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INTRODUCTION

Common Issues of Professional Responsibility

THOMAS EHRLICH*

The thesis of these brief comments can be stated simply: Many difficult questions involving the professional responsibilities of lawyers are also troublesome problems for professionals in other fields. Questions concerning confidentiality, conflicts of interest, and informed consent are examples of common concerns. My conclusion is also easy to express, though not to achieve: Commentaries on legal ethics in the pages of this new journal and elsewhere should draw on insights from other professions.

Unfortunately, most problems in legal ethics have been analyzed as though the issues were unique to the legal profession.\(^1\) This approach seems particularly paradoxical given the central role lawyers play in serving non-legal professionals. In all events, the consideration of ethical dilemmas facing attorneys—and how best to resolve those dilemmas—can be enriched substantially by comparisons with other professions. Similarly, lawyers concerned about legal ethics can help those in other professions shape solutions for their ethical concerns.

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My interests in the comparative dimensions of professional responsibility were significantly enhanced in recent years by two experiences. First, I have met periodically with faculty members from professional schools at the University of Pennsylvania to discuss ethical issues of common interest. Second, I have taught undergraduate seminars on ethics and professions, drawing on materials from various professions. My concerns about the professional responsibilities of lawyers were enhanced by serving on the American Bar Association's Commission on Evaluation of Professional Standards, the so-called Kutak Commission, which drafted the Model Rules of Professional Responsibility. The Model Rules were adopted by the ABA in 1983.

Numerous volumes have been written on ethical issues within other professions. Examples include: Ethical Problems in Engineering (R. Baum & A. Flores eds. 1978); T. Beauchamp & J. Childress, Principles of Biomedical Ethics (2d ed. 1983); C. Christians, K. Rotzoll, & M. Fackler, Media Ethics (1983); F. Loewenberg & R. Dolgoff, Ethical Decisions for Social Work Practice (2nd ed. 1985); P. Reynolds, Ethical Dilemmas in Social Science Research (1979); J. Thompson & H. Thompson, Ethics in Nursing (1981). M. Bayles, Professional Ethics (1981) is one of the rare studies that draws on ethical issues in several professions.

1. G. Hazard & D. Rhode, The Legal Profession: Responsibility and Regulation (1985) is one of the few books of teaching materials on legal ethics to provide a context of professional responsibility that extends beyond lawyering.
I. THE COMPARATIVE SCENE IN PROFESSIONAL ETHICS

In recent decades, several surveys on various aspects of comparative professional ethics have been published. The most significant, a 1980 study by the American Association for the Advancement of Science, reviews professional ethics activities in the Association's affiliated scientific and technical societies.² The study covers 146 professional societies—ranging in size from 193,000 to 170 members—such as the American Psychiatric Association, the National Association of Social Workers, and the National Society of Professional Engineers. (Because bar groups are not members of the Association, the legal profession was not part of the study.) Although published more than a half decade ago, the study remains a valuable source (or at least starting point) on many issues covered by codes of professional ethics. It lists forty-one professional societies with formalized ethical rules. Many of these organizations are involved in activities far removed from lawyering, and caution is obviously important in drawing analogies. The study indicates, however, that numerous issues covered by the codes of other professions bear directly on legal ethics. These include: competency as a prerequisite for undertaking a professional assignment; reporting to authorities other professionals engaged in unethical practices; accepting and rejecting clients; limitations on advertising; and fee splitting.

Definitions of what constitutes a "profession" abound, not all of them flattering. Many focus particularly on a need for specialized academic training and a degree of self-regulation. For present purposes, an exclusive definition is not necessary. It is helpful, however, to limit this discussion to professionals who serve clients, because most questions about the professional responsibilities of lawyers involve serving clients. At the same time, this limitation admittedly excludes a number of occupations with ethical problems analogous to those in lawyering.

Journalists, for example, are excluded by this limitation because they generally do not serve clients, at least not in the same ways as doctors and architects. Yet journalists must frequently decide which confidences to maintain

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². R. CHALK, M. FRANKEL, & S. CHAFER, AAAS PROFESSIONAL ETHICS PROJECT: PROFESSIONAL ETHICS ACTIVITIES IN THE SCIENTIFIC AND ENGINEERING SOCIETIES (1980). This report summarizes a number of prior surveys, id. at 10-16, and includes an annotated bibliography, id. at 216-24.

