PROFESSIONAL RESPONSIBILITY

Problems and Materials

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PROBLEMS AND MATERIALS
ON
PROFESSIONAL RESPONSIBILITY

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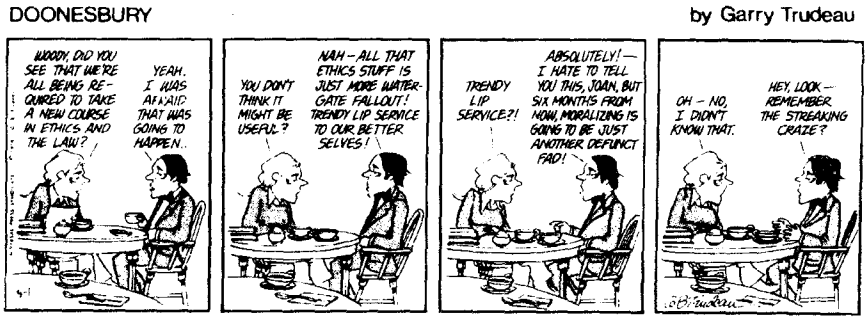
Chapter I

THE LEGAL PROFESSION: BACKGROUND AND FUNDAMENTAL ISSUES

A. Introduction



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The Doonesbury humor is still biting, but in this case Garry Trudeau proved a poor prophet. The study of professional responsibility has proved to be more than "just another defunct fad." It has survived and prospered and seems likely to continue to do so. At least three reasons may account for the continuing interest.

First, the subject of the course in professional responsibility is the legal profession itself. It has not escaped law students that while they may use the substance of their torts course periodically, they will use the substance of professional responsibility daily. This course is about lawyers as they engage in the practice of law. Whatever the theoretical interest of the subject matter, its practical content is extremely high.

Second, at the time Trudeau produced the Doonesbury cartoon, the ABA Model Code of Professional Responsibility was only five years old. Many people believed that the Code, the product of several years work by a distinguished commission, had resolved all questions that were worth considering.

Almost as soon as significant numbers of people began to look seriously at the Code, however, they realized it had answered many questions badly and left others unresolved altogether. The work of the ABA Commission on Evaluation of Professional Standards, commonly

called the Kutak Commission after its chair, the late Robert J. Kutak, produced the ABA Model Rules of Professional Conduct and demonstrated that there were many issues left to debate and discuss.

Third, while work in professional responsibility during the 1970s focused primarily on the legal rules applicable to an attorney's behavior, it has become increasingly clear that "legal ethics" offers an unusually good opportunity to apply the insights of history, sociology, economics and philosophy to fundamental legal questions.

What such study reveals is that, far from being a unitary profession with a long and consistent tradition grounded in fundamental philosophical ideals, the legal profession is a rich, complex, and often perverse mixture of traditions, roles and standards. Understanding the insights and distinctions suggested by history and philosophy will not automatically resolve practical problems, but they may help a lawyer better understand the questions presented and better see relationships between issues that otherwise might be obscured.

B. Development of the American Legal Profession

As of 1995, the United States has about 875,000 practicing lawyers. That is about 2½ times the number in 1970. Roughly 40,000 new lawyers are admitted to the bar each year from ABA accredited schools, and about 15,000 leave the practice annually due to death, retirement, or simply because they don't like the work.[1]

In any event, if present trends continue the bar is likely to have about one million members in the year 2000. Not everyone takes a sanguine view of this development. The growth of the profession led Harvard President Derek Bok, for example, to assert:

> The net result of these trends is a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit. I cannot press this point too strongly. * * * [T]he supply of exceptional people is limited. Yet far too many of these rare individuals are becoming lawyers at a time when the country cries out for more talented business executives, more enlightened public servants, more inventive engineers, more able high-school principals and teachers.
>
> * * * A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country

