

The Case for Renaming the Professional Ethics Committee

By Steven G. Leventhal

Effective April 1, 2009, New York became the last state to abandon the format of the old ABA Code of Professional Responsibility and the last except California to adopt the format of the ABA Model Rules of Professional Conduct. Now, the time has come for the New York State Bar Association to join the vanguard by changing the name of its *Professional Ethics* Committee to the *Professional Conduct* Committee. This name would more accurately describe the function of the committee and, for the reasons that follow, would better promote its goals.



Logic and experience indicate that the vast majority of attorneys are honest, and genuinely wish to do the right thing. The goal of the Professional Ethics Committee is to assist honest attorneys in avoiding ethical missteps before they occur by providing advice concerning their obligations under the New York Rules of Professional Conduct (the “Rules”).¹

Many people use the words “morality” and “ethics” as if they had the same meaning. This is understandable, because the two words have similar meanings. Morality comes from the Latin word *mores*, for the customs and conventions of a community. Ethics comes from the Greek word *ethos*, for the characteristic spirit or tone of a community. But in the applied context of professional ethics, it is inaccurate and unhelpful to think of morality and ethics as having the same meanings.

To illustrate the difference between morality and ethics in the professional context, suppose that you represent the seller at a real estate closing, and that your client asks you to distribute the balance of escrow funds in a check payable to cash. If you were to comply with this request would you have acted immorally? Certainly not; but the Rules of Professional Conduct require that all withdrawals of escrow funds be made only to a named payee and not to cash.²

Similarly, the Rules regulate attorney advertising in ways that are not always intuitive. For example, an attorney advertisement must include the name, principal law office address and telephone number of the lawyer or firm whose services are being offered.³

Further consider that your accountant, insurance agent or stock broker might propose to refer clients to you in exchange for discounted legal services to the referring non-legal professional. Certainly, such an arrangement would not be immoral. In fact, the Rules do not forbid non-exclusive reciprocal referral arrangements with non-legal professionals.⁴ But referrals made in exchange for a *quid pro quo*—“anything of value,” in the words of Rule 7.2(a)—are prohibited.

The Rules are not exclusively or even primarily a statement of the moral obligations owed by an attorney. Rather, many of the Rules prioritize an attorney’s conflicting obligations or regulate commercial aspects of the practice of law. The Rules provide an *ethical framework* for the practice of law.⁵

The touchstone of the client-lawyer relationship is the lawyer’s obligation to assert the client’s position under the rules of the adversary system, to maintain the client’s confidential information except in limited circumstances, and to act with loyalty during the period of representation.⁶

A lawyer’s responsibilities in fulfilling these many roles and obligations are usually harmonious. In the course of law practice, however, conflicts may arise among the lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Nevertheless, within the framework of the Rules, many difficult issues of professional discretion can arise. The lawyer must resolve such issues through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.⁷

It is unhelpful to think of professional ethics in moral terms, because doing so implies a moral failure among attorneys and tends to alienate honest members of the bar, who take rightful pride in their personal integrity. Further, the blurring of the distinction between morality and ethics suggests to unsuspecting attorneys that they may reason out an ethical issue using common sense, and simply take the action that seems to them, by their own personal standards of morality, to be the right thing to do. However, many of a lawyer’s professional obligations are not self-evident, and a lawyer who relies on his or her own moral instincts rather than on the Rules of Professional Conduct does so at the risk of engaging in unintended misconduct. The Rules set forth the minimum level of conduct be-

low which no lawyer can fall without being subject to disciplinary action.⁸

Some laws prohibit conduct that is inherently immoral, such as murder and larceny. This type of misconduct is known as a *malum in se*. It is prohibited because it is wrong. But some laws prohibit and even criminalize conduct that would otherwise be perfectly moral because we find it a safer, more economical or more efficient way to organize our society. The Vehicle and Traffic Law and the Internal Revenue Code are examples of laws that prohibit many kinds of conduct that are not inherently immoral. This type of misconduct is known as a *malum prohibitum*. It is wrong because it is illegal. Similarly, the Rules prohibit many kinds of professional conduct that is not inherently wrong.⁹ The Rules of Professional Conduct are the rules of the road for the practice of law.

In today's modern, pluralistic society, collective moral values are more difficult to discern than they were in 1908, when the ABA Canons of Professional Ethics were first adopted and the profession was less diverse. Today, collective moral values are obscured by constant changes brought about by successive waves of immigration, progressive social movements, and the increased mobility of modern life. In some ways, the communications revolution has reduced the world to a single, multi-cultural community where disparate values are no longer blended into a single ethical consensus. Our philosophical differences are not just cultural in origin. Religious ethicists follow the doctrine of their faith. Social activities are guided by their particular views of social justice. Bar associations have come to realize that diversity in membership enriches an organization by introducing new perspectives, and is essential if bar associations are to attract new members and remain relevant as our society and profession continue to evolve.

