

ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY

Chicago

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1979

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Preface to the Annotated Code

Although not the product of a group or team effort in a formal sense, this volume did come into being through the intensive labor of several people, all of whom worked harder and longer hours than could reasonably be expected to get it done. The following were the principal contributors to the project to annotate the Code of Professional Responsibility:

Lucille V. Alaka, Editor
Carmen L. Bell, Project Secretary
Tina Chiang, Editor
Carol McGeehan, Editor
Marilyn J. Martin, Research Associate
Sandy Mathai, Editor
Bette H. Sikes, Director of Publications
Milton Wakschlag, Research Assistant

I want to express special appreciation to John F. Sutton, Jr., of the University of Texas School of Law, who as the reporter for the committee that drafted the Code is uniquely knowledgeable about the history of the Code and who gracefully submitted to many hours of questioning about it.

None of those mentioned above is in any way responsible for any errors in or shortcomings of the book. The responsibility for the final product is mine alone.

OLAVI MARU
*Director, Project to Annotate the
Code of
Professional Responsibility*

Sources

GENERALLY

The Code of Professional Responsibility was adopted by the American Bar Association on August 12, 1969, with the effective date of January 1, 1970.¹ It was subsequently adopted by most jurisdictions and bar associations during the next year or so.² Annotations in this volume are therefore based for the most part on ABA ethics opinions, judicial decisions reported in the national reporter system, and secondary materials published or issued since about 1971. There are, however, also numerous references to ethics opinions and court decisions that predate the Code of Professional Responsibility. This is so for the reason that agencies which interpret the Code—courts and ethics committees—still cite pre-Code authorities and texts while doing so. There is, in other words, a body of “common law” of sorts which is taken into account and used in conjunction with the specific provisions of the Code of Professional Responsibility. This volume is thus not a narrowly defined treatment of the Code of Professional Responsibility but rather represents a “common law” gloss on it.

CODE TEXT³

The Annotated Code of Professional Responsibility is based on the August 1977 text of the Code (cover title: Code of Professional Responsibility and Code of Judicial Conduct, as amended August, 1977 (American Bar Association, *ca.* 1976; 67 pp.)).⁴

1. 94 *ABA Rep.* 392 (1969).

2. By the summer of 1972 it had been adopted in 40 states. 97 *ABA Rep.* 268 (1972).

3. Several matters should be called to the reader's attention: (1) Direct quotations from the Code of Professional Responsibility are printed in bold type. (2) Beginning with the presentation of Canon 1 (p. 5), all footnotes are as they appear in the Code of Professional Responsibility without change (see discussion of the footnotes at p. xiii). Notes added to the Prefaces and to the Preamble and Preliminary Statement are printed in larger type than are the footnotes that are part of the Code itself. (3) Where only part of a Disciplinary Rule is quoted, the designation “DR _____” appears in brackets to indicate that the entire Disciplinary Rule is not presented at that point (see, e.g., p. 107).

4. As an exception, the August 1978 amendments to the Code have been incorporated into the annotated text. These amendments consisted of the addition of the word “television” to EC 2-8 and of the words “television or” to DR 2-101(B) and (D).

ABA ETHICS OPINIONS

For the texts of the opinions of the ABA Standing Committee on Ethics and Professional Responsibility the following compilations were used: American Bar Association, *Opinions of the Committee on Professional Ethics with the Canons of Professional Ethics Annotated and Canons of Judicial Ethics Annotated*, 1967 edition (American Bar Foundation, 1967; 725 pp.); *Opinions of the Committee on Professional Ethics: Supplement to 1967 Edition*, American Bar Association *Opinions of Professional Ethics* (June, 1968) (50 pp.);⁵ American Bar Association, Committee on Ethics and Professional Responsibility, *Informal Ethics Opinions* (American Bar Association 1975; 2 vols.); American Bar Association, Committee on Ethics and Professional Responsibility, *Recent Ethics Opinions* (1 vol.; looseleaf).

