

1986

Marlin L. Stewart and Candice Stewart v. Aldin J.
Coffman Jr, Penelope Dalton Coffman, Coffman,
Coffman and Woods : Amicus Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 860318

IN THE UTAH COURT OF APPEALS

MARLIN L. STEWART and CANDICE :
STEWART, husband and wife, :

Plaintiffs-Appellants, :

vs. :

Case No. 860318-CA

ALDIN J. COFFMAN, JR., :
PENELOPE DALTON COFFMAN, :
COFFMAN, COFFMAN and WOODS, A :
professional corporation also :
known as COFFMAN and COFFMAN, :
ANTHONY M. THURBER, and :
KENNETH A. OKAZAKI, jointly :
and severally, :

Defendants. :

(PENELOPE DALTON COFFMAN, :
Defendant-Respondent) :

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SEP 18 1987

Court of Appeals

BRIEF OF AMICUS CURIAE
UTAH TRIAL LAWYERS ASSOCIATION

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT OF
GRAND COUNTY, STATE OF UTAH
HONORABLE BOYD BUNNELL
District Judge

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ALDIN J. COFFMAN, JR.,	:	in Supreme Court)
PENELOPE DALTON COFFMAN,	:	
COFFMAN, COFFMAN and WOODS, A	:	Category No. 13.b.
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known as COFFMAN and COFFMAN,	:	
ANTHONY M. THURBER, and	:	
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Defendant-Respondent)	:	

BRIEF OF AMICUS CURIAE
UTAH TRIAL LAWYERS ASSOCIATION

AUTHORITY FOR BRIEF

This brief is filed pursuant to Rule 25 in the Rules of the Utah Court of Appeals. The parties stipulated to the submission of this brief. The Court entered its order authorizing this brief on August 18, 1987.

STATEMENT OF THE ISSUE PRESENTED ON APPEAL

The issue presented on appeal is whether the lower court was correct in holding that a shareholder of a professional corporation is not vicariously liable for the alleged malpractice of another shareholder of the professional corporation.

STATEMENT OF FACTS

This brief adapts and incorporates herein the Plaintiff/Appellant's statement of facts.

SUMMARY OF ARGUMENT

Shareholders in professional corporations generally, and lawyer shareholders specifically, are vicariously liable for the malpractice of other professionals in their professional corporation. The legislative history of the Utah Professional Corporation Act and of professional corporations acts generally reveals an intent not to amend liability relationships historically in place. Both the old and new rules for the regulation of the Bar promulgated by the Utah Supreme Court reflect an intent to require vicarious liability for members of the bar.

ARGUMENT

I.

THE LEGISLATURE DID NOT INTEND THE
PROFESSIONAL CORPORATION ACT TO LIMIT
LIABILITY.

The Appellant and Respondent each base their arguments on interpretations of different sections of the Professional Corporation Act, U.C.A. 16-11-1 et seq. They each argue that one section prevails over the other. Their arguments clearly show that, based on the history of the legal profession and the Utah Corporate Code generally, the Professional Corporation Act is internally inconsistent.

In analyzing professional corporation statute language similar to that found in the Utah Professional Corporation Act Smith and Ault, The Corporate Professional-United States v. Empey, 54 Mass.L.Q. 14 (1969), also found the provisions of the act to be internally inconsistent. They found the interpretations to be "equally reasonable", at 23.

This inconsistency requires this court to examine the legislative history and intent of the Act, see Utah State Road Commission v. Friberg, 687 P2d 821 (Utah, 1984).

A.

THE UTAH LEGISLATURE INTENDED THAT THE
PROFESSIONAL CORPORATION ACT WOULD NOT
LIMIT LIABILITY.

Attachment A is a transcript of the debate in the Utah State House of Representatives on March 19, 1963, on House Bill 196 entitled Incorporation of Persons Rendering Professional Services. The intent of the Legislature in enacting this statute is evident from the first line of discussion in the record. The Speaker of the House

describes the act as one, "to incorporate for tax benefits". The discussion of Representative Watkins, the primary sponsor of the bill, focuses exclusively on tax benefits which are available for professional corporations.

After the introduction of the bill Representative Loverage asked the sponsor,

"In connection with liable [sic] suits, would these individuals still be individually liable in the case of a suit or liable [sic]. I know that in some instances, corporation's individuals may not be sued, but only the corporation. What would be the status of these people?"

Representative Watkins, the sponsor, answers,

"This act does not alter any law applicable to the relationship between a person rendering professional services and a person receiving such services, including liability arising out of such professional services.

Therefore, the doctor who incorporates would not be given limited liability as most corporations provide."

It is obvious from the tenor of the discussion that Representative Loverage was referring to liability for professional malpractice as opposed to "liable". Representative Watkins' response was that the liability aspects of professional practice would not change. Those liability aspects as understood by both Representatives, included the fact that professionals practicing together were individually liable for the malpractice of one another.

The Legislature intended to pass a statute providing tax benefits to professionals, but did not intend to amend the liability aspects of professional practice. It did not intend to shield Ms. Coffman from the liability she would traditionally have faced as a lawyer in practice with another lawyer.

B.

THE GENERAL LEGISLATIVE INTENT OF THE PROFESSIONAL CORPORATION ACT WAS TO ALLOW TAX BENEFITS BUT NOT TO LIMIT LIABILITY.

At about the same time as the Utah Legislature enacted the Utah Professional Corporation Act numerous other states also considered and enacted professional corporation statutes. In Petition of the Bar Association of Hawaii, 516 P.2d 1267 (Hawaii, 1973) the Hawaii Supreme Court quoted the Hawaii Standing Committee Report,

"The basic reason for the establishment of professional corporations is to place professional persons on parity with persons in other business corporations who are favored with tax benefits under the Internal Revenue Code. This bill would allow the professions to take advantage of the tax benefit resulting in doing business through a corporation." Id. at 1268.

See also In re: Rhode Island Bar Association, 263 A.2d 692, 695 (R.I., 1970) and In re: New Hampshire Bar Association, 266 A.2d 583,584 (N.H.,1970) and In re: Florida Bar Association,

133 So.2d 554,555 (Fla., 1961). Notably the Hawaii Supreme Court refused to allow limited liability for lawyers not personally involved in malpractice despite the fact that the Hawaii Corporate Code would have otherwise immunized them. The same result obtained in Ohio in South High Development Limited v. Weyner, Lippe and Cromley Co., L.P.A., 445 N.E. 2d 1106 (Ohio, 1983).

Those legal scholars who addressed the issue at the time Professional Corporation statutes were being enacted also focused on tax issues, see Smith and Ault, The Corporate Professional-United States v. Empey, 54 Mass.L.Q. 14 (1969); Bittker, Professional Service Organizations: A Critique of the Literature, 23 Tax.L.Rev. 429 (1968); and O'Neill, Professional Service Corporations: Coping With Operational Problems, 31 J.Taxation 94 (1969).

Those writers who addressed the liability issue found it incongruous that attorneys would be able to escape individual liability merely by converting their practice to a corporate format. In Jones, The Professional Corporation 27 Fordham.L.R. 353, 360-362 (1958) the author described the proposed form for a professional corporation. That form included,

"The professional corporation shall afford no limitation from the liability of its officers, directors or shareholders or any errors, omissions, malpractice or other torts committed by its agents, employees, officers, directors, or shareholders in the scope of their employment by or professional activities on behalf of the corporation." Id. at 361.

Smith and Ault, supra, at 25, also addressed the liability issue. Their response to the limited liability position, when comparing both sides of the argument before the Court here was,

". . . this limitation on traditional professional responsibilities may raise both ethical problems and problems in terms of the regulatory agencies overseeing the practice of the various professions."

II.

THE RULES OF THE UTAH SUPREME COURT INVOKE RESPONDENT'S LIABILITY.

Utah Code Annotated, Section 78-51-14, provides that rules and regulations pertaining to members of the Utah State Bar shall be submitted and approved by the Utah Supreme Court. Further, Utah Code Annotated, Section 78-2-4(3), provides "The Supreme Court shall, by rule, govern the practice of law, including admission to practice law and *the conduct* and discipline of persons admitted to the practice of law." (emphasis added).

By the Code of Professional Responsibility and the Rules of Professional Conduct, the Supreme Court has exercised the

authority granted in the judicial code. The Code of Professional Responsibility was in effect at the time the incidents occurred which give rise to the Plaintiff's claim against the Defendant. The Code of Professional Responsibility was approved on February 19, 1971, a copy is attached as Attachment B. Subsequently, the Utah Supreme Court approved the Rules of Professional Conduct, to become effective on January 1, 1988, a copy is attached as Attachment C.

The introductory material to the Rules of Professional Conduct contains a section entitled Scope. In discussing the rules, the Scope section describes, "Other [of these] rules define the nature of relationships between the lawyer and others." In other words, some of the rules establish a standard of care. A lawyer may be liable for the violation of that standard, the classic definition of negligence.

A.

THE RESPONDENT WOULD NOT BE DISMISSED
FROM THIS ACTION UNDER RULE 5.1 OF
THE RULES OF PROFESSIONAL CONDUCT.

Rule 5.1 of the Rules of Professional Conduct
provides,

(a) A partner in a law firm shall make reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) . . . A lawyer shall be responsible for another lawyer's violations of the Rules of Professional Conduct if: . . . (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial actions."

The terminology section of the Rules of Professional Conduct defines, "'Partner' denotes a member of a partnership or a shareholder in a law firm organized as a professional corporation."

As a shareholder, with her husband, Ms. Coffman was a "partner" in the law firm of Coffman and Coffman. In that capacity Ms. Coffman would have had, under the Rules of Professional Conduct, a specific duty to insure reasonable measures were taken to insure adherence to the rules.

This matter was disposed of, below, on a Motion to Dismiss. In support of that motion, Ms. Coffman provided an Affidavit stating that she was a member of the firm and that she did not know anything about the matter. This clearly would not meet the criteria established by Rule 5.1. Whether or not steps taken by her were sufficient to meet Rule 5.1 criteria would constitute an issue of fact avoiding both Motions to Dismiss and Motions for Summary Judgment in all but the most straight forward cases.

If Rule 5.1 had been in effect at the time of the negligence of the firm of Coffman and Coffman, as it most assuredly will be at the time this case is decided, Ms. Coffman would not have been removed from the lawsuit. The legislative intent of the Act and the other arguments set forth in this brief show that there is no reason to otherwise distinguish between then and now.

B.

LIMITED LIABILITY FOR A SHAREHOLDER
OF A PROFESSIONAL CORPORATION
CONSTITUTES A PROSPECTIVE LIMITATION
OF LIABILITY.

Rule 1.8(h) of the Rules of Professional Conduct provides,

"A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement . ."

Arguably the limitation of liability associated with practicing in a professional corporation is legal. The legality of a prospective limitation is only half the test. The client must be independently represented. The obvious reason for independent representation is so that the client will be aware of the effect of the limited liability. Very, very few clients will be aware that by choosing Law Firm A, a partnership, they will have the right to look to each of

the members of the law firm as well as the law firm itself, as has traditionally been the case, and that by choosing Law Firm B, a professional corporation, they may be limited to pursuing the lawyer who negligently performs the work, the corporation, if it has any assets, and the corporation's Error's and Omissions policy, if it actually has one, see Smith & Ault, supra at 25.

Choosing to practice as a professional corporation prospectively attempts to limit a law firm's liability just as assuredly as does having a provision in a retainer agreement providing, "We will not be liable for any negligent actions taken by any of our attorneys." Neither such limitation should be allowed.

The relevant provision of Rule 1.8(h) is similar to the comparable provision of DR6-102(a) which addressed this issue under the code of professional responsibility which was in effect at the time this action arose.

III.

LIABILITY IMPOSED UPON A PERSON IS LIABILITY IMPOSED UPON THE RESPONDENT.

The Respondent argues, at pages 3 and 4 of her brief, that the effected relationship is the relationship between a person rendering professional services and that she is not liable because the person was her husband. Utah Code Annotated § 68-3-12 is part of the general rules of

statutory construction. Subsection 5 of that statute provides, "Person includes individuals, bodies politic and corporate, partnerships, associations, and companies."

Traditionally, a client had a relationship with many persons when he employed a law firm. One was the individual lawyer with whom he worked, one was the partnership or association, and the others were those individuals in the association of partnership. The existence of these relationships with the other attorneys is evident from the existence and scope of DR 5-105 and Rule 1.10 on disqualification, DR 5-101 and Rule 3.7 on lawyers as witnesses and DR 2-102 and Rule 7.5 on implying association.

Traditionally all of these were liable for the malpractice of the individual attorney who represented the client. There is nothing in the Professional Corporation Act which would infer that the personal professional relationship referenced is an individual relationship or that Ms. Coffman had no imputed relationship with the appellant.

IV.

PUBLIC POLICY DEMANDS THE RESPONDENT'S LIABILITY.

The public policy arguments for Respondent's liability appear to be clear. It is not inappropriate to briefly state them.

Liability of individual shareholders encourages involvement in and supervision of the work of others within the firm.

Liability of individual shareholders encourages the use of malpractice insurance by those who have the power to require that the firm obtain it.

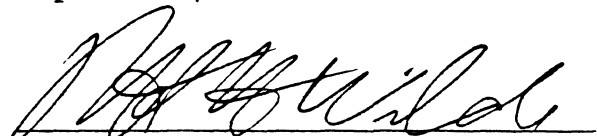
Liability of individual shareholders encourages selective hiring and competent training by those within the firm who govern these actions.

Liability of individual shareholders encourages adherence to Rule 5.1 of the Rules of Professional Conduct.

CONCLUSION

Shareholders in professional corporations are liable under the Professional Corporation Act and other relevant regulations for the malpractice of professionals within their firms. This court should reverse the lower court and remand this case so that Ms. Coffman remains a party.

DATED this 18th day of September, 1987.



ROBERT H. WILDE
Attorney for Amicus Curiae
Utah Trial Lawyers Association

HOUSE BILL 197
INCORPORATION OF PERSONS
RENDERING PROFESSIONAL SERVICES

Sponsors: Reed A. Watkins, Eighth District
J. Robert Bullock, Eleventh District
George R. Aiken, Twenty-Sixth District

BILL SIGNED BY THE GOVERNOR MARCH 19, 1963

HOUSE OF REPRESENTATIVES DEBATE, THIRD DISCUSSION

MR. SPEAKER: To incorporate for tax
benefits (inaudible) Representative Watkins?

REPRESENTATIVE WATKINS: I move we accept the
Committee report.

UNIDENTIFIED SPEAKER: Seconded.

SPEAKER: Thank you. It has been moved and
seconded we adopt the Committee report. All in favor of this
motion, say Aye.

UNIDENTIFIED SPEAKERS: Aye.

MR. SPEAKER: Cause in all? The ayes have it.
It is now before us for consideration and explanation by
Representative Watkins. Will you proceed?

REPRESENTATIVE WATKINS: Mr. Speaker and members
of the House. It is well known that employees of
corporations receive some definite tax benefits under our
federal law. And through the years individuals who have
operated sole proprietorships have been able to form

1 corporations and in effect become employees of their own
2 corporation, so that they too may participate along with the
3 rest of their employees for these benefits.

4 When it comes to the area of professional services,
5 there has been some questions in the ethics of the
6 professions as well as some possible question as to whether
7 say a doctor, could incorporation for the practice of his
8 profession.

9 The present House Bill 197 is a bill that would
10 enable professional individuals under regulation by their
11 own regulating board, as well as supervision by the
12 Secretary of State under the forming of the corporation.
13 But this Bill would enable professional people to practice
14 their profession by the business means of a corporation. It
15 would have no effect whatsoever, upon the personal
16 relationship treated between the doctor and his patient, for
17 example, or the dentist and his patient or the lawyer and
18 his client but would merely enable them to conduct their
19 business in a corporate form rather than as most of them do
20 now, as sole proprietorships or as partnerships.

21 I might mention this: That this type legislation has
22 received very favorable treatment throughout the United
23 States. As of one year ago about 15 states had met this
24 problem and had formed or have enacted enabling legislation
25 of one kind or another to allow the same result. Several of

1 those had done it by means of a professional corporation
2 act. Other states by allowing what they call an association
3 act. As of today, one year later, about 23 or 24 states
4 have now passed this type of enabling legislation and, to my
5 knowledge, similar legislation is before most, if not all,
6 of the other states.