1. The most carefully documented statistics on the American legal profession are those in the American Bar Foundation study by Barbara A. Curran, The Lawyer Statistical Report—A Statistical Profile of the U.S. Legal Profession in the 1980s (1985), and Barbara A. Curran & Clara N. Carson, Supplement to the Lawyer Statistical Report: The U.S. Legal Profession in 1988 (1991). More recent data is contained in ABA Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum (1992) (hereafter ABA Task Force). Even when calculated as carefully as in these studies, of course, the number of lawyers will always be an estimate primarily because of the difficulty in knowing how many licensed lawyers are no longer engaged in a law-related activity.

only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year*. It would be hard to claim that these differences have no practical consequences. As the Japanese put it, "Engineers make the pie grow larger; lawyers only decide how to carve it up." [2]

QUESTIONS

1. Do you agree with President Bok's analysis? Apart from any given lawyer's economic interest in slowing the growth of the legal profession, can one objectively say that there are too many lawyers? What standard would you use to make such an assessment? For example, can you say that all persons with a need for a lawyer now get help at prices they can afford?

2. The average American lawyer earns over $100,000 per year.[3] Is such an income level characteristic of a profession that is overcrowded? Does the income data tend to answer President Bok's concerns, or does it tend to reinforce them?

Whatever one's answers to these questions, it is clear that the legal profession and the role of the lawyer in our society is significantly different today than at most times in the nation's history. The following two excerpts help put our present situation into context.

RICHARD B. MORRIS,* THE LEGAL PROFESSION IN AMERICA ON THE EVE OF THE REVOLUTION, IN HARRY W. JONES, ED., POLITICAL SEPARATION AND LEGAL CONTINUITY

4–11, 18–19 (1976).

* * *

If the Revolutionary era was a legal- and constitution-minded age dominated by lawyers, the period of seventeenth-century settlement was

2. Bok, "A Flawed System": Report to the [Harvard] Board of Overseers, 85 HARVARD Magazine 38, 41 (May-June 1983).

3. There is not good recent data but a number of sources confirm this figure, among them Blodgett, Time and Money: A Look at Today's Lawyer, ABA Journal, Sept. 1, 1986, p. 47. The median income of lawyers was lower—$64,448 in 1986. According to the ABA survey, about 45% of American lawyers in 1986 earned between $35,000 and $75,000 per year. Another 35% earned between $75,000 and $250,000 annually. About 16% earned less than $35,000 per year, and about 4% earned over $250,000. Lawyer salaries, on average, have remained constant or even fallen in recent years. Lissy, American Management Ass'n Compensation and Benefits Review, p. 10 (May 1994).

* The author was Gouverneur Morris Professor of History Emeritus at Columbia University.

the miraculous era of law without lawyers, a time when law was shaped by theologians, politicians, farmers, fishermen, and merchants. This generalization applies to all the colonies settled before the Stuart Restoration, but it is conspicuously appropriate to the Puritan colonies wherein the clergy played an exceptional role in lawmaking and where laymen universally acted as judges. Not a single lawyer came to Plymouth on the *Mayflower*. Massachusetts Bay, settled a decade later, did have some legally-trained men among its first arrivals, but not one among them had then been practicing law in England. The first educated attorney venturing to practice in that colony was Thomas Lechford, whose activities dating from 1637 or thereabouts, were limited, since he was disbarred shortly thereafter for tampering with a jury. While lawyers were not technically prevented from practice, Article XXVI of the Body of Liberties, the initial law code adopted in 1641, while permitting attorneys to plead causes other than their own, disallowed all fees or rewards, thus, for a time at least, withholding inducements to practice as a respectable means of livelihood. Indeed, many of John Cotton's fellow Puritans, both in England and in America at that time, would have agreed with his characterization of lawyers as unconscionable advocates who "bolster out a bad case by quirks of writ and tricks and quillets of law."