5. The 1967 *Opinions* and its 1968 supplement contain *Formal Opinions 1-315* and *316-320*, respectively. *Informal Opinions 230-1284* are in *Informal Ethics Opinions* and *Formal Opinions 321* to date and *Informal Opinions 1249, 1271* to date in *Recent Ethics Opinions*, which is kept current with supplements.

The history of the informal opinions is obscure. Until about 1966 many informal opinions were entitled "informal decisions." It is not known why this terminology was used, but it cannot have referred to a separate class of interpretations that somehow differed from "informal opinions." No authority that defines or creates an "informal decision" exists and the "informal opinions" and "informal decisions" are intermingled, randomly it seems, in the only numbering sequence for informal interpretations that has been used. In this volume all informal interpretations are identified as "opinions."

Some informal opinions among those published before 1965 carried the prefix "C" before their serial number ("C-813"). As with "decision," the reason for this usage is unknown. However, it does not identify a distinct and separate series of opinions but was applied to opinions in the only numbering sequence that has been used. This prefix is not used in this volume.

The first opinion in the *Informal Ethics Opinions* is "Informal Decision C-230(A)." A statement in that collection reads: "[w]here gaps appear in the Informal Opinion numbers, there is no opinion available for publication[,] [although many of such opinions are] summarized [or] referred to in other publications" (p. 7). No reference is made in the book to *Informal Opinions 1-229*. A partial explanation of the status of the first 299 informal opinions appears in the 1967 *Opinions*:

In September 1952, the Committee authorized publication of over 300 Informal Opinions in digest form. These digests were taken from minutes of the Committee's meetings and represent a summary of the opinion issued or the action taken by the Committee. Since these digests are not keyed to the Committee's minutes, it is not possible to trace the complete opinion of the Committee. Thus, the digest of these Informal Opinions is all that is available, even to the Committee itself. For this reason these Informal Opinions are designated "Unpublished" and are so identified by the asterisk (*) in the "Canons of Professional Ethics Annotated," "Canons of Judicial Ethics Annotated," and "Committee Rules of Procedure Annotated" sections of this book.

1967 *Opinions* at 6.

Legislative History: Textual and Historical Notes

It is not possible to assemble a comprehensive legislative history of the Code because the Wright Committee intentionally compiled no record of its discussions and deliberations. An attempt was made to record the first two sessions, but it became quickly apparent that this inhibited discussion by inducing participants to “speak for the record” (Transcript of Interview with John F. Sutton, Jr., by Olavi Maru, Dec. 20, 1976, Houston, p. 24 (on file at American Bar Foundation, Chicago)).

The Textual and Historical Notes that accompany the *Annotated Code* sections represent the fruits of an effort to provide a substitute for the legislative history. They are based for the most part on the three drafts of the Code and subsequent amendments made to the Code after its adoption on August 12, 1969, with the effective date of January 1, 1970. Some statements made in the Notes are supported with references to interviews with members of the Wright Committee. The Code drafts are:

American Bar Association, Special Committee on Evaluation of Ethical Standards, *Code of Professional Responsibility of the American Bar Association*, Tentative Draft, October 1968. ii + 90 pp. (unpublished, mimeo.).

———, Special Committee on Evaluation of Professional Ethics.¹ *Code of Professional Responsibility*, Preliminary Draft, January 15, 1969. xii + 136 pp.

———, Special Committee on Evaluation of Ethical Standards. *Code of Professional Responsibility*, Final Draft, July 1, 1969. xii + 125 pp.; Correction Sheet (1 p.).²

1. This is *not* the correct name of the Committee, which was not changed during its existence, but this is how the title page of the preliminary draft reads. On its cover and elsewhere in it the Committee is identified by its proper name.

2. The correction sheet contains its own errors. It cites errors in “DR 2-101(A)(1)” and “DR 2-101(A)(4)” instead of in DR 2-102(A)(1) and DR 2-102(A)(4), where they actually occur.