7 This is the basic purpose of the Act. It is, I
8 should say, a non-controversial bill. It has the support of
9 the medical profession. It has the support of the dental
10 profession and other professions and I don't think that
11 there would be any particular objections.

12 If anyone has a question I'll be certainly happy to
13 do my best to answer it.

14 MR. SPEAKER: Representative Loverage?

15 REPRESENTATIVE LOVERAGE: Mr. Speaker, I should
16 like to ask Representative Watkins a question.

17 MR. SPEAKER: Will you respond?

18 REPRESENTATIVE WATKINS: Yes.

19 REPRESENTATIVE LOVERAGE: In connection with
20 suits, liable suits, would these individuals still be
21 individually liable in the case of a suit of liable? I know
22 that in some instances corporations may not be, individuals
23 may not be sued but only the corporation. Now, what would
24 be the status of these people?

25 REPRESENTATIVE WATKINS: I can read Section 10

1 of the Act which states: "This Act does not alter any law
2 applicable to the relationship between a person rendering
3 professional services and a person receiving such services,
4 including liability arising out of such professional
5 services."

6 Therefore, the doctor, for example, who
7 incorporates, would not be given limited liability as most
8 corporations provide. That is the--I might mention this
9 too: The term has been coined "Professional Corporation"
10 for this very reason, to point out that the professional
11 ethics and the same standards that now exist between the
12 professional person and his client or patient will remain
13 even though he incorporates.

14 If there are no other questions, Mr. Speaker--

15 REPRESENTATIVE PETERSON: Mr. Speaker, I should
16 like to ask Representative Watkins a question. Could you
17 just briefly tell us what these tax advantages are with
18 regards to these professional people?

19 REPRESENTATIVE WATKINS: The main tax advantage,
20 Mr. Peterson, is the adoption of what we call profit
21 sharing or pension plans. Under the corporation, of
22 course, it can adopt a plan for the benefit of its
23 employees. A partnership can do the same thing for the
24 benefit of the employees, but in the partnership the partner
25 is not an employee, he is an employer. Whereas, under a

1 corporation, the owner-type person is both an employee as
2 well as an owner of stock. So this is the main benefit,
3 that of the adoption of retirement plans such as pension and
4 profit sharing plans.

5 MR. SPEAKER: Any further questions? The
6 question has been called for. I'll ask the chief clerk to
7 call the role on final passage. Representative Peterson?

8 REPRESENTATIVE PETERSON: Mr. Speaker, if there
9 is no opposition to this Bill I would move the rules be
10 suspended, The clerk be permitted to cast the vote of the
11 entire House in favor of this bill.

12 MR. SPEAKER: You heard the motion. All in
13 favor--

14 UNIDENTIFIED SPEAKER: (Inaudible).

15 MR. SPEAKER: Any final direction? Any other
16 objections? All right. All except Representative Anderson,
17 all in favor of this motion say aye.

18 UNIDENTIFIED SPEAKERS: Aye.

19 MR. SPEAKER: All those no? The ayes have it
20 and if you'll remain in your seats I will ask the chief
21 clerk to make the count.


22 END OF RECORDING.
23
24
25

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Penny C. Abbott, do hereby certify I am a Certified Shorthand Reporter and Notary Public in and for the State of Utah. That on the 9th day of September, 1987 I transcribed into typewritten form, from tape recording, the record a House of Representatives hearing regarding House Bill 197 as herein contained in pages 1 through 5, both inclusive. And that said transcript is accurate to the best of my knowledge and ability, some parts of the recording being inaudible due to background noise and numerous persons speaking at once.

WITNESS my hand and official seal this 1st day of
September, 1987.


Penny C. Abbott, C.S.R.
& Notary Public

My commission expires:
September 24, 1988

Professional Conduct of the Utah State Bar

Adopted May 28, 1936, approved by the Utah Supreme Court on March 1, 1937, and amended in 1977, May 7, 1982, and September 16, 1985.

RULE I

SECTION 1. These rules of professional conduct for attorney and counselors of the State of Utah, adopted by the Board of Commissioners of the Utah State Bar and approved by the Supreme Court of Utah under the inherent power of the Court to control and supervise the conduct of members of the Utah State Bar and pursuant to the provisions of Title 6, Utah Code Annotated, 1943, are binding upon all members of the Utah State Bar, and the breach of any of these rules shall be punishable by reprimand, suspension or disbarment, including the assessment of costs.

SECTION 2. These rules may be cited and referred to as the Rules of Professional Conduct of the Utah State Bar.

SECTION 3. Any false statement or failure to disclose all facts required for Admission to the Bar by an applicant, if calculated to deceive, or any violation of the Rules of Conduct for members of the Bar prescribed by statute or by rule, or any cause specified by statute as grounds for disbarment, suspension or reprimand, shall render the offending member of the Utah State Bar subject to disciplinary proceedings.

SECTION 4. The enumeration of particular duties herein should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

RULE II

CONDUCT PRESCRIBED BY STATUTE

SECTION 1. It is the duty of an attorney and counselors:

1. To support the constitution and the laws of the United States and of this State;
2. To maintain the respect due to the courts of justice and judicial officers;
3. To counsel or maintain no other actions, proceedings or defenses than those which appear to him legal and just, excepting the defense of a person charged with a public offense;
4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;
5. To maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client;
6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is charged;
7. Not to encourage either the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed;

9. To comply with all duly approved rules and regulations prescribed by the Board of Commissioners of the Utah State Bar and to pay the annual license fee provided by law.

SECTION 2. An attorney or counselor shall not:

1. Directly or indirectly buy, or be in any manner interested in buying or having assigned to him for the purpose of collection, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon; provided, that this section does not prohibit the receipt by an attorney or counselor of a bond, promissory note, bill of exchange, book debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted, or from buying or receiving a bill of exchange, draft, or other thing in action for the purpose of remittance, and without intent to violate this section.

2. By himself, or by or in the name of another person either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof; but this subdivision does not apply to any agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

3. Knowingly permit any person, not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name, as counsel or attorney for another.

4. Directly or indirectly advise in relation to, or aid or promote the defense of any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by a person as district attorney or other public prosecutor with whom such attorney is directly or indirectly connected as a partner; or, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court, as district attorney or other public prosecutor, afterwards directly or indirectly advise in relations thereto, or take any part in, the defense thereof, as an attorney or otherwise; or take or receive any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof; provided that this section does not prohibit an attorney from defending himself in person, as attorney or as counsel, when a party to a civil or criminal action.

5. Take part in deceit or collusion, or consent thereto with intent to deceive a court or judge or a party to an action or proceeding.

6. Knowingly without authority appear as an attorney for a party to an action or proceeding.

7. Become a surety in any civil or criminal action, suit, or proceeding which may be instituted in any of the courts of this state, in which he is engaged as attorney.

SECTION 3. An attorney and counselor receiving money or property of his client in the course of his professional business, shall pay or deliver

the same to the person entitled thereto within a reasonable time, unless he has just cause for retaining it.

SECTION 4. An attorney and counselor may be disbarred, suspended, or reprimanded for violation of any of the foregoing rules, or for any of the following causes, arising after his admission to practice:

1. His conviction of a felony, or of a misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence;

2. Willful disobedience or violation of a valid and final order of the court requiring him to do or forbear an act connected with or in the course of his profession, a violation of the oath taken by him, or any corrupt or willful violation of his duties as an attorney or counselor;

3. For any other act to which such a consequence is by law attached.

RULE III

OATH OF THE ATTORNEY

The oath of an attorney, to be taken upon Admission to the Bar and to be followed in practice by each member of the Utah State Bar, is promulgated and prescribed as follows:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of Utah, and that I will discharge the duties of Attorney and Counselor at Law with fidelity;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So HELP ME GOD.

RULE IV
CONDUCT PRESCRIBED BY RULE

Code of Professional Responsibility
Adopted by Utah State Bar, May 7, 1970
(Approved by Utah Supreme Court February 19, 1971)

CANON 1

*A Lawyer Should Assist in
Maintaining the Integrity and
Competence of the Legal
Profession*

ETHICAL CONSIDERATIONS

EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC 1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC 1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC 1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

DISCIPLINARY RULES

DR 1-101 Maintaining Integrity and Competence of the Legal Profession.

- (A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.
- (B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102 Misconduct.

- (A) A lawyer shall not:
 - (1) Violate a Disciplinary Rule.
 - (2) Circumvent a Disciplinary Rule through actions of another.
 - (3) Engage in illegal conduct involving moral turpitude.
 - (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
 - (5) Engage in conduct that is prejudicial to the administration of justice.
 - (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103 Disclosure of Information to Authorities.

- (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CANON 2

*A Lawyer Should Assist the Legal Profession
in Fulfilling Its Duty
to Make Legal Counsel Available*

ETHICAL CONSIDERATIONS

EC 2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laypersons, to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in

educational and public relations programs concerning the legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers. The problems of advertising on television and radio require special consideration, due to the style, cost, and transitory nature of such media. If the interests of laypersons in receiving relevant lawyer advertising are not adequately served by print media, and if adequate safeguards to protect the public can reasonably be formulated, television and radio advertising may serve a public interest.

(approved 12-5-77)

EC 2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

(approved 12-5-77)

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

(approved 12-5-77)

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

(approved 12-5-77)

Selection of a Lawyer: Generally

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

(approved 12-5-77)

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about the availability of lawyers, the qualifications of particular lawyers, and the expense of legal representation leads laypersons to avoid seeking legal advice.

(approved 12-5-77)

basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers — and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisement and public communications, whether in law lists, telephone directories, newspapers or other forms of print media should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, but only by using designations and definitions authorized by the Utah Supreme Court, for example, one or more fields of law in which the lawyer or law firm practices; a statement that practice is limited to one or more fields of law; or a statement that the lawyer or law firm concentrates in a particular field of law practice, but only using designations, definitions and standards authorized by the Utah Supreme Court; and (4) permitted fee information. Self-laudation should be avoided. (approved 12-5-77)

Selection of a Lawyer: Lawyer Advertising

EC 2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public. (approved 12-5-77)

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes or causes to be published is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature in communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. Any change which is approved

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers — and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisement and public communications, whether in law lists, telephone directories, newspapers or other forms of print media should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, but only by using designations and definitions authorized by the Utah Supreme Court, for example, one or more fields of law in which the lawyer or law firm practices; a statement that practice is limited to one or more fields of law; or a statement that the lawyer or law firm concentrates in a particular field of law practice, but only using designations, definitions and standards authorized by the Utah Supreme Court; and (4) permitted fee information. Self-laudation should be avoided. (approved 12-5-77)

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(approved 12-5-77)

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lawyers practicing in the jurisdiction may avail themselves to its provisions.
(approved 12-5-77)

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in partnership, or, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.
(approved 12-5-77)

EC 2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm, if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising if it is factual, a limitation of his practice to one or more particular areas or fields of law in which he practices using designations and definitions for that purpose by the Utah Supreme Court.
(approved 12-5-77)

EC 2-15 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel:

Persons Able to Pay Reasonable Fees

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal services would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC 2-19 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.

EC 2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC 2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

EC 2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

Financial Ability to Employ Counsel:

Persons Unable to Pay Reasonable Fees

EC 2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC 2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC 2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC 2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC 2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC 2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling as

distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC 2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC 2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

DISCIPLINARY RULES

DR 2-101(A):

(1) Subject to the requirements of this rule, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in DR 2-10²₁(H).

(2) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(3) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(4) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

(5) A lawyer shall not make a false, fraudulent or misleading statement about the lawyer or the lawyer's services to a client or prospective client.

DR 2-102(B):

A lawyer shall not use a firm name, letterhead or other professional designation that violates DR 2-101(A). A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdiction limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

DR 2-102(C) Deleted.

DR 2-102(D) A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. A paid advertisement must be identified as such unless it is apparent from the context that it is a paid advertisement. If the paid advertisement is communicated to the public by use of electronic broadcast media, a recording of the actual transmission in the form in which the advertisement is to be broadcast shall be first approved by the lawyer(s) authorizing it and a recording thereof retained by the lawyer(s).

- (E) In addition to the further provisions of this DR 2-101 and the provisions of DR 2-102 through DR 2-105, fee advertisements and other publication of information as to fees, shall be subject to the following:
- (1) If a Lawyer advertises a fee for a service, the Lawyer must render that service for no more than the fee advertised.
 - (2) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information in a publication which has no fixed date for publication of a succeeding issue, the Lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.
 - (3) Unless otherwise specified in the advertisement, if a Lawyer broadcasts any fee information, the Lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.
- (F) A copy or record of an advertisement in its entirety shall be kept for one year after its dissemination.
- (G) Every advertisement for legal services shall identify the name of the Lawyer or law firm whose services are advertised.
- (H) Solicitation.
- (1) Except as permitted under DR 2-103 and 2-104, and subparagraph (2) of this DR 2-102(H), in-person, and similar direct forms of contact with a prospective client by a lawyer for the purpose of soliciting business, are prohibited.
 - (2) A lawyer may initiate written contact with prospective clients in the following circumstances:
 - (a) By a general mailing, not concerning a specific case, cause of action, transaction, or other such event.

- (b) By direct mail under the auspices of a public or charitable legal services organization or a bona fide political, social, civic, fraternal, employee, or trade organization whose purposes include, but are not limited to providing or recommending legal services.
- (3) A lawyer may not initiate written contact with prospective clients, as set forth in subparagraph (2), of this DR 2-102(H) if:
 - (a) The Lawyer knows or reasonably should know that the physical, emotional or mental state of any person so contacted is such that the person could not exercise reasonable judgment in employing a lawyer.
 - (b) The communication involves coercion, duress, harassment, or overreaching.
- (4) A copy or record, in its entirety, of a written contact with prospective clients pursuant to the provisions of DR 2-102(H) (2), above, shall be kept for one year after its dissemination, and a copy of such written communication shall be mailed to the office of the Utah State Bar simultaneously with its dissemination to prospective clients; provided, however, that receipt of such copy by the Utah State Bar and subsequent failure to act with respect thereto, whether on one or more occasions, shall not be deemed to constitute approval by the Utah State Bar of the contents thereof, and shall not constitute the basis for a defense of waiver, estoppel, laches, or other such defense by the lawyer sending such communication in the event of any subsequent disciplinary proceeding against the lawyer.
- (I) Any form of communication by a lawyer referred to in this DR 2-101, by any medium of communication, for the purpose of advertising, publicizing, or promoting the services of a lawyer or of an affiliated lawyer shall comply with the Limitations contained in paragraphs DR 2-101 (A) and (B), as well as, where applicable, the provisions contained in DR 2-102 through DR 2-105.

DR 2-103 Recommendation of Professional Employment.

- (A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.
(approved 12-5-77)
- (B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).
(approved 12-5-77)
- (C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that:
 - (1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.
(approved 12-5-77)

(4) and may perform legal services for those to whom he was recommended by it to do such work if:

- (a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and
- (b) The lawyer remains free to exercise his independent professional judgment on behalf of his client. (approved 12-5-77)

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is not interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

- (a) Operated or sponsored by a duly accredited law school
- (b) Operated or sponsored by a bona fide nonprofit community organization.
- (c) Operated or sponsored by a governmental agency.
- (d) Operated, sponsored, or approved by a bar association.
(approved 12-5-77)

(2) A military legal assistance office. (approved 12-5-77)

(3) A lawyer referral service operated, sponsored, or approved by a bar association. (approved 12-5-77)

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied: (approved 12-5-77)

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its members or beneficiary.

(approved 12-5-77)

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(approved 12-5-77)

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
(approved 12-5-77)

furnished, and not such organization, is recognized as the client of the lawyer in the matter. (approved 12-5-77)

- (e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief. (approved 12-5-77)
 - (f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operation. (approved 12-5-77)
 - (g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscriptions charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure. (approved 12-5-77)
- (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule. (approved 12-5-77)

DR 2-104 Suggestion of Need of Legal Services.

- (A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
- (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client. (approved 12-5-77)
 - (2) A lawyer may accept employment that results from his participation in activities designated to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization. (approved 12-5-77)
 - (3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein. (approved 12-5-77)
 - (4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice. (approved 12-5-77)
 - (5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder. (approved 12-5-77)

(A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice except as permitted under DR 2-101 (B) and except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign. (approved 12-5-77)

(2) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

DR 2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.
- (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR 2-107 Division of Fees Among Lawyers.

