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New Rules of Professional Conduct: Critical Concerns for Idaho Lawyers

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ETHICS

THE NEW RULES OF PROFESSIONAL CONDUCT: CRITICAL CONCERNS FOR IDAHO LAWYERS

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They started slowly. But state by state, with increasing momentum, the new Rules of Professional Conduct are displacing the Code of Professional Responsibility.[1] Idaho has joined the movement. Effective November 1, 1986, by order of our Supreme Court, lawyers in this state will be governed by the "Idaho Rules of Professional Conduct." The Rules are patterned substantially after the model adopted by the American Bar Association. This article traces the evolution of the new Idaho Rules, summarizes differences between the Rules and the prior Code, and identifies salient issues now facing Idaho practitioners.

Back to the Future: A Glimpse of History

In 1836, Baltimore practitioner David Hoffman published "Fifty Resolutions" containing standards of lawyer behavior. Two decades later, in 1854, George Sharswood, Dean of the University of Pennslyvania Law School and eventual Chief Justice of the Pennsylvania Supreme Court, delivered a series of lectures on legal ethics. These lectures evolved into Canons of Professional Ethics adopted by the Alabama State Bar Association in 1887. The Canons, in turn, were adopted with modifications by the American Bar Association in 1908.

The Canons contained aspirational statements about lawyers and law practice. By the 1960's, aspirations alone had proven unsatisfactory as tools to regulate lawyer conduct. The Canons suffered from excess generality and ambiguity, causing Stanford Professor Anthony G. Amsterdam to opine that they provided lawyers with as much useful guidance in their work as a valentine would furnish a heart surgeon.[2]

In 1964, ABA President Lewis F. Powell, Jr., now known to us as Justice Powell, appointed a special committee to develop standards "capable of enforcement."[3] Powell's Committee on Evaluation of Professional Standards wrote the Code of Professional Responsibility. The Code was approved by the ABA House of Delegates in 1970 and soon was adopted by jurisdictions throughout the United States. In an effort to improve enforcement of ethical standards, the Code coupled "Ethical Considerations" (EC's) with "Disciplinary Rules" (DR's). The DR's set forth grounds to impose sanctions for professional misconduct. The EC's, retaining the flavor of the former Canons, were described in the Code as "aspirational in character. [They] represent the objectives toward which every member of the profession should strive . . . "

The Code had been in existence only a few years when a movement began to modify or to abolish it. The Code's schizoid presentation of DR's and EC's created confusion as to what was enforceable and what was not. Some states, like Idaho, arguably compounded the problem by adopting the DR's without the EC's. Moreover, neither the DR's nor the EC's covered many practical questions encountered in the practice of law. These questions were addressed by "ethics opinions" of the ABA and of the adopting jurisdictions. The opinions varied considerably in content, quality and accessibility.

The author is a Judge of the Idaho Court of Appeals and past president of the Idaho State Bar. He chaired the Professional Conduct Standards Committee which evaluated — and ultimately recommended that Idaho adopt in substance — the Model Rules of Professional Conduct.

In 1977 the ABA created another committee, the Commission on Evaluation of Professional Standards. This body came to be known as the "Kutak Commission," in honor of its chairman, the late Robert J. Kutak, a lawyer from Omaha, Nebraska. During 1980 and 1981, the Kutak Commission issued a "discussion draft," followed by a "tentative draft," of proposed new Model Rules of Professional Conduct. In 1981 the Commissioners of the Idaho State Bar created a Professional Conduct Standards Committee, charging it to examine these drafts and to offer suggestions for improvement before final action was taken by the ABA House of Delegates. The Standards Committee — consisting of lawyers, non-lawyers, judges and faculty from the University of Idaho College of Law — submitted its report in 1982. The Commissioners forwarded the report to the ABA. As a result of suggestions from Idaho and other states, the ABA prepared a revised "final draft" in 1982. That draft was adopted, with further amendments, by the ABA House of Delegates in 1983.

In 1984 the Idaho Bar Commissioners, with the help of a second committee, studied the ABA's Model Rules. The Commissioners endorsed the Model Rules with some modifications and submitted them to the bar membership as part of the annual resolution process in 1985. The modified rules were adopted and submitted to the Idaho Supreme Court. On June 9, 1986, the Court approved the Idaho Rules "in principle." On September 3, after revising a rule on confidentiality as discussed more fully below, the Court adopted the new Rules. As noted earlier, the Rules carry an effective date of November 1, 1986.

