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Marjorie E. Gross

New York State Bar Association

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Cover Page Footnote

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THE LONG PROCESS OF CHANGE: THE 1990 AMENDMENTS TO THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY*

Marjorie E. Gross**

I. Introduction

An airplane crashes in an Iowa corn field. Is it ethical for New York lawyers to place advertisements in Iowa newspapers offering their legal services to persons affected by the crash?

A 60-year old male lawyer routinely calls the female court clerk, "honey." Should he be subject to discipline for his conduct?

Firm A is defending its client, Acme Company, in a product liability suit brought by Firm B on behalf of a client. Bob Cooper, an associate at Firm A who occasionally has written memos of law on product liability matters for Acme Company, leaves Firm A and joins the corporate department of Firm B. May Firm A move to have Firm B disqualified from the representation? Does it make a difference if Firm B screens Cooper from the case?

Questions like these have been the subject of intensive debate in the past few years, as lawyers have examined whether the Code of Professional Responsibility, effective in New York since 1970 (Original Code) and amended in 1978 (1970 Code),¹ provides adequate guidance to lawyers facing legal and ethical problems in the 1990s. The debate began in earnest in 1980 when the American Bar Association (ABA) proposed to replace the Model Code of Professional Responsibility (Model Code)² with the Model Rules of Professional Conduct

* The views expressed in this article are solely those of the author, and are not meant to reflect the opinion of the Committee or any of its members.

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1. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (McKinney 1970) [hereinafter ORIGINAL CODE], as amended April 29, 1978 [hereinafter 1970 CODE], as amended September 1, 1990 [hereinafter 1990 CODE]. For ease of reference, the portions of the 1990 CODE and the 1970 CODE referred to in this Article are reproduced in relevant part in Appendix A and Appendix B, respectively.

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].

(Model Rules).³ The New York State Bar Association (NYSBA or State Bar) passed a milestone in June, 1987 when it approved significant amendments to both the 1970 Code's Ethical Considerations and Disciplinary Rules, subject to adoption of the proposed Disciplinary Rules by the New York's four Appellate Divisions.⁴ The Appellate Divisions adopted amendments to the Disciplinary Rules, effective as of September 1, 1990,⁵ which were confirmed by the State Bar, thus resulting in the 1990 version of the Lawyer's Code of Professional Responsibility (1990 Code). The principal changes reflected in the 1990 Code include:

making a lawyer subject to discipline for unlawfully discriminating in the practice of law (including hiring, promoting and determining conditions of employment), provided that there has been a final determination of discrimination by a tribunal other than a Departmental Disciplinary Committee, DR 1-102(A)(6);

limiting the obligation of a lawyer to report Code violations by another lawyer to conduct that affects the lawyer's honesty, trustworthiness or fitness to practice law, DR 1-103;

making a supervisory lawyer responsible for misconduct of another lawyer when the supervisor knows or should know of the misconduct, at a time when the consequences of such misconduct may be avoided or mitigated, and fails to take action, DR 1-104;

prohibiting a lawyer from charging a contingency fee in a domestic relations matter involving a divorce or the amount of maintenance, support, equitable distribution or property settlement, DR 2-106(C);

authorizing forwarding fees not in proportion to the work done on the matter, where the client consents to the employment of a new lawyer, the total fees are not unreasonable and each lawyer assumes joint responsibility for the representation, DR 2-107(A);

allowing a lawyer to withdraw an opinion after discovering that it

3. The Model Rules of Professional Conduct were proposed by the American Bar Association's Commission on Evaluation of Professional Standards, also known as the Kutak Commission. The first public discussion draft of the Model Rules was published January 30, 1980. MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft January 30, 1980). The Model Rules were first adopted by the American Bar Association (ABA) on August 2, 1983. MODEL RULES OF PROFESSIONAL CONDUCT (1990) [hereinafter MODEL RULES].

4. See *infra* notes 16-20 and accompanying text for a discussion of the adoption procedures of New York's four Appellate Divisions.

5. Joint Order of the Appellate Divisions of the Supreme Court, First, Second, Third and Fourth Judicial Departments, In the Matter of the Adoption of the Disciplinary Rules of the Lawyer's Code of Professional Responsibility (April 5, 1990) (as yet unpublished order) (adopting the 1990 amendments). See *supra* note 1.

was based on inaccurate information or is being used in furtherance of a crime or fraud, notwithstanding the fact that such a withdrawal may implicitly reveal a confidence or secret of the client, DR 4-101(C)(5);

providing guidelines regarding when a lawyer should reveal a client's intention to commit a crime, EC 4-7;

authorizing a law firm to continue representing a client where one of the firm's partners or associates is disqualified from further representation because he or she may be a witness in the proceeding, DRs 5-101(B), 5-102;

codifying the "substantial relationship" test for determining conflicts of interest between a current and former client, DR 5-108;

changing the standards for trial publicity from a listing of generally permitted communications to a prohibition of only those communications that a lawyer reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding, DR 7-107;

codifying the principles governing conflicts of interest when a lawyer moves between government and private practice, DR 9-102(B); and

making the 1990 Code gender neutral.

Most of the amendments to the 1970 Code are the product of the New York State Bar Association's Special Committee to Review the Code of Professional Responsibility, known as the Jones Committee, named after its chairman, former New York Court of Appeals Judge Hugh R. Jones.⁶ The Jones Committee was the third special committee of the State Bar charged with considering the 1970 Code. The first committee, chaired by Frank R. Rosiny of New York City, commented extensively on the successive drafts of the Model Rules. Following the ABA's adoption of the Model Rules in August 1983,⁷ a second committee, chaired by Ralph L. Halpern of Buffalo, recommended adoption of a modified version of the Model Rules in a report submitted to the State Bar in December, 1984 (Halpern Committee Report).⁸ The New York State Bar Association House of Delegates

6. The members of the Jones Committee were the Honorable Hugh R. Jones, Hiscock & Barclay, Syracuse, New York; James C. Blair, Cleary Gottlieb Steen & Hamilton, New York, New York (since retired); Marjorie E. Gross, Senior Vice President and Associate General Counsel, Chemical Bank, New York, New York; Ralph L. Halpern, Jaeckle Fleischmann & Muegel, Buffalo, New York; and Frank R. Rosiny, Rosiny & Rosiny, New York, New York.

7. See *supra* note 3 and accompanying text.

8. See REPORT OF THE SPECIAL COMMITTEE TO CONSIDER ADOPTION OF ABA

(House of Delegates), voted to reject the Halpern Committee Report at its November, 1985 meeting.⁹ The House concluded that, while certain amendments to the 1970 Code might be warranted, a wholesale abandonment of its format or principles was unnecessary. Consequently, the Jones Committee was appointed to recommend specific amendments.¹⁰

In June, 1987, the House of Delegates approved an amended Code of Professional Responsibility, including the Preamble, Preliminary Statement, Canons, Ethical Considerations¹¹ and Disciplinary Rules, subject to approval by the Appellate Divisions. In October, 1987, the package of proposed amendments was transmitted to the Appellate Divisions with the recommendation that such amendments be adopted.¹² To promote uniformity among the four judicial departments, the Appellate Divisions established an inter-department task force comprised of two representatives of each department. That task force, known as the Kane Committee, named after its chairman, Justice T. Paul Kane of the Third Department, recommended the adoption of the State Bar's proposed amendments to the Disciplinary Rules, with certain exceptions.¹³ On April 5, 1990, the Appellate Divisions adopted a joint order setting forth a uniform set of amended Disciplinary Rules to become effective September 1, 1990.¹⁴ The Appellate Divisions had amended or eliminated seven of the Disciplinary

MODEL RULES OF PROFESSIONAL CONDUCT (December 14, 1984) [hereinafter HALPERN COMMITTEE REPORT].

9. New York State Bar Association Minutes of the House of Delegates meeting, November, 1985: Rejection of Halpern Committee Report recommending adoption of modified version of ABA Model Rules of Professional Conduct.

10. These statements reflect the personal recollections of the author.

11. The Preliminary Statements to the 1970 Code and the 1990 Code characterize Ethical Considerations as "aspirational in character" and state that an enforcing agency "may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations." 1970 CODE, *supra* note 1, Preliminary Statement; 1990 CODE, *supra* note 1, Preliminary Statement.

12. New York State Bar Association Minutes of the House of Delegates meeting, June 26-27, 1987: Approval of amendments to the Lawyer's Code of Professional Responsibility. See NEW YORK STATE BAR ASSOCIATION, DRAFT OF THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (October 5, 1987) (incorporating amendments adopted by the House of Delegates April 11 and June 26-27, 1987) [hereinafter OCTOBER 1987 DRAFT].

13. See *infra* note 15 for the changes eventually made by the Appellate Divisions.

14. Joint Order of the Appellate Divisions of the Supreme Court, First, Second, Third and Fourth Judicial Departments, In the Matter of the Adoption of the Disciplinary Rules of the Lawyer's Code of Professional Responsibility (April 5, 1990) (as yet unpublished order) (adopting the 1990 amendments). See *infra* notes 16-20 and accompanying text for an explanation of the Appellate Divisions' approval procedures for the State Bar's proposed amendments to the Disciplinary Rules.

Rules and one definition proposed by the State Bar.¹⁵ Accordingly, at its meeting in June, 1990, the House of Delegates voted to amend the Disciplinary Rules that had been approved conditionally at its meeting in June, 1987 to conform the Disciplinary Rules to those adopted by the Appellate Divisions.

The purposes of this Article are to describe the significant changes to the 1970 Code and to give a firsthand account of the amendment process. Part I explains the process by which the Appellate Divisions adopt Disciplinary Rules promulgated by the New York State Bar Association. Part II discusses the specific amendments to the 1970 Code which became effective September 1, 1990. Part III summarizes the overall results of the amendments to the Code.

II. Manner of Adoption

The New York State Bar Association traditionally has approved a code of professional responsibility and has recommended formal adoption by the Appellate Divisions.¹⁶ The Appellate Divisions do

15. Specifically, the Appellate Divisions added a proviso to DR 1-102(A)(6) on discrimination; made supervisory lawyers responsible under DR 1-104 for conduct of subordinates that they should have known about as well as conduct that they knew about; eliminated DR 2-100, which formally incorporated by reference the court rules on advertising; modified DR 2-101 to set forth the court rules on advertising; eliminated the State Bar's proposed additions to DR 2-103 with respect to in-person solicitation; eliminated proposed DR 7-103(C), which would have required prosecutors to obtain prior judicial approval before issuing a subpoena to a lawyer when the prosecutor seeks to compel the lawyer to provide evidence concerning a client; and amended DR 9-102 to incorporate the court rules regarding maintenance of client trust accounts, books and records, adopted in the First and Second Departments. Compare OCTOBER 1987 DRAFT, *supra* note 12, at 9-10, 22-33, 92-93, 116-17 with 1990 CODE, *supra* note 1, DRs 1-102(A)(6), 1-104, 2-100, 2-101, 2-103, 7-103(C), 9-102.