- (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
 - (2) The division is made in proportion to the services performed and responsibility assumed by each.
 - (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.
- (B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108 Agreements Restricting the Practice of a Lawyer.

- (A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.
- (B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR 2-109 Acceptance of Employment.

- (A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:
- (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

- (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR 2-110 Withdrawal from Employment.

(A) In general.

- (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
- (3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

- (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.
- (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.
- (3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.
- (4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110 (B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) His client:
 - (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
 - (b) Personally seeks to pursue an illegal course of conduct.
 - (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.
 - (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

- (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.
- (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.
- (2) His continued employment is likely to result in a violation of a Disciplinary Rule.
- (3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
- (4) His mental or physical condition renders it difficult for him to carry out the employment effectively.
- (5) His client knowingly and freely assents to termination of his employment.
- (6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

CANON 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

ETHICAL CONSIDERATIONS

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC 3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be

permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstractors, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

DISCIPLINARY RULES

DR 3-101 Aiding Unauthorized Practice of Law.

- (A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
- (B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR 3-102 Dividing Legal Fees with a Non-Lawyer.

- (A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
 - (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

- (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
- (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR 3-103 Forming a partnership with a Non-Lawyer.

- (A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, book-keeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privileges does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC 5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a

lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC 5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC 5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC 5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a

lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC 5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC 5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his

client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC 5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISCIPLINARY RULES

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.
- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
 - (1) If the testimony will relate solely to an uncontested matter.
 - (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
 - (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

- (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-103 Avoiding Acquisition of Interest in Litigation.

- (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
- (1) Acquire a lien granted by law to secure his fee or expenses.
 - (2) Contract with a client for a reasonable contingent fee in a civil case.
- (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR 5-104 Limiting Business Relations with a Client.

- (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.
- (B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is

likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

- (C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

DR 5-106 Settling Similar Claims of Clients.

- (A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 5-107 Avoiding Influence by Others Than the Client.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not:
 - (1) Accept compensation for his legal services from one other than his client.
 - (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.
- (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.
- (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) A non-lawyer is a corporate director or officer thereof; or
 - (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal

education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.

DR 6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

ETHICAL CONSIDERATIONS

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC 7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts and avoid punishment therefor.

EC 7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC 7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on

his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC 7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC 7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC 7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercises of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit

of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC 7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be *ex parte* in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged, and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC 7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC 7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known, the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC 7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC 7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process, further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC 7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC 7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC 7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC 7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to

leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

EC 7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

EC 7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC 7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37 In adversary proceedings, clients are litigants and though ill feelings may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DE 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
- (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
- (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102 (B).

(B) In his representation of a client, a lawyer may:

- (1) Where permissible, exercise his professional judgment to waive or fail to assert a right of position of his client.
- (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

- (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
 - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
 - (4) Knowingly use perjured testimony or false evidence.
 - (5) Knowingly make a false statement of law or fact.
 - (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
 - (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
 - (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
- (B) A lawyer who receives information clearly establishing that:
- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.
 - (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

- (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
- (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating With One of Adverse Interest.

- (A) During the course of his representation of a client a lawyer shall not:
 - (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
 - (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

DR 7-105 Threatening Criminal Prosecution.

- (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR 7-106 Trial Conduct.

- (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a pro-

ceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

- (B) In presenting a matter to a tribunal, a lawyer shall disclose:
 - (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
 - (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.
- (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
 - (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
 - (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
 - (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
 - (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
 - (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
 - (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
 - (7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107 Trial Publicity.

- (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
 - (1) Information contained in a public record.
 - (2) That the investigation is in progress.
 - (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
 - (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
 - (5) A warning to the public of any dangers.
- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial, or disposition of without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
 - (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
 - (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
 - (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
 - (5) The identity, testimony, or credibility of a prospective witness.
 - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
- (C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:
- (1) The name, age, residence, occupation, and family status of the accused.
 - (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
 - (3) A request for assistance in obtaining evidence.
 - (4) The identity of the victim of the crime.
 - (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
 - (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
 - (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
 - (8) The nature, substance, or text of the charge.
 - (9) Quotations from or references to public records of the court in the case.
 - (10) The scheduling or result of any step in the judicial proceedings.
 - (11) That the accused denies the charges made against him.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
- (E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.
- (F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
- (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records,

that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
 - (5) Any other matter reasonably likely to interfere with a fair trial of the action.
- (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
- (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
 - (5) Any other matter reasonably likely to interfere with a fair hearing.
- (I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.
- (J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extra-judicial statement that he would be prohibited from making under DR 7-107.

DR 7-108 Communication with or Investigation of Jurors.

- (A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.
- (B) During the trial of a case:
- (1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.
 - (2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.
- (C) DR 7-108 (A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.
- (D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

- (E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.
- (F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.
- (G) A lawyer shall reveal promptly to the court improper conduct by a venireman or juror, or by another toward a venireman or a juror, or a member of his family, of which the lawyer has knowledge.

DR 7-109 Contact with Witnesses.

- (A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.
- (B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.
- (C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.

DR 7-110 Contact with Officials.

- (A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal.
- (B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
 - (1) In the course of official proceedings in the cause.
 - (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
 - (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
 - (4) As otherwise authorized by law.

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill and of dedication to the improvement of the system.

Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR 8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

- (1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.
- (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.
- (3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.

- (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
- (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

DR 9-102 Preserving Identity of Funds and Property of a Client.

- (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
 - (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (B) A lawyer shall:
- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
 - (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safe-keeping as soon as practicable.
 - (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
 - (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

DEFINITIONS

As used in the Disciplinary Rules of the Code of Professional Responsibility:

- (1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.
- (2) "Law firm" includes a professional legal corporation.
- (3) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.
- (4) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.
- (5) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.
- (6) "Tribunal" includes all courts and all other adjudicatory bodies.
- (7) "A bar association representative of the general bar" includes a bar association of specialists as referred to in DR 2-105(A) (1) or (4).

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 - (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
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Proposed Rules of Professional Conduct

SUPREME COURT OF UTAH

State of Utah
Salt Lake City, Utah

March 20, 1987

Office of the Clerk

Stephen F. Hutchinson
Executive Director
Utah State Bar
425 East First South
Salt Lake City, Utah 84111

Minute Entry Dated March 20, 1987

IN RE: Rules of Professional Conduct

The Court accepts and approves the proposed revision of the rules of professional conduct dated February 20, 1987, including the further proposed amendments of Rule 5.4 contained in the letter from the Bar dated March 5, 1987, but as to Rule 1.6, the Court declines to accept the recommendation of the Bar and in lieu thereof, adopts the 1981 ABA proposal less subpart (b)(1). The Bar is respectfully requested to provide for publication of the rules and to afford a further comment period through July 1, 1987. The rules will be promulgated by the Court on January 1, 1988

Geoffrey J. Butler, Clerk

Proposed Rules of Professional Conduct

Effective Date:
January 1, 1988

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PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the

legal profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideal of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

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SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumst-

ances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations. Disciplinary action shall be governed by the Procedures of Discipline of the Utah State Bar and the burden of proof shall be on the State Bar to sustain any allegation of violation by clear and convincing evidence.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with the recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to

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compare counterparts in the Code of Professional Responsibility (approved by the Utah Supreme Court February 19, 1971) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

TERMINOLOGY

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 COMPETENCE

A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT. COMPETENT REPRESENTATION REQUIRES THE LEGAL KNOWLEDGE, SKILL, THOROUGHNESS AND PREPARATION REASONABLY NECESSARY FOR THE REPRESENTATION.

COMMENT:

Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elab-

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orate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

CODE COMPARISON

DR 6-101(A)(1) provided that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it." DR 6-101(A)(2) required "preparation adequate in the circumstances." Rule 1.1 more fully particularizes the elements of competence. Whereas DR 6-101(A)(3) prohibited the "[n]eglect of a legal matter" Rule 1.1 does not contain such a prohibition. Instead, Rule 1.1 affirmatively requires the lawyer to be competent.

RULE 1.2 SCOPE OF REPRESENTATION

(a) A LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION, SUBJECT TO PARAGRAPHS (b), (c), (d), AND SHALL CONSULT WITH THE CLIENT AS TO THE MEANS BY WHICH THEY ARE TO BE PURSUED. A LAWYER SHALL ABIDE BY A CLIENT'S DECISION WHETHER TO ACCEPT AN OFFER OF SETTLEMENT OF A MATTER. IN A CRIMINAL CASE, A LAWYER SHALL ABIDE BY THE CLIENT'S DECISION, AFTER CONSULTATION WITH THE LAWYER, AS TO A PLEA TO BE ENTERED, WHETHER TO WAIVE JURY TRIAL AND WHETHER THE CLIENT WILL TESTIFY.

(b) A LAWYER MAY LIMIT THE OBJECTIVES OF THE REPRESENTATION IF THE CLIENT CONSENTS AFTER CONSULTATION.

(c) 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 OF ANY PROPOSED COURSE OF CONDUCT WITH A CLIENT AND MAY COUNSEL OR ASSIST A CLIENT TO MAKE A GOOD FAITH EFFORT TO DETERMINE THE VALIDITY, SCOPE, MEANING OR APPLICATION OF THE LAW.

(d) WHEN A LAWYER KNOWS THAT A CLIENT EXPECTS ASSISTANCE NOT PERMITTED BY THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW, THE LAWYER SHALL CONSULT WITH THE CLIENT REGARDING THE RELEVANT LIMITATIONS ON THE LAWYER'S CONDUCT.

COMMENT:

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client

may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with the beneficiary.

Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal service to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or reg-

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ulation or of the interpretation placed upon it by governmental authorities.

CODE COMPARISON

Paragraph (a) has no counterpart in the Disciplinary Rules of the Code. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client ..." EC 7-8 stated that "[i]n the final analysis, however, the ... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client ... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provided that a lawyer "shall not intentionally ... fail to seek the lawful objectives of his client through reasonably available means permitted by law A lawyer does not violate this Disciplinary Rule, however, by ... avoiding offensive tactics"

With regard to paragraph (b), DR 7-101(B)(1) provided that a lawyer may, "where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client."

With regard to paragraph (c), DR 7-102(A)(7) provided that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-106 provided that a lawyer shall not "advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal ... but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 stated that a lawyer "should never encourage or aid his client to commit criminal acts or counsel his clients on how to violate the law and avoid punishment therefor."

With regard to paragraph (d), DR 2-110(C)(1)(c) provided that a lawyer may withdraw from representation if a client "insists" that the lawyer engage in "conduct that is illegal or that is prohibited under the Disciplinary Rules." DR 9-101(C) provided that "a lawyer shall not state or imply that he is able to influence improperly ... any tribunal, legislative body or public official."

RULE 1.3 DILIGENCE

A LAWYER SHALL ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT.

COMMENT:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should

be controlled so that each matter can be handled adequately.

Clients resent professional procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.14 a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

CODE COMPARISON

DR 6-101(A)(3) required that a lawyer not "[n]eglect a legal matter entrusted to him." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law." DR 7-101(A)(1) provided that a lawyer "shall not intentionally ... fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules" DR 7-101(A)(3) provided that a lawyer "shall not intentionally ... [p]rejudice or damage his client during the course of the professional relationship...."

RULE 1.4 COMMUNICATION

(a) A LAWYER SHALL KEEP A CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND PROMPTLY COMPLY WITH REASONABLE REQUESTS FOR INFORMATION.

(b) A LAWYER SHALL EXPLAIN A MATTER TO THE EXTENT REASONABLY NECESSARY TO ENABLE THE CLIENT TO MAKE INFORMED DECISIONS REGARDING THE REPRESENTATION.

COMMENT:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from

another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case shall promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information, whether written or oral, consistent with the duty to act in the client's best interest, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

CODE COMPARISON

Rule 1.4 has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provided that a lawyer shall not "[n]eglect a legal matter entrusted to him." DR 9-102(B)(1) provided that a lawyer shall "[p]romptly notify a client of the receipt of his funds, securities, or other properties." EC 7- stated that a lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

RULE 1.5 FEES

(a) A LAWYER SHALL NOT ENTER INTO AN AGREEMENT FOR, CHARGE, OR COLLECT AN ILLEGAL OR CLEARLY EXCESSIVE FEE. A FEE IS CLEARLY EXCESSIVE WHEN, AFTER A REVIEW OF THE FACTS, A LAWYER OF ORDINARY PRUDENCE WOULD BE LEFT WITH A DEFINITE AND FIRM CONVICTION THAT THE FEE IS IN EXCESS OF A REASONABLE FEE. FACTORS TO BE CONSIDERED AS GUIDES IN DETERMINING THE REASONABLENESS OF A FEE INCLUDE THE FOLLOWING:

(1) THE TIME AND LABOR REQUIRED, THE NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED, AND THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY;

(2) THE LIKELIHOOD, IF APPARENT TO THE CLIENT, THAT THE ACCEPTANCE OF THE PARTICULAR EMPLOYMENT WILL PRECLUDE OTHER EMPLOYMENT BY THE LAWYER;

(3) THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR LEGAL SERVICES;

(4) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED;

(5) THE TIME LIMITATIONS IMPOSED BY THE CLIENT OR BY THE CIRCUMSTANCES;

(6) THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT;

(7) THE EXPERIENCE, REPUTATION, AND ABILITY OF THE LAWYER OR LAWYERS PERFORMING THE SERVICES; AND

(8) WHETHER THE FEE IS FIXED OR CONTINGENT.

(b) WHEN THE LAWYER HAS NOT REGULARLY REPRESENTED THE CLIENT, THE BASIS OR RATE OF THE FEE SHALL BE COMMUNICATED TO THE CLIENT, PREFERABLY IN WRITING, BEFORE OR WITHIN A REASONABLE TIME AFTER COMMENCING THE REPRESENTATION.

(c) A FEE MAY BE CONTINGENT ON THE OUTCOME OF THE MATTER FOR WHICH THE SERVICE IS RENDERED, EXCEPT IN A MATTER IN WHICH A CONTINGENT FEE IS PROHIBITED BY PARAGRAPH (d) OR OTHER LAW. A CONTINGENT FEE AGREEMENT SHALL BE IN WRITING AND SHALL STATE THE METHOD BY WHICH THE FEE IS TO BE DETERMINED, INCLUDING THE PERCENTAGE OR PERCENTAGES THAT SHALL ACCRUE TO THE LAWYER IN THE EVENT OF SETTLEMENT, TRIAL OR APPEAL, LITIGATION AND OTHER EXPENSES TO BE DEDUCTED FROM THE RECOVERY, AND WHETHER SUCH EXPENSES ARE TO BE DEDUCTED BEFORE OR AFTER THE CONTINGENT FEE IS CALCULATED. UPON CONCLUSION OF A CONTINGENT FEE MATTER, THE LAWYER SHALL PROVIDE THE CLIENT WITH A WRITTEN STATEMENT STATING THE OUTCOME OF THE MATTER AND, IF THERE IS A RECOVERY, SHOWING THE REMITTANCE TO THE CLIENT AND THE

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METHOD OF ITS DETERMINATION.

(d) A LAWYER SHALL NOT ENTER INTO AN ARRANGEMENT FOR, CHARGE, OR COLLECT:

(1) ANY FEE IN A DOMESTIC RELATIONS MATTER, THE PAYMENT OR AMOUNT OF WHICH IS CONTINGENT UPON THE SECURING OF A DIVORCE OR UPON THE AMOUNT OF ALIMONY OR SUPPORT, OR PROPERTY SETTLEMENT IN LIEU THEREOF; OR

(2) A CONTINGENT FEE FOR REPRESENTING A DEFENDANT IN A CRIMINAL CASE.

(e) A DIVISION OF FEE BETWEEN LAWYERS WHO ARE NOT IN THE SAME FIRM MAY BE MADE ONLY IF:

(1) THE DIVISION IS IN PROPORTION TO THE SERVICES PERFORMED BY EACH LAWYER OR, BY WRITTEN AGREEMENT WITH THE CLIENT, EACH LAWYER ASSUMES JOINT RESPONSIBILITY FOR THE REPRESENTATION;

(2) THE CLIENT IS ADVISED OF AND DOES NOT OBJECT TO THE PARTICIPATION OF ALL LAWYERS INVOLVED; AND

(3) THE TOTAL FEE IS REASONABLE.