For reasons not stated, the Supreme Court stopped short of adopting official comments to the Rules. However, the Idaho State Bar has published the comments as aids to interpretation. Idaho lawyers will find most of the comments helpful and authoritative. Indeed, during the long process of debate and compromise — both in the ABA and in Idaho — accommodations were reached by balancing the black letter of the Rules with the explanatory text of the comments.

As the Rules evolved, they came to differ from the prior Code in three fundamental respects. First, the *structure* is different. The Code was organized around broad statements of ethical aspirations carried over from the old Canons of Ethics. In contrast, the Rules are organized by specific professional functions and relationships — e.g., the lawyer-client relationship, the lawyer as a counselor, the lawyer as an advocate, etc. This structure now pervades the current literature on professional standards.[4]

The second fundamental difference lies in substantive *content.* The Rules explicitly provide — whereas the Code scarcely recognized — that modern lawyers are not one-dimensional representatives of their clients. They are officers of the legal system and public citizens with special responsibilities for the fair resolution of disputes and the effective administration of justice. The Rules acknowledge that many ethical problems arise not from dishonesty but from the conflicting demands placed upon lawyers by these competing roles. The Rules laudably undertake to resolve such conflicts by striking balances or assigning priorities among the role requirements. Although the Rules may accomplish this daunting task imperfectly, they still provide more comprehensive and useful guidance than the Code.

The third difference relates to *enforcement.* The proposed Rules define minimum acceptable behavior. They are not aspirational. As one

distinguished commentator has noted:

> The Model Rules . . . represent the culmination of a historical process that began a century and a half ago: the shift from articulating professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach.[5]

Some might say this is a melancholy comment on the legal profession. It signifies that lawyers are not unique; they, like everyone else, need specific rules rather than lofty goals to guide their behavior. Others would say that the new Rules are realistic in this regard and may be more effective in producing ethical conduct than were its aspirational predecessors.

Who's Rules Apply? The Threshold Problem of Jurisdiction

The Rules undertake not only to address the competing roles that lawyers perform but also to prescribe a method for determining what standards govern a lawyer whose practice spills over state boundaries. This problem has become increasingly important as the interstate practice of law has grown. The problem has been exacerbated by recent efforts of federal courts, and even federal agencies, to regulate lawyer conduct.

Rule 8.5 is disarmingly straightforward. It simply states, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The Rule provides for concurrent jurisdiction of disciplinary authorities. This approach is not free from difficulty. Suppose a Pocatello lawyer represents several Utah clients. An ethical question arises. The Idaho and Utah standards differ. How shall the lawyer proceed? Or suppose that an Air Force JAG officer at Mountain Home represents an Idaho serviceman. The Idaho standards conflict with legal assistance regulations promulgated by the Air Force. What should the JAG officer do?

Rule 8.5's adoption of concurrent jurisdiction genuflects toward pluralism among the states and toward comity between the states and the federal government. The official comment to Rule 8.5 observes:

> If the Rules of Professional Conduct in . . . two jurisdictions differ, principles of conflict of laws may apply . . . [T]he general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

The Rule and its comment may invite criticism for begging the question of how a lawyer should conduct his or her practice when faced with inconsistent standards. The reference to "principles of conflict of laws" simply tells the lawyer to make an educated guess at which of the jurisdictional authorities has the "most significant relationship" to him and his conduct.[6] Similarly, a lawyer subject to federal standards must determine whether the federal regulatory scheme is so comprehensive that it displaces state standards through the preemption doctrine.[7]

But Disraeli's famous admonition comes to mind: "It is much easier to be critical than to be correct." The problems inherent in concurrent jurisdiction were well known to drafters of the ABA's Model Rules. The same problems had existed, at least in concept, under the prior Code. Concurrent jurisdiction appeared to be the least troublesome way to reconcile diverse views on standards for lawyers and the diverse mix of sovereign entities empowered to impose such standards. As lawyers occasionally must explain to their clients, uncertainty is a price we pay for creative tensions generated by our federal system. Caution due to uncertainty will be the watchword of cross-jurisdictional law practice in the future.

