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Chris G. McDonough

Michael L. Epstein

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REGULATING ATTORNEY CONDUCT: SPECIFIC STATUTORY SCHEMES V. GENERAL REGULATORY GUIDELINES

Chris G. McDonough and Michael L. Epstein*

INTRODUCTION

A long long time ago in a land not so far away, there were only general guidelines to regulate attorney conduct. Attorneys were guided in their conduct by tenets which were so general that they merely stated what attorney conduct should be, while in no way showing the individual lawyer the way in which to attain those goals. However, modern regulatory schemes are developing a more statutory emphasis.

The modern trend towards specific statutory rules to control attorney conduct conflicts with traditional notions yet is viewed by many as a necessity due to the changing nature of the practice of law. This article will look at the evolution of the current New York Lawyers Code of Professional Responsibility, and examine modern attorney regulatory codes in light of the apparent conflict between the traditional method of regulating via exhortatory ideals and the modern trend towards specificity.

I. HISTORY

The New York State Code of Professional Responsibility was born a very different creature than it is today. Its infancy was a series of ideas developed as lectures by Judge George Sharswood which were published as *Professional Ethics* in 1854.¹ The ideas

* Chris G. McDonough is a 1988 graduate of Touro (cum laude), who is presently Assistant Counsel to the Grievance Committee for the Tenth Judicial

expressed in those lectures prompted the creation of the Alabama Code of Ethics in 1887; the first attorney ethics regulatory scheme in the country.²

The adolescence of the modern Code was spent as *The ABA Canons of Professional Ethics*,³ first adopted by the American Bar Association in 1908. These Canons consisted of thirty-two expressions of ethical ideals, often set forth in vague and inconclusive terms. These Canons were, at best, a general embodiment of the exemplar of professionalism, with little substantive content.⁴ The Canons were repeatedly altered and edited over the next sixty-two years.

From 1964 to 1970 attorney regulation experienced extreme scrutiny and rapid growth. The President of the American Bar Association appointed the Special Committee on Evaluation of Ethical Standards [hereinafter The Wright Committee] on August 14, 1964, to recommend changes to the Canons.⁵ That committee found the Canons to be: incomplete; in need of clarification; impractical for enforcement purposes; insufficient as a guiding and teaching tool; and not up to the challenges of a more complex legal community and society.⁶ As a result, in 1969 the

District. Mr. McDonough frequently writes and lectures on the subject of professional ethics.

Michael L. Epstein is a 1993 graduate of Ohio Northern University College of Law, with an LL.M in taxation from the Georgetown University Law Center. Mr. Epstein is an attorney with the office of the Grievance Committee for the Tenth Judicial District.

The views expressed by the authors are their personal opinion only, and should not be construed as policy of either the Grievance Committee or the Appellate Division, Second Department.

1. ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY XV (Am. B. Found. 1979) (citing Preface to 1969 Final Draft of the Code of Professional Responsibility).

2. *Id.*

3. HENRY S. DRINKER, *LEGAL ETHICS* app. C at 309 (1953).

4. *Id.* For example, "[a] contract for a contingent fee, . . . should be reasonable under all circumstances of the case, . . . but should always be subject to the supervision of a court, as to its reasonableness." *Id.* at 313.

5. ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, XV (Am. B. Found. 1979).

6. *Id.*

ABA adopted the Code of Professional Responsibility, effective January 1, 1970.⁷ It is from this document that our modern New York Code evolved.

II. THE ABA CODE OF PROFESSIONAL RESPONSIBILITY

The Wright Committee cleverly crafted the ABA Code in three parts; the Canons, the Disciplinary Rules, and the Ethical Considerations. The New York Code retains this format to date.

The Canons reflected the early advisory ideals of Judge Sharswood. "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers. . . . They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived."⁸ It must be noted that while the Canons may be mere vestigial reminders of the provenance of the Code, they are nonetheless a strong comment that general statements of ideals are not only proper, but are an essential ingredient in a modern regulatory scheme.⁹

One of the first disciplinary cases to clearly comment on the necessity of generalized attorney regulation came out of the Supreme Court for the Territory of Minnesota. In *Ex Parte Secombe*,¹⁰ the Court wrote that "it is difficult, if not impossible, to enumerate and define, with legal precision, every offence for which an attorney or counsellor ought to be removed."¹¹

But enumerate they did. The Wright Committee created the Disciplinary Rules which were much more specific than the

7. Adopted by the New York State Bar Association January 1, 1970, and promulgated as joint rules of the four Appellate Divisions on September 1, 1970.