COMMENT:

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obligated to return any unearned portion. See Rule 1.14(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client

might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

CODE COMPARISON

The factors of a reasonable fee in Rule 1.5(a) are substantially identical to those listed in DR 2-106(B). EC 2-17 states that a lawyer "should not charge more than a reasonable fee"

There was no counterpart to paragraph (b) in the Disciplinary Rules of the Code. EC 2-19 stated that it is "usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

There was also no counterpart to paragraph (c) in the Disciplinary Rules of the Code. EC 2-20 provided that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee"

With regard to paragraph (d), DR 2-106(C) prohibited "a contingent fee in a criminal case." EC 2-20 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-107(A) permitted division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3)

The total fee does not exceed clearly reasonable compensation" Paragraph (e) permits division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A LAWYER SHALL NOT REVEAL INFORMATION RELATING TO REPRESENTATION OF A CLIENT EXCEPT AS STATED IN PARAGRAPH (b), UNLESS THE CLIENT CONSENTS AFTER DISCLOSURE.

(b) A LAWYER MAY REVEAL SUCH INFORMATION TO THE EXTENT THE LAWYER BELIEVES NECESSARY:

(1) TO PREVENT THE CLIENT FROM COMMITTING A CRIMINAL OR FRAUDULENT ACT THAT THE LAWYER BELIEVES IS LIKELY TO RESULT IN DEATH OR SUBSTANTIAL BODILY HARM, OR SUBSTANTIAL INJURY TO THE FINANCIAL INTEREST OR PROPERTY OF ANOTHER;

(2) TO RECTIFY THE CONSEQUENCES OF A CLIENT'S CRIMINAL OR FRAUDULENT ACT IN THE COMMISSION OF WHICH THE LAWYER'S SERVICES HAD BEEN USED;

(3) TO ESTABLISH A CLAIM OR DEFENSE ON BEHALF OF THE LAWYER IN A CONTROVERSY BETWEEN THE LAWYER AND THE CLIENT, OR TO ESTABLISH A DEFENSE TO A CRIMINAL CHARGE OR CIVIL CLAIM AGAINST THE LAWYER BASED UPON CONDUCT IN WHICH THE CLIENT WAS INVOLVED; OR

(4) TO COMPLY WITH THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW.

COMMENT:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Authorized Disclosure

A lawyer may disclose information about a client when necessary in the proper representation of the client. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the

firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm to another person. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full disclosure by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential, as stated in paragraph (a). However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). As noted in the Comment to that Rule, there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct. Paragraph 1.6(b)(4) permits doing so. Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false or fabricated evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct. Rule 1.6(b)(4) permits revealing information to the extent necessary to comply with Rule 3.3(a). The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right although not a professional duty to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (b)(2) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent.

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Inaction by the lawyer is not a violation of Rule 1.2(d), except in the limited circumstances where failure to act constitutes assisting the client. See Comment to Rule 1.2(d). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. If the prospective crime or fraud is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, the lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent substantial harm likely to result from a client's criminal or fraudulent act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by a client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at risk of disciplinary liability if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as the magnitude, proximity and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

The term "another" in paragraph (b)(1) includes a person, organization and government.

Paragraph (b)(2) does not apply where a lawyer is employed after a crime of fraud has been committed to represent the client in matters ensuing therefrom.

Dispute Concerning Lawyer's Conduct

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending himself. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is not prevented by the rule of confidentiality from proving the services rendered in an action to collect it.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose

information relating to the representation. See Rules 1.13, 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Use of Information

A lawyer may not make use of information relating to the representation in a manner disadvantageous to the client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION OF THAT CLIENT WILL BE DIRECTLY ADVERSE TO ANOTHER CLIENT, UNLESS:

(1) THE LAWYER REASONABLY BELIEVES THE REPRESENTATION WILL NOT ADVERSELY AFFECT THE RELATIONSHIP WITH THE OTHER CLIENT; AND

(2) EACH CLIENT CONSENTS AFTER CONSULTATION.

(b) A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION OF THAT CLIENT MAY BE MATERIALLY LIMITED BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT OR TO A THIRD PERSON, OR BY THE LAWYER'S OWN INTERESTS, UNLESS:

(1) THE LAWYER REASONABLY BELIEVES THE REPRESENTATION WILL NOT BE ADVERSELY AFFECTED; AND

(2) EACH CLIENT CONSENTS AFTER CONSULTATION. WHEN REPRESENTATION OF MULTIPLE CLIENTS IN A SINGLE MATTER IS UNDERTAKEN, THE CONSULTATION SHALL INCLUDE EXPLANATION TO EACH CLIENT OF THE IMPLICATIONS OF THE COMMON REPRESENTATION AND THE ADVANTAGES AND RISKS INVOLVED.

(c) A LAWYER SHALL NOT SIMULTANEOUSLY REPRESENT THE INTERESTS OF ADVERSE PARTIES IN SEPARATE MATTERS, UNLESS:

(1) THE LAWYER REASONABLY BELIEVES THE REPRESENTATION OF EACH WILL NOT BE ADVERSELY AFFECTED; AND

(2) EACH CLIENT CONSENTS AFTER CONSULTATION.

COMMENT:

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.14. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established,

is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent. Paragraph (1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is

governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse affect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for Lawyer's Service

A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide separate counsel for the insured, the arrangement should assure the separate counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the con-

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conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

CODE COMPARISON

DR 5-101(A) provided that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment in behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-105(A) provided that a lawyer "shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provided that "a lawyer may represent multiple clients if it was obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-107(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his profes-

sional judgment in rendering such services.

Rule 1.7 clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the representation reasonably appears not to be adversely affected by the lawyer's other interests. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it was obvious that he can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A LAWYER SHALL NOT ENTER INTO A BUSINESS TRANSACTION WITH A CLIENT OR KNOWINGLY ACQUIRE AN OWNERSHIP, POSSESSORY, SECURITY OR OTHER PECUNIARY INTEREST ADVERSE TO A CLIENT UNLESS:

(1) THE TRANSACTION AND TERMS ON WHICH THE LAWYER ACQUIRES THE INTEREST ARE FAIR AND REASONABLE TO THE CLIENT AND ARE FULLY DISCLOSED AND TRANSMITTED IN WRITING TO THE CLIENT IN A MANNER WHICH CAN BE REASONABLY UNDERSTOOD BY THE CLIENT; AND

(2) THE CLIENT IS GIVEN A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL IN THE TRANSACTION; AND

(3) THE CLIENT CONSENTS IN WRITING THERETO.

(b) A LAWYER SHALL NOT USE INFORMATION RELATING TO REPRESENTATION OF A CLIENT TO THE DISADVANTAGE OF THE CLIENT UNLESS THE CLIENT CONSENTS AFTER CONSULTATION.

(c) A LAWYER SHALL NOT PREPARE AN INSTRUMENT GIVING THE LAWYER OR A PERSON RELATED TO THE LAWYER AS PARENT, CHILD, SIBLING, OR SPOUSE ANY SUBSTANTIAL GIFT FROM A CLIENT, INCLUDING A TESTAMENTARY GIFT, EXCEPT WHERE THE CLIENT IS RELATED TO THE DONEE.

(d) PRIOR TO THE CONCLUSION OF REPRESENTATION OF A CLIENT, A LAWYER SHALL NOT MAKE OR NEGOTIATE AN AGREEMENT GIVING THE LAWYER LITERARY OR MEDIA RIGHTS TO A PORTRAYAL OR ACCOUNT BASED IN SUBSTANTIAL PART ON INFORMATION RELATING TO THE REPRESENTATION.

(e) A LAWYER SHALL NOT PROVIDE FINANCIAL ASSISTANCE TO A CLIENT IN CONNECTION WITH PENDING OR CONTEMPLATED LITIGATION, EXCEPT THAT:

(1) A LAWYER MAY ADVANCE COURT COSTS AND EXPENSES OF LITIGATION THE REPAYMENT OF WHICH MAY BE CONTINGENT ON THE OUTCOME OF THE MATTER; AND

(2) A LAWYER REPRESENTING AN INDIGENT CLIENT MAY PAY COURT COSTS AND

EXPENSES OF LITIGATION ON BEHALF OF THE CLIENT.

(f) A LAWYER SHALL NOT ACCEPT COMPENSATION FOR REPRESENTING A CLIENT FROM ONE OTHER THAN THE CLIENT UNLESS:

(1) THE CLIENT CONSENTS AFTER CONSULTATION;

(2) THERE IS NO INTERFERENCE WITH THE LAWYER'S INDEPENDENCE OF PROFESSIONAL JUDGMENT OR WITH THE CLIENT-LAWYER RELATIONSHIP; AND

(3) INFORMATION RELATING TO REPRESENTATION OF A CLIENT IS PROTECTED AS REQUIRED BY RULE 1.6.

(g) A LAWYER WHO REPRESENTS TWO OR MORE CLIENTS SHALL NOT PARTICIPATE IN MAKING AN AGGREGATE SETTLEMENT OF THE CLAIMS OF OR AGAINST THE CLIENTS, OR IN A CRIMINAL CASE AN AGGREGATED AGREEMENT AS TO GUILTY OR NOLO CONTENDERE PLEAS, UNLESS EACH CLIENT CONSENTS AFTER CONSULTATION, INCLUDING DISCLOSURE OF THE EXISTENCE AND NATURE OF ALL THE CLAIMS OR PLEAS INVOLVED AND OF THE PARTICIPATION OF EACH PERSON IN THE SETTLEMENT.

(h) A LAWYER SHALL NOT MAKE AN AGREEMENT PROSPECTIVELY LIMITING THE LAWYER'S LIABILITY TO A CLIENT FOR MALPRACTICE UNLESS PERMITTED BY LAW AND THE CLIENT IS INDEPENDENTLY REPRESENTED IN MAKING THE AGREEMENT, OR SETTLE A CLAIM FOR SUCH LIABILITY WITH AN UNREPRESENTED CLIENT OR FORMER CLIENT WITHOUT FIRST ADVISING THAT PERSON IN WRITING THAT INDEPENDENT REPRESENTATION IS APPROPRIATE IN CONNECTION THEREWITH.

(i) A LAWYER RELATED TO ANOTHER LAWYER AS PARENT, CHILD, SIBLING OR SPOUSE SHALL NOT REPRESENT A CLIENT IN A REPRESENTATION DIRECTLY ADVERSE TO A PERSON WHO THE LAWYER KNOWS IS REPRESENTED BY THE OTHER LAWYER EXCEPT UPON CONSENT BY THE CLIENT AFTER CONSULTATION REGARDING THE RELATIONSHIP.

(j) A LAWYER SHALL NOT ACQUIRE A PROPRIETARY INTEREST IN THE CAUSE OF ACTION OR SUBJECT MATTER OF LITIGATION THE LAWYER IS CONDUCTING FOR A CLIENT, EXCEPT THAT THE LAWYER MAY:

(1) ACQUIRE A LIEN GRANTED BY LAW TO SECURE THE LAWYER'S FEE OR EXPENSES; AND

(2) CONTRACT WITH A CLIENT FOR A REASONABLE CONTINGENT FEE IN A CIVIL CASE.

COMMENT:

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would

adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for Lawyer's Services

Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

CODE COMPARISON

With regard to Paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the

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protection of the client, unless the client has consented after full disclosure." EC 5-3 stated that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

With regard to paragraph (b), DR 4-101(B)(3) provided that a lawyer should not use "a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."

There was no counterpart to paragraph (c) in the Disciplinary Rules of the Code. EC 5-5 stated that a lawyer "should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Paragraph (d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Paragraph (e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remains ultimately liable for such expenses."

Paragraph (e)(2) has no counterpart in the Code.

Paragraph (f) is substantially identical to DR 5-107(A)(1).

Paragraph (g) is substantially identical to DR 5-106.

The first clause of paragraph (h) is similar to DR 6-102(A). There was no counterpart in the Code to the second clause of paragraph (h).

Paragraph (i) has no counterpart in the Code.

Paragraph (j) is substantially identical to DR 5-103(A).

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

A LAWYER WHO HAS FORMERLY REPRESENTED A CLIENT IN A MATTER SHALL NOT THEREAFTER:

(a) REPRESENT ANOTHER PERSON IN THE SAME OR A SUBSTANTIALLY FACTUALLY RELATED MATTER IN WHICH THAT PERSON'S INTERESTS ARE MATERIALLY ADVERSE TO THE INTERESTS OF THE FORMER CLIENT UNLESS THE FORMER CLIENT CONSENTS AFTER CONSULTATION; OR

(b) USE INFORMATION RELATING TO THE REPRESENTATION TO THE DISADVANTAGE OF THE FORMER CLIENT EXCEPT AS RULE 1.6 WOULD PERMIT WITH RESPECT TO A CLIENT OR WHEN THE INFORMATION HAS BECOME GENERALLY KNOWN.

COMMENT:

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule

1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

CODE COMPARISON

There was no counterpart to paragraphs (a) and (b) in the Disciplinary Rules of the Code. The problem addressed in paragraph (a) was sometimes dealt with under the rubric of Canon 9 of the Code, which provided: "A lawyer should avoid even the appearance of impropriety." EC 4-6 stated that the "obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

The provision in paragraph (a) for waiver by the former client is similar to DR 5-105(C).

The exception in the last sentence of paragraph (b) permits a lawyer to use information relating to a former client that is in the "public domain," a use that was also not prohibited by the Code, which protected only "confidences and secrets." Since the scope of paragraph (a) is much broader than "confidences and secrets," it is necessary under the Rules to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

**RULE 1.10 IMPUTED
DISQUALIFICATION: GENERAL
RULE**

(a) 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 1.7, 1.8(c), 1.9 OR 2.2.

(b) WHEN A LAWYER BECOMES ASSOCIATED WITH A FIRM, THE FIRM MAY NOT KNOWINGLY REPRESENT A PERSON IN THE SAME OR A SUBSTANTIALLY FACTUALLY RELATED MATTER IN WHICH THAT LAWYER, OR A FIRM WITH WHICH THE LAWYER WAS ASSOCIATED, HAD PREVIOUSLY REPRESENTED A CLIENT WHOSE INTERESTS ARE MATERIALLY ADVERSE TO THAT PERSON AND ABOUT WHOM THE LAWYER HAD ACQUIRED INFORMATION PROTECTED BY RULES 1.6 AND 1.9(b) THAT IS MATERIAL TO THE MATTER.

(c) WHEN A LAWYER HAS TERMINATED AN ASSOCIATION WITH A FIRM, THE FIRM IS NOT PROHIBITED FROM THEREAFTER REPRESENTING A PERSON WITH INTERESTS MATERIALLY ADVERSE TO THOSE OF A CLIENT REPRESENTED BY THE FORMERLY ASSOCIATED LAWYER UNLESS:

(1) THE MATTER IS THE SAME OR SUBSTANTIALLY RELATED TO THAT IN WHICH THE FORMERLY ASSOCIATED LAWYER REPRESENTED THE CLIENT; AND

(2) ANY LAWYER REMAINING IN THE FIRM HAS INFORMATION PROTECTED BY RULES 1.6 AND 1.9(b) THAT IS MATERIAL TO THE MATTER.

(d) A DISQUALIFICATION PRESCRIBED BY THIS RULE MAY BE WAIVED BY THE AFFECTED CLIENT UNDER THE CONDITIONS STATED IN RULE 1.7.

COMMENT:

Definition of "Firm"

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where the lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premises that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

Lawyers Moving Between Firms

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be as broadly cast as to preclude other persons from having reasonable

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choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unequal rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the

clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions

The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met.

CODE COMPARISON

DR 5-105(D) provided that "[i]f a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) EXCEPT AS LAW MAY OTHERWISE EXPRESSLY PERMIT, A LAWYER SHALL NOT REPRESENT A PRIVATE CLIENT IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A PUBLIC OFFICER OR EMPLOYEE, UNLESS THE APPROPRIATE GOVERNMENT AGENCY CONSENTS AFTER CONSULTATION. NO LAWYER IN A FIRM WITH WHICH THAT LAWYER IS ASSOCIATED MAY KNOWINGLY UNDERTAKE OR CONTINUE REPRESENTATION IN SUCH A MATTER UNLESS:

(1) THE DISQUALIFIED LAWYER IS SCREENED FROM ANY PARTICIPATION IN THE MATTER AND IS APPORTIONED NO PART OF THE FEE THEREFROM; AND

(2) WRITTEN NOTICE IS PROMPTLY GIVEN TO THE APPROPRIATE GOVERNMENT AGENCY TO ENABLE IT TO ASCERTAIN COMPLIANCE WITH THE PROVISIONS OF THIS RULE.

