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V. Правила адвокатської етики. Дисциплінарна відповідальність адвоката

William Elliott Butler
Doctor of Law (LL.D.), Professor,
Foreign Member of the National Academy of Sciences of Ukraine, Foreign Member of the National Academy of Legal Sciences of Ukraine (USA),
John Edward Fowler Distinguished Professor of Law, Dickinson School of Law, Pennsylvania State University,
Associate Member of International Academy of Comparative Law
ORCID ID https://orcid.org/0000-0002-4249-565X
web15@psu.edu

LEGAL ETHICS IN THE AMERICAN PRACTICE OF LAW

Abstract. The author examines in this article the professional legal ethics in the United States, more commonly known as "professional responsibility", as a subject to an unusual pattern of "codification".

Detailed rules historically originated with the legal profession itself, initially in legal doctrine and then a Code of Ethics published in 1887 by the Alabama State Bar Association. Whatever borrowing occurred among states when introducing their own "codes of ethics", the Alabama model was drawn upon when, in 1908, the American Bar Association approved "32 Canons of Professional Ethics". The sources of law regulating the professional conduct of lawyers in the United States are several. The legal ethics within state courts is regulated by the courts, the legislative (or parliamentary) organ, and the Bar of each state.

Professional responsibility, in the spirit of David Hoffman, has become an integral part of legal education and licensing. Law students take a compulsory course in professional responsibility and are required to pass the Multistate Professional Responsibility Examination administered nationally in the United States by the National Conference of Bar Examiners.

The author concludes, that legal ethics has been an integral part of American legal education since the early nineteenth century. In the twentieth century the legal profession itself introduced "private" canons of ethics which were then accepted by the highest courts in virtually all states as rules of professional conduct binding upon all members of the Bar. It remains a distinctive element of the American legal system that binding rules of professional conduct are formed mostly by the courts, and not by the legislature. These rules are initially "codified" by a voluntary non-State organization, adopted by the courts, and then applied by the courts in cases which ultimately become components of the law of precedent; that is, a separate and distinct source of law.

Keywords: legal ethics; American Bar Association; regulation of professional conduct; foreign lawyers practicing; professional responsibility; admission.

Professional legal ethics in the United States, more commonly known as "professional responsibility", are subject to an unusual pattern of "codification". Detailed rules historically originated with the legal profession itself, initially in legal doctrine and then a Code of Ethics published in 1887 by the Alabama State Bar Association. The individual most closely associated with introducing the importance of ethics in American legal education and practice is David Hoffman (1784–1854)[1], called America's 'first specialist in legal ethics'[2]. He placed great emphasis on the importance of moral philosophy and ethics in legal education: '<…> treatises on morals should be the first which are placed in the hands of the student, and the structure of his legal education be raised on the broad and solid foundation of ethicks <…>'[3]. He later produced for his students at the University of Maryland School of Law "Resolutions in Regard to Professional Deportment". Entirely consistent with his view that the Bible was a major source of knowledge and guidance for professional behavior was Resolution 33 ('What is morally wrong cannot be professionally right; however it may be sanctioned by time or custom')[4].

Hoffman was followed by George Sharswood (1810–1883), a Pennsylvania attorney, Dean of the University of Pennsylvania Law School, and Chief Justice of the Pennsylvania Supreme Court. His writings on the subject[5] extended the discussion to more concrete positivist rules comprehensible to legal practitioners and capable of enforcement. The Alabama State Bar Association used Sharswood's text to advantage when preparing their own "Code of Ethics" in 1887[6], gradually followed by ten or so other states.

Role of American Bar Association

Whatever borrowing occurred among states when introducing their own "codes of ethics" (the term "code" should not be understood in its Ukrainian meaning; these documents were mere compilations of rules with occasional commentary and examples), the Alabama model was drawn upon when, in 1908, the American Bar Association approved "32 Canons of Professional Ethics". The American Bar Association (ABA) had been formed as a voluntary