8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, preliminary statement (Final Draft 1969).

9. See THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY: NEW YORK STATE BAR ASSOCIATION preliminary statement (as amended July 14, 1994).

10. 19 HOW. 9 (1856).

11. *Id.* at 14.

Canons and which set forth the minimum standard below which the conduct of attorneys must not fall.¹² The Code contemplated disciplinary action for conduct which failed to rise to this minimum mandatory level.

While these references to “mandatory minimums” and “disciplinary action” granted the Disciplinary Rules a clear force of law, the drafters did not intend for the Disciplinary Rules to be the last nor the only word on required conduct. The Wright Committee also formulated Ethical Considerations.¹³ The Ethical Considerations were described as inspirational in character, which in light of the “mandatory” fiat given the Disciplinary Rules, appeared to give the Ethical Considerations little hope of commanding respect.

However, the Wright Committee desired all three parts of the Code to be interdependent. In the final draft of the ABA Code, and in the present New York State Bar Association publication of the New York Code,¹⁴ the Preliminary Statement notes that the Canons, Ethical Considerations, and Disciplinary Rules together

12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, preliminary statement (Final Draft 1969). *See, e.g.*, DR 1-102 which states in pertinent part:

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Id.

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981). *See, e.g.*, EC 6-1 which states:

Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

Id.

14. THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY: NEW YORK STATE BAR ASSOCIATION (as amended July 14, 1994).

define the conduct the public has a right to expect. "An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations."¹⁵ In her fine article on the 1990 amendments to the New York Code, Marjorie Gross points out that despite only adopting the Disciplinary Rules, the courts of this State have shown a willingness to discipline based upon violations of an Ethical Consideration or a Canon.¹⁶

The plain language of the Preliminary Statement demonstrates that the three parts of the Code were intended to work together to guide attorneys in their ethical obligations.¹⁷ The Canons set forth the general ideals while the Ethical Considerations inform the mandatory Disciplinary Rules and expand their scope.

Although our New York Code remains akin to its ABA progenitor, the New York Lawyer's Code of Professional Responsibility has, subsequent to its adoption in New York, developed atypically to its ancestor. It has taken on a distinct flavor of its own, while at the same time remaining true to the Wright Committee's intent to create an elastic document for the changing world of law. That intent was recognized and reinforced by New York State's highest court in 1991. The New York Court

15. *Id.* preliminary statement. Note that the New York State Appellate Divisions have adopted only the Disciplinary Rules, and the present publication of the Code in the Court Rules does not contain the Preamble, the Preliminary Statement, the Canons or the Ethical Considerations. See N.Y. JUD. LAW app. (McKinley 1992) for full text and annotations.

16. Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 FORDHAM URB. L.J. 283 (1990-91). "In the 1970 Code, DR 2-106(C) prohibited a lawyer from charging a contingent fee in a criminal case. EC 2-20 also warned against charging a contingent fee in a domestic relations matter. Both ethics committees and courts, however, have treated the Ethical Considerations as binding." *Id.* at 306.

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (explaining that the "Canons, Ethical Considerations, and Disciplinary Rules . . . define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment").

of Appeals wrote that the New York Code must be a flexible document, which provides attorneys with "proper ethical guidelines" only.¹⁸

III. MATTER OF HOLTZMAN

In *In re Holtzman*,¹⁹ the New York Court of Appeals addressed, *inter alia*, a vagueness challenge to that section of the Code Holtzman was accused of violating, and the alleged lack of guidance therein.²⁰ In relevant part, Holtzman argued that the Code did not specifically prohibit her conduct, and that at the time of the conduct she was not on notice that her conduct was in violation of her ethical obligations.²¹

Holtzman was found to have violated DR 1-102(A)(6), now DR 1-102(A)(8).²² This Disciplinary Rule is one of the more general ones, which *Holtzman* referred to as a "standardless rule."²³ The Disciplinary Rule fell at the end of a list which set forth specific types of conduct in which a lawyer should not engage. DR 1-102(A)(6) then provided that: "A lawyer

18. *In re Holtzman*, 78 N.Y.2d 184, 191, 577 N.E.2d 30, 33, 573 N.Y.S.2d 39, 42 (per curiam) (stating "[b]road standards governing professional conduct are permissible and indeed often necessary"), *cert. denied*, 112 S. Ct. 648 (1991).