Several organizations are particularly concerned with studying issues of professional ethics. Two of the most significant are the Hastings Center in Hastings-on-Hudson, New York, and the Center for the Study of Ethics in the Professions at the Illinois Institute of Technology in Chicago, Illinois. A number of other organizations focus attention either on ethical issues involving a single cluster of professions—such as the National Project on Philosophy and Engineering Ethics at Rensselaer Polytechnic Institute in Troy, New York—or on policy issues that include aspects of professional ethics—such as the Center for Philosophy and Public Policy at the University of Maryland, College Park, Maryland.
and which to reveal, a common ethical dilemma facing lawyers. Further, the constraints that journalists face in these situations are comparable to those facing lawyers in several respects. For example, the information in question would not have been revealed except in confidence; if the confidence is broken, others may refuse to reveal confidences to the detriment of the journalist’s or lawyer’s ability to practice his or her profession.

The matter is complicated further because no sharp lines separate professions whose members serve clients from other professions. One may urge, for example, that journalists do serve clients—the public. These comments, however, pertain only to professions primarily structured to provide services or products to clients. Nursing, social work, business, and engineering are all included, even though the relations of professionals to clients are obviously different in business and engineering than in law or medicine. In fact, these relations are not precisely the same in any two professions. Rather, while it is a benefit of comparative analysis to link the various factors involved in considering a common ethical dilemma, the actual practices of the professions under review differ significantly. These differences often can provide useful perspectives on common issues.

Whatever the definition of a “profession,” it is appropriate to ask whether any particular profession has special responsibilities to the public. Some definitions, in fact, differentiate professions from other occupations on the ground of purported special public responsibilities.

For lawyers, one of the most volatile issues in professional ethics is whether and to what extent, lawyers have a responsibility to provide their time and talents pro bono publico for the otherwise unrepresented. A decade-and-a-half ago, F. Raymond Marks analogized the legal profession to a public utility. The profession has a monopoly grant of power, he argued, and with that monopoly comes the obligation to provide representation on a pro bono basis. Both as a law school dean and as president of the Legal Services Corporation, I urged the same position, though on a somewhat different basis. In my own view, lawyers are part of the public system of justice in a different way than the professionals of other disciplines are part of the contexts in which they work. In contrast, however, it can be argued that doctors too should provide some of their time and talent pro bono because medical education is so heavily subsidized by public funds, because health is a uniquely vital service, and no doubt for other reasons.

Lawyers have devoted more time and careful thought to pro bono service than professionals in other fields; and, as a profession, lawyers have also focused more attention on articulating their standards of professional responsi-

bility than have those in other professions. Both the American Bar Association's 1969 Model Code and the 1983 Model Rules provide far more elaborate analyses of issues in professional responsibility than similar codes and rules in other professions. It is hardly surprising that lawyers have gone further than other professionals in codifying their standards of professional responsibility, because lawyers formalize standards as a part of their business. This reality simply underscores the value to other professions of comparative analyses involving the legal profession.

The common ethical dilemmas facing professionals who serve clients can be characterized in various ways. Two underlying clusters of issues are fundamental: First, who is in charge—the client or the professional? Second, who is the client? This introduction will explore each of these clusters, raising more questions than answers. The point is not to resolve particular issues of professional responsibility, but to underscore the importance of comparative analysis. Finally, these comments touch briefly on some of the most troublesome issues facing all professions: maintaining and revealing client confidences, and candor by a professional to a client and on behalf of a client.

II. WHO IS IN CHARGE: CLIENT OR PROFESSIONAL?

Many of the most troubling ethical issues in every profession serving clients involve the basic question: Who is or should be making which decisions—client or professional? In the realm of legal ethics, for example, the rule is well established that any offer to settle a dispute must be communicated by a lawyer to his or her client and the client decides whether to accept or refuse the offer. Tactical decisions are properly made by the lawyer, but

5. The ABA Model Code of Professional Responsibility (hereinafter MODEL CODE), adopted in 1969, and periodically revised thereafter, and the ABA Model Rules of Professional Conduct adopted in 1983 (hereinafter MODEL RULES), are printed in numerous publications such as SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION (West Rev. Ed. 1984).

6. The risks and dangers of codifying ethical standards have been underscored in various publications. Examples include Ladd, The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion, in R. CHALK, M. FRANKEL, & S. CHAFER, supra note 2; and J. LIEBERMAN, THE TYRANNY OF EXPERTS: How PROFESSIONALS ARE CLOSING THE OPEN SOCIETY (1980). Concern that codes of professional responsibility can be shields to protect members of professions—as opposed to the public—is among the most frequent criticism. As applied to the legal profession, see Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689 (1981).