[1] See: W E Butler, 'An Anglo-American Book Label: David Hoffman' (2011) IX The Bookplate Journal 161-4.
[2] See: B Sleeman (ed), *David Hoffman: Life, Letters, and Lectures at the University of Maryland. 1821-1837* (2011); also see: M Bloomfield, 'Hoffman, David' (1999) X American National Biography 938-9.
[3] See: David Hoffman, *A Course of Legal Study; Respectfully Addressed to the Students of Law in the United States* (1817) 41.
[4] The Resolutions were published in 1836; examples routinely appear in accounts of the history of the development of professional ethics in the United States. See, for example, Ronald D Rotunda, *Legal Ethics in a Nutshell* (5th ed, 2018) 1.
[5] G Sharswood, *A Compend of Lectures on the Aims and Duties of the Profession of Law* (1854) 130. The book went through at least six later editions under the title: An Essay on Professional Ethics (2d ed, 1860), and later.
[6] The Alabama Code of Ethics has been described as 'more code of etiquette than code of ethics', advising lawyers to be punctual, avoid outbursts of temper, and provide free services to families of deceased lawyers. See: John Austin Matzko, *Best Men of the Bar: The Early Years of the American Bar Association 1878-1928* (2019) 94.

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association in 1878; its early meetings attracted up to 100 lawyers[7], but today membership exceeds 400,000 (of whom 194,000 were said to be dues-paying members in 2017). An early ambition of the ABA was to introduce ethical rules binding upon its members, irrespective of the nature of their legal practice and independently of any state statutes or other regulations which laid down less rigorous standards.

This approach was, in effect, a "private law" approach designed to enhance the image of the legal profession. Sanctions for violations were necessarily limited to expelling a violator from the ABA, but because the ABA was and is a voluntary association and membership is not required, compliance with the ethical rules could be avoided. Nonetheless, the Canons of Professional Ethics adopted in 1908 and amended from time to time greatly influenced the preparation of official canons of ethics adopted by state supreme courts as binding upon legal practitioners in the respective jurisdictions. The courts cited the ABA Canons of Ethics or even adopted them as binding rules, in which case a violation could entail disbarment from the profession. An Ethics Committee was formed within the ABA to offer published interpretations in the form of "Opinions"; in practice these Opinions often assisted the state courts when dealing with problems of professional discipline, what is known as "legal malpractice", or disbarment.

In 1969 the ABA substantially revised the earlier editions of the Canons and readopted them in the form of the "Code of Professional Responsibility"; these entered into force from 1 January 1970. In the view of the ABA, the Code still served as a "private law" (a type of contract among members of the ABA) governing all of its members; individuals joining the ABA were required to sign a "promise" to comply with the ABA Canons of Ethics and, later, the ABA Code of Professional Responsibility.

The "private law" approach in the 1970s drew attention from the Antitrust Division of the United States Department of Justice, who regarded certain rules of the ABA Canons as "limiting competition" among lawyers, especially insofar as the Canons contained restrictions on the advertisement of legal services or the establishment of minimum legal fees. The ABA abandoned its "contract" theory of the Canons of Ethics in favor of the introduction of "Model" rules or a model code of professional responsibility.

The change in policy and approach was emphasized by renaming the ABA document as the "Model Code of Professional Responsibility", eventually renamed again the "Model Rules" of Professional Responsibility. In its capacity as Model Rules, the document has been influential on several levels, even though not binding. First, most states have officially adopted the Model Rules;

[7] See, in general, ibid.

second, state courts frequently referred to the Model Rules as evidence of the law; and third, the ABA Opinions interpreting the Model Rules are widely accepted, even though not legally binding.

The sequence of texts of the document is as follows:

> (1) on 27 August 1908 the American Bar Association adopted the original Canons of Professional Ethics based on the Alabama State Bar Association Rules and those adopted by other states, which incorporated initial versions introduced by David Hoffman and George Sharswood;
> (2) following several years of preparatory work, on 12 August 1969 the ABA adopted the Model Code of Professional Responsibility to replace the 1908 version;
> (3) on 2 August 1983 the ABA, having undertaken further revisions, adopted the Model Rules of Professional Conduct, which in turn were amended fourteen times between 1983 and 2002 and again at frequent intervals through 6 August 2018[8].

The ABA Opinions interpreting the Model Rules of Professional Conduct have been published in a series of casebound volumes from 1924 to 2003 (also available as individual pdf files commencing with the 1984 Opinions)[9].

