The Need for Improving the *Code of Professional Responsibility* and Its Administration

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It augers well for the future that students at Alabama are devoting this publication to the legal profession. More scholarship and attention should be paid to our responsibilities as professionals and as lawyers. Hopefully, a number of practical steps will emerge for improving

1. the *Code of Professional Responsibility*,
2. the way in which versions of the *Code* are adopted and administered in the states,
3. use of the *Code* by lawyers as a guide for solving everyday as well as special practice problems, and
4. how the profession facilitates bringing legal service to all persons who need it.

To predict or call for improvements is not to disparage recent developments. For example, the Supreme Court of my state, Indiana, in company with the courts of many other states, has adopted the new *Code of Professional Responsibility* as it was originally approved by the American Bar Association. The Indiana Supreme Court has also created a Disciplinary Commission which investigates complaints of misconduct and makes recommendations thereon to the Supreme Court. Each Indiana lawyer is assessed $35 a year to support the work of the Commission. The result has been an increase in the number of disciplinary cases, a greater awareness of how formal institutions can usefully monitor and help maintain bar discipline and, hopefully, a diminution in the incidence of misconduct situations.

Still, we have a way to go. There is little evidence that most of Indiana's lawyers guide their day-to-day decisions in light of the *Code's* provisions. Instead, most lawyers appear to rely on their innate sense of morals or their informed knowledge of how various practices might affect their clients and their own practice.

There are understandable reasons for the slight impact of the *Code's* language. Many of today's practitioners did not have a

course on ethics in law school. They have never been required to study the Canons in preparation for an examination. Of course, this will change because the ABA’s accreditation standards now require that each student be provided with instruction in professional responsibility.

However, even a course on ethics won’t change several other impediments to wider use of the Code by practitioners. In the first place, the Code is not well designed for ease of reading, learning, and use. It is not easy to get around in the Code. Its organizational principles are not readily apparent. Points of conflict are not always found in adjacent sections, e.g., the duty of confidentiality is far removed in the Code from the duty to inform the court of a client who has committed fraud on the court and who refuses to clarify the situation. There are several different standards of knowledge and notice in the Code, with no apparent reasons. Some sections, e.g., those on advertising, are burdensomely detailed. Especially now that the Code has become part of the required education of every law student, scholarship should be devoted to improving its organization and format.

More important, in my opinion, is the fact that we don’t have a sufficient number of institutions formally charged with the duty to monitor recent or proposed developments in professional responsibility and bring them to the attention of the authorities who have legislative authority.

For example, in Indiana there is no agency charged to make recommendations to the Court on what to do about Code amendments which have been approved by the ABA or which have been made (or discussed) by other concerned agencies. Nor has the Court, at the other end of the legislative process, created procedures whereby changes in the Code proposed by the Court would be distributed to the bar prior to final promulgation. In short, the Code has not become the subject for a set of legislative and/or administrative procedures of the kind customarily associated these days with other important legal matters that develop through a legislative or administrative process. Without advance distribution of proposed changes in the Code and wide discussion in hearings or otherwise, it is more difficult for the court or the bar to be fully informed about such proposals. Combined with the absence of an official initiating agency this has a dampening effect on scholarship with respect to the Code and contributes to long time lags between changes in the ABA Code and their adoption in the state.
Further, the failure to place legal ethics and the *Code* squarely into the kind of arena usually reserved for legislative and administrative law not only slows the pace of development and contributes to practitioner disinterest but it also tends to leave the subject impliedly classified as morals rather than law. Thus, a tendency persists to think of the *Code* and professional responsibility situations in purely moral terms rather than to engage in the functional analysis of roles, consequences, and mental states that lawyers bring to the analysis of legal problems.

If a functional analysis was brought to the problems of legal ethics by officials, the bar, and an envigorated legal scholarship, I believe that a number of useful projects would soon emerge, including:

1. the preparation of a more teachable *Code* (probably joined with efforts to provide teaching materials drawn from lawyer files or studies of law office decisions),
2. satellite codes for legal specialties (because the profession-wide *Code* cannot deal in sufficient detail with the problems which beset certain specialties),
3. empirical studies of the causes for misconduct, the consequences of various kinds of sanctions, and the operation of disciplinary institutions, and
4. more publications, such as this one, devoted to problems of the legal profession.