19. 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (per curiam), *cert. denied*, 112 S. Ct. 648 (1991).

20. For a full examination of the *Holtzman* case, see David W. Wright, *In re Holtzman: Free Speech or Professional Misconduct?*, 9 TOURO L. REV. 587 (1993). "Ms. Holtzman asserted, without ever having seen the trial transcript, that Judge . . . asked the rape victim to get down on her knees and reenact her rape." *Id.* at 587. After being given a Letter of Reprimand, Ms. Holtzman appealed to the New York Court of Appeals to vacate the letter, "claiming that it was a violation of her right to free speech, and asserting that the disciplinary rules under which she was charged were void for vagueness." *Id.* at 589 (citing *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 31, 573 N.Y.S.2d at 41).

21. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 31, 573 N.Y.S.2d at 41.

22. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.3(a)(8) (1994).

23. Brief for Appellant at 26, *Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 112 S. Ct. 648 (1991). *But cf. Ex Parte Secombe*, 19 How. 9, 14 (1856) (acknowledging near impossibility of defining every attorney offense "with legal precision").

shall . . . not [e]ngage in any other conduct that adversely reflects upon the lawyer's fitness to practice law."²⁴

The court held in its per curiam opinion that Holtzman's specific false statements regarding a sitting judge violated this Rule.²⁵ The court said that broad professional standards are permissible and often necessary, reasoning that "[r]ather than an absolute prohibition on broad standards, the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed."²⁶ The ethical strictures the court refers to are not only the Ethical Considerations and the other supportive regulations, but also those general precepts of ethics and professionalism to which attorneys must conform.²⁷ The court relied upon this to uphold the reprimand despite having the option of disciplining her under the specific rule of DR 8-102(B) which states, "[a] [l]awyer shall not knowingly make false accusations against a judge or other adjudicatory officer."²⁸ Perhaps the court did so to enable it to look not only at the falsity of the statement, but to the recklessness with which it was made.²⁹

24. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.3(a)(8).

25. *Holtzman*, 78 N.Y.2d at 191-92, 577 N.E.2d at 33, 573 N.Y.S.2d at 42 (stating that Holtzman's "release to the media of a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant . . ." was "unwarranted and unprofessional. . .").

26. *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42 (citations omitted).

27. *Id.* at 191-93, 577 N.E.2d at 33-34, 573 N.Y.S.2d at 42-43 (holding the *Holtzman* reprimand valid based upon her failure to take any of the reasonable steps available, as suggested by her own staff, to check the veracity of the allegations before publicizing them).

28. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.43(b) (1990).

29. *See Holtzman*, 78 N.Y.2d at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42 (finding petitioner "plainly on notice" that the release of information to the press could subject her to disciplinary action, and she should have further investigated the allegations before publicizing them).

IV. BROAD V. SPECIFIC REGULATIONS

Foregoing a specific statutory scheme detailing what attorneys can and cannot do, the drafters of the Code instead created a device which contained particular rules as well as general precepts to encourage attorneys to look to the accepted standards within the legal community and to examine their own morals and general sense of professionalism, before deciding what the appropriate conduct is in a certain situation.

In the early days Judge Sharswood believed that a lawyer needed to be shown only a glimmer of guidance where his ethical obligations were concerned. He wrote that:

There are pitfalls and man-traps at every step, and the mere youth, at the very outset of his career needs often the prudence and self-denial, as well as the moral courage, which belongs commonly to ripper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction.³⁰

The drafters of the 1887 Alabama Code understood that a specific set of conclusive statutory rules would not serve the profession well. The Preamble stated that rather than control via "statutory rules and an authoritative code," an attorney's duty must "be ascertained in view of the peculiar facts, in the light of conscience, and the conduct of honorable and distinguished attorneys in similar cases, and by an analogy to the duties enjoined by statute, and the rules of good neighborhood."³¹

What is implicit in that language is that ethical regulations require room for personal and community morals and standards to operate. No mere set of statutes could possibly encompass all that attorneys were required to do, or refrain from doing; even in 1887. Nor could specific statutes adapt to the constantly changing face of the practice of law or the ingenuity of lawyers.