16. The Appellate Divisions of the New York Supreme Court have jurisdiction over all attorneys practicing law in the state. See N.Y. JUD. LAW § 90(2) (McKinney 1983). The appellate division in each department is authorized to censure, suspend or disbar any attorney who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor or any conduct prejudicial to the administration of justice. N.Y. JUD. LAW § 90 (McKinney 1983). Although section 487 of the Judiciary Law contains a definition of misconduct, see N.Y. JUD. LAW § 487 (McKinney 1983), the court rules for each of the Appellate Divisions have defined professional misconduct to include a violation of any disciplinary rule of a code of professional responsibility adopted by the New York State Bar Association. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.2 (1977) (First Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.2 (1978) (Second Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.2 (1978) (Third Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.17 (1978) (Fourth Department). The manner in which amendments are adopted may be important in assuring the immunity of the State Bar from prosecution under the antitrust laws for any rules that may be deemed to have an anticompetitive effect. The state action doctrine, set forth by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), holds that regulatory activities of a bar association are entitled to such immunity where the activities are directed and

not adopt an entire code, but only its disciplinary rules.¹⁷ Previously, this was accomplished by means of a court rule making a violation of a Disciplinary Rule professional misconduct for which a lawyer could be disciplined.¹⁸ Thus, the Disciplinary Rules were incorporated by reference into the court rules. Under this method of adoption, the Appellate Divisions maintained a relatively passive role in establishing rules of conduct for the legal profession. As the New York Court of Appeals noted in *In re Greene*, "[t]he Code of Professional Responsibility is . . . an enactment of the New York State Bar Association rather than the Legislature or any court."¹⁹

With regard to the recent amendments, the Appellate Divisions adopted the Disciplinary Rules promulgated by the State Bar as separate court rules instead of amending the existing court rules to refer to the amended code as adopted by the State Bar. That is, the Disciplinary Rules are set forth in full in the court rules.²⁰

supervised closely by the state supreme court. *See also* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (advertising rule had been directly adopted by the state supreme court); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (bar association regulatory activities were immune if authorized by state law, even if neither compelled nor actively supervised by the state).

17. This results in a strange dichotomy where the Preamble, Preliminary Statement, Canons and Ethical Considerations are the province of the State Bar, and the Disciplinary Rules are recommended by the State Bar, but are ultimately the province of the Appellate Divisions.

18. In the case of the Original Code, the First Department court rules incorporated the Disciplinary Rules as amended periodically by the State Bar. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.2 (1977) (First Department). Accordingly, amendments have been automatically incorporated in the court rules. In the other departments, amendments to the court rules have been necessary to effectuate amendments to the Code. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 691.2 (1978) (the Second Department also includes as misconduct a violation of any canon of the former Canons of Professional Ethics, which were superseded by the Code in 1970); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.2 (1978) (Third Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.17 (1978) (Fourth Department).

19. 54 N.Y.2d 118, 124, 429 N.E.2d 390, 393, 444 N.Y.S.2d 883, 886, (1984), *cert. denied*, 455 U.S. 1035 (1982).

20. The Joint Order adopted by the Appellate Divisions does not address the method for setting forth the rules. It merely states that:

the Disciplinary Rules of the Lawyer's Code of Professional Responsibility, annexed hereto and made a part hereof, are hereby adopted by the Appellate Divisions of the Supreme Court as minimum standards of conduct for attorneys in the State of New York the violation of which shall subject the attorney to disciplinary action.

Joint Order of the Appellate Divisions of the Supreme Court, First, Second, Third and Fourth Judicial Departments, In the Matter of the Adoption of the Disciplinary Rules of the Lawyer's Code of Professional Responsibility (April 5, 1990) (as yet unpublished order) (adopting the 1990 amendments). The rules are expected to be set forth in a new uniform part in the Official Compilation of Codes, Rules & Regulations of the State of New York, applicable in all four judicial departments.

As long as the rules adopted by the State Bar and the Appellate Divisions are identical, the change from incorporation by reference to incorporation by annexation has little practical effect. It is possible, however, that the decision to make the Disciplinary Rules rules of court reflects a determination of the Appellate Divisions to take a more active role in providing minimum rules of conduct for the profession. Since 1978, the Appellate Divisions increasingly have become involved with the recommendations of the State Bar in this area;²¹ an Appellate Division no longer need adopt each and every Disciplinary Rule promulgated by the State Bar.²² A recent New York Court of Appeals case is further evidence of this change. In *Niesig v. Team I*,²³ the court noted that the Disciplinary Rules are “[a]pproved by the New York State Bar Association and then enacted by the Appellate Divisions.”²⁴

III. The 1990 Amendments

A. Preliminary Statement

Although the Appellate Divisions have adopted only the Disciplinary Rules, ethics committee opinions often cite Ethical Considera-

21. See *infra* notes 82-85 and accompanying text for a discussion of the Appellate Divisions' role in amending the Disciplinary Rules on advertising.

22. The rules of the First Department specifically defined misconduct as violation of any disciplinary rule of the Lawyer's Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970, as amended. The 1978 amendment to the Lawyer's Code of Professional Responsibility was therefore automatically incorporated into the court rules of the First Department. The court rules of the other departments had to be amended when the NYSBA revised the Code in 1978. These court rules therefore referred to the Disciplinary Rules as amended through May 1, 1978. Compare N.Y. COMP. CODES R. & REGS. tit. 22, § 603.2 (1977) with N.Y. COMP. CODES R. & REGS. tit. 22, § 691.2 (1978) (Second Department); see N.Y. COMP. CODES R. & REGS. tit. 22, § 806.2 (1978) (Third Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.17 (1978) (Fourth Department).

23. 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990).

24. *Id.* at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495 (1990). The court also concluded that, in certain cases, it was not required to follow the exact meaning of the Disciplinary Rules:

While unquestionably important, and respected by the courts, the Code does not have the force of (decisional or statutory) law (*See* [Estate] of Weinstock, 40 N.Y.2d 1, 6 [351 N.E.2d 647, 386 N.Y.S.2d 1 (1976)]). . . . That distinction is particularly significant when a Disciplinary Rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers. In such instances, we are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake.

Id. at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495.

tions or Canons²⁵ and some lawyers fear that a lawyer may be disciplined for violating an Ethical Consideration²⁶ or for conduct not specifically prohibited by a Disciplinary Rule. The Jones Committee added a section to the Preliminary Statement that warns lawyers of this possibility:

[c]onduct that does not appear to violate the express terms of any Disciplinary Rule nevertheless may be found by an enforcing agency to be the subject of discipline on the basis of a general principle illustrated by a Disciplinary Rule or on the basis of an accepted common law principle applicable to lawyers.²⁷

The Committee's Source Note²⁸ indicates that the purpose of the above paragraph is to "clarify" that attorneys may be subject to discipline "beyond the express terms of the Disciplinary Rules."²⁹ Many lawyers may be surprised to learn that the 1990 Code places such discretion in disciplinary authorities. The adoption of broad ethical principles would seem to give lawyers wide latitude in determining how to act. Although the Jones Committee did not advocate broadening the grounds for discipline,³⁰ the possibility exists that disciplinary authorities will use this new warning to extend further the general principles of the 1990 Code. Ironically, that the Appellate Divisions adopted the Disciplinary Rules but not the Ethical Considerations as court rules may indicate their belief that lawyers should be subject to discipline only for a violation of a Disciplinary Rule.

B. Definitions

Only two changes in the definitions section of the 1970 Code have been made. The first change concerns the term "law firm." The original definition referred only to professional legal corporations. Court cases or ethics opinions, however, have applied the term to legal serv-

25. See HALPERN COMMITTEE REPORT, *supra* note 8, at nn.15-19 and accompanying text.

26. See, e.g., *In re Justices of the Appellate Division, First Dep't v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (an isolated violation of the Ethical Consideration is insufficient to warrant discipline, but "persistent or general courses" of conduct may be sufficient).

27. OCTOBER 1987 DRAFT, *supra* note 12, at 3; 1990 CODE, *supra* note 1, Preliminary Statement.

28. Jones Committee's Source Notes are contained in the New York State Bar Association's October 5, 1987 Draft of the Lawyer's Code of Professional Responsibility, which was transmitted to the Appellate Divisions. OCTOBER 1987 DRAFT, *supra* note 12.

29. OCTOBER 1987 DRAFT, *supra* note 12, at 3.

30. See generally OCTOBER 1987 DRAFT, *supra* note 12.

ices organizations³¹ and government law departments.³² The term conceivably may be applied to corporate law departments as well. The Jones Committee revised the definition of "law firm" to indicate that the term includes, "but is not limited to, a professional legal corporation, the legal department of a corporation or other organization and a legal services organization." This definition is similar to, but broader than, the definition in the Model Rules which does not contain the language "not limited to."³³

The Jones Committee failed to state whether the "not limited to" language was meant to include government agencies. Determining what is included in the term "law firm" is significant for matters of vicarious disqualification under DR 5-105(D) in either the 1970 Code or as amended in the 1990 Code. The subject of vicarious disqualification when a private lawyer joins the government, however, is specifically addressed in DR 9-101(B)(3).³⁴ Thus, the definition of "law firm" is not relevant for that purpose. Nevertheless, the distinction potentially is relevant to the permission to share confidential information contained in EC 4-2 and to the lawyer-witness restrictions of DR 5-102. For these purposes, there is no apparent reason why the term "law firm" should not be interpreted to include a government law department.

The second change in the definition section is an addition to the definition of "tribunal" made by the Appellate Divisions. Under the new definition, a tribunal is deemed "available" to hear a complaint of discrimination when the tribunal would have jurisdiction to hear the complaint.³⁵

31. *Borden v. Borden*, 277 A.2d 89 (D.C. App. 1971); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1975).

32. NYSBA Comm. on Professional Ethics, Op. 492 (1978); NYSBA Comm. on Professional Ethics, Op. 419 (1975) (applies vicarious disqualification and requires the retention of special counsel pursuant to Section 701 of the County Law, N.Y. COUNTY LAW § 701 (McKinney 1972)). Some courts and ethics committees, however, have been reluctant to disqualify an entire prosecutor's office when one member is disqualified. See *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *State v. Fitzpatrick*, 464 So. 2d 1185 (Fla. 1985); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) (refuses to apply DR 5-105(D) to disqualify an entire government agency because the government's ability to function would be unreasonably impaired).