7. MODEL RULES Rule 1.2(a) provides in relevant part:

A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs . . . (d) and (e), and shall consult with the client as to the means by which they are pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. . . .

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences
because issues of tactics and substance often overlap, the lawyer's obligation is often unclear.

Some of the difficult testing cases involve public interest firms, where in a real sense the client is a social cause such as environmental protection. Such firms may not ethically condition representation on an agreement not to settle a case even though settlement may undermine completely the very purpose for which the representation was undertaken, often without fee. A public interest firm may challenge a landlord's allegedly discriminatory rental practices, for example, and successfully represent a potential renter rejected by the landlord. The representation may succeed both at trial and several levels of appeal. At any time, however, the client may choose to accept a landlord's settlement offer. Unless the public interest firm has brought a class action, the suit's potential for eliminating the discrimination will be lost. Although this ethical norm is settled, many difficult questions remain in other areas of public interest practice.8

The same general question—who is or should be in charge—faces professionals in other fields as well. There are few matters of importance for any professional about which one can imagine concluding that a client need never be consulted. But the tension between the professional's judgment of what should be done and deference to the client's wishes is a shared dilemma. Extreme cases are usually relatively easy. A dentist will not follow a procedure he or she thinks involves unnecessary risks to the patient, even though the patient may be adamant. Dentistry, incidentally, presents particularly interesting parallels and contrasts to law because a high share of dental procedures are elective.9 Most situations, of course, are not so extreme, and, as a result, are much more difficult.

A professional has to decide not only whether an issue should be presented to a client for decision, but also, and no less important, what level of knowledge is required for the client's decision to be adequately informed. The professional's power to frame an issue is critical. A veterinarian, for example, may face the question whether to perform euthanasia on an injured pet. What is the likelihood of recovery by the pet? What are the risks of continued suffering? What costs will be involved? These and an almost infinite

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8. See, e.g., Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976). This article examines the special attorney-client relation that has evolved from the school desegregation litigation.

variety of other issues can shape, and sometimes force, one decision or another by a client even when it is clear that the owner should decide the issue.

Every profession faces the additional problem of giving content to the concept of a client's informed consent. What information must the client have? A professional cannot train a client to the professional's level of expertise, but how much less is appropriate? To what extent is it sufficient for a professional to express only conclusions and to what extent must the professional try to inform the client of the relevant factors involved in the decision? Generally, the professional and the client should interact in the decision making process, but difficult questions arise about how best to promote that interaction.

In some situations it is advisable, if not essential, to obtain a client's waiver of consent. Among the most familiar are the consent forms used by hospitals and doctors. Doctors are increasing their efforts to limit liability in the realm of possible medical malpractice. Mandatory arbitration by a stipulated method represents one procedural approach,10 with obvious and interesting analogies for potential legal malpractice.

Perhaps the most obvious cluster of dilemmas in the realm of "Who is in charge?" involves conflicts between the personal values or interests of individual professionals and the values or interests of their clients. Conflicts between the economic interests of professionals and clients are usually the easiest to resolve—which is not to say they are always easy. An attorney, naturally, should not represent a client when that attorney has an economic interest adverse to the client either because of the attorney's own economic activities or because the attorney represents another client with conflicting interests. Many of these same conflict of interest issues arise in other professions. When a stockbroker recommends the purchase of bonds in which the broker's firm has taken a financial position, for example, should the broker be required to reveal that position? What if the broker's commission varies depending on which bond issue a client purchases? Is disclosure of that information to the client ethically required?

Even more common than conflicts of interest in other professions are conflicts of values. In lawyering, these conflicts involve how an attorney should decide whether to represent a client with whose values the attorney disagrees. Obviously, a key question is whether the representation furthers those values. As in other areas, the extreme situations seem easy. It is plainly unethical for a lawyer to represent a client in promoting an illegal enterprise, except in limited circumstances such as testing the constitutionality of a law's prohibition. Similarly, a doctor should not, as a matter of medical ethics, provide a

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drug that is not approved by the Food and Drug Administration. The fact that the lawyer personally believes the enterprise should be legal or that the doctor personally believes that the drug should be approved are not grounds for concluding otherwise. Even these extreme situations become much more difficult when the facts are changed only slightly, especially when the professional cannot resort to legal proscriptions.