The Code was amended in February 1970, 1974, 1975, 1976, and in August 1976, 1977, 1978.³

3. In these seven instances, 76 Ethical Considerations, numbered sections and subsections of Disciplinary Rules, and Definitions were amended. Several were amended three times. One—DR 2-101 (B)—was amended four times. It is of interest to note that all but 8 of the 76 amendments were to Canon 2 and to Definitions relevant to it. Canon 2 was also the most difficult one to draft; the Wright Committee spent about half of its time on it (Transcript of Interview with John F. Sutton, Jr., by Olavi Maru, Dec. 20, 1976, Houston, pp. 25, 84 (on file at American Bar Foundation, Chicago)).

Footnotes

With three exceptions,¹ footnotes to the *Code* were prepared by research assistants to John F. Sutton, Jr., reporter for the Wright Committee. The sole purpose of the notes was to provide the Committee members with a convenient cross-reference tool to the old Canons.² The Committee did not review or discuss the notes and planned to include them only in the January 1969 preliminary draft of the Code.³ However, a number of lawyers to whom the preliminary draft was sent wrote to the Committee urging it to leave the notes in because they would be helpful to the users of the Code. As a consequence, the notes were carried over to the final draft and became part of the Code when the final draft was adopted by the ABA House of Delegates.

1. The Committee provided the following footnotes: note 12 to the Preamble; note 10 to Canon 3; and note 85 to Canon 7 (Transcript of Interview with John F. Sutton, Jr., by Olavi Maru, Nov. 3, 1978, Austin, Tex. (on file at American Bar Foundation, Chicago)).

2. *Id.* at 1. In the preliminary and final drafts note 1 to the Preamble stated that footnotes were not intended to be "exhaustive" annotations of the views taken by the Committee. This is obviously not consistent with the statement that the notes were merely references prepared for the convenience of the Committee. John Sutton's recollection (*id.* at 2) is that the Committee wished note 1 to explain that the notes did not (1) represent the views of the Committee and (2) did not comprise an exhaustive set of references to all relevant materials. How note 1 came to read that notes were not an "exhaustive" annotation of the views of the Committee is not known. At any rate, beginning with the 1970 printing of the Code the word "exhaustive" was eliminated from note 1. It is not known who was responsible for that.

3. Note 1 to the Preamble in the preliminary draft states that footnotes will be deleted from the final draft.

Preface to 1969 Final Draft of the Code of Professional Responsibility*

On August 14, 1964, at the request of President Lewis F. Powell, Jr., the House of Delegates of the American Bar Association created the Special Committee on Evaluation of Ethical Standards to examine the current Canons of Professional Ethics and to make recommendations for changes. Your Committee has been at work since that time with the extremely competent assistance of its Reporter, Professor John F. Sutton, Jr., of the University of Texas School of Law. Since August of 1967 we have been aided by Mrs. Sarah Ragle Weddington, a member of the Texas Bar, who has served as Assistant to Mr. Sutton. The supporting research work was conducted under the supervision of Mr. Sutton in his capacity as Director of a research project for the American Bar Foundation. We acknowledge with thanks the effective help of Frederick R. Franklin of the American Bar Association Division of Professional Service Activities, who served as Staff Assistant in the crowded latter months of our work.

After substantial study and a number of meetings, we concluded that the present Canons needed revision in four principal particulars: (1) There are important areas involving the conduct of lawyers that are either only partially covered in or totally omitted from the Canons; (2) Many Canons that are sound in substance are in need of editorial revision; (3) Most of the Canons do not lend themselves to practical sanctions for violations; and (4) Changed and changing conditions in our legal system and urbanized society require new statements of professional principles.

The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908. They were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of *Professional Ethics*. Since then a limited number of amendments have been adopted on a piecemeal basis.

The thought of studying the Canons of Professional Ethics with a view of possible revision is not a new one. In 1928,¹ 1933² and 1937³ special committees of the American Bar Association, appointed for the purpose of investigating the subject, made reports recommending overall revisions,

*This version of the Preface is from the final draft of the *Code* (July 1, 1969). It is included here because it tells more about the work of the drafting committee than the current Preface does.