(b) EXCEPT AS LAW MAY OTHERWISE

EXPRESSLY PERMIT, A LAWYER HAVING INFORMATION THAT THE LAWYER KNOWS IS CONFIDENTIAL GOVERNMENT INFORMATION ABOUT A PERSON ACQUIRED WHEN THE LAWYER WAS A PUBLIC OFFICER OR EMPLOYEE, MAY NOT REPRESENT A PRIVATE CLIENT WHOSE INTERESTS ARE ADVERSE TO THAT PERSON IN A MATTER IN WHICH THE INFORMATION COULD BE USED TO THE MATERIAL DISADVANTAGE OF THAT PERSON, UNLESS THE APPROPRIATE GOVERNMENT CLIENT CONSENTS AFTER CONSULTATION WITH THE LAWYER. A FIRM WITH WHICH THAT LAWYER IS ASSOCIATED MAY UNDERTAKE OR CONTINUE REPRESENTATION IN THE MATTER ONLY IF THE DISQUALIFIED LAWYER IS SCREENED FROM ANY PARTICIPATION IN THE MATTER AND IS APPORTIONED NO PART OF THE FEE THEREFROM.

(c) EXCEPT AS LAW MAY OTHERWISE EXPRESSLY PERMIT, A LAWYER SERVING AS A PUBLIC OFFICER OR EMPLOYEE SHALL NOT:

(1) PARTICIPATE IN A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY WHILE IN PRIVATE PRACTICE OR NONGOVERNMENTAL EMPLOYMENT, UNLESS UNDER APPLICABLE LAW NO ONE IS, OR BY LAWFUL DELEGATION MAY BE, AUTHORIZED TO ACT IN THE LAWYER'S STEAD IN THE MATTER; OR

(2) NEGOTIATE FOR PRIVATE EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS ATTORNEY FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY, UNLESS THE APPROPRIATE GOVERNMENT CLIENT CONSENTS AFTER CONSULTATION WITH THE LAWYER.

(d) AS USED IN THIS RULE, THE TERM "MATTER" INCLUDES:

(1) ANY JUDICIAL OR OTHER PROCEEDING, APPLICATION, REQUEST FOR A RULING OR OTHER DETERMINATION, CONTRACT, CLAIM, CONTROVERSY, INVESTIGATION, CHARGE, ACCUSATION, ARREST OR OTHER PARTICULAR MATTER INVOLVING A SPECIFIC PARTY OR PARTIES; AND

(2) ANY OTHER MATTER COVERED BY THE CONFLICT OF INTEREST RULES OF THE APPROPRIATE GOVERNMENT AGENCY.

(e) AS USED IN THIS RULE, THE TERM "CONFIDENTIAL GOVERNMENT INFORMATION" MEANS INFORMATION WHICH HAS BEEN OBTAINED UNDER GOVERNMENTAL AUTHORITY AND WHICH, AT THE TIME THIS RULE IS APPLIED, THE GOVERNMENT IS PROHIBITED BY LAW FROM DISCLOSING TO THE PUBLIC OR HAS A LEGAL PRIVILEGE NOT TO DISCLOSE, AND WHICH IS NOT OTHERWISE AVAILABLE TO THE PUBLIC.

COMMENT:

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is the counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specifically retained by the

government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in a public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

CODE COMPARISON

Paragraph (a) is similar to DR 9-101(B), except that the latter used the terms "in which he had substantial responsibility while he was a public employee."

Paragraphs (b), (c), (d) and (e) have no counterparts in the Code.

RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) EXCEPT AS STATED IN PARAGRAPH (d), A LAWYER SHALL NOT REPRESENT ANYONE IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A JUDGE OR OTHER ADJUDICATIVE OFFICER, ARBITRATOR OR LAW CLERK TO SUCH A PERSON, UNLESS ALL PARTIES TO THE PROCEEDING CONSENT AFTER DISCLOSURE.

(b) A LAWYER SHALL NOT NEGOTIATE FOR EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS ATTORNEY FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY AS A JUDGE OR OTHER ADJUDICATIVE OFFICER, OR ARBITRATOR. A LAWYER SERVING AS A LAW CLERK TO A JUDGE, OTHER ADJUDICATIVE OFFICER OR ARBITRATOR MAY NEGOTIATE FOR EMPLOYMENT WITH A PARTY OR ATTORNEY INVOLVED IN A MATTER IN WHICH THE CLERK IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY, BUT ONLY AFTER THE LAWYER HAS NOTIFIED THE JUDGE, OTHER ADJUDICATIVE OFFICER OR ARBITRATOR.

(c) IF A LAWYER IS DISQUALIFIED BY PARAGRAPH (a), NO LAWYER IN A FIRM WITH WHICH THAT LAWYER IS ASSOCIATED MAY KNOWINGLY UNDERTAKE OR CONTINUE REPRESENTATION IN THE MATTER UNLESS:

(1) THE DISQUALIFIED LAWYER IS SCREENED FROM ANY PARTICIPATION IN THE MATTER AND IS APPORTIONED NO PART OF THE FEE THEREFROM; AND

(2) WRITTEN NOTICE IS PROMPTLY GIVEN TO THE APPROPRIATE TRIBUNAL TO ENABLE IT TO ASCERTAIN COMPLIANCE WITH THE PROVISIONS OF THIS RULE.

(d) AN ARBITRATOR SELECTED AS A PARTISAN OF A PARTY IN A MULTIMEMBER ARBITRATION PANEL IS NOT PROHIBITED FROM SUBSEQUENTLY REPRESENTING THAT PARTY.

COMMENT:

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

CODE COMPARISON

Paragraph (a) is substantially similar to DR 9-

101(A), which provided that a lawyer "shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There was no counterpart in the Code to paragraphs (b), (c), or (d).

With regard to arbitrators, EC 5-20 stated that "a lawyer (who) has undertaken to act as an impartial arbitrator or mediator, ... should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) did not permit a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) was similar in effect and could be construed to permit waiver.

RULE 1.13 SAFEKEEPING PROPERTY

(a) A LAWYER SHALL HOLD PROPERTY OF CLIENTS OR THIRD PERSONS THAT IS IN A LAWYER'S POSSESSION IN CONNECTION WITH A REPRESENTATION SEPARATE FROM THE LAWYER'S OWN PROPERTY. FUNDS SHALL BE KEPT IN A SEPARATE ACCOUNT MAINTAINED IN THE STATE WHERE THE LAWYER'S OFFICE IS SITUATED, OR ELSEWHERE WITH THE CONSENT OF THE CLIENT OR THIRD PERSON. OTHER PROPERTY SHALL BE IDENTIFIED AS SUCH AND APPROPRIATELY SAFEGUARDED. COMPLETE RECORDS OF SUCH ACCOUNT FUNDS AND OTHER PROPERTY SHALL BE KEPT THE LAWYER AND SHALL BE PRESERVED FOR A PERIOD OF FIVE YEARS AFTER TERMINATION OF THE REPRESENTATION.

(b) UPON RECEIVING FUNDS OR OTHER PROPERTY IN WHICH A CLIENT OR THIRD PERSON HAS AN INTEREST, A LAWYER SHALL PROMPTLY NOTIFY THE CLIENT OR THIRD PERSON. EXCEPT AS STATED IN THIS RULE OR OTHERWISE PERMITTED BY LAW OR BY AGREEMENT WITH THE CLIENT, A LAWYER SHALL PROMPTLY DELIVER TO THE CLIENT OR THIRD PERSON ANY FUNDS OR OTHER PROPERTY THAT THE CLIENT OR THIRD PERSON IS ENTITLED TO RECEIVE AND, UPON REQUEST BY THE CLIENT OR THIRD PERSON, SHALL PROMPTLY RENDER A FULL ACCOUNTING REGARDING SUCH PROPERTY.

(c) WHEN IN THE COURSE OF REPRESENTATION A LAWYER IS IN POSSESSION OF PROPERTY IN WHICH BOTH THE LAWYER AND ANOTHER PERSON CLAIM INTERESTS, THE PROPERTY SHALL BE KEPT SEPARATE BY THE LAWYER UNTIL THERE IS AN ACCOUNTING AND SEVERANCE OF THEIR INTERESTS. IF A DISPUTE ARISES CONCERNING THEIR RESPECTIVE INTERESTS, THE PORTION IN DISPUTE SHALL BE KEPT SEPARATE BY THE LAWYER UNTIL THE DISPUTE IS RESOLVED.

COMMENT:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust acco-

unts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

A "client's security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

CODE COMPARISON

With regard to paragraph (a), DR 9-102(A) provided that "funds of clients" are to be kept in an identifiable bank account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provided that a lawyer shall "identify and label securities and properties of a client ... and place them in ... safekeeping" DR 9-102(B)(3) required that a lawyer "maintain complete records of all funds, securities, and other properties of a client" Rule 1.13 (a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Paragraph (b) is substantially similar to DR 9-102(B)(1), (3) and (4).

Paragraph (c) is similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

RULE 1.14 DECLINING OR TERMINATING REPRESENTATION

(a) A LAWYER SHALL NOT REPRESENT A CLIENT OR, WHERE REPRESENTATION HAS COMMENCED, SHALL WITHDRAW FROM THE REPRESENTATION OF A CLIENT IF:

(1) THE REPRESENTATION WILL RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW;

(2) THE LAWYER'S PHYSICAL OR MENTAL CONDITION MATERIALLY IMPAIRS THE LAWYER'S ABILITY TO REPRESENT THE CLIENT; OR

(3) THE LAWYER IS DISCHARGED.

(b) A LAWYER MAY WITHDRAW FROM REPRESENTING A CLIENT IF WITHDRAWAL CAN BE ACCOMPLISHED WITHOUT MATERIAL ADVERSE EFFECT ON THE INTERESTS OF THE CLIENT, OR IF:

(1) THE CLIENT PERSISTS IN A COURSE OF ACTION INVOLVING THE LAWYER'S SERVICES THAT THE LAWYER REASONABLY BELIEVES IS CRIMINAL OR FRAUDULENT;

(2) THE CLIENT HAS USED THE LAWYER'S SERVICES TO PERPETRATE A CRIME OR FRAUD;

(3) A CLIENT INSISTS UPON PURSUING AN OBJECTIVE THAT THE LAWYER CONSIDERS REPUGNANT OR IMPRUDENT;

(4) THE CLIENT FAILS SUBSTANTIALLY TO FULFILL AN OBLIGATION TO THE LAWYER REGARDING THE LAWYER'S SERVICES AND HAS BEEN GIVEN REASONABLE WARNING THAT THE LAWYER WILL WITHDRAW UNLESS THE OBLIGATION IS FULFILLED;

(5) THE REPRESENTATION WILL RESULT IN AN UNREASONABLE FINANCIAL BURDEN ON THE LAWYER OR HAS BEEN RENDERED UNREASONABLY DIFFICULT BY THE CLIENT; OR

(6) OTHER GOOD CAUSE FOR WITHDRAWAL EXISTS.

(c) THIS RULE IS NOT VIOLATED BY A LAWYER WHO CONTINUES REPRESENTATION WHEN ORDERED TO DO SO BY A TRIBUNAL, NOTWITHSTANDING GOOD CAUSE FOR TERMINATING THE REPRESENTATION.

(d) UPON TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A CLIENT'S INTERESTS, SUCH AS GIVING REASONABLE NOTICE TO THE CLIENT, ALLOWING TIME FOR EMPLOYMENT OF OTHER COUNSEL, SURRENDERING PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED AND REFUNDING ANY ADVANCE PAYMENT OF FEE THAT HAS NOT BEEN EARNED. THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY OTHER LAW.

COMMENT:

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would

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constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Compliance with Applicable Court Rule Regarding Withdrawal

When a lawyer is representing a client in a matter before the courts, and the lawyer seeks to withdraw from the matter under these rules, the lawyer should consult applicable court rules regarding procedures for withdrawal.

CODE COMPARISON

With regard to paragraph (a), DR 2-109(A) provided that a lawyer "shall not accept employment ... if he knows or it is obvious that [the prospective client] wishes to ... [b]ring a legal action ... or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person ...". Nor may a lawyer accept employment if he is aware that the prospective client wishes to "[p]resent a claim or defense ... that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law." DR 2-110(B) provided that a lawyer "shall withdraw from empl-

oyment ... if:

"(1) He knows or it is obvious that his client is bringing the legal action ... or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

"(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

"(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

"(4) He is discharged by his client.

With regard to paragraph (b), DR 2-110(C) permitted withdrawal regardless of the effect on the client if:

"(1) His client: (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; (b) Personally seeks to pursue an illegal course of conduct; (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules; (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively; (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules; (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses and fees.

"(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

"(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

"(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

"(5) His client knowingly and freely assents to termination of his employment.

"(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

With regard to paragraph (c), DR 2-110(A)(1) provided: "If permission for withdrawal from employment is required by the laws of the tribunal, the lawyer shall not withdraw ... without its permission."

The provisions of paragraph (d) are substantially identical to DR 2-110(A)(2) and (3).

COUNSELOR

RULE 2.1 ADVISOR

IN REPRESENTING A CLIENT, A LAWYER SHALL EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT AND RENDER CANDID ADVICE. IN RENDERING ADVICE, A LAWYER MAY REFER NOT ONLY TO LAW BUT TO OTHER CONSIDERATIONS SUCH AS MORAL, ECONOMIC, SOCIAL AND POLITICAL FACTORS, THAT MAY BE RELEVANT TO THE CLIENT'S SITUATION.

COMMENT:

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the Code. DR 5-107(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 stated that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations ... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible ... In the final analysis, however, ... the decision whether to forego legally available objectives or

methods because of non-legal factors is ultimately for the client"

RULE 2.2 INTERMEDIARY

(a) A LAWYER MAY ACT AS INTERMEDIARY BETWEEN CLIENTS IF:

(1) THE LAWYER CONSULTS WITH EACH CLIENT CONCERNING THE IMPLICATIONS OF THE COMMON REPRESENTATION, INCLUDING THE ADVANTAGES AND RISKS INVOLVED, AND THE EFFECT OF THE ATTORNEY-CLIENT PRIVILEGES, AND OBTAINS EACH CLIENT'S CONSENT TO THE COMMON REPRESENTATION; AND

(2) THE LAWYER REASONABLY BELIEVES THAT THE MATTER CAN BE RESOLVED ON TERMS COMPATIBLE WITH THE CLIENT'S BEST INTEREST, THAT EACH CLIENT WILL BE ABLE TO MAKE ADEQUATELY INFORMED DECISIONS IN THE MATTER AND THAT THERE IS LITTLE RISK OF MATERIAL PREJUDICE TO THE INTERESTS OF ANY OF THE CLIENTS IF THE CONTEMPLATED RESOLUTION IS UNSUCCESSFUL; AND

(3) THE LAWYER REASONABLY BELIEVES THAT THE COMMON REPRESENTATION CAN BE UNDERTAKEN IMPARTIALLY AND WITHOUT IMPROPER EFFECT ON OTHER RESPONSIBILITIES THE LAWYER HAS TO ANY OF THE CLIENTS; AND

(4) ALL REQUIREMENTS OF RULES 1.7 AND 1.8 ARE MET.

(b) WHILE ACTING AS INTERMEDIARY, THE LAWYER SHALL CONSULT WITH EACH CLIENT CONCERNING THE DECISIONS TO BE MADE AND THE CONSIDERATIONS RELEVANT IN MAKING THEM, SO THAT EACH CLIENT CAN MAKE ADEQUATELY INFORMED DECISIONS.

(c) A LAWYER SHALL WITHDRAW AS INTERMEDIARY IF ANY OF THE CLIENTS SO REQUESTS, OR IF ANY OF THE CONDITIONS STATED IN PARAGRAPH (a) IS NO LONGER SATISFIED. UPON WITHDRAWAL, THE LAWYER SHALL NOT CONTINUE TO REPRESENT ANY OF THE CLIENTS IN THE MATTER THAT WAS THE SUBJECT OF THE INTERMEDIATION.