Early hostility to the profession of the law was by no means confined to reformist New England. It was manifest as well in the tobacco colonies. A Maryland act of 1674 recited the allegation that the "good people of this Province are much burthened" by lawyers taking and exacting "excessive fees." Curbs continued into the eighteenth century. In 1707, Maryland's legislature set rules for controlling the admission of attorneys on the basis of the alleged "corruption, ignorance and extortion" of several of them and set such ceilings on fees that leading attorneys withdrew in protest from practice for a short time. The limitation on fees continued in force as late as 1729. In Virginia so deep-seated was anti-lawyer prejudice that a statute of 1645 virtually disbarred paid attorneys. Its repeal a decade later failed to end discrimination against the legal profession. In 1657 the court heavily fined a lawyer for appearing in court on behalf of a client, and the situation was not stabilized until 1680, when attorneys were permitted to practice under rigid restrictions and after obtaining a license from the governor.

* * *

Whether the low repute of the lawyers stemmed from their relatively obscure social origins in this early period, from their lack of professionalism, or from their tendency to regard law as a minor part of the multiple enterprises in which they were engaged, their early conduct failed to evoke good will. In short, courts dominated by laymen informed by a few basic lawbooks such as Dalton's *Country Justice*, as in the contemporary English county seats, and litigated by attorneys in fact, who were agents with powers of attorney (including among them

numerous wives of absent litigants), provided the substance of justice without the benefit of a professional bar.

* * *

* * * Somewhere between the Stuart Restoration and that systematic imperial machinery set up following the Glorious Revolution, one finds that the socio-economic structure of the colonies underwent a transformation. In the North a merchant-capitalist system was evolving based upon rapidly expanding transatlantic and intercolonial trade. In the South, a plantation economy emerged, based on the production for export of the great staples, tobacco and rice, and spawning a slave-holding and property-conscious society. That emergent business society was less egalitarian than at the time of settlement and determined to protect its interests against a variety of threats—whether from the constrictive trade laws of Parliament, from challenges to land titles, or from depreciating currencies. Everywhere the propertied class now exerted an influence toward security and stability, while the rapid expansion of business and the utilization of more sophisticated instruments in transatlantic trade necessitated a resort to the more technical legal system of the mother country.

Somewhere, then, around 1690 we find the legal profession establishing a foothold in the colonies. While the roster of trained legal specialists expanded dramatically over the next three decades, nonspecialists without professional training were descending on the courts in hordes. A host of parasitic pettifoggers, encouraged by the practice of filing writs by sheriffs and their deputies, easily outnumbered the trained members of the bar. Shoemakers, wigmakers, and masons procured deputations from the sheriffs and stirred up petty and contemptible litigation. It seems almost incredible that the colonial folk of the eighteenth century would manifest a litigious spirit even more intense than their forbears, but the theologian-statesman Cotton Mather was prompted in 1719 to found, in addition to a variety of organizations for effective lobbying and for suppressing vice, a Society of Peacemakers, which aimed to "divert Law-suits" and promote arbitration. If Mather achieved any success, it was not perceptible to the later generation of lawyers which claimed John Adams. Rather did Adams, whose own town attained such notoriety that "as litigious as Braintree" became proverbial, feel impelled to declaim against "the dirty dabblers in the law" who were taking bread out of the mouths of respectable lawyers.

Efforts to limit the legal profession to qualified attorneys mark the entire pre-Revolutionary era, along with enjoining sheriffs and their deputies from filing writs or giving legal advice. Even earlier, in the first few decades of the eighteenth century we find the legal profession asserting its claims to a monopoly over litigation. In New York a bar association has been unearthed as early as 1710, and one scholar insists that it functioned continuously thereafter, certainly in a rather formal sense by the year 1756. In Massachusetts an embryo bar association can be traced back at least to the year 1759. Even John Adams found its

meeting "delightful." Aside from affording their members a chance for sociability, such associations, in effect guilds, were concerned about limiting the number of practitioners, restricting clerkships, barring the disqualified and, in later years, proposing legislative reforms.