33. MODEL RULES, *supra* note 3, Rule 1.10 comment.

34. DR 9-101(B)(3) does not require vicarious disqualification of the government when a private lawyer joins the government. This is tempered by DR 9-101(B)(1), which states that, in general, neither a lawyer nor such lawyer's firm may represent a client in connection with a matter in which such lawyer participated personally as a public officer or employee.

35. For a discussion of the new disciplinary rule concerning discrimination, see *infra* notes 37-56 and accompanying text.

C. Canon 1 — Misconduct

1. Discrimination

One of the most significant changes to the 1970 Code is the adoption of an Ethical Consideration and a Disciplinary Rule addressing discrimination. The Ethical Consideration encourages lawyers to avoid bias toward participants in court proceedings.³⁶ The new Disciplinary Rule subjects a lawyer to discipline for illegally discriminating in the practice of law, but does so only after a finding of illegal discrimination by a tribunal of competent jurisdiction where such a tribunal is available.³⁷

The history of the adoption of these provisions is a long and tortuous one. The anti-discrimination provisions are the result of two separate proposals from State Bar committees. The Committee on Minorities in the Profession proposed to prohibit discrimination in hiring, promoting or otherwise determining conditions of employment, on nine bases, including race, color, religion, sex, age and handicap.³⁸

The Special Committee on Women in the Courts sought a far broader prohibition against discrimination. As a result of a study of discrimination in the courts,³⁹ the Special Committee on Women in the Courts advocated that the Bar Association provide that a lawyer is prohibited from engaging in any conduct that would discriminate or manifest bias on nine bases, including sex, color, race, religion, disability, age, marital status and sexual preference, in handling a legal matter.⁴⁰ The Jones Committee declined to recommend adoption of either an Ethical Consideration or a Disciplinary Rule addressing discrimination because the subject of discrimination was adequately covered by laws, such as the Federal anti-discrimination law⁴¹ and the New York Human Rights Law,⁴² and was an inappropriate subject for a code of ethics.⁴³

36. 1990 CODE, *supra* note 1, EC 1-7.

37. 1990 CODE, *supra* note 1, DR 1-102(A)(6).

38. NEW YORK STATE BAR ASSOCIATION COMMITTEE ON MINORITIES IN THE PROFESSION, REPORT TO THE STATE BAR ASSOCIATION HOUSE OF DELEGATES (April 2, 1987).

39. NEW YORK STATE BAR ASSOCIATION REPORT OF THE SPECIAL COMMITTEE ON WOMEN IN THE COURTS (March 24, 1987) [hereinafter *WOMEN IN THE COURTS*]; *see* NEW YORK STATE BAR ASSOCIATION REPORT OF THE TASK FORCE ON WOMEN IN THE COURTS (March 31, 1986).

40. *WOMEN IN THE COURTS*, *supra* note 39, at 49.

41. *See* Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e (1982).

42. N.Y. EXEC. LAW § 296 (McKinney 1982).

43. *See* REPORT OF THE NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE TO REVIEW THE CODE OF PROFESSIONAL RESPONSIBILITY (February 28, 1987)

The proposals regarding discrimination were discussed at both the April and June, 1987 meetings of the House of Delegates. In April, the House clearly did not wish to prohibit all discrimination. For example, the House of Delegates supported the preservation of a lawyer's ability to adopt affirmative action programs. The House of Delegates, however, was inclined to make a formal statement prohibiting at least certain kinds of discrimination; therefore, the House directed the Jones Committee to synthesize the two special committees' proposals into a single provision.⁴⁴

Between the April and June meetings, the Jones Committee consulted with both special committees and offered for the consideration of the House a single Ethical Consideration composed of two sentences. The first sentence encouraged the lawyer to avoid unlawful discrimination; the second sentence exhorted lawyers to avoid condescension and to treat with dignity and respect all parties, witnesses, lawyers, court employees and others involved in the legal process. Nevertheless, the Jones Committee recommended rejection of the proposal on the grounds that prohibiting a violation of a particular law is inconsistent where, under DR 1-102(A)(3), other violations of law constitute misconduct only if they involve moral turpitude, and grievance committees are ill-equipped to act as quasi-human rights commissions determining discrimination cases.

After extended debate, the House of Delegates agreed to divide the special committees' concepts into an Ethical Consideration and a Disciplinary Rule. New EC 1-7 reads as follows: "A lawyer should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees and other persons involved in the legal process."⁴⁵ This language is similar to language already appearing in EC 7-10.⁴⁶

New DR 1-102(A)(6) as proposed by the House of Delegates would have only provided that: "[a] lawyer shall not . . . unlawfully discriminate in the practice of law, including discrimination in hiring, promoting or otherwise determining conditions of employment, on the basis of race, creed, color, national origin, sex, disability, or marital

(committee recommendations concerning Disciplinary Rule on discrimination) [hereinafter FEBRUARY 1987 DRAFT].

44. New York State Bar Association Minutes of the House of Delegates meeting, Albany, New York, April 11, 1987: Report and Recommendations of Special Committee to Review the Code of Professional Responsibility, at 4.

45. 1990 CODE, *supra* note 1, EC 1-7.

46. By restricting its prohibition to the infliction of *needless* harm, EC 7-10 presumably allows a lawyer certain latitude in examining witnesses. There is no indication that the House of Delegates intended EC 1-7 to override EC 7-10 in the context of litigation.

status."⁴⁷ The Appellate Divisions, however, were concerned about the effect of the proposed Disciplinary Rule. Like the Jones Committee, the Appellate Divisions did not want to convert the Departmental Disciplinary Committees into quasi-human rights commissions determining discrimination cases. Therefore, the Appellate Divisions added a provision clarifying that, where a tribunal other than a Departmental Disciplinary Committee (e.g., a court or the Human Rights Commission) has jurisdiction, a complaint "of professional misconduct"⁴⁸ based on unlawful discrimination must be brought before that tribunal. A certified copy of a final determination of unlawful discrimination by that tribunal constitutes *prima facie* evidence of professional misconduct in a disciplinary proceeding.⁴⁹

The basic anti-discrimination provision prohibits all unlawful discrimination on the eight named bases.⁵⁰ Employment discrimination is the most obvious form of prohibited discrimination.⁵¹ Courts also have held it unlawful for a prosecutor or a defense attorney to make peremptory challenges of jurors on the grounds of race and national origin.⁵² Not all professional conduct of lawyers, however, will be subject to the new provisions. The requirement that the discrimination be unlawful will have the practical effect of exempting very small law firms from the prohibition. The New York Human Rights Law prohibits employment discrimination only by "employers," and the definition of employer excludes those with fewer than four persons in his or her employ.⁵³ Although EC 1-7 discourages bias, it is directed at persons "involved" in the legal process. Similarly, DR 1-102(A)(6) prohibits unlawful discrimination in the "practice" of law, which presumably commences at a point after legal representation has begun.

The eight bases upon which discrimination is prohibited are those

47. See OCTOBER 1987 DRAFT, *supra* note 12, at 9.

48. Technically, such a complaint would be for unlawful discrimination rather than for professional misconduct.

49. 1990 CODE, *supra* note 1, DR 1-102(A)(6).

50. *Id.*

51. See 42 U.S.C. § 2000e; N.Y. EXEC. LAW § 296 (McKinney 1982).

52. *Batson v. Kentucky*, 476 U.S. 79 (1986) (equal protection clause forbids a prosecutor to make a peremptory challenge to potential jurors solely on the basis of race); *Lockhart v. McCree*, 476 U.S. 162 (1986) (although the equal protection clause of the fourteenth amendment or the fair cross-section component of the sixth amendment may prohibit the exclusion from a jury of groups such as blacks, women and Mexican-Americans, a group defined solely in terms of shared attitudes, such as people opposed to the death penalty, may be excluded); *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (defense attorneys could not exercise peremptory challenges of jurors on racial grounds), *cert. denied*, 111 S. Ct. 77 (1990).

53. N.Y. EXEC. LAW § 292(5) (McKinney 1982).

listed in the New York Human Rights Law.⁵⁴ The House of Delegates adopted the language of the Human Rights Law because the terms used are defined at length and have been interpreted by both the Human Rights Commission and the courts.⁵⁵

The House of Delegates approved one final recommendation of the Jones Committee to eliminate gender bias: a proposal to make the 1990 Code gender-neutral. The House of Delegates did not approve each drafting change, but rather delegated authority to the Jones Committee to effect the changes. Although providing gender neutrality involved hundreds of changes,⁵⁶ such changes were not intended to affect the substance of any provision.

2. Reporting Misconduct

One of the hallmarks of the legal profession is its self-policing nature. DR 1-103(A)⁵⁷ provided that a lawyer possessing unprivileged knowledge of a violation of DR 1-102 must report that knowledge to a tribunal or other authority empowered to investigate or act upon the violation. Several problems with this section existed. First, many lawyers thought it unfair that they be required to report any violation of the 1970 Code, no matter how trivial. Second, there was a general perception that the broad proscription had been widely ignored, particularly as to violations that lawyers considered insignificant. Finally, a technical question arose regarding whether the reference to "unprivileged" knowledge applied only to information protected by the attorney-client privilege or to the broader category of "secrets" as well.⁵⁸

54. The New York Human Rights Law prohibits employment discrimination based upon age, race, creed, color, national origin, sex, disability or marital status. N.Y. EXEC. LAW § 296 (McKinney 1982). The Special Committee on the Role of Women in the Courts recommended the inclusion of sexual preference in the list of prohibited bases of discrimination. WOMEN IN THE COURTS, *supra* note 39, at 49. This proposal was rejected by the House of Delegates. See OCTOBER 1987 DRAFT, *supra* note 12, at 9.

55. See generally OCTOBER 1987 DRAFT, *supra* note 12, at 8-9 and accompanying Source Notes.

56. An exception to the widespread changes was Canon 2, which had been rendered gender-neutral at the time of the 1978 advertising amendments. 1970 CODE, *supra* note 1, Canon 2.

57. 1970 CODE, *supra* note 1, DR 1-103(A).

58. See OCTOBER 1987 DRAFT, *supra* note 12, at 9 and accompanying Source Notes. See 1970 CODE, *supra* note 1, DR 4-101. There is conflicting authority as to the meaning of "unprivileged knowledge." In interpreting the same phrase as it appears in DR 7-102(B)(1) of the ABA Model Code, the ABA's Ethics Committee opined that it included both confidences and secrets. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). The Ethics Committee of the Association of the Bar of the City of New York, however, concluded that it meant only "confidences." See Ass'n of the Bar of the City of N.Y., Comm. of Professional and Judicial Ethics, Formal Op. 1990-3

The amendments to DR 1-103(A) and EC 1-4 address the first problem in the same manner as the Model Rules do;⁵⁹ the amendments limit the reporting obligation only to violations of DR 1-102 that raise "a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer."⁶⁰ The amendments treat the final problem by specifying in both DR 1-103(A) (reporting lawyer misconduct) and DR 1-103(B) (providing evidence to an investigation of lawyer or judicial misconduct) that the lawyer must disclose knowledge or evidence only when it is not protected as a confidence or secret.