This understanding of the need for flexibility within the regulatory scheme was included in the Canons of Ethics when

30. ALABAMA CODE OF ETHICS preamble, app. F at 352 (1887).

31. *Id.*

they were adopted in 1908. The Preamble to the 1908 Canons set down that understanding as:

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.³²

The creators of the Canons plainly acknowledged not only that a general set of guidelines was preferable, but also that lawyers must be made to understand that the inclusion of certain specifics does not preclude disciplinary action for conduct similar in scope but not included as a specific misdeed. Rather than creating “loopholes” through which attorneys could slip unprofessional yet unenumerated conduct, this scheme encouraged ethical conduct by nudging inquiring attorneys down an ethical corridor which they themselves shaped through the factoring in of their own moral and ethical beliefs and by considering the accepted standards of conduct within the legal community. However, times change, and the specific rule of law slowly crept into the regulatory arena.

In 1934 Judge Harlan Fiske Stone (later Chief Justice) vocalized his belief that the Canons of Ethics alone and the generalization of moral standards that they represented, were incapable of meeting the needs of the bar and the public in the then modern era.³³

Before [the bar] can function at all as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationships of the lawyer to his clients, to his professional

32. DRINKER, *supra* note 3.

33. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1 (1934) (referring to Judge Stone’s address at the Dedication of the University of Michigan Law Quadrangle June 15, 1934).

brethren and to the public. . . . Our canons of ethics for the most part are generalizations designed for an earlier era.³⁴

Today, commentators, continuing in that vein, have found problems with the present attorney regulatory codes, which remain to a large degree collections of exhortatory ideals set forth as general tenets. The complaints include: selective enforcement;³⁵ too much inherent prosecutorial discretion;³⁶ and insufficient specific guidance or notice.³⁷

What these criticisms fail to acknowledge is that the present codes are not statutes, were never intended to be such, and therefore do not enumerate required elements as a statute is required to do. In *Niesig v. Team I*,³⁸ Judge Kaye (now Chief Judge) referring to the New York Lawyer's Code of Professional Responsibility said: "The disciplinary rules have a different provenance and purpose [from statutes]. . . . [T]he Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline. . . ." ³⁹ The court's discussion of such a broad notion as "general principles" when discussing a regulatory scheme clearly accents the different "provenance and purpose" of the Code and the court's acceptance and approval of that difference.⁴⁰ The New York Code was never intended to be a statutory scheme, nor could it function as such because it could never anticipate each and every conceivable legal ethical situation.

34. *Id.* at 10.

35. Mark Aultman, *Moral Character and Professional Regulation*, 8 GEO. J. LEGAL ETHICS 103, 111-12 (1994).

36. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 805 n.19 (1992).

37. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1132 (1988).

38. 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990).

39. *Id.* at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495 (citations omitted).

40. *Id.* at 369-70, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495.

V. LAW AS A DISTINCT SOCIETY

As Judge Kaye recognized, the Code comes from a different place and serves a different community than is served by most statutory schemes.⁴¹ The community the Code serves is composed of individuals of comparable education and experience. Lawyers, because of their training and experience, are and should be held to a higher standard of conduct than, for example, the average criminal who is subject to regulation by specific criminal law statutes.

A lawyer under a broad regulatory scheme is encouraged by that breadth of rule to examine factors other than the strict interpretation of the language of the rule encompassing the situation. Paramount among these extra-regulatory factors is an examination of what a reasonable attorney would do under similar circumstances. Thus, in *Holtzman*, the court upheld a letter of reprimand to District Attorney Holtzman because she knew or should have known that releasing unsubstantiated charges against a sitting trial judge to the media without making a reasonable attempt to ascertain their proof, was "unwarranted and unprofessional, [and] serve[d] to bring the Bench and Bar into disrepute, and . . . to undermine public confidence in the judicial system."⁴²

If, however, a specific statutory scheme were in effect, a lawyer examining his conduct in the face of such a scheme could, once he had examined the specific rules and found them silent as to his proposed conduct, go forth with the belief that he was within the spirit of the code; even where reasonable members of the legal community might find the conduct improper. Moreover, if the specific scheme did not prohibit the conduct in question, yet purported to be the entire regulation, then there would be no

41. *Id.* (stating that statutes are enacted by the legislature and are binding, whereas, the Code is "the legal profession's document of self-governance" which is respected by the courts but does not have the force of law).

42. *Holtzman*, 78 N.Y.2d at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42 (citations omitted).

duty upon the inquiring lawyer to look further - even into his own conscience.