COMMENT:

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

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A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

In acting as intermediary between clients, the

lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.14, and the protection of Rule 1. concerning obligations to a former client.

CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the Code. EC 5-20 stated that a "lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships." DR 5-105(B) provided that a lawyer "shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representation of differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A LAWYER MAY UNDERTAKE AN EVALUATION OF A MATTER AFFECTING A CLIENT FOR THE USE OF SOMEONE OTHER THAN THE CLIENT IF:

(1) THE LAWYER REASONABLY BELIEVES THAT MAKING THE EVALUATION IS COMPATIBLE WITH OTHER ASPECTS OF THE LAWYER'S RELATIONSHIP WITH THE CLIENT; AND

(2) THE CLIENT CONSENTS AFTER CONSULTATION.

(b) EXCEPT AS DISCLOSURE IS REQUIRED IN CONNECTION WITH A REPORT OF AN EVALUATION, INFORMATION RELATING TO THE EVALUATION IS OTHERWISE PROTECTED BY RULE 1.6.

COMMENT:

Definition

An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be

required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which

it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

CODE COMPARISON

There was no counterpart to this Rule in the Code.

ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A LAWYER SHALL NOT BRING OR DEFEND A PROCEEDING, OR ASSERT OR CONTROL AN ISSUE THEREIN, UNLESS THERE IS A BASIS FOR DOING SO THAT IS NOT FRIVOLOUS, WHICH INCLUDES A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW. A LAWYER FOR THE DEFENDANT IN A CRIMINAL PROCEEDING, OR THE RESPONDENT IN A PROCEEDING THAT COULD RESULT IN INCARCERATION, MAY NEVERTHELESS SO DEFEND THE PROCEEDING AS TO REQUIRE THAT EVERY ELEMENT OF THE CASE BE ESTABLISHED.

COMMENT:

The advocate has a duty to use legal procedure for the fullest benefit of the client's case, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

CODE COMPARISON

DR 7-102(A)(1) provided that a lawyer may not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that

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such action would serve merely to harass or maliciously injure another." Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirements that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

RULE 3.2 EXPEDITING LITIGATION

A LAWYER SHALL MAKE REASONABLE EFFORTS TO EXPEDITE LITIGATION CONSISTENT WITH THE INTERESTS OF THE CLIENT.

COMMENT:

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.

CODE COMPARISON

DR 7-101(A)(1) stated that a lawyer does not violate his duty to represent a client zealously "by being punctual in fulfilling all professional commitments." DR 7-102(A)(1) provided that a lawyer "shall not ... file a suit, assert a position, conduct a defense [or] delay a trial ... when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A LAWYER SHALL NOT KNOWINGLY:

(1) MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A TRIBUNAL;

(2) FAIL TO DISCLOSE A MATERIAL FACT TO A TRIBUNAL WHEN DISCLOSURE IS NECESSARY TO AVOID ASSISTING A CRIMINAL OR FRAUDULENT ACT BY THE CLIENT;

(3) FAIL TO DISCLOSE TO THE TRIBUNAL LEGAL AUTHORITY IN THE CONTROLLING JURISDICTION KNOWN TO THE LAWYER TO BE DIRECTLY ADVERSE TO THE POSITION OF THE CLIENT AND NOT DISCLOSED BY OPPOSING COUNSEL; OR

(4) OFFER EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE. IF A LAWYER HAS OFFERED MATERIAL EVIDENCE AND COMES TO KNOW OF ITS FALSITY, THE LAWYER SHALL TAKE REASONABLE REMEDIAL MEASURES.

(b) THE DUTIES STATED IN PARAGRAPH (a) CONTINUE TO THE CONCLUSION OF THE PROCEEDING, AND APPLY EVEN IF COMP-

LIANCE REQUIRES DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY RULE 1.6.

(c) A LAWYER MAY REFUSE TO OFFER EVIDENCE THAT THE LAWYER REASONABLY BELIEVES IS FALSE.

(d) IN AN EX PARTE PROCEEDING, A LAWYER SHALL INFORM THE TRIBUNAL OF ALL MATERIAL FACTS KNOWN TO THE LAWYER WHICH WILL ENABLE THE TRIBUNAL TO MAKE AN INFORMED DECISION, WHETHER OR NOT THE FACTS ARE ADVERSE.

COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward a tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the

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rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not

remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule--that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client--applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

CODE COMPARISON

Paragraph (a)(1) is substantially identical to DR 7-102(A)(5), which provided that a lawyer shall not "knowingly make a false statement of law or fact."

Paragraph (a)(2) is implicit in DR 7-102(A)(3),

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which provided that a "lawyer shall not ... knowingly fail to disclose that which he is required by law to reveal."

Paragraph (a)(3) is substantially identical to DR 7-106(B)(1).

With regard to paragraph (a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of paragraph (a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, did not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with Rule 1.6, provided that a lawyer "who receives information clearly establishing that ... his client has ... perpetrated a fraud upon ... a tribunal shall [if the client does not rectify the situation] ... reveal the fraud to the... tribunal ..." Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently required disclosure by the lawyer in such circumstances. However, Utah has amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including a crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer has a duty to disclose the perjury.

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that he "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the Code to paragraph (d).

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A LAWYER SHALL NOT:

(a) UNLAWFULLY OBSTRUCT ANOTHER PARTY'S ACCESS TO EVIDENCE OR UNLAWFULLY ALTER, DESTROY OR CONCEAL A DOCUMENT OR OTHER MATERIAL HAVING POTENTIAL EVIDENTIARY VALUE. A LAWYER SHALL NOT COUNSEL OR ASSIST ANOTHER PERSON TO DO ANY SUCH ACT;

(b) FALSIFY EVIDENCE, COUNSEL OR ASSIST A WITNESS TO TESTIFY FALSELY, OR OFFER AN INDUCEMENT TO A WITNESS THAT IS PROHIBITED BY LAW;

(c) KNOWINGLY DISOBEY AN OBLIGATION UNDER THE RULES OF A TRIBUNAL EXCEPT FOR AN OPEN REFUSAL BASED ON AN ASSERTION THAT NO VALID OBLIGATION EXISTS;

(d) IN PRETRIAL PROCEDURE, MAKE A FRIVOLOUS DISCOVERY REQUEST OR FAIL TO MAKE REASONABLY DILIGENT EFFORT TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST BY AN OPPOSING PARTY;

(e) IN TRIAL, ALLUDE TO ANY MATTER THAT THE LAWYER DOES NOT REASONABLY BELIEVE IS RELEVANT OR THAT WILL NOT BE SUPPORTED BY ADMISSIBLE EVIDENCE, ASSERT PERSONAL KNOWLEDGE OF FACTS IN ISSUE EXCEPT WHEN TESTIFYING AS A WITNESS, OR STATE A PERSONAL OPINION AS TO THE JUSTNESS OF A CAUSE, THE CREDIBILITY OF A WITNESS, THE CULPABILITY OF A CIVIL LITIGANT OR THE GUILT OR INNOCENCE OF AN ACCUSED; OR

(f) REQUEST A PERSON OTHER THAN A CLIENT TO REFRAIN FROM VOLUNTARILY GIVING RELEVANT INFORMATION TO ANOTHER PARTY UNLESS:

(1) THE PERSON IS A RELATIVE OR AN EMPLOYEE OR OTHER AGENT OF A CLIENT; AND

(2) THE LAWYER REASONABLY BELIEVES THAT THE PERSON'S INTERESTS WILL NOT BE ADVERSELY AFFECTED BY REFRAINING FROM GIVING SUCH INFORMATION.

COMMENT:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

CODE COMPARISON

With regard to paragraph (a), DR 7-102(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provided that a lawyer "shall not advise or cause a person to secrete himself ... for the purpose of making him unavailable as a witness" DR 7-106(C)(7) provided that a lawyer shall not "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

With regard to paragraph (b), DR 7-102(A)(6) provided that "a lawyer shall not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-

109(C) provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; [or] (3) A reasonable fee for the professional services of an expert witness." EC 7-28 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (c) is substantially similar to DR 7-106(A), which provided that a lawyer "shall not disregard ... a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

Paragraph (d) has no counterpart in the Code.

Paragraph (e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribed asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "[f]ail to comply with known local customs of courtesy or practice," was too vague to be a rule of conduct enforceable as law.

With regard to paragraph (f), DR 7-104(A)(2) provided that a lawyer shall not "[g]ive advice to a person who is not represented ... other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A LAWYER SHALL NOT:

(a) SEEK TO INFLUENCE A JUDGE, JUROR, PROSPECTIVE JUROR OR OTHER OFFICIAL BY MEANS PROHIBITED BY LAW; OR

(b) COMMUNICATE EX PARTE WITH A JUROR OR PROSPECTIVE JUROR BEFORE THE DISCHARGE OF THE JURY EXCEPT AS PERMITTED BY LAW; OR

(c) IN AN ADVERSARY PROCEEDING, COMMUNICATE, OR CAUSE ANOTHER TO COMMUNICATE, AS TO THE MERITS OF THE CAUSE WITH A JUDGE OR OTHER OFFICIAL BEFORE WHOM A MATTER IS PENDING, EXCEPT:

(1) IN THE COURSE OF OFFICIAL PROCEEDINGS IN THE CAUSE;

(2) IN WRITING IF THE LAWYER PROMPTLY DELIVERS A COPY OF THE WRITING TO OPPOSING COUNSEL OR TO THE ADVERSE PARTY IF SUCH PARTY IS NOT REPRESENTED BY A LAWYER;

(3) ORALLY UPON ADEQUATE NOTICE TO OPPOSING COUNSEL OR TO THE ADVERSE PARTY IF SUCH PARTY IS NOT REPRESENTED BY A LAWYER; OR

(4) AS OTHERWISE AUTHORIZED BY LAW; OR

(d) ENGAGE IN CONDUCT INTENDED TO DISRUPT A TRIBUNAL.

COMMENT:

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, with

which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

CODE COMPARISON

With regard to paragraphs (a) and (b), DR 7-108(A) provided that "[b]efore the trial of a case a lawyer ... shall not communicate with ... anyone he knows to be a member of the venire" DR 7-108(B) provided that during the trial of a case a lawyer "shall not communicate with ... any member of the jury."

Paragraph (c) is substantially similar to DR 7-110(B).

With regard to paragraph (d), DR 7-106(C)(6) provided that a lawyer shall not engage in "undignified or discourteous conduct which is degrading to a tribunal."

RULE 3.6 TRIAL PUBLICITY

(a) A LAWYER SHALL NOT MAKE OR CAUSE ANOTHER TO MAKE AN EXTRAJUDICIAL STATEMENT THAT A REASONABLE PERSON WOULD EXPECT TO BE DISSEMINATED BY MEANS OF PUBLIC COMMUNICATION IF THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT IT WILL HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY INFLUENCING AN ADJUDICATIVE PROCEEDING.

(b) A STATEMENT REFERRED TO IN PARAGRAPH (a) ORDINARILY IS LIKELY TO HAVE SUCH AN EFFECT WHEN IT REFERS TO A CIVIL MATTER TRIABLE TO A JURY, A CRIMINAL MATTER, OR ANY OTHER PROCEEDING THAT COULD RESULT IN INCARCERATION, AND THE STATEMENT RELATES TO:

(1) THE CHARACTER, CREDIBILITY, REPUTATION OR CRIMINAL RECORD OF A PARTY, SUSPECT IN A CRIMINAL INVESTIGATION OR WITNESS, OR THE IDENTITY OF A WITNESS, OR THE EXPECTED TESTIMONY OF A PARTY OR WITNESS;

(2) IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION, THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE OR THE EXISTENCE OR CONTENTS OF ANY CONFESSION, ADMISSION, OR STATEMENT GIVEN BY A DEFENDANT OR SUSPECT OR THAT PERSON'S REFUSAL OR FAILURE TO MAKE A STATEMENT;

(3) THE PERFORMANCE OR RESULTS OF ANY EXAMINATION OR TEST OR THE REFUSAL OR FAILURE OF A PERSON TO SUBMIT TO AN EXAMINATION OR TEST, OR THE IDENTITY OR NATURE OF PHYSICAL

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EVIDENCE EXPECTED TO BE PRESENTED;

(4) ANY OPINION AS TO THE GUILT OR INNOCENCE OF A DEFENDANT OR SUSPECT IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION;

(5) INFORMATION THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS LIKELY TO BE INADMISSIBLE AS EVIDENCE IN A TRIAL AND WOULD IF DISCLOSED CREATE A SUBSTANTIAL RISK OF PREJUDICING AN IMPARTIAL TRIAL; OR

(6) THE FACT THAT A DEFENDANT HAS BEEN CHARGED WITH A CRIME, UNLESS THERE IS INCLUDED THEREIN A STATEMENT EXPLAINING THAT THE CHARGE IS MERELY AN ACCUSATION AND THAT THE DEFENDANT IS PRESUMED INNOCENT UNTIL AND UNLESS PROVEN GUILTY.

(c) SUBJECT TO THE PROVISIONS OF PARAGRAPHS (a) and (b), A LAWYER INVOLVED IN THE INVESTIGATION OR LITIGATION OF A MATTER MAY STATE WITHOUT ELABORATION:

(1) THE GENERAL NATURE OF THE CLAIM OR DEFENSE;

(2) THE INFORMATION CONTAINED IN A PUBLIC RECORD;

(3) THAT AN INVESTIGATION OF THE MATTER IS IN PROGRESS, INCLUDING THE GENERAL SCOPE OF THE INVESTIGATION, THE OFFENSE OR CLAIM OR DEFENSE INVOLVED AND, EXCEPT WHEN PROHIBITED BY LAW, THE IDENTITY OF THE PERSONS INVOLVED;

(4) THE SCHEDULING OR RESULT OF ANY STEP IN LITIGATION;

(5) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE AND INFORMATION NECESSARY THERETO;

(6) A WARNING OF DANGER CONCERNING THE BEHAVIOR OF A PERSON INVOLVED, WHEN THERE IS REASON TO BELIEVE THAT THERE EXISTS THE LIKELIHOOD OF SUBSTANTIAL HARM TO AN INDIVIDUAL OR TO THE PUBLIC INTEREST; AND

(7) IN A CRIMINAL CASE:

(i) THE IDENTITY, AGE, RESIDENCE, OCCUPATION AND FAMILY STATUS OF THE ACCUSED;

(ii) IF THE ACCUSED HAS NOT BEEN APPREHENDED, INFORMATION NECESSARY TO AID IN APPREHENSION OF THAT PERSON;

(iii) THE FACT, TIME AND PLACE OF ARREST; AND

(iv) THE IDENTITY OF INVESTIGATING AND ARRESTING OFFICERS OR AGENCIES AND THE LENGTH OF THE INVESTIGATION.

COMMENT:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having

legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

CODE COMPARISON

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criteria of "substantial likelihood of materially influencing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice. Finally, Rule 3.6 omits DR 7-107(C)(7), which provided that a lawyer may reveal "[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions, which, if successful, may be circumvented by prior disclosure to the press.

RULE 3.7 LAWYER AS WITNESS

(a) A LAWYER SHALL NOT ACT AS ADVOCATE AT A TRIAL IN WHICH THE LAWYER IS LIKELY TO BE A NECESSARY WITNESS EXCEPT WHERE:

(1) THE TESTIMONY RELATES TO AN UNCONTESTED ISSUE;

(2) THE TESTIMONY RELATES TO THE NATURE AND VALUE OF LEGAL SERVICES RENDERED IN THE CASE; OR

(3) DISQUALIFICATION OF THE LAWYER WOULD WORK SUBSTANTIAL HARDSHIP ON THE CLIENT.

(b) A LAWYER MAY ACT AS ADVOCATE IN THE TRIAL IN WHICH ANOTHER LAWYER IN THE LAWYER'S FIRM IS LIKELY TO BE CALLED AS A WITNESS UNLESS PRECLUDED FROM DOING SO BY RULE 1.7 OR RULE 1.9.