3. *Ethical Measures in Law Firms*

When the House of Delegates considered the Halpern Committee Report on the Model Rules, it specifically rejected Model Rule 5.2(b), providing that, "[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 an arguable question of professional duty."⁶¹ Although this provision supplied much needed assurance to a law firm associate who believes that the conduct of a partner for whom he or she works is ethically questionable, it distinguished ethical responsibilities varying with a lawyer's age or with a lawyer's title within the firm.

To provide guidance in ethical matters, the Jones Committee added EC 1-8, suggesting that a law firm adopt compliance procedures to the 1990 Code. These procedures include:

measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics.⁶²

This language, derived from comment 2 to Model Rule 5.1,⁶³ should provide some comfort to a lawyer who questions the ethical propriety

(1981). A more recent opinion of the State Bar Ethics Committee simply assumed that "unprivileged" included both confidences and secrets. NYSBA Comm. on Professional Ethics, Op. 531 (1981).

59. See MODEL RULES, *supra* note 3, Rule 8.3(a).

60. 1990 CODE, *supra* note 1, DR 1-103(A), EC 1-4.

61. MODEL RULES, *supra* note 3, Rule 5.2(B).

62. 1990 CODE, *supra* note 1, EC 1-8.

63. MODEL RULES, *supra* note 3, Rule 5.1 comment 2.

of conduct engaged in by another lawyer in the same firm. Although the provision is only an Ethical Consideration, and, thus, does not mandate the use of firm ethics committees, the provision should encourage the use of such procedures, thereby ensuring that the affected lawyer will not have to confront an ethical dilemma alone.

The 1970 Code did not delineate the responsibility of a supervisory lawyer for the conduct of another lawyer or a non-lawyer. The Jones Committee recommended an amended DR 1-104, which would have made a supervisory lawyer responsible whenever such lawyer ordered the conduct or *knew* of the conduct at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action.⁶⁴ Although this standard mirrored the standard contained in Model Rule 5.1(c),⁶⁵ Model Rule 5.1 also gives lawyers an affirmative duty to supervise subordinates.⁶⁶ Model Rule 5.1(b) states that a lawyer with supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.⁶⁷ The Jones Committee believed that a supervisory lawyer should not be subject to discipline where civil liability would not be imposed under Section 1505(a) of the Business Corporation Law, which makes each shareholder, employee or agent of a professional legal corporation liable for any negligent or wrongful act or misconduct committed by a person rendering professional services under his or her direct supervision and control.⁶⁸

The Appellate Divisions agreed with the sentiment in Model Rule 5.1(b). Thus, they amended DR 1-104 to make a supervisory lawyer responsible for the conduct of a subordinate when the supervisor “*knows or should have known* of the conduct at a time when its consequences can be avoided or mitigated” and fails to take action.⁶⁹ The addition of this language effectively mandates adoption of the compliance procedures recommended in new EC 1-8.

The amended DR 1-104 is consistent with recent case law in New York indicating that partners may be held to a standard higher than the standard provided by Section 1505(a) of the Business Corporation Law.⁷⁰ For example, *Matter of Dahowski*⁷¹ involved a two-man law firm where Partner A stole money from clients without the knowledge

64. OCTOBER 1987 DRAFT, *supra* note 12, at 10.

65. MODEL RULES, *supra* note 3, Rule 5.1(c).

66. MODEL RULES, *supra* note 3, Rule 5.1.

67. MODEL RULES, *supra* note 3, Rule 5.1(b).

68. N.Y. BUS. CORP. LAW § 1505(a) (McKinney 1986).

69. 1990 CODE, *supra* note 1, DR 1-104.

70. N.Y. BUS. CORP. LAW § 1505(a) (McKinney 1986).

71. 103 A.D.2d 354, 479 N.Y.S.2d 755 (2d Dep't 1984).

of Partner B. Partner B was censured by the Second Department for having failed "to oversee or review the record keeping of his law firm, thereby contributing to the conversion by [Partner A] of funds entrusted to the law firm."⁷² The Client's Security Fund then sued Partner B for reimbursement of moneys the Fund had paid to Partner A's clients. In *Client's Security Fund v. Grandeau*,⁷³ the New York Court of Appeals unanimously held that Partner B could be held financially responsible for negligence which permitted or assisted Partner A in committing thefts or illegal acts: "[A]ny member of a partnership may be liable for a conversion of property committed by a member of the firm, even where the other members of the firm had no knowledge of the offending partner's action."⁷⁴

D. Canon 2 — Making Legal Counsel Available

1. Advertising

The rules governing advertising remain substantially the same under the 1990 amendments.

The 1970 Code provisions concerning advertising were the result of a philosophical battle that followed the Supreme Court's decision in *Bates v. State Bar of Arizona*.⁷⁵ One school of thought, championed by the State Bar, provided that advertising should be restricted to a limited list of permissible items.⁷⁶ The other ideology, advocated by the more liberal Association of the Bar of the City of New York, favored a general proscription of statements that were false, misleading or deceptive.⁷⁷ The advertising rules adopted by the four Appellate Divisions in 1978⁷⁸ and incorporated into the Code as DR 2-101 are an exquisite compromise between these two approaches. The rules begin with a general proscription against communications that are false, deceptive or misleading or that "cast reflection on the legal profession as a whole."⁷⁹ The advertising rules also contain an exhortation that advertising not "contain puffery, self-laudation, claims

72. *Id.* at 355, 479 N.Y.S.2d at 755-56.

73. 72 N.Y.2d 62, 526 N.E.2d 270, 530 N.Y.S.2d 775 (1988).

74. *Id.* at 67, 526 N.E.2d at 273, 530 N.Y.S.2d at 778.

75. 433 U.S. 350 (1977).

76. NYSBA Comm. on Professional Ethics, Op. 505 (1979).

77. EXECUTIVE COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, ADVERTISING BY LAWYERS (January 19, 1978).

78. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.22 (1978) (First Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.22 (1978) (Second Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.15 (1978) (Third Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.16 (1978) (Fourth Department).

79. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.22 (1978) (First Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.22 (1978) (Second Department); N.Y. COMP.

regarding the quality of the lawyer's legal services, or claims that cannot be measured or verified."⁸⁰ The rules provide a list of information that usually will not violate the general rules, as well as certain general requirements with respect to broadcast ads and advertising of fees.⁸¹ Thus, the court rules provide maximum flexibility for lawyer advertising while setting forth a safe harbor for lawyers interested in fact-based advertising.

Given the specificity of the court rules, the State Bar believed there was little additional guidance that could be supplied by the 1970 Code. Accordingly, in 1978, the State Bar added a new DR 2-100,⁸² which maintained that a lawyer should not advertise in violation of any statute⁸³ or rule of court. DR 2-100 also provided for the incorporation by reference into DR 2-101 of any rule of court adopted by the Appellate Divisions. The State Bar also added a revised DR 2-101, fully setting forth the then-existing court rule.

Although this system worked fairly well, the incorporation by reference combined with the list in DR 2-101 may have been confusing to some practitioners. For example, the court rules were amended to add two additional requirements, but, because those requirements were incorporated by reference under DR 2-100(B), the 1970 Code was not reprinted to show their inclusion. The Jones Committee proposed to delete the provisions of the court rule from DR 2-101(A) through (J), and to incorporate them by reference instead.⁸⁴

The Appellate Divisions followed a different course. Rather than having the 1990 Code incorporate the advertising rules by reference, they decided that the advertising rules should remain in the 1990 Code and that the Disciplinary Rules should be adopted as rules of the Appellate Divisions. The Appellate Divisions therefore deleted DR 2-100, added paragraph k of the court rules as DR 2-101(K) and added paragraph l of the court rules to DR 2-101(F). The result of

CODES R. & REGS. tit. 22, § 806.15 (1978) (Third Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.16 (1978) (Fourth Department).

80. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.22 (1978) (First Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.22 (1978) (Second Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.15 (1978) (Third Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.16 (1978) (Fourth Department).

81. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.22 (1978) (First Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.22 (1978) (Second Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.15 (1978) (Third Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.16 (1978) (Fourth Department).

82. 1970 CODE, *supra* note 1, DR 2-100. DR 2-100 was subsequently eliminated. See generally 1990 CODE, *supra* note 1, Canon 2.

83. See, e.g., N.Y. JUD. LAW § 479 (McKinney 1983).

84. FEBRUARY 1987 DRAFT, *supra* note 43, at 22-25.

the Appellate Divisions' solution is the same, the rules governing advertising remain unchanged.

In addition, the meaning of to "cast reflection on the legal profession as a whole"⁸⁵ is unclear. Presumably, the provision was intended only to prohibit casting aspersion or adverse reflection. The Jones Committee could do little about this lack of clarity, for it existed in the court rules.

2. Dissemination of Professional Announcements

Once the Supreme Court declared that a lawyer ethically could place truthful advertisements in a newspaper,⁸⁶ a remaining critical issue was whether a lawyer could mail the same truthful statements to a targeted group of people.⁸⁷ Several ethics committees and courts in the State have held that information that may be placed in an advertisement also may be mailed to any person.⁸⁸ Accordingly, the language in DR 2-102(A)(2) limiting the mailing of announcement cards to lawyers, clients, former clients, personal friends and relatives has been deleted. Under the general standard of DR 2-101(A), an announcement card may contain far more than the information set forth in former DR 2-102(A)(2). As the introduction to DR 2-102(A) indicates, paragraph (2) is merely a safe harbor.

3. Solicitation

Since the Supreme Court's decisions in *In re Primus*⁸⁹ and *Ohralik v. Ohio State Bar Association*,⁹⁰ courts and ethics committees have struggled to determine which forms of solicitation constitutionally may be prohibited. In *Ohralik*, the Supreme Court recognized the state interest in prohibiting classic ambulance chasing: "soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."⁹¹ The Court found that in-person solicitation may exert undue pressure and may demand an immediate response, without providing an opportunity for the victim

85. 1970 CODE, *supra* note 1, DR 2-101.

86. *Bates v. Arizona*, 433 U.S. 350 (1977).

87. This issue is discussed more fully in the context of solicitation below, but a special example of the issue occurs in connection with professional announcements. *See infra* notes 89-116 and accompanying text.

88. *See, e.g.*, NYSBA Comm. on Professional Ethics, Op. 505 (1979); *Matter of Koffler*, 51 N.Y.2d 140, 143, 412 N.E.2d 927, 929, 432 N.Y.S.2d 872, 873 (1980) ("Direct mail solicitation of potential clients by lawyers is constitutionally protected commercial speech which may be regulated but not proscribed."), *cert. denied*, 450 U.S. 1026 (1981).

