CHAPTER II
PROFESSIONAL REGULATION

As we have seen in Chapter I, lawyers, by virtue of their position, may be entitled (and perhaps required) to act for clients in ways which might not be acceptable if not acting in such capacity. How far, however, can lawyers go? How far should they go? The possible answers deriving from perceptions of role were addressed in Chapter I. This Chapter will address the more formal constraints on attorney conduct.

There are many sources of "law" governing conduct by attorneys. As citizens, attorneys are subject to the "positive" law of the jurisdictions in which they practice. Thus, in some instances, criminal statutes relating to perjury, conflict of interest and related matters must be consulted. Court and agency rules of practice, procedure and evidence may provide guidance as well. In addition, some guidance may be found in court decisions in malpractice, disqualification, and ineffective-assistance-of-counsel cases.

The primary source of guidance for attorneys, however, is found in the rules developed by the Bar. Those rules are currently embodied in the Model Rules of Professional Conduct. The Model Rules were initially adopted by the ABA in 1983 to supersede the Code of Professional Responsibility, which had been adopted in some form in 49 states. The Model Rules have been adopted in the large majority of states (although a few states have explicitly rejected them), and they were adopted in Missouri effective January 1, 1986. The Rules contain "black letter" rules and commentary. The Code was written by the American Bar Association in 1969 to replace the then existing Canons of Professional Ethics. The Code is divided into three parts: Canons, Disciplinary Rules and Ethical Considerations. Neither the Rules nor the Code provide sanctions for violation of its proscriptions. These are left to the courts which supervise enforcement.

In the late 1990’s, a Commission (commonly called Ethics 2000) completed study of possible revisions to the Model Rules and recommended numerous changes to those Rules. The ABA House of Delegates adopted many of the changes at its midyear meeting in February 2002. Additional changes were adopted in 2003. We will be studying both the 2001 Rules (which are still in effect in many jurisdictions, including Missouri) and the 2003 Rules, and both can be found in the Standards Supplement. A Missouri Bar committee recently recommended changes in the Missouri Rules to the Missouri Supreme Court, and decision on those changes is pending.

At this point, read through the Model Rules to get a sense of their structure and approach. Pay particular attention to the recent changes. It may also be desirable to compare the structure of the Rules to that of the Code.

The Code was heavily criticized on many grounds, among them its failure to set out guiding principles, its inability to provide any real guidance to lawyers in making difficult decisions, its failure to take into account the realities of present day law
practice, and its over-protectiveness of lawyers. The Model Rules were drafted in an attempt to meet these criticisms, but, partly as a function of compromises during the adoption process, there is some question as to whether this effort was successful. The most recent changes reflect changes in practice as well as a response to corporate crises such as Enron. Although major overhaul of the Rules was considered, in most areas, amendments were more in the nature of tinkering rather than major structural change.

1. Why should we have a code of professional conduct? What purposes should it serve? Whose interests should it protect? What principles should be reflected, and how should these be prioritized? What are the priorities reflected in the current Rules? Have they changed in the last few years? Can you identify the prioritization of principles? Is it consistent? If not, why not? How should it be changed?

2. Who should regulate lawyers? The profession? The state? The judiciary? Consumers of legal services? Some combination of the above? Who regulates other trades and professions? Is there anything unique about law which requires a particular form of regulation?

3. Whose values should a professional code reflect? Can a code of conduct be ethically neutral? Should it? If not, whose ethics and values should be embodied therein? Can one code of conduct govern the practice of law in diverse settings by diverse groups of professionals? If it must, must we insure representation by the many factions within the Bar in the drafting of such a code? Is a code drafted by the organized Bar necessarily a "political" document?

4. How specific should a code be? Should it be a collection of "do's" and "don't's" or a document to "sensitize lawyers to the scope, depth and complexity of the commitments that they have undertaken in entering the profession" and to act as "a catalyst for a continuing discourse on the profession's raison d'être?" See Frankel, Book Review, Code of Professional Responsibility, 43 U. Chi. L. Rev. 874 (1976). Should it be a document reflecting and rationalizing the underlying principles of the profession? Should it be aspirational, or merely set lower limits of conduct? What are the costs and benefits of either approach?