1. 53 *ABA Reports* 495 (1928).

2. 58 *ABA Reports* 428 (1933).

3. 62 *ABA Reports* 761 (1937).

but nothing came of these efforts. In 1954⁴ a distinguished committee of the American Bar Foundation made extensive studies of the Canons and recommended further work in the field, but the subject lay fallow for ten more years until the creation of our Committee.

As far back as 1934 Mr. Justice (later Chief Justice) Harlan Fiske Stone, in his memorable address entitled *The Public Influence of the Bar*, made this observation:

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 relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era.

Our studies led us unanimously to the conclusion that the need for change in the statements of professional responsibility of lawyers could not be met by merely amending the present Canons. A new Code of Professional Responsibility could be the only answer.

While the opinions of the Committee on Professional Ethics of the American Bar Association have been published and given fairly wide distribution with resulting value to the bench and bar, they certainly are not conclusive as to the adequacy of the present Canons. Because the opinions are necessarily interpretations of the existing Canons, they tend to support the Canons and are critical of them only in the most unusual case. Since a large number of requests for opinions from the Committee on Professional Ethics deal with the etiquette of law practice, advertising, partnership names, announcements and the like, there has been a tendency for many lawyers to assume that this is the exclusive field of interest of the Committee and that it is not concerned with the more serious questions of professional standards and obligations.

The present Canons are not an effective teaching instrument and they fail to give guidance to young lawyers beyond the language of the Canons themselves. There is no organized interrelationship of the Canons and they often overlap. They are not cast in language designed for disciplinary enforcement and many abound with quaint expressions of the past. The present Canons, nevertheless, contain many provisions that are sound in substance, and all of these have been brought forward in the proposed Code.

4. The Special Committee on Canons of Ethics was actually appointed in February 1955 and submitted its report on June 30, 1958 (Special Committee of the American Bar Foundation on Canons of Ethics, *Report*, June 30, 1958, at 1).

This unpublished report is an important document to the historian of the legal profession. It is not merely a list of suggested or recommended textual changes to the Canons of Professional Ethics. Rather, it discusses and analyzes in substantial detail and with sophistication and realism problems in and shortcomings of various canons in relation to the realities of law practice. One of its general recommendations was that "Rules and Standards to be followed in law practice should be revised where necessary to maintain basic professional principles in the face of changes in the professional environment" (p. 97). However, as the Preface states above, "the subject lay fallow for ten more years."

In our studies and meetings we have relied heavily upon the monumental *Legal Ethics* (1953) of Henry S. Drinker, who served with great distinction for nine years as Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the American Bar Association.

We have had constant recourse to the opinions of the Committee on Professional Ethics. These opinions were collected and published in a single volume in 1967; since that time we have been favored with all opinions of the Committee in loose-leaf form.

Recent decisions of the Supreme Court of the United States have necessitated intensive studies of certain Canons. Among the landmark cases in this regard are *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963), *Brotherhood of R. R. Trainmen v. Virginia*, 377 U.S. 1, 84 S. Ct. 1113, 12 L.Ed.2d 89 (1964), and *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 88 S. Ct. 353, 19 L.Ed.2d 426 (1967). It is not here necessary to comment in detail on these far-reaching rulings since they are familiar to all lawyers.

Also, in recent years the Supreme Court of the United States has made important pronouncements in the areas of admission to the bar and discipline of lawyers. Without attempting an exhaustive catalogue in this regard, we refer to *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 96 (1957), *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L.Ed.2d 754 (1967), and *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L.Ed.2d 117 (1968).

Our Committee has held meetings with 37 major units of the profession and has corresponded with more than 100 additional groups. The entire Committee has met a total of 71 days and the editorial subcommittee of three members has met 28 additional days. Geoffrey C. Hazard, Jr., of Chicago, Illinois, Director of the American Bar Foundation, John G. Bonomi, of New York, New York, a member of the A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, and Paul Carrington, of Dallas, Texas, a member of the A.B.A. Special Committee on Availability of Legal Services, attended many of our meetings and each made invaluable suggestions in the course of our deliberations. Lawrence E. Walsh, of New York, New York, served as a member of our Committee in the first two years of its existence and rendered distinctive service in that period.