A specific statutory scheme could remove reasonable attorney standards, individual beliefs, community practice standards, and professional conscience from consideration by an attorney researching his ethical obligations. Conversely, where there is a broad regulatory scheme there is flexibility and room, not only for individual morals and beliefs to be considered, but also for consideration of the accepted standards of the local legal community.

One of the most common complaints against general regulatory schemes is that the rules are too vague to put the honest inquiring member on notice that his conduct is inappropriate.⁴³ The United States Supreme Court case of *Parker v. Levy*⁴⁴ is instructive. The Court there was faced with a vagueness challenge to the Uniform Code of Military Justice. Specifically at issue was section 133 which provides punishment for "conduct unbecoming an officer and a gentleman."⁴⁵ Clearly, this standard is more general and less specific in its requirements than most of the Rules within the New York Lawyer's Code of Professional Responsibility. The Court, however, noted that because a different society was served by the Uniform Code of Military Justice, section 133 was sufficient to give a member of that society notice of conduct which would be proscribed.⁴⁶ The Court reasoned that due to the differences between military and civilian society and law, and due to the fact that the Military Code regulates a far greater range of conduct than civilian law, the members of that society could be held to a stricter standard through a more general set of regulations.⁴⁷

43. DRINKER, *supra* note 3.

44. 417 U.S. 733 (1974).

45. 10 U.S.C. § 933 (1956). Section 933 provides in pertinent part: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentlemen shall be punished as a court martial may direct." *Id.*

46. *Parker*, 417 U.S. at 756-57.

47. *Id.* at 750.

VI. RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Just as the national trend in attorney ethical regulation is toward increasing specificity, so too is the regulation of professional conduct in federal civil practice via monetary sanctions.

Since its inception, Rule 11 of the Federal Rules of Civil Procedure has provided for the imposition of sanctions in an attempt to curb abuses in litigation by providing for the payment of costs and fees.⁴⁸ However, prior to the 1983 amendments to that rule, it was largely ineffective.⁴⁹ Specifically, confusion existed in the areas of "(1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions and (3) the range of available and appropriate sanctions."⁵⁰ Originally, the Rule required pleadings or motions to be based upon "good ground to support."⁵¹ The 1983 amendments imposed the more stringent reasonableness standard which, it was anticipated, would result in a greater range of circumstances triggering a violation.⁵² Thus, it was hoped that increased control of lawyer conduct would result.

Between 1983 and 1990, Rule 11 as amended generated well over one thousand judicial opinions and a growing number of articles that fiercely debated its advantages and disadvantages.⁵³

48. FED. R. CIV. P. 11. Rule 11 provides, in relevant part: "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." *Id.*

49. 5A CHARLES A. WRIGHT AND ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1334 (2d ed. 1990).

50. FED. R. CIV. P. 11 advisory committee's notes (citing Rodes, Ripple and Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure*, Federal Judicial Center 64-65. (1981)).

51. *Id.*

52. *Id.* (citing *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980)).

53. See Cary J. Coglianese, *Insuring Rule 11 Sanctions*, 88 MICH. L. REV. 344 (1989); Christopher A. Considine, *Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach*, 75 CORNELL L. REV. 727 (1990); Paul Kaufman, *A Prospective Cap on Rule 11 Sanctions*, 56

To say the least, the 1983 amendments have opened the door to a flood of satellite litigation. While the amendments were intended to increase the availability and imposition of sanctions aimed at controlling attorney professional conduct, they were not intended to increase the already strained federal court calendars. Rule 11 has essentially been used "as a weapon against other lawyers, especially against civil rights plaintiffs or lawyers for the poor."⁵⁴ Thus, a rule that was originally intended to prevent the filing and arguing of frivolous matters "[had] become a tool of harassment," which is clearly contrary to its intent.⁵⁵

As a result of this unintentional by-product, further amendments were made in 1993 which were intended to remedy problems that arose in the interpretation and application of Rule 11 after the 1983 amendments. The 1993 amendments were, in essence, intended to stem the tide of satellite litigation.⁵⁶ The drafters chose to do this via more specific regulation. However, because Rule 11 is the first and last word on the subject, the probable result is that the increased specificity of Rule 11 will work against the intended result.