The role of the ABA Model Rules has been set out by Rotunda as follows:

> [The Model Rules bind] lawyers practicing in a jurisdiction only if the court has adopted some form of the ABA Rules as substantive law. In a sense, the ABA Model Rules are a lot like the uniform laws that are the products of the National Commission on Uniform State Laws. The Uniform laws are not law until a state adopts them, and sometimes a state approves the law with non-uniform changes[10].

It is not easy to explain the legal nature of ethical rules to lawyers outside the Anglo-American legal tradition for their existence and operation often depend upon doctrines, principles, or even terminology not found in other legal traditions or families of legal systems. To take one example, Rotunda suggests that "legal ethics" is "law" in the same way that "Rules of Evidence are law" because 'both are rules of the court and those rules apply to lawyers the same way any other law applies to lawyers'[11]. But in continental or post-Soviet legal systems, for example, the rules of evidence are not rules of the court; indeed, there is no concept of "rules of the court".

[8] See: Ellen J Bennett and Helen W Gunnarsson, *Annotated Model Rules of Professional Conduct* (9th ed, 2019) vii-viii. One of the challenges is to determine when changes to the ABA Model Rules are or are not incorporated into the substantive law of individual states.
[9] Ibid viii.
[10] Rotunda (n 4) 6.
[11] Ibid 11.

Regulation of Professional Conduct

The sources of law regulating the professional conduct of lawyers in the United States are several. The legal ethics within state courts is regulated by the courts, the legislative (or parliamentary) organ, and the Bar of each state. As regards federal courts, professional conduct is regulated by the rules of each district court and circuit court of appeals, rules issued by the Supreme Court of the United States, and rules adopted by the Congress of the United States. Unusual in the United States generally is that most regulation of professional behavior originates with the courts (and not the legislature). Any state might be chosen as an example, but in this article we shall dwell on the Commonwealth of Pennsylvania.

State Regulation

There are two sources of State regulation in Pennsylvania (and in most other states): the Supreme Court of Pennsylvania and the Pennsylvania State Bar Association. Under Article V of the Constitution of the Commonwealth of Pennsylvania, the Pennsylvania Supreme Court has the exclusive power to regulate admission to the Bar and the practice of law. The state legislature may not adopt a law that infringes upon that power.

The Pennsylvania Supreme Court has adopted the ABA Rules of Professional Conduct (not, it should be noted, the legislature). Pennsylvania lawyers are therefore bound by the ABA Rules.

Pennsylvania has a voluntary Bar association, and not all lawyers in Pennsylvania are members of that Bar association. Nonetheless, the Pennsylvania State Bar Association is active in promoting the introduction or revision of ethical standards through its committees and publications[12].

Federal Regulation

In principle federal district and appellate courts each apply their own rules separately from those in force for state courts. The three federal district courts in Pennsylvania each apply the Pennsylvania Rules of Professional Conduct promulgated by the Supreme Court of Pennsylvania, which introduces a welcome level of harmonization and uniformity. The sole exception is that Rule 3.10 of the Pennsylvania Rules of Professional Conduct is not applied in the federal courts.

Professional Responsibility and Admission to the Bar

Professional responsibility, in the spirit of David Hoffman, has become an integral part of legal education and licensing. Law students take a compulsory

[12] The Pennsylvania State Bar Association publishes the *Pennsylvania Bar Association Quarterly* under the editorship of Professor Emeritus Robert E. Rains, Dickinson Law, Pennsylvania State University; and *The Pennsylvania Lawyer,* a more popular journal which appears six times yearly.

course in professional responsibility and are required to pass the Multistate Professional Responsibility Examination (MPRE) administered nationally in the United States by the National Conference of Bar Examiners (NCBE). In 2019 the MPRE was administered in 49 states, the District of Columbia, Guam, Northern Mariana Islands, Palau, and the Virgin Islands. Only Puerto Rico and Wisconsin do not use the MPRE.

The NCBE was founded in 1931 as a non-profit organization to promote the development of uniform bar admission standards. It developed the MPRE, first administered in 1980, finds test accommodations for the examination, scores the examination, reports results to the examinees and jurisdictions. The minimum passing score is determined by each jurisdiction and ranges from 75 to 86. The examination is given three times a year (August, November, and March).