Rules in Controversy: Standards Relating to Confidentiality, Conflicts and Organizations

Assuming that a lawyer determines that his or her conduct will be governed in Idaho, the next task is to identify the applicable standard. Here, the news is good. The Idaho Rules will provide readier and more practical guidance than did the prior Code. But this does not mean that the guidance will be free from controversy. Several of the most important Rules deal with subjects of great sensitivity for lawyers: confidentiality, conflict of interest, and the needs of organizational clients.

Confidentiality. At common law, as well as by statute and modern court rules, communications between lawyer and client have been treated as privileged.[8] From this evidentiary doctrine has grown a corollary that the lawyer, as the client's representative, is required to maintain the confidentiality of all communications, disclosing only what the client expressly or impliedly authorizes. However, as an officer of the legal system and as a public citizen, the lawyer also has a separate duty to prevent perjury, fraud or other harm. How should this tension be resolved?

> Three broad approaches to the choice of values between client confidentiality and third-party and other social interests are discernible. First, confidentiality could be raised from doctrine to overriding principle, such that a lawyer would always be required to protect a client's interests regardless of impacts on third parties. That would treat the values of confidentiality and the adversary system as absolutes and would require defense of the implied proposition that their social or other values are uniformly superior to those of competing interests and proposed resolutions. Second, and conversely, third-party and other social interests could be made predominant, so that interests of client confidentiality and loyalty would have to yield uniformly in instances of client wrongdoing. A third, much more complex approach would be to develop criteria or categories that attempt to differentiate instances in which either client interests or public interests are to be given preference. To a large extent, the variegated treatment of disclosure problems in the 1969 Code and the 1983 Model Rules reflects such a sophisticated approach.[9]

What does "variegated treatment" mean in the real world? Suppose a client insists on perjuring himself, undertakes a fraud, or threatens physical harm to someone else. What should the lawyer do? As to perjury or fraud, the prior Code furnished little help. DR 7-102(A) stated that the lawyer could not "knowingly use perjured testimony or false evidence." The same DR required the lawyer to reveal a "perpetrated" fraud (saying nothing about a contemplated future fraud). What guidance

DR 7-102(A) gave, DR's 4-101(B) and (C) appeared to take away. They declared that a lawyer's right to make corrective disclosures did not extend to "confidences" of the client. "Confidences," as opposed to "secrets," were broadly defined as all communications protected by the lawyer-client privilege. As to other kinds of harm, DR 4-101(C)(3) stated that a lawyer "may" reveal the client's intent "to commit a crime, and the information necessary to prevent the crime." This disclosure apparently was not subject to the "confidences" exception of DR's 4-101(B) and (C).

The Code was criticized for its overlapping provisions and for ambiguities lurking in the terms "secrets," "confidences" and "crimes." Lawyers also complained that flatly prohibiting the use of perjury failed to take account of how difficult it is for counsel to ascertain whether proffered testimony is really false. To remedy these problems, the ABA proposed in its Model Rules to abolish any distinction among "secrets," "confidences" and other communications. Broadly speaking, the ABA's Rule 1.6 undertook to protect from disclosure *any* information relating to the lawyer's representation of the client, except as the client might authorize. Model Rule 3.3 qualified this sweeping proposition by providing that a lawyer "shall" refuse to offer evidence he "knows" to be false and that the lawyer "may" refuse to offer evidence he "reasonably believes" to be false. Model Rule 1.6 contained a further exception. It narrowed the permissive disclosure of crimes by providing that a lawyer could reveal information to prevent the client from committing "a criminal act" only if the lawyer believed the act was "likely to result in imminent death or substantial bodily harm." The ABA Model Rules contained no exception to confidentiality for fraud or nonphysical harm; consequently, such disclosure without the client's consent was prohibited.

Although the ABA Rules seemed clearer than the Code, not everyone agreed with the clarification. The provision in Rule 3.3 concerning false evidence was criticized as going too far, or as not going far enough, in preventing perjury. However, the United States Supreme Court, in *Nix v. Whiteside,*[10] may have muted some criticism about going too far. The Court there held that a criminal defendant's right to effective assistance of counsel does not oblige the lawyer to cooperate in presenting perjured testimony. Thus any concern that Rule 3.3 would conflict with a constitutional right in criminal cases seems to have been alleviated. Idaho's new Rule 3.3 conforms to the ABA model.

