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Counselors Oughtta Counsel (Not Conceal)

By David A. Giacalone



The ABA's Ethics 2000 Commission wants to revise the Model Rules of Professional Conduct for Lawyers. If you're already a sophisticated and satisfied purchaser of legal services, you needn't worry much about their proposals. Otherwise, my professional advice is "buyer be wary."

THIS! You can check out the final Ethics 2000 proposals in the Commission's "November Report," on its Web page.

Here's a rough draft of my comments. Don't forget to send yours to the Commission before May, 2001 to [Sue Campbell](#).

Dear Ethics 2000:

We do need revised model rules for lawyer conduct. But, your proposals leave out the most important ones — ethical rules that can improve lawyer conduct and make a difference to the average consumer with a legal problem.

The Commission wants several useful revisions. (e.g., permitting the "unbundling," of legal services). However, they are easily eclipsed by the pro-client reforms you have rejected or removed, and by those that will surely be defeated or postponed based on the "comprehensive" recommendations of this distinguished Commission.

It Matters

Forty-two states base their lawyers' code of ethics on the ABA's Model Rules, and other states look to them for guidance. The Model Rules will help shape how legal services will be delivered, who will get them, and how much they will cost in 21st Century America.

Ethics 2000 could have endorsed the best new ideas in "responsible" lawyering. Instead, the Commission treats innovative rules and inconvenient ethical opinions as problems for lawyers and their

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watchdogs, rather than solutions for clients. Ethics 2000 chose "uniformity" over progress — lowest-common-denominator ethics over the highest aspirations of the profession.

Info as Foe

The basic problem with Ethics 2000 was aptly stated in a press release from the legal reform group HALT:

[Rule 2.1 of the Colorado Code of Prof. Responsibility Comparative Analysis State-by-State from the American Legal Ethics Library](#)
[Legal Ethics in Crisis: Overlawyered.Com](#)

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"The strongest ethics rules in the world are worthless, if consumers don't know about them. On this score, the ABA's latest ethics revision is an abject failure; nowhere in the hundreds of pages of new rules is there a requirement that lawyers inform potential clients about their ethical duties. Requiring lawyers to include this basic consumer information in retainer agreements will do more to improve legal ethics and enhance lawyer accountability than any other action that the ABA could take."

Information spurs competition, innovation and efficiency. Yet, the Commission ignored the consumer advocates and ethicists who sought meaningful notice and disclosure to clients. Rather than embracing information as the best tool for self-regulation and client protection, Ethics 2000 protects lawyers from the forces that would be unleashed if clients were truly well-informed consumers of legal services, able to insist on their rights and make intelligent choices among meaningful options.

Why Not?

Used car dealers like uninformed customers. Medieval guilds were big on secrets. But, ethical "counselors-at-law" have a duty to fully inform and protect their clients — not to exploit client ignorance for their own financial gain or prestige.

Yes, there oughtta be some new Model Rules. Any effective, "responsible" code of ethics for lawyers in the Age of Information must include the following:

- The obligation of every lawyer to **provide** every client and prospective client with a **clear, plain-language Legal Consumer Bill of Rights**, so clients will know the ethical obligations and sound practices to expect from their lawyers. The Bill or Rights must describe in detail, and lawyers must explain further if asked, the four basic rights of every client:
 - The right to control your own legal affairs.
 - The right to affordable legal services.
 - The right to competent legal representation.
 - The right to an accessible and accountable legal system.
- The explicit ethical responsibility of every lawyer (1) to be familiar with **low-cost options** for consumers (such as self-help legal materials and internet sites, and nontraditional legal service providers); and (2) to help their clients find and use resources, such as mediation and arbitration services, if they

appear more appropriate than litigation to resolve a dispute or solve a legal problem.

- An updated Model Rule 2.1, clarifying that the lawyer's role as **Advisor and Counselor** includes advice about **alternative methods of dispute resolution**, such as arbitration, mediation and negotiation, which often are quicker and far less expensive and disruptive than litigation. For example, Colorado's ethical rules specify that, "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." In its Comments section, the Colorado Code goes on to advise lawyers that, "Depending upon the circumstances, it may be appropriate for the lawyer to discuss with the client factors, such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitation, and relevant procedural rules and statutes."
- Codification of the lawyer's obligations and client's rights that are set forth in the ABA's 1994 ethics opinion on **contingent fees**. [See "Pricey Contingency Fees," in the Article Archives.] Clients must be told prior to signing a contingency fee contract that they have the right to pay by the hour instead, to negotiate a fair contingency fee based on the risk the lawyer is taking, and to make a fully-informed choice among pricing arrangements. [Instead, the current proposal actually deletes Commentary to Rule 1.5 that requires a lawyer to offer alternative fees when a contingency fee might not be in the client's best interests.]

Shortchanged again

Sophisticated clients demand much and receive much from their elite lawyers. Only good luck brings the inexperienced or unsophisticated client to the door of an honest and competent lawyer. The unlucky often find themselves in an unaffordable legal nightmare — with few choices, little information or control, and much delay and confusion.

No code of ethics can assure that every client is well-served. Still, the well-informed client is the surest and quickest cure for what ails the legal profession. I bet you already knew that.

Yours truly, DAG

Until universal notification rules exist, prospective clients can best protect themselves by learning and insisting on their rights, and by choosing attorneys who truly act like counselors, giving full information and a full choice of options to each client (based on the client's circumstances, goals, and financial constraints). That's the best clue as to who comes first in any law office.

Send Your Comments on the Report to: [Sue Campbell](#).

David Giacalone practiced law for more than 20 years — a decade at the Federal Trade Commission, then as a divorce mediator and children's lawyer. He recently hung up his lawyer's sword, preferring to use pen and PC as a consumer advocate. He currently resides in Schenectady, N.Y.