To a rising and ambitious lawyer like Adams, the restrictive measures that had been taken by the bar of his province did not seem a sufficient deterrent, and he was led to bemoan the threatening number of his juniors seeking admission to practice. "They swarm and multiply," he complained with characteristic exaggeration. Still, the standards that were drawn up in Massachusetts were rather rigid. The Essex County bar in 1769 prescribed three years of clerking before admission to the inferior courts, another two years of practice in the lower courts before being admitted to the Superior Court as an attorney, and another two years more in practice before the Superior Court as a prerequisite to the status of barrister that they were desperately intent on establishing. Not only did they attempt to transplant those distinctions in the legal profession found in contemporary England, but in 1762 they further introduced the pageantry of the common law courts by requiring judges and lawyers to wear austere judicial gowns and wigs, a practice emulated in New York two years later.

In New York also, the lawyers raised the bars. An agreement entered into in 1756 by the "gentlemen of the Law" provided that they would cease taking any clerks for a period of fourteen years, the only exception being that each subscriber could take one of his own sons. Furthermore, at the end of that period, when clerkships were reopened, the lawyers stipulated that clerks must possess college degrees and that attorneys could take only one clerk at a time. The lawyer was to exact a £200 fee from his clerk, who would be required to serve for a minimum of five years. It was this monopolistic agreement which stood in the way of young John Jay's plans to study law. His father, a prosperous New York merchant, considered sending his son to London or Bristol to clerk in a law office there. He found out that in Bristol a five-year clerkship was required and the payment of a fee of from £200 to £300. If there was no alternative, Jay's father even thought of enrolling his son at the Inns of Court. Fortunately for Jay, in January of 1764 the members of the New York City bar relaxed their rules. Under the new agreement, an attorney could take a second clerk, but only after his first clerk had served for three years, thus insuring that no attorney would have more than two clerks at one time. Benjamin Kissam agreed to take John Jay on under these terms, but in fact Kissam had taken Lindley Murray as his clerk only a year before. Strictly speaking, Kissam should have waited until the end of 1764 before admitting another clerk to his office. Somehow these technicalities were waived; no one seems to have protested, and the first Chief Justice of the United States Supreme Court finally won his chance to climb the ladder of the legal profession.

ROBERT STEVENS,** DEMOCRACY AND THE LEGAL PROFESSION: CAUTIONARY NOTES

3 Learning and the Law 18 (No. 3, 1976).***

Law was not a profession [then] open to the masses, and during the 1780s and 1790s in most states an effort was made to keep it as narrow as possible. Each state except for Virginia—and that for peculiar reasons—retained a period of apprenticeship. This period was reduced if the young lawyer attended college, but there were still only half a dozen colleges in the new states. (For instance, Massachusetts had a five-year apprenticeship at that time, but only three years for Harvard or Yale graduates.)

* * * We still don't know what happened to lawyers [from 1820 to 1860] * * *. But what we can say, categorically, is that if the profession was heavily anglicized until 1820, after 1820 the old English notions of the professions slowly collapsed.

The differences between the American and English systems of legal training were made dramatically evident. In America, there was an obvious decline of formal structures; the bar associations had largely evaporated, as had the apprenticeship system. Legal education in the United States had fallen into a decline. The legal profession was "wide open." Such training as there was in law was almost invariably picked up on the job.

What does appear to have emerged from the impact of these forces is that, by the mid-nineteenth century, the lawyer had a different function in America from his counterpart in England. He became the man who greased the wheels of society—what today might be referred to, depending on one's perspective, as the "leading citizen," "hired gun," or "the multi-purpose social science decision maker." Whichever perspective you have, however, there is no question that the concept of the lawyer and the function he served in America after the Civil War bore little resemblance to his English counterparts.

What happened after 1870, both in the society as a whole and in the legal profession, was a process of institutionalization. It followed the years of Civil War, of rapid growth in population and of westward expansion. It was a time when great corporations were born, when great law firms grew and when universities came of age.