The subjects of fraud and physical harm, addressed in ABA Model Rule 1.6, generated louder debate. In 1980 the Kutak Commission's "discussion draft" would have *required* disclosure to prevent criminal acts likely to result in death or serious physical harm, and would have *allowed* disclosure to prevent fraud or other nonphysical harm. In 1981 the "tentative draft" was watered down to provide that both kinds of disclosure merely would be *allowed.* In 1982, the Idaho Standards Committee expressed a preference for the 1980 version, arguing that threats of death or serious physical harm should be mandatorily disclosed. Nevertheless, some national organizations of general practitioners and trial lawyers leaned the opposite direction. They felt that even the 1981 version encroached too much upon client confidentiality. They urged that disclosures relating to death or serious physical harm merely be *allowed* and that disclosures of fraud and of criminal acts against property or financial interests be *prohibited.* After a close and sharply divided vote, the ABA House of Delegates ultimately adopted this position in 1983.

Back in Idaho, the Bar Commissioners proposed that Rule 1.6 be revised by allowing disclosures relating not only to death or serious physical harm but also to fraud. During the resolution process in 1985, this version of Rule 1.6 passed six of the seven districts but met opposition from the Boise Bar Association. The Boise Bar opposed it not because it had been watered down from the 1980 Kutak draft, but because it allegedly still went too far in the direction of disclosure. The Boise Bar voted to amend the proposed Rule by *prohibiting* the disclosure of fraudulent acts. The district bar presidents later adopted this amendment, bringing the proposed Rule into conformity with the ABA model.

When the resolution embodying the new Rules was transmitted to our Supreme Court, the turbulent history of Rule 1.6 disclosed a full range of options. The Court could have chosen (a) mandatory disclosure of threatened death or serious physical harm, as well as fraud and other kinds of nonphysical harm. It could have elected (b) permissive disclosure of fraud and nonphysical harm but mandatory disclosure of physical harm, as provided in the 1980 Kutak draft and as favored by the Idaho Standards Committee. It could have opted for (c) permissive disclosure of all kinds of harm. It could have chosen (d) permissive disclosure of threatened death or serious physical harm but no other disclosure, as adopted by the House of Delegates and ultimately by the Idaho State Bar. Finally, it could have (e) prohibited disclosure of any kind without the client's consent. The Court ultimately chose a variation on alternative (c). The Court revived the provision in the prior Code that a lawyer "may" disclose such information as he or she "reasonably believes necessary . . . to prevent the client from committing a crime, including disclosure of the intention of his client to commit a crime . . . " Thus, the Court accepted the ABA's abolition of "secrets" and "confidences," but it retained the prior Code's use of the word "may" (as had the ABA model). It also retained the Code's use of "crimes" as the broad criterion for permissive disclosure.

Conflicts and imputed disqualification. Rules prohibiting conflicts of interest arise from two fundamental principles in lawyer-client relationships: confidentiality and loyalty. The prior Code provided, in DR's 5-101(A) and 5-105(C), that a lawyer could not accept employment if the exercise of his professional judgment on behalf of the client was reasonably likely to be adversely affected by differing interests of other clients or by the lawyer's own personal interests — *unless* the client consented after full disclosure. The ABA's Model Rule 1.7, now adopted in Idaho, strengthens the safeguard against conflicting interests by requiring the client to give his consent after full disclosure *and* by further requiring that the lawyer "reasonably" believe the client's interests will not be adversely affected. The client's informed consent no longer suffices.

The principle of loyalty carries over to the problem of imputed disqualification. Suppose two or more lawyers practice together. Their respective clients become entangled in a legal dispute. Under the prior Code the lawyers — with proper disclosure and consent — could have represented their clients in the dispute. Although this standard made sense to lawyers, it made the world uneasy. As one commentator stated, "Lawyers practicing together are in a poor position to give the world assurance that one lawyer is not for many purposes the alter ego of the other. Ties of friendship and finance and ready access to each other's files unite their efforts and interests . . ."[11]

> Accordingly, the ABA's Model Rule 1.10 draws a "bright line": While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [rules relating to general conflict of interest, prohibited transactions, former clients or functioning as an intermediary].

Idaho has adopted this Rule. It embodies a judgment that conflicts of interest in group law practices are best resolved by a blanket standard of imputed disqualification. Idaho lawyers in group practice no longer can rely on disclosure and consent to resolve conflict problems within the firm. They must search their professional souls and determine whether a client's interests are adversely affected by continued representation on the matter in controversy.