If a lawyer believes abortion is unethical, should he or she represent a clinic seeking a license to perform legal abortions? Should a doctor with personal beliefs similar to the lawyer perform abortions? The analogy is not exact, but the distinctions can help to clarify the issues. For instance, the doctor’s responsibility to determine whether a mother’s life is at stake has no obvious counterpart in the lawyer’s decision. Similarly, there is no precise medical analogy to whether a lawyer should represent a tobacco company or other client if the lawyer disapproves of the product or thinks that the client’s goal may ill serve the public interest. Sharp differences on the issues have been expressed by lawyers.¹¹ My point, as indicated, is not to resolve these issues, but to underscore their similarities.

The discussion thus far implicitly assumes that a single professional is working for a single client. Often, however, a number of professionals are involved. They may be members of the same or different professions. This is perhaps most frequently true in the medical arena. The American Nurses’ Association Code For Nurses, for example, states that “the nurse assumes responsibility and accountability for individual nursing judgments and actions.”¹² In a particular case a nurse may conclude that her professional responsibility requires telling a patient that the patient is dying, though a doctor treating that patient disagrees. Most doctors, I suspect, would claim that their judgments should control because they are in charge of medical treatment. Many nurses would respond, however, that they are more closely involved on a day-to-day basis with the patients, better understand the patients and their emotions, and have an independent set of professional responsibilities. Similar conflicts occur between lawyers and social workers in terms of revealing particular information to a client. These issues can be multiplied, but the broad area of concern should be evident.

Professionals employed by public agencies face a special set of problems. In these situations, the professional’s responsibility is to represent the public. Who decides what the public’s interests are? These issues arise for almost every type of professional employed by a public agency. In the State Department, where I once worked, lawyers in the Legal Adviser’s Office traditionally referred to those whom they advise, the Assistant Secretary for African

Affairs, for example, as their "clients." The Legal Adviser frequently refers to the Secretary of State in the same way. Yet one view holds that a government lawyer's responsibilities to the public extend beyond those of attorneys representing private clients. The U.S. Government recently decided, for example, not to recognize the jurisdiction of the International Court of Justice when Nicaragua brought suit. I have heard informally that lawyers within the Legal Adviser's office opposed the decision. When President Reagan decided to invade Grenada early in his administration, the Legal Adviser's Office prepared a brief defending the action under international law. Again, based on informal reports, I understand that many in the Legal Adviser's Office believed that action lacked legal justification. Did those lawyers have a special set of responsibilities to the public because they worked in public agencies? What steps should they have taken if called on to defend a position they thought legally erroneous?

The same issues apply to the decisions of doctors in a public health service, government social workers, and other professionals in public agencies. These questions lead directly to the second broad cluster of underlying issues deserving of comparative analysis.

III. WHO IS THE CLIENT?

Posing the initial cluster of issues as "Who is in charge?" assumes the client can be identified. In ethical dilemmas involving professionals in many fields, however, "Who is the client?" is itself a difficult problem. For example, social workers are frequently employed by public agencies to help resolve difficult problems between parents and children. Do social workers owe a primary duty to parents or children, or equal duties to both? Or is their duty to the organizations that employ them? For the increasing numbers of professionals who work for organizations, simply identifying the client is a troublesome task.

The Kutak Commission grappled with the problems of lawyers in representing organizational clients and took several steps beyond the prior code, which was totally silent on the matter. Yet many issues regarding the ethi-


14. Model Rules Rule 1.13 (Organization as Client). This rule provides much less scope for "whistleblowing" than was permitted in earlier versions drafted by the Kutak Commission. Rule 1.13 provides in relevant part:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation which reasonably might be imputed to the organization, and is likely to result
cal responsibilities of organization attorneys remain. The manner in which engineers and business people employed by corporations should handle similar problems can shed light on what is appropriate conduct by lawyers.\textsuperscript{15}

Another and quite different aspect of the issue—who is the client?—involves situations in which a professional is hired by someone other than the individual to be represented. This is, of course, the norm when that individual is a minor. Obvious questions arise when the minor and the parents disagree about what course to follow. These conflicts can occur within the scope of any professional's services. No profession has developed a satisfactory set of answers for all these issues, but little comparative analysis has been done.

This cluster of questions also relates closely to the problems involved when a client lacks some degree of competency. How to define competency and who defines it are issues common to all professions. To a degree, the issue of competency is involved in every client representation by every professional; a client seeks help from a professional because the client is, or at least feels, inadequate if not incompetent to handle the issues in question. When a client is mentally retarded, providing appropriate representation becomes more challenging. In such situations, a guardian is often the answer to "Who is the client?" That answer is frequently not feasible because of the costs involved. This problem is a prime example of an area in which lawyers have no monopoly on the dilemmas involved and can gain from comparative analyses.

in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motives involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's effort in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16.