Preface to the 1977 Version of the Code of Professional Responsibility

On August 14, 1964, at the request of President Lewis F. Powell, Jr., the House of Delegates of the American Bar Association created a Special Committee on Evaluation of Ethical Standards to examine the then current Canons of Professional Ethics and to make recommendations for changes. That committee produced the Code of Professional Responsibility which was adopted in 1969 and became effective January 1, 1970. The new Code revised the previous Canons in four principal particulars: (1) There were important areas involving the conduct of lawyers that were either only partially covered in or totally omitted from the Canons; (2) Many Canons that were sound in substance were in need of editorial revision; (3) Most of the Canons did not lend themselves to practical sanctions for violations; and (4) Changed and changing conditions in our legal system and urbanized society required new statements of professional principles.

The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908. They were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of *Professional Ethics*. Since then a limited number of amendments have been adopted on a piecemeal basis.

As far back as 1934 Mr. Justice (later Chief Justice) Harlan Fiske Stone, in his memorable address entitled *The Public Influence of the Bar*, made this observation:

"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 relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era."

The new Code of Professional Responsibility developed by the committee appointed by President Powell and adopted in 1969 was the result of the efforts of that committee.

While the opinions of the Committee on Professional Ethics of the American Bar Association had been published and given fairly wide distribution with resulting value to the bench and bar, they certainly were not conclusive as to the adequacy of the previous Canons. Because the opinions were necessarily interpretations of the existing Canons, they tended to support the Canons and were critical of them only in the most unusual case. Since a large number of requests for opinions from the Committee on

Professional Ethics dealt with the etiquette of law practice, advertising, partnership names, announcements and the like, there had been a tendency for many lawyers to assume that this was the exclusive field of interest of the Committee and that it was not concerned with the more serious questions of professional standards and obligations.

The previous Canons were not an effective teaching instrument and failed to give guidance to young lawyers beyond the language of the Canons themselves. There was no organized interrelationship between the Canons and they often overlapped. They were not cast in language designed for disciplinary enforcement and many abounded with quaint expressions of the past. Those Canons contained, nevertheless, many provisions that were sound in substance, and all of these were retained in the Code adopted in 1969. In the studies and meetings conducted by the committee which developed the present Code, the committee relied heavily upon the monumental *Legal Ethics* (1953) of Henry S. Drinker, who served with great distinction for nine years as Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the American Bar Association.

The Formal Opinions of the Committee on Ethics and Professional Responsibility were collected and published in a single volume in 1967, and since that time have been published continuously in loose-leaf form. The Informal Opinions of the Committee on Ethics and Professional Responsibility were collected and published in a two volume set in 1975, and since that time also have been published continuously in loose-leaf form.

Since the adoption of the Code of Professional Responsibility in 1969 a number of amendments have been required due to decisions of the Supreme Court of the United States and lower courts relating to the provision of group legal services and the provision of additional legal services on a wide scale not only to indigents but also to persons of moderate means. Furthermore, recent decisions of the Supreme Court of the United States on the subject of the constitutionality of restrictive provisions in the Code relating to lawyer advertising have required a substantial revision of Canon 2 and of other portions of the present Code. These modifications in the Code are included in the present printing, up to and including the action taken by the House of Delegates in August of 1977. Many of these were recommended by the Committee on Ethics and Professional Responsibility and by the Special Committee on Professional Discipline.

Lewis H. Van Dusen, Jr.
Chairman
Committee on Ethics and
Professional Responsibility

The Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August

12, 1969 and was amended by the House of Delegates in February 1970, February 1974, February 1975, August 1976 and August 1977.

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*As shown in the final draft of the Code, July 1, 1969.