89. 436 U.S. 412 (1978).

90. 436 U.S. 447 (1978).

91. *Id.* at 449.

to compare or reflect.⁹² The courts, however, have yet to determine the lawyer's bounds where the circumstances involved do not pose the dangers identified in *Ohralik*.

Advertisements targeted to a particular type of prospective client and letters directed to persons known to have a particular type of legal problem are permitted. In *Zauderer v. Office of Disciplinary Counsel*,⁹³ a lawyer placed an advertisement composed of a line drawing of the Dalkon Shield Intrauterine Device and the question, "Did you use this IUD?"⁹⁴ The Supreme Court found that the advertisement did not invade the privacy of those who read it, and posed far less of a risk of overreaching, coercion or undue influence than in-person solicitation.⁹⁵ In *Shapiro v. Kentucky Bar Association*,⁹⁶ a lawyer proposed to send letters to potential clients against whom foreclosure suits had been filed. The Court held that such targeted mailings could not be prohibited categorically.⁹⁷ The recipient would not be confronted with the coercive presence of a trained advocate or pressured for a yes-or-no-answer, but could ignore, discard or carefully consider the offer of representation.⁹⁸ Similarly, in *Matter of von Wiegen*,⁹⁹ an attorney sent a letter to persons injured in the collapse of a walkway in a hotel ballroom. The New York Court of Appeals found that the blanket prohibition of soliciting accident victims by mail violated a lawyer's right of expression under the first amendment of the United States Constitution.¹⁰⁰

Section 479 of the New York Judiciary Law prohibits any person from directly or indirectly soliciting legal business.¹⁰¹ Following *Bates v. State Bar of Arizona*,¹⁰² section 479 has been held constitutionally unenforceable in many respects.¹⁰³ Consequently, the Jones

92. *Id.* at 457, 465.

93. 471 U.S. 626 (1985).

94. *Id.* at 630.

95. *Id.* at 641-42.

96. 486 U.S. 466 (1988).

97. *Id.* at 472-73.

98. *Id.* at 475.

99. 63 N.Y.2d 163, 166, 470 N.E.2d 838, 839, 481 N.Y.S.2d 40, 41 (1984), *cert. denied*, 472 U.S. 1007 (1985).

100. *Id.* at 170, 470 N.E.2d at 841, 481 N.Y.S.2d at 43.

101. N.Y. JUD. LAW § 479 (McKinney 1983).

102. 433 U.S. 350 (1977).

103. *See, e.g.*, *Matter of Koffler*, 51 N.Y.2d 140, 143, 412 N.E.2d 927, 929, 432 N.Y.S.2d 872, 873 (1980), *cert. denied*, 450 U.S. 1026 (1981). *But see* *Matter of Alessi*, 60 N.Y.2d 229, 231, 457 N.E.2d 682, 683, 469 N.Y.S.2d 577, 578 (1983), *cert. denied*, 465 U.S. 1102 (1984); *Matter of Greene*, 54 N.Y.2d 118, 120, 429 N.E.2d 390, 391, 444 N.Y.S.2d 883, 884 (1981), *cert. denied*, 455 U.S. 1035 (1982) (mail solicitations directed at real estate brokers). In *Matter of Alessi*, the Court of Appeals explained that *Greene*

Committee concluded that section 479 no longer provided sufficient guidance to practitioners. Moreover, the law in the area of in-person solicitation is still in a state of evolution. The Jones Committee decided that DR 2-103, which prohibited solicitation of employment from a person who has not sought the lawyer's advice "in violation of any statute or court rule," was inadequate.¹⁰⁴ Accordingly, it proposed to *add* several requirements to the provision that solicitation may not violate a law or court rule. Such requirements would have prohibited in-person contact where the lawyer knows or reasonably should know that, because of the prospective client's physical, emotional or mental state, he or she is unlikely to be able to exercise independent and reasonable judgment in employing a lawyer. The requirements also would have prohibited both in-person and written contact where the prospective client has asked not to be contacted or the contact involves coercion, duress or harassment.¹⁰⁵

The Jones Committee was criticized for producing the most liberal solicitation rule in the country.¹⁰⁶ In actuality, the Committee's proposal contained more conditions than the 1970 Code did. It was not the Committee's intention to permit in-person solicitation on the day the amendment became effective. Because section 479 of the Judiciary Law specifically prohibits solicitation,¹⁰⁷ the additions made by the Jones Committee regarding a prospective client's physical or emotional state and involving coercion, duress or harassment would have permitted a lawyer's solicitation of business only where consistent

did not ban all third-party mailings by attorneys, but was limited to mailings to real estate brokers and others whose interests might "be more closely intertwined with those of the attorney than with those of the client." 60 N.Y.2d at 234-35, 457 N.E.2d at 686, 469 N.Y.S.2d at 581. This encourages the argument that not all in-person solicitation may be prohibited.

104. 1970 CODE, *supra* note 1, DR 2-103.

105. The Model Rules' approach to solicitation is quite different. MODEL RULES, *supra* note 3, Rule 7.3. Although an earlier draft of the Model Rules would have treated solicitation the same way as did the Jones Committee, the version of Model Rule 7.3 initially adopted by the ABA provided that a lawyer could not solicit professional employment by mail, in person or otherwise, if the solicitation was directed to a specific person, or to persons known to need the kind of legal services the lawyer provided. After the Supreme Court's *Shapiro* decision, the ABA amended Model Rule 7.3 to require that every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter include the words "advertising material" on the outside envelope and at the beginning and ending of any recorded communication.

106. See Gillers, *Amending the Ethics Code — Solicitation, Prepaid Plans, Fees*, N.Y.L.J., Nov. 10, 1986, at 1, col. 4.

107. See *supra* notes 102-05 and accompanying text.

with the Court of Appeals' interpretation of section 479.¹⁰⁸

Nevertheless, the Appellate Divisions believed that the Jones Committee proposal invited in-person solicitation. Consequently, the Appellate Divisions decided to retain much of the existing language of DR 2-103(A), which prohibits seeking professional employment from a person who has not sought legal advice "in violation of any statute or court rule."¹⁰⁹ They made two additional changes in this provision. First, they made lawyers subject to the court rules "in the judicial department in which the lawyer practices."¹¹⁰ Second, they deleted the sentence expressly providing that solicitation permitted by DR 2-104 and advertising in accordance with DR 2-101 would not be deemed solicitation in violation of DR 2-103.¹¹¹

The amendments permit one form of in-person solicitation. DR 2-103(C)(3) allows a lawyer to request recommendations from another lawyer or from organizations performing legal services. Lawyers have traditionally requested referrals from other lawyers. Indeed, before the 1978 amendments to Canon 2 regarding advertising, DR 2-103 prohibited only solicitation of laypersons.¹¹² In *Matter of Greene*,¹¹³ the New York Court of Appeals held that a lawyer could not ask a real estate broker to solicit clients for the lawyer, on the grounds that the broker has a conflict of interest that may affect the recommendation.¹¹⁴ Such a conflict of interest, however, is rarely present in a recommendation by a lawyer.¹¹⁵ The Jones Committee's Source Notes fail to indicate why a lawyer may request recommendations from organizations performing legal services.¹¹⁶ Presumably, the reason is to remedy DR 2-103(D) which allows the lawyer to accept referrals from certain organizations that perform legal services or recommend lawyers, but does not specifically authorize the lawyer to request such

108. See *Matter of Koffler*, 51 N.Y.2d 140, 146-47, 412 N.E.2d 927, 931, 432 N.Y.S.2d 873, 875 (1980), *cert. denied*, 450 U.S. 1026 (1981).

109. See FEBRUARY 1987 DRAFT, *supra* note 43, at 28-29.

110. 1990 CODE, *supra* note 1, DR 2-103(A).

111. *Id.*

112. Before the 1978 amendments, DR 2-103(a) provided, in relevant part:

DR 2-103 RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

ORIGINAL CODE, *supra* note 1, DR 2-103(A).

113. 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 455 U.S. 1035 (1982).

114. *Id.* at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884.

115. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1504 (1984) (approval of soliciting recommendations from lawyers).

116. See generally OCTOBER 1987 DRAFT, *supra* note 12, at 28-33.

a referral. A lawyer who has asked for such a recommendation from a bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries would still be subject to the conditions contained in DR 2-103(D).

A second form of solicitation long treated with ambiguity by the 1970 Code has been clarified. DR 2-104(F) previously stated that if success in asserting rights in a class action was dependent upon joining additional parties, the lawyer could accept employment from those contacted for the purpose of obtaining their joinder, but could not seek such employment. The fine distinction between solicitation of joinder and solicitation of employment may escape the persons contacted. Thus, in light of the above-mentioned advertising and solicitation case, the prohibition against seeking employment has been deleted.

4. *Legal Service Plans*

DR 2-103(D)(4) encompasses acceptance of employment from legal services organizations that recommend, furnish or pay for legal services to members. The most common of these organizations are union and corporate plans, usually backed by insurance, which provide legal services to employees. DR 2-103(D)(4)(a) allowed lawyers to cooperate with such an organization only if the organization did not profit from rendering legal services or did not employ, direct or supervise the lawyers unless it also assumed ultimate liability in the legal matter. Similarly, DR 2-103(D)(4)(e) allowed lawyers to cooperate with a legal services organization only if the client was free to designate any counsel, not if the client was required to employ a lawyer provided by the plan. This is referred to as the open-panel/closed-panel distinction.

Profit versus non-profit and open-panel versus closed-panel choices are outdated and should be changed.¹¹⁷ In fact, the Model Rules abandoned both. The Jones Committee refrained from recommending any changes in the section, suggesting instead that the matter be given thorough examination by an expert, such as the Committee on Prepaid Legal Services. The latter committee submitted to the House of Delegates a proposal to delete DR 2-103(D)(4)(a), which distinguished between profit and non-profit plans.¹¹⁸ This pro-

117. See, e.g., Committee on Professional Responsibility (of the Association of the Bar of the City of New York), *A Proposal to Liberalize the Provisions of the Code of Professional Responsibility Governing Prepaid Legal Service Plans*, 43 THE RECORD 698 (1988) [hereinafter *Prepaid Legal Service Plans*].

118. *Id.*

posal was adopted; thus, paragraphs (b) through (g) have been renumbered.¹¹⁹ The Committee on Prepaid Legal Services apparently believed that the Bar's long-standing opposition to closed-panel plans made the open-panel/closed-panel issue too controversial and it did not recommend authorizing closed-panel plans.¹²⁰ The text of former DR 2-103(D)(e), therefore, remains unchanged.