G. Hazard, \textit{Ethics in the Practice of Law} (1978) is the most thoughtful analysis of the ethical issues facing corporate counsel.

IV. CONFIDENCES AND CANDOR: THE MOST TROUBLESOME ISSUES

Three clusters of issues in the realm of legal ethics have been debated with particular passion in recent years: First, under what circumstances may or must a professional reveal the confidences of a client? Second, when if ever is less than full candor by a professional justified on behalf of a client? Third, when if ever is less than full candor by a professional justified to a client? Because these three issues arise in the context of every profession that serves clients, they are particularly useful bases for comparison.

The basic arguments that it is unethical for a lawyer to reveal the confidences of a client are well known. Most important, it is claimed, a lawyer can best represent a client only if the lawyer understands all that actually happened. If the client fears the lawyer may reveal what the client says, the client will shape his or her statements accordingly, and the result will be inadequate representation and, viewed more generally, inadequate service in the cause of justice.

All would agree that a few exceptions must exist, but when the Kutak Commission tried to establish a rule authorizing lawyers to reveal confidences in an expanded range of situations, the American Bar Association reacted by cutting back the permissible occasions even further than in the prior code. In my view, the Kutak Commission should have required, or at least authorized, lawyers to reveal confidences in a broader range of situations than it did propose. Obviously, I think the American Bar Association, by rejecting even the Commission's view, was in error. My point here, again, is not to debate these issues, but to urge comparison of the lawyer's situation to that of other professionals.

The basic arguments are essentially the same for a number of other professions, particularly medicine and social work. Unless a patient feels comfortable in telling a doctor the full facts, the doctor cannot adequately treat that patient. Yet there may be strong reasons for a doctor to reveal a patient's confidences. This is most obviously true when a communicable disease is

16. MODEL RULES Rule 1.6 provides:

Confidentiality of Information
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
involved and the health of others—as well as the patient—is at stake. Several courts have upheld requirements for particular professions similar to the standards in the ABA Model Rules of Professional Conduct.\textsuperscript{17} Other judicial decisions, however, have adopted approaches for some professions that differ from those standards.\textsuperscript{18}

The \textit{Model Rules} state that, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact to a third person . . . ."\textsuperscript{19} The arena where that blanket requirement would seem most troublesome—negotiations—is excluded as a matter of definition in the comments to the \textit{Model Rules}. The codes of other professions that I have reviewed do not focus on the issue as directly as the \textit{Model Rules}. The problem arises, however, in many situations. A doctor knows that a patient has Acquired Immune Deficiency Syndrome (AIDS), but the patient does not want his or her family to know. When the family asks the doctor for the facts, should the doctor lie? Business persons obviously face this problem not only in negotiations, but in many other circumstances as well. A full comparative analysis of the situations would be extremely useful both for lawyering and other professions.

Last, it is helpful to consider whether there are counterparts to the situation in which it is appropriate for a doctor to prescribe a placebo to a patient—in other words, to lie to that patient. When a lawyer thinks a client will be a more effective witness if the client does not know a particular fact, is it justifiable to withhold knowledge of that fact? Similarly, some psychological testing is feasible only if the subjects of the test are not told key facts about the testing. Are there analogies in legal ethics?

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I underscore in conclusion that the common issues of professional responsibility raised in these comments are illustrative and not exhaustive, and not all of the issues fit within the categories "Who is in charge?" and "Who is the client?" One substantial cluster of other questions, for example, relates to how and by whom allocations of limited benefits are made among clients.

\textsuperscript{17} See, \textit{e.g.}, Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychologist did not reveal that patient had threatened to kill plaintiff's child). The California Supreme Court, in upholding the plaintiff's claim that a psychologist had a duty to reveal a patient's confidential communication, relied in part on section 9 of the \textit{Principles of Medical Ethics of the American Medical Association}: "A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community."


\textsuperscript{19} \textit{Model Rules} Rule 4.1.
The problems of choice facing legal-services lawyers struggling to serve more clients than they can handle are related to the difficulties of doctors in deciding which patients should receive special medical treatment when facilities are limited. Similarly, a wide range of questions involving fees are common to all professions. What criteria should apply in setting fees? Is the ability to pay an appropriate consideration? When are contingency fees a professionally responsible means to share risks?

In short, there is ample room and substantial need for systematic reviews of issues involving professional ethics, profession by profession, particularly in terms of those professions that involve representing clients. I hope that the pages of this new journal will be marked by insights from those reviews.