Organizational clients. The paradigm lawyer-client relationship exists between two individuals. But the face of law practice is changing rapidly. A recent survey has indicated that approximately two-thirds of all lawyers work within organizations of some sort, and they perform the bulk of their services for entities rather than individuals.[12]

> In a substantial amount of legal practice, "the client" is not the "person with a problem" traditionally depicted in legal literature, but an organization with indeterminate or potentially conflicting interests. So too, the attorney often is not an independent moral agent but an employee with circumscribed responsibility, organizational loyalty, and attenuated client contact.[13]

The prior Code did not contain, in its DR's, a standard governing the conduct of a lawyer toward an organizational client. However, EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a . . . person connected with the entity." The ABA's new Model Rule 1.13, adopted in Idaho, explicitly deals with organizational clients, reemphasizing the basic precept that the lawyer's client is the entity itself.

The critical question faced by lawyers representing entities is what to do if a person in authority within the organization acts, or intends to act, contrary to the organization's legal interests. Rule 1.13 provides no single discrete answer. It offers guidelines, some of which narrow the lawyer's ethical responsibility. The lawyer need concern himself with the aberrant individual's conduct only if it relates to the subject matter of the lawyer's representation of the entity. Moreover, the lawyer need not act unless the individual's conduct is "a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization . . . "

If these tests are satisfied, then the lawyer is directed to "proceed as is reasonably necessary in the best interest of the organization." The remedial measures a lawyer may undertake include requesting the individual to reconsider his conduct; advising him to seek another legal opinion; referring the matter to "higher authority" in the organization; and, as a last resort, terminating the lawyer-client relationship with the organization. Prominently omitted from this laundry list of permissible remedies is "whistle blowing" — disclosure of information to outside parties in order to prevent the individual from harming the organization. Authority to blow the whistle was contained in the Kutak Committee's 1980, 1981 and 1982 drafts; but it was excised, and the reference to resignation was inserted, after heated debate in the ABA's House of Delegates. The Idaho Rule now reflects this outcome.

Calmer Seas: An Overview of Other Rules

Not all of the new Rules are burdened with controversy. As a result of laborious drafting and redrafting from 1977 to 1983, the ABA succeeded in fashioning a consensus on most provisions of the Rules. Many early problems, including several noted by the Idaho Standards Committee, were resolved. Except as noted above, the Rules did not generate substantial controversy among Idaho practitioners during the resolution process. The remaining Rules, surveyed below, provide much-needed clarifications regarding the scope of a lawyer's duties in various contexts.

The Lawyer-Client Relationship (Rules 1.1-1.16). Rule 1.1 makes competency an affirmative requirement. The Code expressed a negative approach, prohibiting lawyers to accept cases beyond their competency. Rule 1.2 clarifies a client's right to make decisions that bind the lawyer; the Code contained no counterpart provision. Rule 1.3 makes diligence an affirmative obligation; the Code simply prohibited "neglect." Rule 1.4 commands the lawyer to keep the client informed; the Code contained no explicit correlative provision.

Rule 1.5 mandates that fees be reasonable. It outlines criteria of reasonableness consistent with I.R.C.P. 54(e)(3), and it expresses a preference for written fee agreements with new clients. The Code merely prohibited charging an "illegal or clearly excessive fee."

Rules 1.6 ("Confidentiality of Information"), 1.7 ("Conflict of Interest: General Rule") and 1.10 ("Imputed Disqualification: General Rule") are discussed above. Rules 1.8 and 1.9 deal with conflicts arising from business transactions between a lawyer and a client, and with conflicts pertaining to former clients. The Code contained no provision relating to former clients.

Rules 1.11 and 1.12 prescribe safeguards for career transitions among private practice, government service and the judiciary, in order to minimize potential conflicts. The Code provided a less comprehensive set of safeguards.

Rule 1.13 ("Organization as Client") is discussed above. Rule 1.14 deals with disabled clients, a subject not addressed by the prior Code. Rule 1.15 prescribes a lawyer's duties in safekeeping the client's property. It mandates a separate trust account. This requirement was implicit, rather than explicit, in the Code.

Rule 1.16 deals with termination of the lawyer-client relationship. Its provisions go beyond prior Code requirements. If an Idaho lawyer seeks to withdraw from representation of a client in litigation, he should also consult I.R.C.P. 11(b)(2).