5. *Legal Fees*

The subject of legal fees has produced substantial controversy because it has such immediate consequences to the pocketbooks of most lawyers. The 1970 Code prohibited clearly excessive fees. This standard had been criticized for allowing fees that are unreasonably high. For example, a 1968 opinion of the ABA Ethics Committee commented that it was not concerned with the amount of fees "unless so excessive as to constitute a misappropriation of the client's funds."¹²¹ For this reason, the ABA decided to adopt a requirement in the Model Rules that legal fees be "reasonable."¹²² The Jones Committee did not follow suit; it merely recommended deletion of the word "clearly." Because the definition of an excessive fee and the factors for determining such a fee in DR 2-106(B) remain almost unchanged, the practical effect of the deletion of "clearly" should be negligible. Moreover, because an "excessive" fee is defined in terms of what is in excess of a reasonable fee, and because the factors listed in DR 2-106 are almost identical to those listed in Model Rule 1.5,¹²³ there should be little difference in the determination of what is an unethical fee under either the 1990 Code or the Model Rules.

Only one change in the factors for determining an excessive fee has been made. DR 2-106(B)(2) formerly permitted a lawyer to increase a fee where acceptance of the particular employment was likely to preclude the lawyer from accepting other employment where such a likelihood was "apparent" to the client. Because what is apparent to the client may depend upon the client's sophistication in the use of lawyers, the amended rule provides that the likelihood of preclusion also may be taken into consideration if it is "made known" to the client.

119. Compare 1970 CODE, *supra* note 1, DR 2-103(D)(4) with 1990 CODE, *supra* note 1, DR 2-103(D)(4).

120. See *Prepaid Legal Service Plans*, *supra* note 117. Some Kane Committee members criticized that the 1970 Code authorized only open-panel legal service plans, but that Committee did not recommend any changes to DR 2-103(D).

121. ABA Comm. on Professional Ethics, Formal Op. 320 (1968).

122. MODEL RULES, *supra* note 3, Rule 1.5.

123. Compare MODEL RULES, *supra* note 3, Rule 1.5 with 1990 CODE, *supra* note 1, DR 2-106.

6. *Contingent Fees*

In the 1970 Code, DR 2-106(C) prohibited a lawyer from charging a contingent fee in a criminal case. EC 2-20 also warned against charging a contingent fee in a domestic relations matter. Both ethics committees and courts, however, have treated the Ethical Consideration as binding.¹²⁴ The 1990 Code codifies these positions and prohibits a contingent fee in a domestic relations matter that involves securing a divorce or determining the amount of maintenance, support, equitable distribution or property settlement.¹²⁵ EC 2-20 had posed problems because married women often lack the funds to hire a lawyer and, thus, could benefit from the use of a contingent fee system. New DR 2-106(C)(2), however, was not opposed in the House of Delegates.

New DR 2-106(D) requires that a contingent fee be described to the client in writing promptly after the employment of the lawyer. The fee agreement must explain how the fee is to be determined in the case of settlement, trial or appeal, and how litigation and other expenses are to be treated. The provision also requires that, at the conclusion of the matter, the lawyer provide the client with a written statement of the outcome, and, if there is a recovery, a statement of the amount of money being remitted to the client with an explanation of how the amount was determined. This provision, derived from Model Rule 1.5,¹²⁶ is designed to reduce client misunderstandings with respect to contingent fees.

124. The New York courts traditionally have held that a contract providing for a contingency fee dependent upon procuring a divorce or on the amount of alimony obtained is void as against public policy. *See Van Vleck v. Van Vleck*, 21 A.D. 272, 47 N.Y.S. 470 (4th Dep't 1897) (percentage of support in separation action); *Levine v. Levine*, 206 Misc. 884, 135 N.Y.S.2d 304 (Sup. Ct. Queens County 1954) (percentage of alimony or lump sum in lieu of future alimony); *Dougherty v. Burger*, 133 Misc. 807, 234 N.Y.S. 274 (Sup. Ct. N.Y. County 1929) (percentage of lump sum in divorce action); *In re Dangler*, 192 A.D. 237, 182 N.Y.S. 471 (1st Dep't 1920) (percentage of lump sum or alimony in separation action); *In re Brackett*, 114 A.D. 257, 99 N.Y.S. 802 (3d Dep't), *aff'd*, 189 N.Y. 502, 81 N.E. 1160 (1906) (percentage of total settlement, including support, maintenance and other matters in separation action). *See also* N.Y. County Lawyers' Ass'n, Comm. on Professional Ethics, Op. 660 (1984); Ass'n of the Bar of the City of N.Y., Comm. on Professional and Judicial Ethics, Op. 35 (1981); NYSBA Comm. on Professional Ethics, Op. 443 (1976). This rule would not apply to cases such as a suit for the collection of overdue alimony. *See, e.g.*, NYSBA Comm. on Professional Ethics, Op. 443 (1976); NYSBA Comm. on Professional Ethics, Op. 390 (1975); N.Y. County Lawyers' Ass'n, Comm. on Professional Ethics, Op. 533 (1964); N.Y. County Lawyers' Ass'n, Comm. on Professional Ethics, Op. 275 (1929).

125. 1990 CODE, *supra* note 1, DR 2-106(c)(2).

126. MODEL RULES, *supra* note 3, Rule 1.5. See OCTOBER 1987 DRAFT, *supra* note 12, at 36 and accompanying Source Notes.

7. Fee Splitting

The 1970 Code permitted a division of fees between lawyers not associated with the same firm only where the division was in proportion to the services performed by each lawyer.¹²⁷ This rule disadvantaged lawyers in small firms.¹²⁸ Lawyers in large firms could refer matters to their partners and receive a share of the fees. Lawyers in small firms, however, were prohibited under the traditional fee-splitting rule from forwarding a matter outside their expertise to a more qualified attorney and from participating in the fee. Consequently, lawyers associated with smaller firms may have had less incentive to refer matters to the most appropriate counsel. The amendment to DR 2-107(A), like Model Rule 1.5(e)(1),¹²⁹ allows the payment of forwarding fees where the client consents after full disclosure that a division of fees will be made, the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation, and the total fee is reasonable.

The new rule has been criticized. During the debate in a meeting of the State Bar House of Delegates, the representatives of the New York City Bar Association offered three objections to the proposal.¹³⁰ First, the New York City Bar argued that client consent might not be meaningful if the client were unsophisticated. Nonetheless, the House of Delegates apparently agreed with the Jones Committee that most clients are sophisticated regarding the payment of legal fees, and that requiring the total fee to be reasonable provides adequate client protection. The State Bar also feared that courts would be reluctant to impose liability on a referring lawyer who did not engage in affirmative wrongdoing. The House of Delegates, however, apparently agreed with the Jones Committee that, while referring lawyers may not be held liable for every mistake in the representation, they should be held liable for failure to supervise adequately. Finally, the New York City Bar contended that allowing forwarding fees would en-

127. 1970 CODE, *supra* note 1, DR 2-107.

128. See COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS (OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK), PRELIMINARY REPORT ON THE ABA PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT (JANUARY 30, 1980 DRAFT) 13 (July 1980).

129. MODEL RULES, *supra* note 3, Rule 1.5(e)(1).

130. See letter from Robert Kaufman, President of the Association of the Bar of the City of New York to the New York State Bar Association (December 24, 1986); Proposed Amendments to Revised Draft, prepared by the Special State Bar Committee, of the Lawyer's Code of Professional Responsibility submitted to the House of Delegates by the Association of the Bar of the City of New York (April 6, 1987).

courage sending cases, not to the best lawyer, but to the lawyer with the best fee-splitting arrangement. Because the referring lawyer would remain responsible for supervising the work of the receiving lawyer, however, a strong incentive to send the case to the best lawyer exists. The Jones Committee, the House of Delegates and the Appellate Divisions apparently believed that the potential benefits of the amendment outweighed any possible harms.

8. *Pro Bono Service*

The State Bar has debated extensively the merits of mandatory versus voluntary work in the public interest. When the Halpern Committee Report was discussed at the June, 1985 House of Delegates meeting, the House approved an amendment to Model Rule 1.6¹³¹ that had been proposed by the Committee on Public Interest Law regarding pro bono work.¹³² The rule, adopted as a black letter rule, was phrased in precatory terms.¹³³ The New York State Bar Association Committee on Public Interest Law proposed to the Jones Committee that the language concerning pro bono work contained in Model Rule 1.6 be included in the 1990 Code. In view of the precatory nature of Model Rule 1.6, the Jones Committee recommended that it replace EC 2-25; both the House of Delegates and the Appellate Divisions approved this change.

The revised Ethical Consideration provides that each lawyer has an obligation to render public interest and pro bono legal service. This obligation may be fulfilled by providing professional services at no fee or a reduced fee to individuals of limited financial means, or to public service or charitable organizations or programs designed to increase the availability of legal services. Unlike Model Rule 1.6,¹³⁴ the obligation imposed by EC 2-25 may not be satisfied by service in activities for improving the law, the legal system or the legal profession, or by exclusive financial support for legal services organizations. EC 2-25 encourages financial contributions in addition to the "obligation" to provide free or reduced-cost legal services to the poor.

9. *Representation of Unpopular Clients*

Both the 1990 Code and the Model Rules contain provisions that

131. MODEL RULES, *supra* note 3, Rule 1.6.

132. See letter from Helaine Barnett, chair, Committee on Public Interest Law, to Hon. Hugh R. Jones, chair, New York State Bar Association Committee to Review the Code of Professional Responsibility (January 16, 1987).

133. *Id.*

134. MODEL RULES, *supra* note 3, Rule 1.6.

resemble neither rules nor aspirational principles. New EC 2-27, which contains the substance of Model Rule 1.2(b),¹³⁵ is illustrative. EC 2-27 states that a lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social or moral views or activities. Though EC 2-27 falls short of encouraging lawyers to represent unpopular clients, it is helpful to those lawyers who undertake such representation.

10. *Withdrawal from Representation*

The 1970 Code allowed permissive withdrawal only where permitted by DR 2-110(C). Although the listed causes for withdrawal were fairly broad, they presented some problems. For example, the catch-all phrase of DR 2-110(C)(6), which provided that a lawyer may withdraw where, in a proceeding before a tribunal, the lawyer believes the tribunal will find good cause for withdrawal, applied only in a litigation context. The first amendment to DR 2-110(C) resolves that problem by allowing withdrawal for any reason as long as withdrawal can be accomplished without material adverse effect on the interests of the client. This amendment is similar to Model Rule 1.16(b).¹³⁶

Another change adopted by both the ABA and the State Bar is that the lawyer may withdraw where a justification for withdrawal exists, even if the withdrawal would have a material adverse effect on the interests of the client.¹³⁷ Under DR 2-110(A)(2) as amended, the lawyer would have to take steps to the extent reasonably practicable to avoid foreseeable prejudice to the client's rights, including giving due notice and allowing time for the client to employ other counsel. The Jones Committee supported this amendment because it believed that under the 1970 Code, clients could place the lawyer in a position where withdrawal was desirable but prohibited because of the possible prejudice to the client. The Committee maintained that the specified justifications for withdrawal were serious enough to strike a proper balance between the rights of lawyers and clients.¹³⁸ The House of Delegates rejected a proposal by the Jones Committee to add to the list the situation where representation would result in an unreasonable financial burden on the lawyer, even though that ground for withdrawal appears in Model Rule 1.16(b)(6).¹³⁹

135. MODEL RULES, *supra* note 3, Rule 1.2(b).

136. MODEL RULES, *supra* note 3, Rule 1.16(b).

137. 1990 CODE, *supra* note 1, DR 2-110(C).