Significantly, the development of legal education—or, more accurately, of the resurgence of law schools—preceded that of the legal profession. Dwight at Columbia in the late 1860s, and Langdell, who became dean of Harvard Law School in 1870, were the two who set the pattern for the kind of legal education which we think of today.

What Langdell did was to take the erratic law training as it was being practiced in the law offices and systematize it. Building on the

** At the time of this article, the author was Provost at Tulane University.

earlier work of Story at Harvard, he completed the process of taking law training out of the law offices and placed it firmly inside the universities. Academic law became respectable, as it never had been under the English system—or during the Jacksonian period.

* * *

Langdell had a vision of academic respectability, and he was remarkably successful as a role model. Other universities began developing law schools, as did various private entrepreneurs. At the same time, under pressure from the ABA, states gradually reintroduced a period of apprenticeship.

Indeed, by 1900 most states had returned to the three-year apprenticeship requirement, and bar exams had begun to reappear in the 1890s. Yet legal education still remained voluntary. "The principle of supply and demand works" remarked the Englishman Bryce upon his visit to Harvard during this time. "No one is obliged to attend these courses to obtain admission and the [bar] examinations are generally too lax to require elaborate preparation. But the instruction is found so valuable, so helpful for professional success, that young men throng the lecture halls, willingly spending two or three years in the scientific study of law, which they might have spent in the chambers of a practicing lawyer."

Basically, anyone who wanted to be a lawyer could hang out his shingle, and there were very few requirements for doing so, except limited apprenticeship in some states. So the vast majority of lawyers at the turn of the century—80 to 90 percent—never saw the inside of a university, whether it was a law school or a college. Most of them had to take a bar exam, but, unlike the situation today, the market was the primary determinant of whether they would be successful.

Meanwhile, Harvard Law School continued to grow and to train the elite lawyers—at least those whose parents had money. In 1900 a young man went to Harvard Law School if he wanted to practice with one of the large Boston or New York firms. But in addition, there were a plethora of other law schools—part-time and full-time, one year, two year and three year—while apprenticeship remained the normal method of entry to the profession.

In the last 70 years, we have seen the apprenticeship method go the way of the dodo and formal, institutionalized legal education become compulsory.

What happened was not really the academic lawyer's fault. It was the American Bar Association's. I don't mean to say that the academic lawyer was entirely innocent in the implementation of this retrograde step, but it was the ABA which was the primary mover in making law school compulsory. It wanted to make law school compulsory because it wanted to contribute to "raising standards."

"Raising standards" is purposely vague. What it meant in this case undoubtedly included concern over the large number of illiterate and dishonest lawyers. A significant number of lawyers in 1900 had not

finished high school and heretofore the ABA's effort to raise standards was in part a genuine effort to protect the public.

The developments, however, also represented an effort on the part of many practitioners to restrict numbers. The move was, to some extent, an anticompetitive device, and it was also undoubtedly—although I think that some recent studies overstate this—an effort to discriminate against certain groups. It was an effort to keep blacks and immigrant groups—especially Jews—out of the legal profession.

The first state to make law school compulsory was West Virginia which, in 1928, required one year of law school. It was not difficult to see where these pressures were coming from. West Virginia argued the need to inculcate "The Spirit of American Government." A New York delegate to the ABA put it more bluntly: "The need to have lawyers able to read, write and talk the English language—not Bohemian, not Gaelic, not Yiddish, but English." That was the beginning of compulsory legal education and prior college training in the United States—the debates of the House of Delegates in the 1930s and 1940s make it clear that the same sentiment motivated the ABA when it tried to drive out some law schools—and the depression provided a powerful stimulus to "raising standards."