The Lawyer as Counselor (Rules 2.1-2.3). These rules elaborate a lawyer's duty to exercise independent professional judgment in representing a client. They also authorize a lawyer, in certain situations, to act as an intermediary between clients or to provide evaluations of client matters for use by third parties. These rules recognize the expanded scope of services demanded of lawyers by the public. The rules have no direct counterparts in the Code.

The Lawyer as Advocate (Rules 3.1-3.9). Rule 3.1 prohibits lawyers to assert frivolous claims or contentions. It requires advocacy to be based upon the law or upon "a good faith argument for an extension, modification or reversal of existing law." However, it recognizes the right of a criminal defense lawyer to put the government to its proof on all material elements of an alleged offense. This rule is more affirmative in tone than its prior Code counterpart, which simply prohibited lawyers from advocating positions that would serve "merely to harass or maliciously injure another."

Idaho lawyers also should be aware of I.R.C.P. 11(a)(1), which provides that an attorney signing a pleading, motion or other paper implicitly warrants "that to the best of his knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." A court may order sanctions for a violation of Rule 11(a)(1). Moreover, attorney fees may be awarded to a prevailing party in litigation if the opposing party is found to have brought or pursued a claim or defense frivolously, unreasonably or without foundation. I.C. § 12-121; I.R.C.P. 54(e)(1).

Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client." The rule has a sharper meaning than its Code counterpart, which broadly said that a lawyer should be "punctual in fulfilling all professional commitments."

Rule 3.3 details the requirement of candor toward a tribunal. It is mentioned in the discussion of client perjury elsewhere in this article. Rules 3.4-3.6 prescribe appropriate conduct toward an opposing party and counsel, toward a court or tribunal, and toward the news media. These provisions are more detailed and comprehensive than correlative sections of the Code.

Rules 3.7 and 3.8 govern conduct of the lawyer as a witness in litigation, as the prosecutor in a criminal case, and as an advocate in

legislative or administrative proceedings. Similar but more cursory provisions appeared in the Code.

Transactions with Persons Other than Clients (Rules 4.1-4.4). These rules gather together in a convenient place various ethical standards pertaining to truthfulness in statements to others, communications with persons represented by counsel, special precautions in dealing with unrepresented persons, and respect for the rights of third parties. Similar provisions were scattered generically throughout the Code.

Law Firms and Associations (Rules 5.1-5.6). These rules prescribe a lawyer's responsibility toward colleagues in the profession and in the same firm. They set forth the responsibilities of supervisory and subordinate lawyers with respect to each other, the responsibilities of lawyers regarding nonlawyer legal assistants, and a lawyer's duty to avoid professional compensation arrangements that impinge upon his or her professional independence. Most of these provisions have no direct counterparts in the Code.

Rules 5.5 and 5.6 prohibit lawyers to engage in practice where they are not licensed, to assist others in the unauthorized practice of law, or to participate in agreements that would limit a lawyer's right to practice after leaving a firm. The Code contained similar provisions.

Public Service (Rule 6.1-6.4). Rule 6.1 deals with pro bono publico service. Although the 1980 Kutak discussion draft contained a mandatory pro bono standard, the requirement was dropped before the Rule was adopted by the ABA in 1983. The Rule now merely states that a lawyer "should render public interest legal service." However, this seemingly precatory language may have sharper teeth in Idaho than elsewhere. The Idaho lawyer's oath, incorporating I.C. § 3-201, prohibits any lawyer, for personal considerations, to decline representation of the "defenseless or oppressed."

Rules 6.2-6.4 enunciate a lawyer's duty to accept appointments by courts or other tribunals, the lawyer's right to participate in legal service organizations, and the lawyer's right to advocate legal reforms even if client interests would be affected. The Code did not address these subjects.

Information about Legal Services (Rules 7.1-7.4). Rule 7.1 permits lawyer advertising so long as it does not contain misleading information about the lawyer or the lawyer's services. This section is more lenient than the corresponding provision in the ABA's prior Code, but it is consistent with the Code as amended in Idaho during the 1970s.

Rule 7.2 identifies the appropriate media for advertising. It prohibits paying others to recommend the lawyer to potential clients. These provisions are more detailed than those found in the prior Code.

Rule 7.3 prohibits direct solicitation of prospective clients with whom the lawyer has no family or prior professional relationship. It is consistent with the corresponding Code provision.

