communicate with the client; clarified and strengthened a lawyer’s duty to clients in certain specific problem areas; responded to the changing organization and structure of modern law practice; responded to new issues and questions raised by the influence that technological developments are having on the delivery of legal services; clarified existing Rules to provide better guidance and explanation to lawyers; clarified and strengthened a lawyer’s obligations to the tribunal and to the justice system; responded to the need for changes in the delivery of legal services to low- and middle-income persons; and increased protection of third parties.

The ABA House of Delegates began consideration of the Commission’s Report at the August 2001 Annual Meeting in Chicago and completed its review at the February 2002 Midyear Meeting in Philadelphia.
At the August 2002 Annual Meeting in Washington, D.C., the ABA House of Delegates considered and adopted additional amendments to the Model Rules sponsored by the ABA Commission on Multijurisdictional Practice and the ABA Standing Committee on Ethics and Professional Responsibility. As state supreme courts consider implementation of these newly revised Rules, it is our fervent hope that the goal of uniformity will be the guiding beacon.

In closing, the Commission expresses its gratitude to the law firm of Drinker Biddle & Reath, whose generous contribution helped make possible the continued, invaluable support of the Commission’s Chief Reporter. I also want to express personally my gratitude to and admiration for my colleagues. The chemistry, goodwill, good humor, serious purpose, collegiality, and hard work of the Commission members, Reporters, and ABA staff have been extraordinary. The profession and the public have been enriched beyond measure by their efforts. It has been a pleasure and a privilege for me to work with all of them.

Hon. E. Norman Veasey
August 2002
PREAMBLE AND SCOPE

PREAMBLE:
A LAWYER’S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a law-
yer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approval of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.

[8] A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules,
however, many difficult issues of professional discretion can arise. Such
issues must be resolved through the exercise of sensitive professional
and moral judgment guided by the basic principles underlying the Rules.
These principles include the lawyer’s obligation zealously to protect and
pursue a client’s legitimate interests, within the bounds of the law, while
maintaining a professional, courteous and civil attitude toward all per-
sons involved in the legal system.

[10] The legal profession is largely self-governing. Although other
professions also have been granted powers of self-government, the legal
profession is unique in this respect because of the close relationship be-
tween the profession and the processes of government and law enforce-
ment. This connection is manifested in the fact that ultimate authority
over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their profes-
sonal calling, the occasion for government regulation is obviated. Self-
regulation also helps maintain the legal profession’s independence from
government domination. An independent legal profession is an impor-
tant force in preserving government under law, for abuse of legal autho-
ry is more readily challenged by a profession whose members are not
dependent on government for the right to practice.

[12] The legal profession’s relative autonomy carries with it special
responsibilities of self-government. The profession has a responsibility to
assure that its regulations are conceived in the public interest and not in
furtherance of parochial or self-interested concerns of the bar. Every law-
yer is responsible for observance of the Rules of Professional Conduct.
A lawyer should also aid in securing their observance by other lawyers.
Neglect of these responsibilities compromises the independence of the
profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The ful-
fillment of this role requires an understanding by lawyers of their rela-
tionship to our legal system. The Rules of Professional Conduct, when
properly applied, serve to define that relationship.

**Scope**

[14] The Rules of Professional Conduct are rules of reason. They
should be interpreted with reference to the purposes of legal representa-
tion and of the law itself. Some of the Rules are imperatives, cast in the
terms “shall” or “shall not.” These define proper conduct for purposes
of professional discipline. Others, generally cast in the term “may,” are
permissive and define areas under the Rules in which the lawyer has dis-
cretion to exercise professional judgment. No disciplinary action should
be taken when the lawyer chooses not to act or acts within the bounds of
such discretion. Other Rules define the nature of relationships between
the lawyer and others. The Rules are thus partly obligatory and disciplin-
ary and partly constitutive and descriptive in that they define a lawyer’s
professional role. Many of the Comments use the term “should.” Com-
ments do not add obligations to the Rules but provide guidance for prac-
ticing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer’s
role. That context includes court rules and statutes relating to matters of
licensure, laws defining specific obligations of lawyers and substantive
and procedural law in general. The Comments are sometimes used to
alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society,
depends primarily upon understanding and voluntary compliance, sec-
ondarily upon reinforcement by peer and public opinion and finally,
when necessary, upon enforcement through disciplinary proceedings.
The Rules do not, however, exhaust the moral and ethical considerations
that should inform a lawyer, for no worthwhile human activity can be
completely defined by legal rules. The Rules simply provide a framework
for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer’s authority
and responsibility, principles of substantive law external to these Rules
determine whether a client-lawyer relationship exists. Most of the du-
ties flowing from the client-lawyer relationship attach only after the cli-
ent has requested the lawyer to render legal services and the lawyer has
agreed to do so. But there are some duties, such as that of confidentiality
under Rule 1.6, that attach when the lawyer agrees to consider whether a
client-lawyer relationship shall be established. See Rule 1.18. Whether a
client-lawyer relationship exists for any specific purpose can depend on
the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statu-
tory and common law, the responsibilities of government lawyers may
include authority concerning legal matters that ordinarily reposes in the
client in private client-lawyer relationships. For example, a lawyer for a
government agency may have authority on behalf of the government to
decide upon settlement or whether to appeal from an adverse judgment.
Such authority in various respects is generally vested in the attorney
PREAMBLE AND SCOPE

general and the state’s attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.