Gradually, between 1929 and 1942 each state, partly for anticompetitive reasons and partly in a genuine effort to raise standards, followed the lead of West Virginia—and the suggestions of the American Bar Association. In 1920 there had still been a certain flexibility: many law schools only had two-year programs and only two or three law schools required an undergraduate degree. Increasingly, lawyers had gone to law school and most of the leading universities had law schools—but not because they were required to. At that time virtually every state allowed, as an alternative, three years of apprenticeship; and the majority of American lawyers had still not been to law school.

By 1950 attendance at law school was compulsory, and during the 1950s law school entrance requirements included two, and later three years of college. It was all part of the movement to "improve standards," although for reasons both good and bad. Moreover, in the post-Second World War years, the number of lawyers who had attended law school for the first time outran the number who had not.

The transition from compulsory apprenticeship to compulsory legal education was accomplished in three steps. First, law schools had become an alternative to apprenticeship; second, they had gradually driven out apprenticeship, and finally, they had become anxious to tighten standards and cut back on the number of accredited schools, thereby further limiting access to a legal education.

* * *

The question of access to the legal profession, especially for minorities, is directly tied to the accreditation process. For example, when a new, small, low cost law school opens which has a sizable minority

student population, is that school serving a minority group or exploiting it? The line between serving and exploiting is an extremely difficult one, but, in effect, there is always an inherent danger in a self-regulating profession to reproduce itself in the same colors and tones.

Changes in the Bar Over the Past Twenty Years

The above articles were written in 1976 at the time of the bicentennial of the nation and the centennial of the founding of the American Bar Association. Few lawyers in 1976 could have predicted the changes in professional life that were about to come.

The profession in 1976 was beginning a rate of growth that has not abated and that so concerned President Bok a few years later. The number of lawyers admitted to the bar in 1975 was 34,930, for example; that was almost double the number admitted in 1970.[4]

The demographics of the legal profession had begun to change as well. Less than 7,000 women were in law school in 1970; the figure rose to over 40,000 by 1980.[5] During the same decade, the number of African–Americans in law school rose from less than 4000 to almost 15,000.[6] The numbers were even higher by the end of the 1980s.[7]

The rules governing the practice of law were likewise on the brink of change. Before 1975, most lawyers adhered to schedules that established minimum levels for their fees for countless services.[8] Lawyers were potentially subject to professional discipline if they allowed their legal talents to be praised in a positive newspaper story.[9]

Further, while some legal practitioners have always been more prominent or successful than others, the profession has probably become even more stratified than before. Professors Heinz and Laumann concluded their landmark study of Chicago lawyers this way:

> [M]uch of the differentiation within the legal profession is secondary to one fundamental distinction—the distinction between lawyers who represent large organizations (corporations, labor unions, or government) and those who represent individuals. The two kinds of law practice are the two hemispheres of the profession. Most lawyers reside exclusively in one hemisphere or the other and seldom, if ever, cross the equator.

4. ABA Task Force at 14.

5. Id. at 18.

6. Id. at 25.

7. By 1991, for example, women constituted 43% of law school students. Curran, Lawyers in Profile, in 5 Researching Law: An American Bar Foundation Update 1, 4 col. 2 (Spring, 1994).

8. The fee schedules were found to violate the antitrust laws in Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), discussed in Problem 7, infra.

9. Cf., Belli v. State Bar, 10 Cal.3d 824, 112 Cal.Rptr. 527, 519 P.2d 575 (1974) (lawyer censured for comments in advertisement for scotch in which his legal talent was praised).

> Lawyers who serve major corporations and other large organizations differ systematically from those who work for individuals and small businesses whether we look at the social origins of the lawyers, the prestige of the law schools they attended, their social or political values, their networks of friends and professional associates, or several other social variables.[10]

In 1986, the ABA appointed a "Commission on Professionalism". Its report called for the profession's return to a common set of institutional values based on Roscoe Pound's definition of a profession as "a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood." [11]

As you work your way through these materials, ask yourself whether law indeed is still a profession with a common core. Is it united by any more than a set of regulatory provisions? If there are still core values, do they include the "spirit of a public service." If not, should the lack of such a core be a cause for concern?