COMMENT:

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony

will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation, the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

CODE COMPARISON

DR 5-102(A) prohibited a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learned or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provided that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client ... until it is apparent that his testimony is or may be prejudicial to his client." DR 5-101(B) permitted a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in paragraph (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to formality, referred to in DR 5-101(B)(2), in effect defined the phrase "uncontested issue," and was redundant.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

THE PROSECUTOR IN A CRIMINAL CASE SHALL:

(a) REFRAIN FROM PROSECUTING A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE;

(b) MAKE REASONABLE EFFORTS TO ASSURE THAT THE ACCUSED HAS BEEN ADVISED OF THE RIGHT TO, AND THE PROCEDURE FOR OBTAINING, COUNSEL AND HAS BEEN GIVEN REASONABLE OPPORTUNITY TO OBTAIN COUNSEL;

(c) NOT SEEK TO OBTAIN FROM AN UNREPRESENTED ACCUSED A WAIVER OF IMPORTANT PRETRIAL RIGHTS, SUCH AS THE RIGHT TO A PRELIMINARY HEARING;

(d) MAKE TIMELY DISCLOSURE TO THE DEFENSE OF ALL EVIDENCE OR INFORMATION KNOWN TO THE PROSECUTOR THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED OR MITIGATES THE OFFENSE, AND, IN CONNECTION WITH SENTENCING, DISCLOSE TO THE DEFENSE ALL UNPRIVILEGED MITIGATING INFORMATION KNOWN TO THE PROSECUTOR, EXCEPT WHEN THE PROSECUTOR IS RELIEVED OF THIS RESPONSIBILITY BY A PROTECTIVE ORDER OF THE TRIBUNAL; AND

(e) EXERCISE REASONABLE CARE TO PREVENT INVESTIGATORS, LAW ENFORCEMENT PERSONNEL, EMPLOYEES OR OTHER PERSONS ASSISTING OR ASSOCIATED WITH THE PROSECUTOR IN A CRIMINAL CASE FROM MAKING AN EXTRAJUDICIAL STATEMENT THAT THE PROSECUTOR WOULD BE PROHIBITED FROM MAKING UNDER RULE 3.6.

COMMENT:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

CODE COMPARISON

DR 7-103(A) provided that a "public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not

supported by probable cause." DR 7-103(B) provided that "[a] public prosecutor ... shall make timely disclosure ... of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A LAWYER REPRESENTING A CLIENT BEFORE A LEGISLATIVE OR ADMINISTRATIVE TRIBUNAL IN A NONADJUDICATIVE PROCEEDING SHALL DISCLOSE THAT THE APPEARANCE IS IN A REPRESENTATIVE CAPACITY AND SHALL CONFORM TO THE PROVISIONS OF RULES 3.3(a) THROUGH (c), 3.4(a) THROUGH (c), and 3.5.

COMMENT:

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

CODE COMPARISON

EC 7-15 stated that a lawyer "appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 stated that "[w]hen a lawyer appears in connection with proposed legislation, he ... should comply with applicable laws and legislative rules." EC 8-5 stated that "fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a ... legislative body ... should never be participated in ... by lawyers." DR 7-106(B)(1) provided that "[i]n presenting a matter to a tribunal, a lawyer shall disclose ... [u]nless privileged or irrelevant, the identity of the clients he represents and of the persons who employed him."

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

IN THE COURSE OF REPRESENTING A CLIENT A LAWYER SHALL NOT KNOWINGLY:

(a) MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A THIRD PERSON; OR

(b) FAIL TO DISCLOSE A MATERIAL FACT TO A THIRD PERSON WHEN DISCLOSURE IS NECESSARY TO AVOID ASSISTING A CRIMINAL OR FRAUDULENT ACT BY A CLIENT, UNLESS DISCLOSURE IS PROHIBITED BY RULE 1.6.

COMMENT:

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

CODE COMPARISON

Paragraph (a) is substantially similar to DR 7-102(A)(5), which stated that "[i]n his representation of a client, a lawyer shall not ... [k]nowingly make a false statement of law or fact."

With regard to paragraph (b), DR 7-102(A)(3) provided that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

IN REPRESENTING A CLIENT, A LAWYER SHALL NOT COMMUNICATE ABOUT THE

SUBJECT OF THE REPRESENTATION WITH A PARTY THE LAWYER KNOWS TO BE REPRESENTED BY ANOTHER LAWYER IN THE MATTER, UNLESS THE LAWYER HAS THE CONSENT OF THE OTHER LAWYER OR IS AUTHORIZED BY LAW TO DO SO.

COMMENT:

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

CODE COMPARISON

This Rule is substantially identical to DR 7-104(A)(1).

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

(a) DURING THE COURSE OF A LAWYER'S REPRESENTATION OF A CLIENT, THE LAWYER SHALL NOT GIVE ADVICE TO AN UNREPRESENTED PERSON OTHER THAN THE ADVICE TO OBTAIN COUNSEL.

(b) IN DEALING ON BEHALF OF A CLIENT WITH A PERSON WHO IS NOT REPRESENTED BY COUNSEL, A LAWYER SHALL NOT STATE OR IMPLY THAT THE LAWYER IS DISINTERESTED. WHEN THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE UNREPRESENTED PERSON MISUNDERSTANDS THE LAWYER'S ROLE IN THE MATTER, THE LAWYER SHALL MAKE REASONABLE EFFORTS TO CORRECT THE MISUNDERSTANDING.

COMMENT:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.

CODE COMPARISON

There was no direct counterpart to this Rule in

the Code. DR 7-104(A)(2) provided that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel ..."

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

IN REPRESENTING A CLIENT, A LAWYER SHALL NOT USE MEANS THAT HAVE NO SUBSTANTIAL PURPOSE OTHER THAN TO EMBARRASS, DELAY, OR BURDEN A THIRD PERSON, OR USE METHODS OF OBTAINING EVIDENCE THAT VIOLATE THE LEGAL RIGHTS OF SUCH A PERSON.

COMMENT:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

CODE COMPARISON

DR 7-106(C)(2) provided that a lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provided that a lawyer shall not "take ... action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-108(D) provided that "[a]fter discharge of the jury ... the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror ..." DR 7-108(E) provided that a lawyer "shall not conduct ... a vexatious or harassing investigation of either a venireman or a juror."

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OR A PARTNER OR SUPERVISORY LAWYER

(a) A PARTNER IN A LAW FIRM SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE FIRM HAS IN EFFECT MEASURES GIVING REASONABLE ASSURANCE THAT ALL LAWYERS IN THE FIRM CONFORM TO THE RULES OF PROFESSIONAL CONDUCT.

(b) A LAWYER HAVING DIRECT SUPERVISORY AUTHORITY OVER ANOTHER LAWYER SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE OTHER LAWYER CONFORMS TO THE RULES OF PROFESSIONAL CONDUCT.

(c) A LAWYER SHALL BE RESPONSIBLE FOR ANOTHER LAWYER'S VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT IF:

- (1) THE LAWYER ORDERS OR, WITH KNOWLEDGE OF THE SPECIFIC CONDUCT, RATIFIES THE CONDUCT INVOLVED; OR
- (2) THE LAWYER IS A PARTNER IN THE

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LAW FIRM IN WHICH THE OTHER LAWYER PRACTICES, OR HAS DIRECT SUPERVISORY AUTHORITY OVER THE OTHER LAWYER, AND KNOWS OF THE CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE REMEDIAL ACTION.

COMMENT:

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

CODE COMPARISON

There was no direct counterpart to this Rule in the Code. DR 1-103(A) provided that a lawyer "possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to ... authority empowered to investigate or act upon such violation."

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A LAWYER IS BOUND BY THE RULES OF PROFESSIONAL CONDUCT NOTWITHSTANDING THAT THE LAWYER ACTED AT THE DIRECTION OF ANOTHER PERSON.

(b) A SUBORDINATE LAWYER DOES NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT IF THAT LAWYER ACTS IN ACCORDANCE WITH A SUPERVISORY LAWYER'S REASONABLE RESOLUTION OF A QUESTION OF PROFESSIONAL DUTY.

COMMENT:

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. If the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

CODE COMPARISON

There was no counterpart to this Rule in the Code.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

WITH RESPECT TO A NONLAWYER EMPLOYED OR RETAINED BY OR ASSOCIATED WITH A LAWYER:

(a) A PARTNER IN A LAW FIRM SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE FIRM HAS IN EFFECT MEASURES GIVING REASONABLE ASSURANCE THAT THE PERSON'S CONDUCT IS COMPATIBLE WITH THE PROFESSIONAL OBLIGATIONS OF THE LAWYER;

(b) A LAWYER HAVING DIRECT SUPERVISORY AUTHORITY OVER THE NONLAWYER

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SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE PERSON'S CONDUCT IS COMPATIBLE WITH THE PROFESSIONAL OBLIGATIONS OF THE LAWYER; AND

(c) A LAWYER SHALL BE RESPONSIBLE FOR CONDUCT OF SUCH A PERSON THAT WOULD BE A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT IF ENGAGED IN BY A LAWYER IF:

(1) THE LAWYER ORDERS OR, WITH KNOWLEDGE OF THE SPECIFIC CONDUCT, RATIFIES THE CONDUCT INVOLVED; OR

(2) THE LAWYER IS A PARTNER IN THE LAW FIRM IN WHICH THE PERSON IS EMPLOYED, OR HAS DIRECT SUPERVISORY AUTHORITY OVER THE PERSON, AND KNOWS OF THE CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE REMEDIAL ACTION.

COMMENT:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

CODE COMPARISON

There was no direct counterpart to this Rule in the Code. DR 4-101(D) provided that a lawyer "shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client ... " DR 7-107(J) provided that "[a] lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107."

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A LAWYER OR LAW FIRM SHALL NOT SHARE LEGAL FEES WITH A NONLAWYER, EXCEPT THAT:

(1) AN AGREEMENT BY A LAWYER WITH THE LAWYER'S FIRM, PARTNER, OR ASSOCIATE MAY PROVIDE FOR THE PAYMENT OF MONEY, OVER A REASONABLE PERIOD OF TIME AFTER THE LAWYER'S DEATH, TO THE LAWYER'S ESTATE OR TO ONE OR MORE SPECIFIED PERSONS;

(2) A LAWYER WHO UNDERTAKES TO COMPLETE UNFINISHED LEGAL BUSINESS OF A DECEASED LAWYER MAY PAY TO THE ESTATE OF THE DECEASED LAWYER THAT PROPORTION OF THE TOTAL COMPENSATION WHICH FAIRLY REPRESENTS THE SERVICES RENDERED BY THE DECEASED LAWYER; AND

(3) A LAWYER OR LAW FIRM MAY INCLUDE NONLAWYER EMPLOYEES IN A

COMPENSATION OR RETIREMENT PLAN, EVEN THOUGH THE PLAN IS BASED IN WHOLE OR IN PART ON A PROFIT-SHARING ARRANGEMENT.

(b) A LAWYER SHALL NOT FORM A PARTNERSHIP WITH A NONLAWYER IF ANY OF THE ACTIVITIES OF THE PARTNERSHIP CONSIST OF THE PRACTICE OF LAW.

(c) A LAWYER SHALL NOT PERMIT A PERSON WHO RECOMMENDS, EMPLOYS, OR PAYS THE LAWYER TO RENDER LEGAL SERVICES FOR ANOTHER TO DIRECT OR REGULATE THE LAWYER'S PROFESSIONAL JUDGMENT IN RENDERING SUCH LEGAL SERVICES.

(d) A LAWYER SHALL NOT PRACTICE WITH OR IN THE FORM OF A PROFESSIONAL CORPORATION OR ASSOCIATION AUTHORIZED TO PRACTICE LAW FOR A PROFIT, IF:

(1) A NONLAWYER OWNS ANY INTEREST THEREIN, EXCEPT THAT A FIDUCIARY REPRESENTATIVE OF THE ESTATE OF A LAWYER MAY HOLD THE STOCK OR INTEREST OF THE LAWYER FOR A REASONABLE TIME DURING ADMINISTRATION;

(2) A NONLAWYER IS A CORPORATE DIRECTOR OR OFFICER THEREOF; OR

(3) A NONLAWYER HAS THE RIGHT TO DIRECT OR CONTROL THE PROFESSIONAL JUDGMENT OF A LAWYER.

(e) A LAWYER MAY PRACTICE IN A NON-PROFIT CORPORATION WHICH IS ESTABLISHED TO SERVE THE PUBLIC INTEREST PROVIDED THAT THE NONLAWYER DIRECTORS AND OFFICERS OF SUCH CORPORATION DO NOT INTERFERE WITH THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER.

COMMENT:

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

The Rule is intended to prevent lay interference with the attorney/client relationship in non-profit public interest law firms. Typically, these organizations are structured so that a lay board of directors decides to undertake or fund a case or category of cases on behalf of a third party. The organization thus becomes the payor or provider of legal services for others.

CODE COMPARISON

Paragraph (a) is substantially identical to DR 3-102(A).

Paragraph (b) is substantially identical to DR 3-103(A).

Paragraph (c) is substantially identical to DR 5-107(B).

Paragraph (d) is substantially identical to DR 5-107(C).

Paragraph (e) had no counterpart in the Code.

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RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

A LAWYER SHALL NOT:

(a) PRACTICE LAW IN A JURISDICTION WHERE DOING SO VIOLATES THE REGULATION OF THE LEGAL PROFESSION IN THAT JURISDICTION; OR

(b) ASSIST ANY PERSON IN THE PERFORMANCE OF ACTIVITY THAT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

COMMENT:

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the Bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

CODE COMPARISON

With regard to paragraph (a), DR 3-101(B) of the Code provided that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

With regard to paragraph (b), DR 3-101(A) of the Code provided that "[a] lawyer shall not aid a nonlawyer in the unauthorized practice of law."

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A LAWYER SHALL NOT PARTICIPATE IN OFFERING OR MAKING:

(a) A PARTNERSHIP OR EMPLOYMENT AGREEMENT THAT RESTRICTS THE RIGHTS OF A LAWYER TO PRACTICE AFTER TERMINATION OF THE RELATIONSHIP, EXCEPT AN AGREEMENT CONCERNING BENEFITS UPON RETIREMENT; OR

(b) AN AGREEMENT IN WHICH A RESTRICTION ON THE LAWYER'S RIGHT TO PRACTICE IS PART OF THE SETTLEMENT OF A CONTROVERSY BETWEEN PRIVATE PARTIES.

COMMENT:

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

CODE COMPARISON

This Rule is substantially similar to DR 2-108.

PUBLIC SERVICE

RULE 6.1 PRO BONO PUBLICO SERVICE

A LAWYER SHOULD RENDER PUBLIC INTEREST LEGAL SERVICE. A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY PROVIDING PROFESSIONAL SERVICES AT NO FEE OR A REDUCED FEE TO PERSONS OF LIMITED MEANS OR TO PUBLIC SERVICE OR CHARITABLE GROUPS OR ORGANIZATIONS, BY SERVICE IN ACTIVITIES FOR IMPROVING THE LAW, THE LEGAL SYSTEM OR THE LEGAL PROFESSION, AND BY FINANCIAL SUPPORT FOR ORGANIZATIONS THAT PROVIDE LEGAL SERVICES TO PERSONS OF LIMITED MEANS.

COMMENT:

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal service to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

CODE COMPARISON

There was no counterpart of this rule in the Disciplinary Rules of the Code. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer Every lawyer, regardless of professional prominence or professional workload,

should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law ... [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services."

RULE 6.2 ACCEPTING APPOINTMENTS

A LAWYER SHALL NOT SEEK TO AVOID APPOINTMENT BY A TRIBUNAL TO REPRESENT A PERSON EXCEPT FOR GOOD CAUSE, SUCH AS:

(a) REPRESENTING THE CLIENT IS LIKELY TO RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW;

(b) REPRESENTING THE CLIENT IS LIKELY TO RESULT IN AN UNREASONABLE FINANCIAL BURDEN ON THE LAWYER; OR

(c) THE CLIENT OR THE CAUSE IS SO REPUGNANT TO THE LAWYER AS TO BE LIKELY TO IMPAIR THE CLIENT-LAWYER RELATIONSHIP OR THE LAWYER'S ABILITY TO REPRESENT THE CLIENT.