5. Where can attorneys go for guidance if the Code or Rules are not crystal clear in their resolution of a professional responsibility problem? There are several sources of help for attorneys with professional responsibility problems, although a necessary first step is consulting the Code or Rules.

The Code or Rules are not applicable in a jurisdiction until adopted by the appropriate governmental body. They are generally adopted by the highest court in a state as a court rule (in Missouri, as Rule 4 of the Rules Governing The Missouri Bar and the Judiciary), and decided cases can be found through the annotated rules. These cases may provide more definitive interpretations of the relevant rules and generally have precedential value.
The American Bar Association and local bar committees issue opinions which are advisory only and are not binding on the courts. They are often referred to and relied on in court opinions, however. The ABA Standing Committee on Ethics and Professional Responsibility will respond to requests for interpretations of the Rules in formal or informal ethical opinions. Formal opinions are issued on questions of wide significance, whereas informal opinions tend to respond to more specific problems. Both formal and informal opinions of the ABA committee are published. The ABA opinions and those of many states and local bars are available in the ABA/BNA Manual, and many are available on-line. In addition, summaries of recent formal ethics opinions can be found at http://www.abanet.org/cpr/ethicopinions.html. Missouri Informal Opinions are available on-line in searchable format at http://www.mobanet.org/opinions/index.htm.

In Missouri, Supreme Court Rule 5.30 provides as follows:

**OPINIONS AND REGULATIONS BY ADVISORY COMMITTEE**

(a) The advisory committee may give formal opinions as to the interpretations of Rules 4, 5, and 6, and the amendments or additions thereto and may make regulations consistent therewith for the administration of Rules 4, 5, and 6. Formal opinions and regulations of the advisory committee shall be published in the Journal of The Missouri Bar after adoption thereof.

(b) The chief disciplinary counsel or any member of the bar who is substantially and individually aggrieved by any formal opinion of the advisory committee may petition this Court for review of the opinion. The Court in its discretion may direct that the petition be briefed and argued as though a petition for an original remedial writ has been sustained, may sustain, modify or vacate the opinion, or may dismiss the petition.

(c) The ethics counsel on behalf of the advisory committee on request may give a member of the bar an informal opinion on matters of special concern to the lawyer. Informal opinions are not binding. Written summaries of informal opinions may be published for informational purposes as determined by the advisory committee.


In addition to Ethical opinions and decided cases, attorneys with professional responsibility problems should determine whether guiding rules (either mandatory or advisory) exist for the particular type or area of practice in which they are involved. See, e.g., ABA Standards Relating to the Administration of Criminal Justice: Prosecution and Defense Functions (guidelines); American Academy of Matrimonial Lawyers, *Bounds of Advocacy* (2000); S.E.C. Rule of Practice 2(e), 17 C.F.R. ' 201.102(e) (mandatory rule) and Standards for Professional Conduct of Attorneys, 17 C.F.R. §205 (adopted in response to the Sarbanes-Oxley Act). Samples of some of these specialized rules are found in the Standards Supplement.
An important new resource is the Restatement of the Law Governing Lawyers, which was recently adopted by the American Law Institute. The Restatement is becoming an important source of guidance for lawyers on professional responsibility issues. It can be found in the Standards Supplement and should be consulted regularly as part of your reading for the course. In addition, relevant cases and articles can be found using the ABA/BNA Manual on Lawyer’s Professional Conduct and the ABA’s Annotated Model Rules of Professional Conduct. Much helpful information can also be found on the ABA’s Center for Professional Responsibility website, which can be accessed at http://www.abanet.org/cpr. Finally, assistance in researching professional responsibility issues can be obtained from Professor Glesner Fine’s website at http://www.law.umkc.edu/faculty/profiles/glesnerfines/bgf-13.htm.

If research efforts fail and an advisory opinion is impracticable, an attorney should discuss the problem with other reputable lawyers (taking care, of course, to preserve confidentiality [see Model Rules (2003), Rule 1.6(b)(2)]). In addition to hopefully getting sound advice, this will help to establish a good faith attempt at proper resolution of the problem should disciplinary action ultimately ensue.