In the mid–1990s, of course, the principal concern of lawyers may be which of them will continue to have jobs. Editor Stephen Brill has predicted that large firms may have to lay off as many as one-third of their lawyers.[12] There is reason to believe those concerns may be overstated, but there will unquestionably be increased pressure for the efficient delivery of legal services at ever lower prices.[13]

What will such pressures do to the idea of a unified legal profession? What will it do to lawyers' ability and willingness to deliver pro bono service? Can lawyers' professional standards survive the economic pressures lawyers will face? Will the profession itself survive if its standards do not exceed those of the economic marketplace?

C. The Development of Standards of Professional Conduct

For at least 150 years, American lawyers have tried to describe proper professional behavior. The earliest such standards were statements of moral principles that had no legal effect. Throughout most of the 19th Century, such principles were developed and published by lawyers who were also teaching law.

In 1836, for example, Baltimore lawyer David Hoffman closed his two volume *A Course of Legal Study* with "Fifty Resolutions" to which he urged lawyers to adhere. Those resolutions, in turn, appear to have

10. J. Heinz & E. Laumann, Chicago Lawyers: The Social Structure of the Bar, pp. 319–20 (1982).

11. Roscoe Pound, The Lawyer from Antiquity to Modern Times 5 (1953).

12. E.g., Steven Brill, The Coming Crisis: Lopping off a Third, The American Lawyer, June 1993, p. 5; Discussion, Is There 30% Overcapacity?, The American Lawyer, Oct. 1993, p. 7.

13. E.g., Thomas D. Morgan, Economic Reality Facing Twenty–First Century Lawyers, 69 U.Wash.L.Rev. 625 (1994).

been an important influence on the writing of George Sharswood, whose *A Compend of Lectures on the Aims and Duties of the Profession of the Law* was published in Philadelphia in 1854.

Sharswood's standards are usually cited as the source of the Code of Ethics adopted by the State of Alabama in 1887. It was the Alabama Code, in turn, that formed the basis for the American Bar Association's first statement of ethical principles, the Canons of Professional Ethics, published in 1908.

The ABA Canons remained the national professional model for over sixty years, although over that time its original thirty-two Canons were supplemented by fifteen others. You will find the ABA Canons in the Standards Supplement to this book. In many states, however, lawyers were subject to professional discipline for offenses not much more specific than "conduct unbecoming a lawyer."

Thus, in 1969, the ABA adopted its Model Code of Professional Responsibility. That Code, adopted almost universally by state supreme courts around the country, was a set of principles designed to be more specific and more amenable to disciplinary enforcement.

The nine "Canons" in the Code were "axiomatic norms," i.e., general propositions serving as little more than chapter headings for the rest of the text. The "Disciplinary Rules" were "mandatory in character," that is, violations would subject the attorney to discipline up to and including disbarment. The Ethical Considerations, on the other hand, were "aspirational in character" and were said to be an unenforceable but articulate statement of the profession's consensus about proper lawyer behavior.

As mentioned earlier in connection with the Doonesbury cartoon, and as you will see throughout this course, the decade of the 1970s was a period of great ferment in the field of legal ethics. Important Supreme Court cases were handed down and there was vigorous debate about ethical propositions that had to that point been little challenged.

Thus, in 1983, the ABA adopted yet another version of its statement of professional standards. The ABA Model Rules of Professional Conduct are structured in a "Restatement" format. They have black-letter rules that are followed by explanatory "Comments" and notes comparing the Model Rules to the Model Code.[14] The Comments are meant to have authoritative status; the Code Comparison notes do not.

It is important to understand, however, that none of the ABA documents is legally binding on anyone. That is, they are models that must be adopted or rejected by individual state supreme courts before they have any legal effect. As of 1995, over thirty-five states have revised their own rules to follow the Model Rules in substantial part.