138. *See supra* note 10.

139. Compare FEBRUARY 1987 DRAFT, *supra* note 43, at 41 with OCTOBER 1987 DRAFT, *supra* note 12, at 38-41; MODEL RULES, *supra* note 3, Rule 1.16(b)(6).

The one addition to the list of reasons for permissive withdrawal is DR 2-110(C)(1)(g), authorizing withdrawal where the client has used the lawyer's services to perpetrate a crime or fraud. This addition, which also appears in Model Rule 1.16(b)(2),¹⁴⁰ may be referred to as the OPM exception. In *In re O.P.M. Leasing Services, Inc.*,¹⁴¹ the client admitted that it had used the firm's services to close several fraudulent lease financing transactions. The client, however, represented to the firm that all fraudulent conduct occurred in the past, and that all current transactions were completely honest. Thus, the law firm concluded that the 1970 Code provided no grounds for withdrawal.¹⁴² DR 2-110(C)(1)(g) allows a lawyer to withdraw on the ground that the lawyer's services have been used to commit a past crime or fraud, even where the lawyer has no reason to believe that any present or future criminal activity is likely.

E. Canon 4 — Preserving the Client's Confidences¹⁴³

Given the lengthy and often bitter debate concerning the subject of confidentiality in connection with the ABA's adoption of the Model Rules, it may be surprising to some that New York has effected only minor changes in Canons 4 and 7.¹⁴⁴ It seems likely, however, that the vehemence of the New York State Bar Association's opposition to Model Rules 1.6 and 3.3¹⁴⁵ stemmed from the belief that the 1970 Code, as previously interpreted, struck a fair balance between the interests of the public and the sanctity of the attorney-client relationship.

There has been only one change to the Disciplinary Rules concerning disclosure of client confidences and secrets. A new DR 4-101(C)(5) incorporates language from one of the comments to Model Rule 1.6.¹⁴⁶ DR 4-101(C)(5) allows a lawyer to reveal confidences or secrets to the extent implicit in withdrawing a previously rendered written or oral opinion when the lawyer discovers that the opinion is based on materially inaccurate information or is being used in the furtherance of criminal or fraudulent conduct and where the lawyer believes a third person is still relying on the opinion or representation.

140. MODEL RULES, *supra* note 3, Rule 1.16(b)(2).

141. 13 B.R. 64 (S.D.N.Y. 1981), *aff'd*, 670 F.2d 383 (2d Cir. 1982).

142. See Taylor, *Ethics and the Law: A Case History*, N.Y. Times, January 9, 1983, § 6 (Magazine), at 31.

143. The only amendments to Canon 3 were changes to effect gender-neutrality.

144. For a discussion of the changes to Canon 7, see *infra* notes 192-215 and accompanying text. Only the changes to Canon 4 are discussed in this section.

145. MODEL RULES, *supra* note 3, Rules 1.6, 3.3.

146. MODEL RULES, *supra* note 3, Rule 1.6.

Although some debate existed over whether the 1970 Code allowed a lawyer to withdraw his or her opinion, even though failure to do so might be deemed aiding and abetting a fraud on the part of the client, the prevailing view would have permitted withdrawal of the opinion without further explanation.¹⁴⁷ This "withdrawal-without-comment" solution also has been approved where the lawyer believes the client intends to commit perjury.¹⁴⁸

The second change in Canon 4 is a new EC 4-7, which provides lawyers with guidelines to determine when to reveal confidential client information under DR 4-101(C) and sets forth an admonition to grievance committees and courts that the lawyer's decision regarding disclosure should not subject the lawyer to discipline. The lawyer's discretion to disclose future crimes is very broad; it is not limited to serious crimes, but covers any crime. Ethical Consideration 4-7, which codifies concepts set forth in a 1984 opinion of the State Bar's Ethics Committee,¹⁴⁹ suggests that the lawyer consider such factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that the crime will be committed and the crime's imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information and any aggravating or extenuating circumstances.

F. Canon 5 — Conflicts of Interest

1. *Payment of Court Costs*

Traditional notions of champerty and maintenance prohibit a lawyer from agreeing to pay the costs incurred in litigation. Moreover, paying such costs is deemed to give a lawyer financial interest in the outcome of the litigation that may affect the lawyer's independent judgment. Accordingly, under both EC 5-8 and DR 5-103(B)(2) of the 1970 Code, a lawyer was prohibited from advancing such costs unless the client remained ultimately liable for their payment. This provision proved worrisome to lawyers engaged in pro bono work for

147. See Sonde, *Continuing Debate on Attorneys' Responsibilities to the Public and Third Parties*, 36 BUS. LAW. 585 (1981); *ABA Proceedings of Corporate Law Department Forum, Panel Discussion*, 36 BUS. LAW. 597 (1981).

148. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (if the court asks the lawyer to confirm an untruthful statement of the client, the lawyer should ask to withdraw, although this would doubtless cause the court to inquire further as to the truth).

149. NYSBA Comm. on Professional Ethics, Formal Op. 562 (1984).

indigent clients whose means were insufficient to guaranty the payment of court costs. Several ethics opinions held that, where law does not prohibit the practice, a lawyer ethically may pay court and other litigation costs for indigent clients.¹⁵⁰ The amendments to EC 5-8 and DR 5-103(B)(2) codify those opinions by providing that a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable litigation expenses on behalf of the client unless such payment is prohibited by law or by court rules.

2. *Literary or Media Rights*

It is not uncommon for lawyers to buy from their clients the publication or television/movie rights to their stories.¹⁵¹ Indeed, this may be one way for clients to finance their cases. Ownership of such rights, however, may raise conflicting interests. The lawyer's desire for a sensational story may compromise his or her ability to attain the most advantageous disposition for the client. EC 5-4 and DR 5-104(B) formerly prohibit the lawyer from negotiating an interest in the publication rights to the subject matter of the representation prior to the conclusion of all aspects of the matter giving rise to the representation. Although EC 5-4 referred to television, radio and motion picture rights as well as newspaper, magazine and book rights, the Jones Committee, like the drafters of Model Rule 1.8(d),¹⁵² broadened the terminology from "publication" rights to "literary or media" rights to incorporate new forms of transmitting information.¹⁵³

3. *The Lawyer as Witness*

The rules of the profession long have provided that a lawyer who may be called as a witness for the client, other than to testify as to formalistic or uncontested issues, should not try the case.¹⁵⁴ The 1970 Code also provided that none of the lawyer's partners or associates

150. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1361 (1976).

151. See *Maxwell v. Superior Court*, 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982). The resulting story, however, may effect a waiver of the attorney-client privilege. See *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987).

152. MODEL RULES, *supra* note 3, Rule 1.8(d).

153. See OCTOBER 1987 DRAFT, *supra* note 12, at 54.

154. See, e.g., American Bar Association Canons of Professional Ethics, Canon 19, 33 ABA REPORTS 85 (1908).

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client.

Id.

could undertake the representation.¹⁵⁵ Under several amendments to the 1970 Code, only the lawyer-witness and not his or her partners and associates will be disqualified.

EC 5-9 identifies four reasons for disqualifying the lawyer-witness: (1) the lawyer-witness is more easily impeachable for interest and, thus, may be a less effective witness; (2) opposing counsel may be handicapped in challenging the credibility of the lawyer-witness; (3) it is unseemly, and may be ineffective, for a lawyer-witness to argue his or her own credibility; and (4) the roles of advocate and witness are inconsistent, for the advocate's function is to introduce the client's case in its best light, while the obligation of the witness is to state the facts of the case objectively. For these reasons, DR 5-101(B) prohibited the acceptance of employment where it was obvious that the lawyer ought to be called as a witness. Moreover, DR 5-102(A) required withdrawal when, after accepting representation, the lawyer learned that he or she ought to be called as a witness for the client.

The rationales of former DR 5-101(B) and DR 5-102(A) are weak when applied to the affected lawyer,¹⁵⁶ and even weaker when applied to the entire firm.¹⁵⁷ The disqualification of the entire firm has been criticized as having an unnecessarily harsh effect on clients, because it forces clients to hire new counsel to represent them at trial.¹⁵⁸ For these reasons, the 1990 Code, like Model Rule 3.7(b),¹⁵⁹ does not disqualify the entire firm when one lawyer may be called as a witness.

The amendments to DR 5-101(B) and DR 5-102 specify that the affected lawyer may not *act as an advocate* in any such proceeding, and thus clarifies that the lawyer may continue to work on the matter.¹⁶⁰ In addition, the disqualification of the other lawyers in the firm

155. See 1970 CODE, *supra* note 1, DR 5-102(A).

156. For example, the regular counsel for a client will be impeachable for interest whether or not the lawyer serves as an advocate in the matter in which he or she will testify. Moreover, matters of credibility should certainly not apply in a non-jury trial. On the theory that the rule was designed to protect the client rather than the opposing lawyer, California amended its code to allow a lawyer to serve as both advocate and witness where the client consents in writing after full disclosure. CALIFORNIA RULES OF PROFESSIONAL CONDUCT, Rule 2-111(A)(4) (1975).

157. See *People ex. rel. Younger v. Superior Court*, 86 Cal. App. 3d 180, 150 Cal. Rptr. 156 (1978) (court refuses to apply vicarious disqualification to prosecutor's office, and states that most of EC 5-9's reasons for not allowing a lawyer to be both advocate and witness do not apply when the witness's law firm acts as counsel); *Plotkin v. Interco Development Corp.*, 137 A.D.2d 671, 524 N.Y.S.2d 763 (2d Dep't 1988).

158. See generally Note, *The Testifying Advocate-Witness Rule: If Z, then X. But Why?*, 52 N.Y.U. L. REV. 1365 (1977).

159. MODEL RULES, *supra* note 3, Rule 3.7(b).

160. Cf. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1529 (1989) (reaching the same conclusion under the Model Rules).

has been eliminated from these rules, as well as from the vicarious disqualification provisions of DR 5-105(D), unless the lawyer-witness will be called by the adversary to give testimony that may prejudice the client.