The MPRE is a two-hour, 60-question multiple-choice examination. The questions encompass the lawyer-client relationship; client confidentiality; conflicts of interest; competence, legal malpractice, and other civil liability; litigation and other forms of advocacy; transactions and communications with persons other than clients; different roles of the lawyer; safekeeping funds and other property; communications about legal services; duties of lawyers to the public and the legal system; and judicial behavior. The questions are based on the ABA Model Rules of Professional Conduct, the ABA Model Code of Judicial Conduct, and the leading constitutional precedents and generally-accepted principles established in federal and state cases and in rules of procedure and evidence. The MPRE may be taken before students graduate from law school; many prefer to complete this requirement immediately after completing their law school courses on professional responsibility or legal ethics. Each state determines when the MPRE must be taken with respect to the Bar examination.

Foreign Lawyers Practicing in the United States

In February 2016 the ABA Model Rule of Professional Conduct 5.5 and the ABA Model Rule for Registration of In-House Council were amended to enable the court of highest jurisdiction, at its discretion, to allow foreign in-house lawyers (jurisconsults) who do not satisfy the ABA definition of a foreign lawyer because they cannot be "members of the Bar" to practice as in-house counsel in the United States and to be so registered. Of special interest to Ukrainian lawyers may be Rule 5.5(d), which provides in relevant part:

> (d) A lawyer admitted <…> in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of

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a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
(2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.
(e) For the purposes of paragraph (d):
(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline or by a duly constituted professional body or a public authority; or
(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, (the highest court of this jurisdiction)[13].

Conclusion. Legal ethics has been an integral part of American legal education since the early nineteenth century. In the twentieth century the legal profession itself introduced "private" canons of ethics which were then accepted by the highest courts in virtually all states as rules of professional conduct binding upon all members of the Bar. It remains a distinctive element of the American legal system that binding rules of professional conduct are formed mostly by the courts, and not by the legislature. These rules are initially "codified" by a voluntary non-State organization, adopted by the courts, and then applied by the courts in cases which ultimately become components of the law of precedent; that is, a separate and distinct source of law.

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Вільям Еліот Батлер

ПРОФЕСІЙНА ПРАВНИЧА ЕТИКА В АДВОКАТСЬКІЙ ПРАКТИЦІ В США

Анотація. Стаття присвячена питанню професійної правничої етики у США, більш відомої під терміном "професійна відповідальність", яку автор розглядає як предмет "кодифікації" за особливою моделлю.

Відповідні деталізовані правила історично виникли в межах самої адвокатури і знайшли своє відображення спочатку в юридичній доктрині, а потім у Кодексі етики, опублікованому в 1887 р. Асоціацією адвокатів штату Алабама. Потім відбувався процес упровадження штатами їхніх власних "кодексів етики", під час якого штати запозичували різні положення один в одного. Однак, незалежно від цього, саме алабамська модель була взята за основу "32 Канонів професійної етики", затверджених Американською асоціацією адвокатів у 1908 р. Нині є декілька джерел права, що регулюють професійну діяльність адвокатів у США. Правнича етика в судах штатів регулюється судами, законодавчим (або парламентським) органом та Асоціацією адвокатів кожного штату.

Професійна відповідальність у стилі Д. Хоффмана стала невід'ємним компонентом правничої освіти та ліцензування. Курс із професійної відповідальності є обов'язковим для вивчення студентами-правниками, після якого вони мають скласти іспит із професійної відповідальності, який у США має загальнонаціональний статус і проводиться Національною конференцією експертів-адвокатів.

Автор доходить висновку, що правнича етика була невід'ємною частиною американської правничої освіти ще з початку XIX ст. У XX ст. самою адвокатурою були впровадженні "приватні" канони етики, які потім були прийняті вищими судовими інстанціями практично в усіх штатах як правила професійної поведінки, обов'язкові для всіх членів асоціацій адвокатів. Відмінною рисою американської правничої системи залишається те, що обов'язкові правила професійної поведінки формуються переважно судами, а не законодавчими органами. Такі правила спочатку "кодифікуються" добровільною недержавною організацією, потім приймаються судами, і після цього застосовуються судами у справах, які в підсумку стають компонентами прецедентного права, тобто окремим і самостійним джерелом права.

Ключові слова: правнича етика; Американська асоціація адвокатів; регулювання професійної поведінки; професійна діяльність іноземних адвокатів; професійна відповідальність; допуск.