BE IT RESOLVED, that the House of Delegates of the American Bar Association approves the “restatement” format of the Model Rules of Professional Conduct for the formulation of changes in the profession’s ethical standards.

REPORT

This Report of the Commission on Evaluation of Professional Standards is limited to the Commission’s recommendation that ethical standards governing the profession be promulgated in a “restatement” format consisting of black-letter Rules and explanatory Comments. This Report does not address the Commission’s recommendations with respect to substantive Rules. Those recommendations will be addressed in the Commission’s Report to the House of Delegates filed prior to the August 1982 Annual Meeting.

The restatement format of the Model Rules of Professional Conduct consists of 50 black-letter Rules, each accompanied by explanatory Comment. This format is a familiar and widely accepted means of presenting law. The Commission has two purposes in recommending the use of this format. One is to provide lawyers with rules in a convenient organization to which they can comfortably turn for answers to questions of professional responsibility. Anyone who has worked through a problem using the format of the existing Code of Professional Responsibility has discovered that frequently it may be necessary to search numerous Canons, Ethical Considerations and Disciplinary Rules to ascertain the proper course of conduct. While reviewing more than a single provision of a code is not an unusual task, the problem of doing so with the existing Code is substantially compounded by confusion about the substantive effects of the Code’s Canons and Ethical Considerations, which is discussed more fully below. For the individual lawyer with a busy practice such search can be burdensome and frustrating. The restatement format provides a more understandable and simplified organization for rules of ethical lawyering.

Our other major purpose in recommending the use of a restatement format is to provide reliable rules by eliminating confusion about which parts of the existing Code are enforceable. The Commission has concluded that such reliability cannot be achieved under the format of the existing Code.

The format of the existing Code consists of three parts: nine Canons, described as “general maxims,” 129 Ethical Considerations, described as “aspirations,” and 43 Disciplinary Rules, described as “minimum standards.” It is a unique format. The Wright Committee, which drafted the Code between 1964 and 1969, conceived of this format to emphasize the distinction between enforceable standards of conduct—the Disciplinary Rules—and the more generally phrased
exhortations. As explained in the Code Preamble, it was the intent of the Wright Committee that the Code’s Canons and Ethical Considerations be and remain unenforceable.

The intent, however, has not been fulfilled. It has been frustrated by courts and disciplinary agencies increasingly treating the Code’s three parts as one set of integrated, enforceable rules. The Code’s Canons and Ethical Considerations have been employed substantively in disciplinary proceedings and as rules of trial procedure.

Early in its work, the Commission on Evaluation of Professional Standards reviewed the problem of misuse of the Code’s Canons and Ethical Considerations. After studying the cases and the Code carefully, we concluded that substantive use of the Canons and Ethical Considerations is inevitable and can be avoided only by a revision of the existing Code format. Substantive use of the Canons and Ethical Considerations occurs in part because they intertwine substantive legal propositions with nonsubstantive exhortation. The Code’s Canons, for example, state that “a lawyer should preserve confidences” (Canon 4), that “a lawyer should exercise independent professional judgment” (Canon 5), that “a lawyer should represent a client competently” (Canon 6), and that “a lawyer should represent a client … within the bounds of law” (Canon 7). Each of these is a statement of general legal principle articulated by courts in cases dating back to before the turn of the century.

For practical purposes, there is no distinction between the substantive effect of these legal principles and the substantive effect of more specific Disciplinary Rules. Thus, in practical effect, the Canons offer very general standards supplementary to the more specifically phrased standards in the Disciplinary Rules. However, the standards in the Canons are fundamentally different from those in the Disciplinary Rules. The breadth of the language of Canons goes far beyond the scope of specific Disciplinary Rules with the result that a Canon’s standard may infinitely extend application of Disciplinary Rules or impose an independent standard apart from any Disciplinary Rule. The value of standards of ethical conduct to the individual lawyer who seeks to practice in professionally responsible ways lies in their definiteness. The very presence of Canons prevents such definiteness because their language is so sweeping as to be without fair limitation or fair warning. How such standards should be applied will inevitably be resolved only by hindsight.

Inspection of the Code’s Ethical Considerations reveals problems of a similar nature. Many Ethical Considerations restate existing legal rules. For example, EC 4-6 states the rule that “the obligation … to preserve confidences … continues … after termination of employment.” Some Ethical Considerations appear to restate common law agency duties that lawyers share with other agents, but in language that would suggest that lawyer obligations are more expansive. Such expansion necessarily has implications in both disciplinary proceedings and malpractice litigation. One example is the lawyer’s duty of communication. EC 7-8 states that a “lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of the relevant considerations.” EC 9-2 states that “a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client.” The duty of a lawyer to communicate has been recognized in both disciplinary proceedings and malpractice litigation. Other Ethical Considerations explain or illustrate Disciplinary Rules.
These inevitably will be used substantively, not aspirationally, when Disciplinary Rules are applied.