COMMENT:

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

CODE COMPARISON

There was no counterpart to this Rule in the Disciplinary Rules of the Code. EC 2-29 stated that when a lawyer is "appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling

reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-30 stated that "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A LAWYER MAY SERVE AS A DIRECTOR, OFFICER OR MEMBER OF A LEGAL SERVICES ORGANIZATION, APART FROM THE LAW FIRM IN WHICH THE LAWYER PRACTICES, NOTWITHSTANDING THAT THE ORGANIZATION SERVES PERSONS HAVING INTERESTS ADVERSE TO A CLIENT OF THE LAWYER. THE LAWYER SHALL NOT KNOWINGLY PARTICIPATE IN A DECISION OR ACTION OF THE ORGANIZATION:

(a) IF PARTICIPATION IN THE DECISION WOULD BE INCOMPATIBLE WITH THE LAWYER'S OBLIGATIONS TO A CLIENT UNDER RULE 1.7; OR

(b) WHERE THE DECISION COULD HAVE A MATERIAL ADVERSE EFFECT ON THE REPRESENTATION OF A CLIENT OF THE ORGANIZATION WHOSE INTERESTS ARE ADVERSE TO A CLIENT OF THE LAWYER, OR ON THE REPRESENTATION OF A CLIENT OF THE LAWYER OR THE LAWYER'S FIRM.

COMMENT:

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

CODE COMPARISON

There was no counterpart to this Rule in the Code.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A LAWYER MAY SERVE AS A DIRECTOR, OFFICER OR MEMBER OF AN ORGANIZATION INVOLVED IN REFORM OF THE LAW OR ITS ADMINISTRATION NOTWITHSTANDING THAT THE REFORM MAY AFFECT THE INTERESTS OF A CLIENT OF THE LAWYER. WHEN THE LAWYER KNOWS THAT THE INTERESTS OF A CLIENT MAY BE MATERIALLY BENEFITTED BY A DECISION IN

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WHICH THE LAWYER PARTICIPATES, THE LAWYER SHALL DISCLOSE THAT FACT BUT NEED NOT IDENTIFY THE CLIENT.

COMMENT:

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

CODE COMPARISON

There was no counterpart to this Rule in the Code.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A LAWYER SHALL NOT MAKE A FALSE OR MISLEADING COMMUNICATION ABOUT THE LAWYER OR THE LAWYER'S SERVICES. A COMMUNICATION IS FALSE OR MISLEADING IF IT:

(a) CONTAINS A MATERIAL MISREPRESENTATION OF FACT OR LAW, OR OMITTS A FACT NECESSARY TO MAKE THE STATEMENT CONSIDERED AS A WHOLE NOT MATERIALLY MISLEADING;

(b) IS LIKELY TO CREATE AN UNJUSTIFIED EXPECTATION ABOUT RESULTS THE LAWYER CAN ACHIEVE, OR STATES OR IMPLIES THAT THE LAWYER CAN ACHIEVE RESULTS BY MEANS THAT VIOLATE THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW; OR

(c) COMPARES THE LAWYER'S SERVICES WITH OTHER LAWYERS' SERVICES, UNLESS THE COMPARISON CAN BE FACTUALLY SUBSTANTIATED.

COMMENT:

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without

reference to the specific factual and legal circumstances.

CODE COMPARISON

DR 2-101 provided that "[a] lawyer shall not ... use ... any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." DR 2-101(B) provided that a lawyer "may publish or broadcast ... the following information ... in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information complies with DR 2-101(A), and is presented in a dignified manner" DR 2-101(B) then specified twenty-five categories of information that may be disseminated. DR 2-101(C) provided that "[a]ny person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to [the agency having jurisdiction under state law] The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers."

RULE 7.2 ADVERTISING

(a) SUBJECT TO THE REQUIREMENTS OF RULE 7.1, A LAWYER MAY ADVERTISE SERVICES THROUGH PUBLIC MEDIA, SUCH AS A TELEPHONE DIRECTORY, LEGAL DIRECTORY, NEWSPAPER OR OTHER PERIODICAL, OUTDOOR, RADIO OR TELEVISION, OR THROUGH WRITTEN COMMUNICATION NOT INVOLVING SOLICITATION AS DEFINED IN RULE 7.3.

(b) A COPY OR RECORDING OF AN ADVERTISEMENT OR WRITTEN COMMUNICATION SHALL BE KEPT FOR TWO YEARS AFTER ITS LAST DISSEMINATION ALONG WITH A RECORD OF WHEN AND WHERE IT WAS USED.

(c) A LAWYER SHALL NOT GIVE ANYTHING OF VALUE TO A PERSON FOR RECOMMENDING THE LAWYER'S SERVICES, EXCEPT THAT A LAWYER MAY PAY THE REASONABLE COST OF ADVERTISING OR WRITTEN COMMUNICATION PERMITTED BY THIS RULE AND MAY PAY THE USUAL CHARGES OF A NOT-FOR-PROFIT LAWYER REFERRAL SERVICE OR OTHER LEGAL SERVICE ORGANIZATION.

(d) ANY COMMUNICATION MADE PURSUANT TO THIS RULE SHALL INCLUDE THE NAME OF AT LEAST ONE LAWYER RESPONSIBLE FOR ITS CONTENT.

COMMENT:

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over con-

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siderations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the Bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.1 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

CODE COMPARISON

With regard to paragraph (a), DR 2-101(B) provided that a lawyer "may publish or broadcast, subject to DR 2-103, ... in print media ... or television or radio" With regard to paragraph (b), DR 2-101(D) provided that if the advertisement is "communicated to the public over television or radio, ... a recording of the actual transmission shall be retained by the lawyer."

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

A LAWYER MAY NOT SOLICIT PROFESSIONAL EMPLOYMENT FROM A PROSPECTIVE

CLIENT WITH WHOM THE LAWYER HAS NO FAMILY OR PRIOR PROFESSIONAL RELATIONSHIP, BY MAIL, IN-PERSON OR OTHERWISE, WHEN A SIGNIFICANT MOTIVE FOR THE LAWYER'S DOING SO IS THE LAWYER'S PECUNIARY GAIN. THE TERM "SOLICIT" INCLUDES CONTACT IN PERSON, BY TELEPHONE OR TELEGRAPH, BY LETTER OR OTHER WRITING, OR BY OTHER COMMUNICATION DIRECTED TO A SPECIFIC RECIPIENT, BUT DOES NOT INCLUDE LETTERS ADDRESSED OR ADVERTISING CIRCULARS DISTRIBUTED GENERALLY TO PERSONS NOT KNOWN TO NEED LEGAL SERVICES OF THE KIND PROVIDED BY THE LAWYER IN A PARTICULAR MATTER, BUT WHO ARE SO SITUATED THAT THEY MIGHT IN GENERAL FIND SUCH SERVICES USEFUL.

COMMENT:

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal service. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third party scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition. One proposed safeguard is to require that the designation "Advertising" be stamped on any envelope containing a solicitation letter. This would do nothing to assure the accuracy and reliability of the contents. Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical

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matter. State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading. In any event, such review would be after the fact, potentially too late to avert the undesirable consequences of disseminating false and misleading material.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less important than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

Similarly, this Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

CODE COMPARISON

DR 2-104(A) provided with certain exceptions that "[a] lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice" The exceptions include DR 2-104(A)(1), which provided that a lawyer "may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(2) through DR 2-104(A)(5) provided other exceptions relating, respectively, to employment resulting from public educational programs, recommendation by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A LAWYER MAY COMMUNICATE THE FACT THAT THE LAWYER WILL ACCEPT EMPLOYMENT IN SPECIFIED AREAS OF PRACTICE. A LAWYER WHOSE PRACTICE IS LIMITED TO SPECIFIED AREAS OF PRACTICE

MAY COMMUNICATE THAT FACT. A LAWYER SHALL NOT HOLD HIMSELF OUT PUBLICLY AS A SPECIALIST AND SHALL NOT INDICATE ANY CERTIFICATION OR DESIGNATION AS A SPECIALIST, EXCEPT AS FOLLOWS:

(a) A LAWYER ADMITTED TO PRACTICE BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE MAY USE THE DESIGNATION "PATENT ATTORNEY" OR A SUBSTANTIALLY SIMILAR DESIGNATION; AND

(b) IN ACCORDANCE WITH ANY PLAN REGULATING LAWYER SPECIALIZATION APPROVED AND PROMULGATED BY THE UTAH SUPREME COURT.

COMMENT:

See *In re: UTAH STATE BAR PETITION FOR APPROVAL OF CHANGES IN DISCIPLINARY RULES ON ADVERTISING*, 647 P.2d 991 (Utah 1982).

CODE COMPARISON

Rule 7.4 is substantially identical to DR 2-105.

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A LAWYER SHALL NOT USE A FIRM NAME, LETTERHEAD OR OTHER PROFESSIONAL DESIGNATION THAT VIOLATES RULE 7.1. A TRADE NAME MAY BE USED BY A LAWYER IN PRIVATE PRACTICE IF IT DOES NOT IMPLY A CONNECTION WITH A GOVERNMENT AGENCY OR WITH A PUBLIC OR CHARITABLE LEGAL SERVICES ORGANIZATION AND IS NOT OTHERWISE IN VIOLATION OF RULE 7.1.

(b) A LAW FIRM WITH OFFICES IN MORE THAN ONE JURISDICTION MAY USE THE SAME NAME IN EACH JURISDICTION, BUT IDENTIFICATION OF THE LAWYERS IN AN OFFICE OF THE FIRM SHALL INDICATE THE JURISDICTIONAL LIMITATIONS ON THOSE NOT LICENSED TO PRACTICE IN THE JURISDICTION WHERE THE OFFICE IS LOCATED.

(c) THE NAME OF A LAWYER HOLDING A PUBLIC OFFICE SHALL NOT BE USED IN THE NAME OF A LAW FIRM, OR IN COMMUNICATIONS ON ITS BEHALF, DURING ANY SUBSTANTIAL PERIOD IN WHICH THE LAWYER IS NOT ACTIVELY AND REGULARLY PRACTICING WITH THE FIRM.

(d) LAWYERS MAY STATE OR IMPLY THAT THEY PRACTICE IN A PARTNERSHIP OR OTHER ORGANIZATION ONLY WHEN THAT IS THE FACT.

COMMENT:

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as "ABC Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a

deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

CODE COMPARISON

With regard to paragraph (a), DR 2-102(A) provided that "[a] lawyer ... shall not use ... professional cards ... letterheads, or similar professional notices or devices, [except] ... if they are in dignified form ..." DR 2-102(B) provided that "[a] lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that ... a firm may use as ... its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession."

With regard to paragraph (a), DR 2-102(A) provided that "[a] lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, firm name or other professional designation, notice or device that violates the provisions of DR 2-101(A) and (B), this Rule or DR 2-105."

With regard to paragraph (b), DR 2-102(D) provided that a partnership "shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction."

With regard to paragraph (c), DR 2-102(B) provided that "[a] lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm ... during any significant period in which he is not actively and regularly practicing law as a member of the firm"

Paragraph (d) is substantially identical to DR 2-102(C).

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

AN APPLICANT FOR ADMISSION TO THE BAR, OR A LAWYER IN CONNECTION WITH A BAR ADMISSION APPLICATION OR IN CONNECTION WITH A DISCIPLINARY MATTER, SHALL NOT:

(a) KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT; OR

(b) FAIL TO DISCLOSE A FACT NECESSARY

TO CORRECT A MISAPPREHENSION KNOWN BY THE PERSON TO HAVE ARISEN IN THE MATTER, OR KNOWINGLY FAIL TO RESPOND TO A LAWFUL DEMAND FOR INFORMATION FROM AN ADMISSIONS OR DISCIPLINARY AUTHORITY, EXCEPT THAT THIS RULE DOES NOT REQUIRE DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY RULE 1.6.

COMMENT:

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of non-disclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

CODE COMPARISON

DR 1-101(A) provided that a lawyer is "subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar." DR 1-101(B) provided that a lawyer "shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute." With respect to paragraph (b), DR 1-102(A)(5) provided that a lawyer shall not engage in "conduct that is prejudicial to the administration of justice."

RULE 8.2 JUDICIAL OFFICIALS

(a) A LAWYER SHALL NOT MAKE A PUBLIC STATEMENT THAT THE LAWYER KNOWS TO BE FALSE OR WITH RECKLESS DISREGARD AS TO ITS TRUTH OR FALSITY CONCERNING THE QUALIFICATIONS OR INTEGRITY OF A JUDGE, ADJUDICATORY OFFICER, OR OF A CANDIDATE FOR ELECTION OR APPOINTMENT TO JUDICIAL OFFICE.

(b) A LAWYER WHO IS A CANDIDATE FOR JUDICIAL OFFICE SHALL COMPLY WITH THE APPLICABLE PROVISIONS OF THE CODE OF JUDICIAL CONDUCT.

COMMENT:

Assessments by lawyers are relied on in evaluating

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the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

CODE COMPARISON

With regard to paragraph (a), DR 8-102(A) provided that a lawyer "shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to judicial office." DR 8-102(B) provided that a lawyer "shall not knowingly make false accusations against a judge or other adjudicatory officer."

Paragraph (b) is substantially identical to DR 8-103.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A LAWYER HAVING KNOWLEDGE THAT ANOTHER LAWYER HAS COMMITTED A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT THAT RAISES A SUBSTANTIAL QUESTION AS TO THAT LAWYER'S HONESTY, TRUSTWORTHINESS OR FITNESS AS A LAWYER IN OTHER RESPECTS, SHALL INFORM THE APPROPRIATE PROFESSIONAL AUTHORITY.

(b) A LAWYER HAVING KNOWLEDGE THAT A JUDGE HAS COMMITTED A VIOLATION OF THE APPLICABLE RULES OF JUDICIAL CONDUCT THAT RAISES A SUBSTANTIAL QUESTION AS TO THE JUDGE'S FITNESS FOR OFFICE SHALL INFORM THE APPROPRIATE AUTHORITY.

(c) THIS RULE DOES NOT REQUIRE DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY RULE 1.6.

COMMENT:

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A

measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

CODE COMPARISON

DR 1-103(A) provided that "[a] lawyer possessing unprivileged knowledge of a violation of [a Disciplinary Rule] shall report such knowledge to ... authority empowered to investigate or act upon such violation."

RULE 8.4 MISCONDUCT

IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:

(a) VIOLATE OR ATTEMPT TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT, KNOWINGLY ASSIST OR INDUCE ANOTHER TO DO SO, OR DO SO THROUGH THE ACTS OF ANOTHER;

(b) COMMIT A CRIMINAL ACT THAT REFLECTS ADVERSELY ON THE LAWYER'S HONESTY, TRUSTWORTHINESS OR FITNESS AS A LAWYER IN OTHER RESPECTS;

(c) ENGAGE IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION;

(d) ENGAGE IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE;

(e) STATE OR IMPLY AN ABILITY TO INFLUENCE IMPROPERLY A GOVERNMENT AGENCY OR OFFICIAL; OR

(f) KNOWINGLY ASSIST A JUDGE OR JUDICIAL OFFICER IN CONDUCT THAT IS A VIOLATION OF APPLICABLE RULES OF JUDICIAL CONDUCT OR OTHER LAW.

COMMENT:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no

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valid obligation exists. The provisions of Rule 1.2(c) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

CODE COMPARISON

With regard to paragraphs (a) through (d), DR 1-102(A) provided that a lawyer shall not:

"(1) Violate a Disciplinary Rule.

"(2) Circumvent a Disciplinary Rule through actions of another.

"(3) Engage in illegal conduct involving moral turpitude.

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Paragraph (c) is substantially similar to DR 9-101(C).

There is no direct counterpart to paragraph (e) in the Disciplinary Rules of the Code. EC 7-34 stated in part that "[a] lawyer ... is never justified in making a gift or a loan to a [judicial officer] except as permitted by ... the Code of Judicial Conduct." EC 9-1 stated that a lawyer "should promote public confidence in our [legal] system and in the legal profession."

RULE 8.5 JURISDICTION

A LAWYER ADMITTED TO PRACTICE IN THIS JURISDICTION IS SUBJECT TO THE DISCIPLINARY AUTHORITY OF THIS JURISDICTION ALTHOUGH ENGAGED IN PRACTICE ELSEWHERE.

COMMENT:

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems arise when a lawyer is licensed to practice in more than one jurisdiction.

Where a lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the 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.

CODE COMPARISON

There was no counterpart to this Rule in the Code.

CERTIFICATE OF SERVICE

Served the foregoing Brief of Amicus Curiae this 18th day of September, 1987, by mailing four copies postage prepaid, to the following:

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