To be sure, an attorney may, in some instances, violate the Rules by engaging in morally culpable misconduct such as the misappropriation of escrow funds or the subornation of perjury. But such infractions are the business of the grievance committee and, where appropriate, the district attorney's office. They are not the business of the Professional Ethics Committee. Rather, the Professional Ethics Committee is engaged in providing assistance to honest attorneys in avoiding ethical missteps before they occur. This is accomplished through advisory opinions about an inquiring attorney's proposed future conduct and educational programs about the Rules of Professional conduct and the body of law that has grown up around them. These efforts by the Professional Ethics Committee advance the goal of the Association expressed in its statement of purpose, to elevate the standard of integrity, honor, professional skill and courtesy in the legal profession.¹⁰

"Professionalism" in the practice of law is a goal to which we should all aspire. But attorney professionalism is broader in concept than the minimum standards of professional conduct established by the Rules of Professional Conduct. In its mission statement, the New York State Bar Association Committee on Attorney Professionalism defines "attorney professionalism" as "dedication to service to clients and a commitment to promoting respect for the legal system in pursuit of justice and the public good, characterized by exemplary ethical conduct, competence, good judgment, integrity and civility."¹¹

To some, it may seem heretical to suggest that there is a distinction to be made between morality and ethics or between professionalism and ethics; and certainly attorneys have moral and professional duties that may sometimes transcend their obligations under the Rules of Professional Conduct. In appropriate cases, courts may look beyond the Rules in determining the professional obligations of an attorney.¹² However, by adopting the Rules effective April 1, 2009, New York joined nearly all other states in moving away from a value based system having its origin in the 1908 ABA Canons of Professional Ethics, to a more modern system based on policy choices, embodied in the 2009 rules of Professional Conduct, as amended in 2010.

Some have argued that a change in the name of the Professional Ethics Committee would leave practitioners unable to find it. Needless to say, this concern may be addressed by a listing in the Association directory under "Professional Ethics Committee" that refers members to the newly renamed "Professional Conduct Committee."

Others have expressed reluctance to abandon a descriptive term that is used by other bar associations, law schools, the bar exam, and continuing legal education programs. However, progress in the use of more accurate nomenclature is not a revolutionary concept. Five state bar associations have adopted names that better reflect the function of their ethics committees (e.g. Arizona (Committee on the Rules of Professional Conduct ("Ethics Committee")), California (Committee on Professional Responsibility and Conduct), Illinois (Standing Committee on Professional Conduct), Vermont (Professional Responsibility Committee) and Washington (Rules of Professional Conduct Committee)).¹³ Here, our Association should proudly join those bar associations leading the way to a modern understanding of a lawyer's professional obligations by adopting a more accurate and more helpful name for its Professional Ethics Committee—a name that promotes the mission of the committee and better describes its function—the "Professional Conduct Committee."

Endnotes

1. The New York State Bar Association web site describes the function of the Professional Ethics Committee as follows:

The Committee on Professional Ethics is charged with the duty of observing the ethical standards of the members of the profession. With the approval of the Executive Committee, it may take original action and may cooperate with other bar associations and federations in taking action to maintain high ethical standards among the members of the profession. In its discretion it shall make answer to inquiries as to proper conduct for a member of the legal profession in any given case if such answer shall have been adopted or authorized at a meeting of the committee and concurred in by a majority of the committee; provided that between meetings of the committee any such answer may be adopted or authorized if it be concurred in by a majority of the committee, and nonconcurring member shall have requested discussion of the question and answer at a meeting of the committee. It may publish such questions and answers in the *Journal* if, in its opinion, such publication would not violate the confidence of the inquiries. The terms "members of the profession" and "member of the legal profession" as used in the preceding paragraph, shall be deemed to include members of the judiciary; and the jurisdiction of the Committee on Professional Ethics shall extend to the canons of judicial ethics as well as to the code of professional responsibility.

See, New York State Bar Association, Committee on Professional Ethics: Stated Purpose, http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Professional_Ethics_Home&Template=/CM/HTMLDisplay.cfm&ContentID=53017.

2. See, Rules of Professional Conduct rule 1.15(e). Unless otherwise stated, all "Rules" cited in this article are found in the New York Rules of Professional Conduct, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2012).
3. See, Rule 7.1(h).
4. See, Rule 5.8(c); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 765 (2003) ("A lawyer or law firm may enter into a non-exclusive reciprocal referral agreement or understanding with a securities broker or insurance agent...with appropriate disclosure of the relationship.")
5. See Rules of Professional Conduct Scope, ¶ 8.
6. See Rules of Professional Conduct Preamble, ¶ 2. The Appellate Division has not adopted the Preamble, Scope and Comments, which are published by the New York State Bar Association to provide guidance for attorneys in complying with the Rules.
7. See Preamble, ¶ 3.
8. See Scope, Comment ¶ 6.
9. For example, the purposes of the "No Contact Rule" (Rule 4.2) are to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics,

Op. 652 (1993); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 650 (1993); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 607 (1990).

10. For the full text of the New York State Bar Association Mission Statement, see http://www.nysba.org/Content/NavigationMenu/NewsCenter/VitalStatistics/Vital_Statistics.htm.
11. The NYSBA Committee on Attorney Professionalism was established in 1989. The Committee's mission statement was last revised in 2009. See, New York State Bar Association Committee on Attorney Professionalism, *Mission Statement*, <http://www.nysba.org/Content/NavigationMenu26/CommitteeonAttorneyProfessionalismHome/AttorneyProfessionalismMissionStatement.pdf>.
12. See *Niesig v. Team I et al.*, 76 N.Y.2d 363, 369–70 (N.Y. 1990).

In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State... [the Court is] of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the 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 of professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law.

That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorney, implicates the interests of nonlawyers. In such instances...[the Court is] not constrained to effectuate the intent of the drafters, but look[s] to the rules as guidelines to be applied with due regard for the broad range of interests at stake. When...[the Court] find[s] that the Code applies in an equitable manner to a matter before... [it, the Court] should not hesitate to enforce it with vigor. When...[the Court] find[s] an area of uncertainty, however,...[it] must use...[its] judicial process to make...[its] own decision in the interests of justice to all concerned.

(citations omitted).

13. Similarly, the City of New York calls its government ethics agency the "Conflicts of Interest Board."

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