A second reason that substantive use of Canons and Ethical Considerations is unavoidable is that the very presence of alternative standards provides opportunity for ad hoc conversion of those standards into enforceable rules, frequently after the fact. Illustrative of that process is the enforcement of the Code’s Canon 9, which states that “a lawyer should avoid even the appearance of impropriety.” That Canon has been applied to analyze the obligations of corporate counsel, the duties of the former government lawyer, representation adverse to a former client, representation in class action litigation, representation of opposing parties by related lawyers, representation of multiple witnesses in grand jury proceedings and imputed disqualification of lawyers associated in a law firm. It is submitted that so broad a statement does not provide reliable guidance to a lawyer seeking to determine what the ethical standards of the profession require in specific situations.

Conceivably, the Canons and Ethical Considerations could be edited to further separate and distinguish substantive legal proposition from exhortation. An alternative draft published by the Commission consisting of Canons, Ethical Considerations, Disciplinary Rules and Comments illustrates that process. Such editing substantially reduces the number of Ethical Considerations, but results in a cumbersome organization that lawyers will not find convenient or coherent. Moreover, regardless of how carefully and conscientiously done, no degree of editing which truly preserves the “aspirational” aspect of the Code format can assure that Canons and Ethical Considerations in fact will be without substantive effect. Even the most general exhortation may later be employed as an independent rule or as gloss on a Disciplinary Rule. For example, the statement in EC 1-5 that a lawyer “should be temperate and dignified,” has been employed substantively. Even changing the wording of the often misused Canon 9 will not change the fact that the remaining Canons are legal principles that can have substantive effect. Perhaps the most convincing evidence on this point is provided by the report published by the National Organization of Bar Counsel. That report urges retention of the existing Code format. Explaining the role of the Ethical Considerations, the NOBC report states:

The NOBC recommends retention of Ethical Considerations … as a means of assisting in interpretation of the Disciplinary Rules … Lawyers should not examine the mandatory rules for loopholes, but, rather, they should conduct their business well within the tolerances of ‘aspirational’ goals. (Emphasis added).

This statement by the NOBC goes directly to the heart of the matter. Whether called maxims or aspirations, it is inevitable that second and third tier standards will be used interpretatively to expand enforceable rules by hindsight. Lawyers who object to expansions undertaken without prior notice will be viewed by enforcement officials as looking for “loopholes.” Lawyers, who would never permit clients to be subject to such risks, should not accept such latent ambiguity in the law governing their right to practice law.

The existing Code format has thus become unreliable to the individual lawyer who consults its standards for guidance when confronted with a question of professional responsibility. Confusion about the substantive import of its Canons and Ethical Considerations has fostered uncertainty
and encouraged ad hoc development of professional standards without full deliberation by the profession. The Commission urges adoption of the restatement format to prevent this. A format consisting simply of Rules and explanatory Comment will give the individual lawyer reliable guidance as well as fair warning and fair limitation. Moreover, this format will permit the profession to evaluate fully any proposed modifications of its standards before such standards become law. Changes in professional standards will occur only as a result of careful deliberation and not by ad hoc conversion of exhortations into rules.

The only enforceable rules in the restatement text recommended by the Commission will be the express black-letter Rules. Prior to adoption, and when considering subsequent amendments, the profession will be able to focus directly on the substantive issues raised by those Rules. The Comments will serve the same explanatory and illustrative function that is served by comments accompanying other model legislation, for example the Uniform Commercial Code. While the Comment will be helpful in understanding the Rules, the actual text of the black-letter will be authoritative and controlling.

The Commission did not arrive at this recommendation without consideration of the costs that may be associated with revision of the existing Code format. One concern was the effect that such revision might have on national uniformity in the law of professional conduct. But we found that no such uniformity has been achieved under the existing Code. The Code format has neither been uniformly adopted nor given consistent treatment. Six states (California, Oklahoma, Massachusetts, Illinois, Maine, Michigan) adopted codes without the Ethical Considerations. In some states, for example, Iowa, the Ethical Considerations as a whole are considered generally obligatory, thus rendering the distinction between Ethical Considerations and Disciplinary Rules meaningless. In still other states, Canons and Ethical Considerations have been treated as enforceable rules on an ad hoc basis.

We also considered the effect that a revision of format might have on the individual lawyer familiar with the format of the existing Code. Any inconvenience will be largely mitigated by the fact that the restatement format is widely accepted and familiar to lawyers everywhere. Lawyers everywhere have used ALI Restatements of law and modern model codes, such as the Uniform Commercial Code. Their formats are similarly organized and have been tested and found to be workable and reliable. In contrast, no matter how well acquainted lawyers are with the existing Code, there are chronic and continuous complaints about its format. Furthermore, the format we propose is substantially similar to the format approved by this House for the recently adopted ABA Standards for Lawyer Discipline and Disability Proceedings, as well as the ABA Model Code of Judicial Conduct and the ABA Standards of Criminal Justice. Weighing the importance of preventing further substantive misuse of the existing Code format against the temporary inconvenience and marginal administrative costs of converting to the more traditional restatement format seems to us to compel the course we recommend.

We have been authorized and are pleased to state that the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Professional Discipline concur in our findings and our recommendation with regard to format for the formulation of changes in the profession’s ethical standards.
Respectfully submitted

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Chairman

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