VII. WHY SPECIFIC ATTORNEY REGULATORY SCHEMES ARE SUSPECT

The attempt to regulate solely by an antiseptic rule which limits the factors an attorney has to look at in making a decision as to how he must act, creates the opportunity for that attorney to approach ethical questions narrowly. Instead of looking at an ethical situation after examining not only his personal and

BROOK. L. REV. 1275 (1991); Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793 (1991); Lawrence C. Marshall, et al., *The Use and Impact Of Rule 11*, 86 NW. U. L. REV. 943 (1992); Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990).

54. Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219 (1995) (citing Wilkins, *supra* note 36, at 838-40).

55. *Id.* at 241.

56. FED. R. CIV. P. 11 advisory committee's note.

professional conscience but also the general tenets and goals of his profession and the prevailing view of his fellow professionals, an attorney's inquiry may be limited to the letter of the rule. The inquiring attorney may then take advantage of any loophole or softness existing in the applicable statute - for this is what we are trained to do, and faced with a specific rule this is what we will do until the window of opportunity is closed.

This, at least to the authors of this article, appears to demonstrate the problem with most specific regulatory schemes which fail to require that individual and community morals and immutable ethical tenets be a part of every attorney regulatory analysis. That is, where a rule of conduct rests solely upon words set down as a specific regulation with no requirement that the inquiring attorney look to those "other" more general factors of attorney ethics (discussed previously), attorneys will seek the soft underbelly of the regulation; and where you try to regulate the conduct of attorneys through specific statutory regulations, the scope of possible situations attorneys are involved in is so vast that it is impossible to anticipate all such circumstances. Thus, there will always be loopholes and soft spots for attorneys to "test."

VIII. CODE AS HYBRID

The New York Lawyer's Code of Professional Responsibility in its present state is neither strictly statutory nor exhortatory. The modern New York Code is actually a hybrid, neatly balancing both the specific rule and the general ideal. While the Code certainly has become more specific of late, it is notable that the addition of specific rules of conduct has not resulted in the overruling or removing of those general ideals remaining from its nascency.

Overall, the recent adoption of specific Disciplinary Rules by the four Appellate Divisions is not meant to impact the existing general ideals represented in the Code; but is instead aimed at rectifying very narrow bands of conduct needing specific correction, or to address an area of practice truly ministerial or uncomplicated. One example of the need for correction is the

1993 amendments to the New York Code impacting the matrimonial practice.⁵⁷ The matrimonial amendments were the direct result of the "troubling atmosphere" surrounding the matrimonial practice.⁵⁸ One example of the utilization of specific regulation over ministerial areas of practice is the recent inclusion of the rules on advertising in the Code.⁵⁹ The advertising rules are mostly ministerial, and cover such areas as filing requirements,⁶⁰ fee information,⁶¹ and required content.⁶²

However, even with such straight-forward rules, the Code continues to contain overriding general guidelines which require the exercise of individual research and inquiry to arrive at a proper course of conduct. The courts have wisely refrained from eliminating the need to exercise individual ethics entirely, and where the rule is not simply a housekeeping one, the attorney must still conform his conduct to general guidelines.⁶³

57. Some of the new matrimonial rules include mandatory fee arbitration and fee retainer agreements, the prohibition of non-refundable retainers, prohibition of sexual relations between attorney and client during the course of representation, and an inclusive statement of client rights. *See* Edward A. Adams, *Divorce Law Reforms Unveiled; Changes Affect Fees, Handling of Disputes*, N.Y. L.J., Aug. 17, 1993, at 1; Joel R. Brandes and Carole L. Weidman, *Regulation and the Conduct of Divorce Lawyers*, N.Y. L.J., Mar. 22, 1994, at 3; Judith S. Kaye, *Chief Administrative Judge Orders Amendments*, N.Y. L.J., Aug. 23, 1993, at 4; Chris G. McDonough, *Fee Agreements, Security and Collection*, N.Y. L.J., Sept. 7, 1993, at 1.

58. *See Report of the Committee to Examine Lawyer Conduct in Matrimonial Actions*, May 1993, at 1; *Women in Divorce: Lawyers, Ethics, Fees and Fairness*, N.Y. DEP'T OF CONSUMER AFF., Mar. 1992.

59. Prior to 1990, the rules on attorney advertising were within each Appellate Division's Court Rules. By Order of April 5, 1990, the Appellate Divisions jointly adopted all the Disciplinary Rules of the Lawyer's Code of Professional Responsibility as the minimum standards of conduct for all attorneys, effective as of September 1, 1990. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.