14. Unlike an actual Restatement, however, the Model Rules offer no examples and illustrative cases.

Others have amended their Model Code to adopt important Model Rules ideas.

Both the ABA Model Rules and the ABA Model Code are contained in the Standards Supplement to this book. In this text, we ask how both the Model Rules and Model Code approach the ethical problems confronting lawyers. Keep in mind, however, that the "Code of Ethics" that will be legally binding on you will be the one adopted by the supreme court of the state or states in which you are licensed.[15] It may or may not correspond exactly to the ABA model from which it is derived.

At least three other sources of authority and advice will also be important to your analysis of problems. First are the decisions of courts, whether in cases seeking discipline of lawyers, civil suits seeking malpractice damages, contempt proceedings, criminal cases, or the like.

In addition, the ABA and state and local bar associations often issue ethics opinions. These are advisory opinions that respond to a specific question or to an assumed state of facts. Courts often cite such opinions as evidence of the law, but they are not formally binding on any lawyer.

Third, in 1987, the American Law Institute began work on the Restatement of the Law (Third), The Law Governing Lawyers.[16] It is expected to be finished sometime before the start of the next millennium. Like other Restatements, this one will not be law, but courts are likely to cite it as reliably describing the law. The topics addressed in the Restatement go beyond subjects of lawyer discipline to cover issues such as lawyer malpractice, liens to secure legal fees, and the like.

D. Some Contributions From Moral Philosophy to the Study of Legal Ethics

Ethics is a traditional field for philosophers. The dilemma for any course such as this one is how to acknowledge philosophical traditions while recognizing that most questions of modern legal ethics are debated in more traditional legal terms. The most helpful approach here seems to be to look at some distinctions that have been important in the philosophical tradition and can also be useful to us.[17]

15. Lawyers licensed in more than one state face problems of potentially conflicting ethical standards. Situations in which disclosure of information is required by some states and prohibited by others are likely to prove particularly difficult. At least in principle, a state supreme court may impose discipline on lawyers it has licensed wherever the conduct takes place. ABA Model Rule 8.5 is the latest attempt to try to deal with this problem.

16. There is no Restatement, First or Second, of The Law Governing Lawyers. This proposed Restatement is called "Third" because the American Law Institute is now drafting the third wave of Restatements on various subjects. Though we do not normally think of a "third" unless there is a "first" or "second", there are exceptions. Napoleon III was Emperor of France although there was never a Napoleon II who was Emperor.

17. Professor Ted Schneyer appropriately cautions lawyers and law students to discount the insights of moral philosophers when those insights reflect a lack of understanding of the issues actually faced in law practice. See Schneyer, Moral Philosophy's

1. The Ethics of Duty Versus the Ethics of Aspiration

Should the goal of ethical analysis be understood as one of defining a minimum standard below which conduct may not fall, establishing standards of ideal behavior toward which individuals should aim but cannot realistically expect to reach, or should it consist of giving "practical advice" that is somewhere in between?

Professor Lon Fuller suggested a distinction between what he called the "morality of duty" and the "morality of aspiration."

FULLER, THE MORALITY OF LAW

5–6, 9–10 (Rev. Ed. 1969).

The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In a morality of aspiration there may be overtones of a notion approaching that of duty. But these overtones are usually muted, as they are in Plato and Aristotle. Those thinkers recognized, of course, that a man might fail to realize his fullest capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing. Generally with the Greeks instead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as beseems a human being functioning at his best.

Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of "thou shalt not," and, less frequently, of "thou shalt." It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.

* * *

As we consider the whole range of moral issues, we may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins. The whole field of moral argument is dominated by a great undeclared war over the location of this pointer. There are those who struggle to push it upward; others work to pull it down. Those whom we regard as being

Standard Misconception of Legal Ethics,
1984 Wisconsin L.Rev. 1529.