Rule 7.4 as adopted in Idaho, prohibits any advertisement that contains a "designation of specialization." The prohibition is intended to protect the public because Idaho does not now have a program to certify specialists. The prohibition is consistent with the prior Code and with the ABA's Model Rule, which would allow designations of specialization only where certification programs exist.

Rule 7.5 ostensibly deals with the prosaic subject of "firm names and letterheads." However, its real significance is that it allows interstate practice under a single firm name, so long as the lawyers practicing in each state actually are licensed there. This Rule encountered virtually no resistance from Idaho lawyers during the resolution process. Multistate practice now seems to be widely accepted.

Maintaining the Integrity of the Profession (Rules 8.1-8.5). These rules define the responsibilities of lawyers, judges and bar applicants in the regulatory system and in professional discipline. Rule 8.5, providing concurrent jurisdiction when lawyers practice in more than one state, is discussed above.

Taken as a whole, the new Idaho Rules represent a consensus on minimum standards of conduct in rapidly evolving areas of professional responsibility. They are good standards; they are not perfect standards. They illustrate the difficulty of distilling specific maxims of conduct from general ethical principles. As the early Canons, the prior Code and the new Rules show, this is the never-ending but ennobling task of a profession that takes ethics seriously and tries to bring its behavior closer to its aspirations.

Footnotes

1. During 1983 and 1984, only two states substantially adopted the ABA's proposed Rules. However, from January, 1985, through November, 1986, thirteen more states, including Idaho, followed suit. The bar associations of at least ten additional states have recommended favorable action.

2. *Time Magazine,* May 13, 1966, at 81, *cited in* Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement,* 1980 AM. BAR FOUND. RESEARCH J. 939, 939 (1980).

3. Armstrong, *A Century of Legal Ethics,* 64 A.B.A.J. 1063, 1069 (1978).

4. *See, e.g.,* C. WOLFRAM, MODERN LEGAL ETHICS (1986); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (1984 and supplements). The structure of the Rules already has proven its practical value. In Idaho and Nevada — two states with which the author is personally familiar — disciplinary authorities found the organization of the Rules so plainly superior to the Code that they regularly employed the Rules as a research tool even before the Rules had been substantively adopted.

5. Schwartz, *The Death and Regeneration of Ethics,* 1980 AM. BAR FOUND. RESEARCH J. 953, 953-54 (1980).

6. The "most significant relationship" test is articulated and explained in the RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS (1969).

7. Regarding preemption generally, *see* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Michigan Canners et al. v. Agricultural Board, 467 U.S. 461 (1984); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). On the issue of federal administrative regulation of lawyer conduct, *see* WOLFRAM, *supra* note 5, at 143-44.

8. A typical formulation of the attorney-client privilege is found in 8 J. WIGMORE, EVIDENCE § 2292, at 554 (J. McNaughton rev. ed. 1961).

9. WOLFRAM, *supra* note 5, at 665-66.

10. 475 U.S. _____, 106 S. Ct. 988 (1986).

11. WOLFRAM, *supra* note 5, at 391.

12. B. CURRAN, THE LEGAL PROFESSIONS OF THE 1980s: SELECTED STATISTICS FROM THE 1984 LAWYER STATISTICAL REPORT (1984).

13. Rhode, *Ethical Perspectives on Legal Practice,* 37 STAN. L. REV. 589, 590 (1985). □

ABA ANNOUNCES LAW DAY THEME

The American Bar Association has announced the theme for Law Day 1987 is "We the People." Law Day U.S.A., celebrated annually on May 1, has been established to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws."

A detailed planning guide and many promotional, education and informational materials are available from the A.B.A. for groups planning observance of Law Day. For further information, contact Law Day U.S.A., American Bar Association, 8th Floor, 750 North Lake Shore Drive, Chicago, IL 60611, or phone 312/988-6134. □

Idaho State Tax Institute Held

The 28th Annual Idaho State Tax Institute was held October 10-11 in Pocatello. The Institute was sponsored by the Idaho Law Foundation, Idaho State University and the Idaho Society of Certified Public Accountants.

One hundred fifty-nine participants attended workshops on a diversity of tax-related subjects, and speakers received excellent ratings on their presentations.

Plans are already underway for next year's seminar which will be held Oct. 2-3, 1987, in conjunction with the U of I, ISU game. □