60. N.Y. COMP. CODES R. & REGS. tit. 22, § 12.00.6(f)(1).

61. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.06(c), (e), (g), (h), and (i).

62. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.6(k).

63. For example, while many of the advertising rules under Canon Two are specific, general tenets must still be included and factored into attorney ethical analysis. Before getting into the ministerial advertising rules, Canon

In his article, *Moral Character and Professional Regulation*,⁶⁴ Mark Aultman, in analyzing the modern codes including those of other states and the ABA Model Code, draws a very bright line between general rules requiring moral input and those seemingly uncomplicated ethical matters which can be controlled by the mechanical application of specific statutes.⁶⁵ That distinction is, and appropriately so, not so neat or simple in New York.⁶⁶

IX. THE 1990 AMENDMENT TO THE PRELIMINARY STATEMENT

In 1990 the New York Code was amended, and certain language was added to the existing Preliminary Statement:

No codification of principles can expressly cover all situations that may arise. Accordingly, conduct that does not appear to violate the express terms of any Disciplinary Rule nevertheless may be found by an enforcing agency to be the subject of

Two, § 1200.6 [DR 2-101] starts off with the general admonition: "A lawyer on behalf of himself or herself or partner or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements that are false, deceptive, misleading or cast reflection on the legal profession as a whole." *Id.* See also § 1200.6(b) and (d).

64. 8 GEO. J. LEGAL ETHICS 103 (1994).

65. *Id.* at 104 (stating that the confusion of disciplinary regulation of administrative matters with those requiring moral input has damaged the legal profession and society at large).

66. New York has, while adding more and more specific regulations, continued to require that an attorney look to his own ethics and those of the legal community before making almost every ethical decision - being guided by the Code rather than locked in by it. To continue our advertising analogy, there can be little doubt that the Appellate Divisions found that while most of the rules on advertising could be set down with specificity as they required little or no insight, there was the need to retain general guidelines dictating that advertising by attorneys be honest, above-board, and professional (DR 2-101 (A) and (B)). To try to express those simply stated yet far reaching sentiments in a specific set of statutes, would be quite impossible. Yet, an advertisement which violated, for example, the requirement that an advertisement not cast reflection on the legal profession as a whole, would be one that the vast majority of attorneys would recognize and agree on.

discipline on the basis of a general principle illustrated by a Disciplinary Rule or on the basis of an accepted common law principle applicable to lawyers.⁶⁷

Remarkably, this language very closely parallels the Preamble of the original ABA Canons of Ethics, adopted back in 1908.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.⁶⁸

In connection with this addition, The Jones Committee Source Notes indicate that the added language "represents a committee improvement to clarify that, beyond the express terms of the Disciplinary Rules, attorneys may be subject to discipline for violation of a general principle illustrated by a Disciplinary Rule or based on accepted common law principles applicable to lawyers."⁶⁹

The 1990 amendment to the Preliminary Statement did not actually change anything. As the Jones Committee noted, the added language merely "clarified" what had been accepted since 1908, and even before -- that attorneys are held accountable not only to specific regulations, but also to general immutable principles of ethical conduct.

CONCLUSION

"There is a place [in attorney regulation] for both specific and generalized" rule making dependent upon the purpose of the

67. N.Y. JUD. LAW app., preliminary statement (McKinney 1992 & Supp. 1995).

68. ABA CANONS OF PROFESSIONAL ETHICS (1908). *See* DRINKER, *supra* note 3.

69. *See* NEW YORK STATE BAR ASSOCIATION, DRAFT OF THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (Oct. 5, 1987) (incorporating amendments adopted by the House of Delegates April 11 and June 26-27, 1987); *see also* Gross, *supra* note 16, at 286 n.12.

regulation.⁷⁰ Perhaps the best regulation will blend the general and the specific in such a way that the inquiring attorney will initially be given a general overview of his obligations, followed where appropriate by a partial list of the more apparent possible violations of that general tenet. But by no means should that list attempt to be exhaustive.

It is the belief of the authors that the current trend towards hybridization in New York has and should continue to recognize that despite the hue and cry for specificity within our Code, there will always be a place for requiring an attorney to inquire not only into the Code when researching an ethical problem, but also into the common law, his professional community, his experience, his own morals, and his own sense of professionalism.

70. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 224 (1993). "The form of an appropriate rule should depend, in part, on the precise purpose the rulemakers identify." *Id.* at 290.

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