4. *Vicarious Disqualification*

Under the rule of vicarious disqualification contained in DR 5-105(D) of the 1970 Code, where one lawyer in a firm is required to decline or withdraw from representation under DR 5-105, governing the conflicts of interest between two clients, no other lawyer in the firm may continue the representation. When the ABA amended its version of DR 5-105(D) to apply vicarious disqualification to all disciplinary rules, not just DR 5-105,¹⁶¹ New York did not follow suit. Nevertheless, the State Bar Association Ethics Committee opined that the rule in New York should be interpreted as if the amendment had been adopted.¹⁶²

Such a broad interpretation hardly makes sense. For example, where a lawyer is required to decline representation because he or she is not competent to handle the matter, another lawyer in the firm should not be barred from continuing representation. Similarly, where a lawyer is obligated to withdraw under DR 2-110(B)(3) because of a mental or physical condition, or under DR 2-110(B)(2) and DR 7-101(A) because dislike of the client makes the lawyer incapable of representing the client with zeal, there is no reason why another lawyer in the firm should be disqualified from handling the case.

Consequently, the amendment to DR 5-105(D) limits vicarious disqualification to the conflict of interest situations set forth in DR 5-101(A) (financial, business or personal interests), DR 5-105(A), (B) and (C) (representation of differing interests), DR 5-108 (undertaking a representation adverse to a former client on a matter substantially related to the former representation) and DR 9-101(B) (representation of a private client in a matter which a former government lawyer was personally and substantially involved).¹⁶³

The amendment is not without anomaly. For example, if one lawyer in the firm is unable to represent a client because of personal beliefs, another lawyer in the firm arguably should not be prohibited

161. MODEL CODE, *supra* note 2, DR 5-105.

162. NYSBA Comm. on Professional Responsibility, Op. 502 (1979)

163. In the case of the former government lawyer, the firm is not vicariously disqualified if the former government lawyer is effectively screened from participation in the matter as provided in DR 9-101(B). For a discussion of DR 9-101(B), see *infra* notes 220-29 and accompanying text.

from undertaking the representation. The Jones Committee, however, did not believe it was possible to draft DR 5-105(D) to accommodate such fine distinctions under DR 5-101(A).¹⁶⁴

New DR 5-105(D) reflects a drafting change made by the Jones Committee to correct what it deemed to be an unintended effect of poor drafting. The original version of DR 5-105(D) provided that where one lawyer was required to decline representation, no other lawyer in the firm was permitted to continue it. The effect of the provision could be avoided where the client first went to a lawyer who was not required to decline the representation. The new provision clarifies that vicarious disqualification applies regardless of whether the lawyer with the primary disqualification is approached for representation.

5. *Conflicts with Former Clients*

The Original Code became effective long after Judge Weinfeld first articulated the "substantially related" test to distinguish between conflicts of interest between concurrent and successive representations.¹⁶⁵ Nevertheless, both the Original Code and the 1970 Code have failed to set forth this important distinction to aid lawyers in analyzing conflicts problems. To remedy this situation, new DR 5-108(A), like Model Rule 1.9,¹⁶⁶ prohibits a lawyer who has represented Client A from thereafter representing Client B in the same or a substantially related matter in which Client B's interests are materially adverse to those of Client A, without obtaining the consent of Client A. In addition, the new rule emphasizes that a lawyer may not use confidences or secrets of Client A in the subsequent matter except when permitted under DR 4-101(C) or when the information has become generally known. This latter exception departs from EC 4-4, which provides that information is protected as a "secret" despite "the fact that others share the knowledge," but remains consistent with the attorney-client privilege, which does not apply when the information becomes publicly known. This departure from Canon 4 is justified in the context of DR 5-108, because a former client should not preclude a lawyer from representing another client when the lawyer cannot derive any advantage from the prior representation.

164. See FEBRUARY 1987 DRAFT, *supra* note 43, at 66 and accompanying Source Notes.

165. *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

166. MODEL RULES, *supra* note 3, Rule 1.9.

6. *Lateral Movement Between Firms*

The House of Delegates rejected a recommendation of the Jones Committee to add provisions concerning lateral movement of lawyers between law firms.¹⁶⁷ Thus, the law in New York State regarding lateral movement between law firms remains the same as it was before the adoption of the 1990 Code amendments.

The Jones Committee proposed two additions to the 1970 Code to be denominated as DR 5-108(B) and (C).¹⁶⁸ The first provided that when a lawyer, or the firm where he or she practiced, had represented Client A, and the lawyer then became associated with a new firm, the new firm was barred from representing Client B in the same or a substantially related matter where the interests of Client B were materially adverse to the interests of Client A. This rule merely codified the existing law on "concurrent representation" and would not have created any controversy had the House of Delegates been asked to vote on it alone.

The vote on this proposed addition, however, was coupled with a vote on a far more controversial proposal, DR 5-108(C).¹⁶⁹ This provision allowed the new firm to represent Client B if three conditions were met: (1) the transferring lawyer did not participate personally or substantially in the representation at the prior firm; (2) the transferring lawyer learned no confidences or secrets of Client A; and (3) the transferring lawyer was effectively screened from any participation in the new representation and was apportioned no part of the fee from Client B. This proposal was criticized by both liberals and conservatives.¹⁷⁰ Liberals argued that, under current New York State and Second Circuit case law, the lawyer must have had access to Client A's confidences and secrets before being disqualified. Accordingly, liberals contended that disqualification should apply only where the lawyer, not merely the former firm, represented Client A or had access to Client A's confidences or secrets.¹⁷¹ Where no such access existed,

167. Compare FEBRUARY 1987 DRAFT, *supra* note 43, at 68-69 and accompanying Source Notes with 1990 CODE, *supra* note 1, Canon 5.

168. FEBRUARY 1987 DRAFT, *supra* note 43, at 68-69 and accompanying Source Notes.

169. New York State Bar Association Minutes of the House of Delegates meeting, June 26-27, 1987.

170. See, e.g., Gillers, *Amending State Ethics Code — Conflicts of Interest Gone Awry*, N.Y.L.J., May 18, 1987, at 1, col. 3 ("Young New York lawyers, and older ones who may want to change firms, pay attention. Your job mobility is about to be sharply curtailed."); Statement of Barry H. Garfinkel to New York State Bar Association in opposition to proposed DR 5-108 (April 10, 1987).

171. See *Laskey Bros. v. Warner Bros. Pictures, Inc.*, 224 F.2d 824, 827 (2d Cir. 1955) (a lawyer, formerly of Firm A, could rebut the presumption he had confidential client

the lawyer should not be prohibited from representing Client B. Conservatives argued that, where the lawyer did have access to Client A's confidential information, screening should not be permitted, except in the case of former government lawyers, where a special public policy toward encouraging public service applies.¹⁷² To avoid departure from existing case law, the House of Delegates rejected the proposed amendment.¹⁷³

7. *The Organizational Client*

The complex subject of the representation of organizational clients, particularly of corporations, was addressed in the 1970 Code in four sentences, noting that a lawyer represents the corporate entity and not any stockholder, director, officer, employee, representative or other person connected with the corporation.¹⁷⁴ The Model Rules devoted an entire rule, Model Rule 1.13,¹⁷⁵ to the conflicts that may occur in representing an organization. In particular, the rule sets forth the responsibilities of a lawyer when an individual associated with the organization violates a legal obligation to the organization or engages in a violation of law that may be imputed to the entity and is likely to

information that would benefit the clients of his new firm, Firm B; otherwise, "young lawyers might seriously jeopardize their careers by temporary affiliation with large law firms"); *United States v. Standard Oil Company*, 136 F. Supp. 345, 364 (S.D.N.Y. 1955) ("[I]t is doubtful if the Canons of Ethics are intended to disqualify an attorney who did not actually come into contact with materials substantially related to the controversy at hand when he was acting as attorney for a former client now adverse to his position."); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975) ("cases and the Canons on which they are based are intended to protect the confidences of former clients when an attorney has been in a position to learn them"); *USFL v. NFL*, 605 F. Supp. 1448, 1466 (S.D.N.Y. 1985) (court recognizes in dicta that the presumption that each lawyer in a firm is privy to confidences is a rebuttable one); *Greene v. Greene*, 47 N.Y.2d 447, 453, 418 N.Y.S.2d 379, 382 (1979) ("reasonable probability of disclosure" of confidences required for disqualification); *Lopez v. Precision Papers, Inc.*, 99 A.D.2d 507, 507, 470 N.Y.S.2d 678, 679 (2d Dep't 1984) (although attorney associated with plaintiff's counsel was privy to confidential information about defendants, appearance of impropriety created by such conduct was "too slender a reed on which to rest a disqualification order").

172. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975); Ass'n of the Bar of the City of N.Y., Comm. of Professional and Judicial Ethics, Op. 889 (1976). The exception that proves the rule is *NFC Inc. v. General Nutrition, Inc.*, 562 F. Supp. 332, 334-35 (D. Mass. 1983), where the court approved screening. See also *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981) (Supreme Court recognizes that measures short of disqualification are available, including a protective order limiting counsel's ability to disclose or to act on purportedly confidential information).

173. See generally OCTOBER 1987 DRAFT, *supra* note 12, at 69-70.

174. See 1970 CODE, *supra* note 1, EC 5-18.

175. MODEL RULES, *supra* note 3, Rule 1.3.

result in substantial injury to the entity.¹⁷⁶

Because many of the guidelines set forth in Model Rule 1.13 are suggestions of permitted conduct, the Jones Committee recommended that a version of those guidelines be added to EC 5-18.¹⁷⁷ The amendment proposed that the lawyer proceed in the best interest of the entity, taking into account such factors as the seriousness of the violation and its consequences, the responsibility in the entity and the apparent motivation of the person involved in the conduct, and the policies of the entity concerning such matters.¹⁷⁸ This formulation allows the matter to be pursued through the corporate hierarchy or "chain of command," rather than by the board of directors.¹⁷⁹

New DR 5-109, also derived from Model Rule 1.13, encompasses the classic conflict of interest that occurs when the interests of the corporation diverge from the interests of an officer, director, employee or shareholder with whom the lawyer is dealing. Such conflicts may occur, for example, when both the organization and directors, officers or employees are accused of wrongdoing or when the organization or its lawyers conduct an investigation of possible wrongdoing by corporate officers. The new rule requires the lawyer to explain to the individuals that he or she represents only the organization.

8. *Membership in a Legal Services Organization*

The final new conflicts provision, DR 5-110, addresses the situation where a lawyer is a member of a legal services organization whose clients may have interests different than those of a private client of the lawyer or his or her firm. A 1978 opinion of the New York State Bar Association Ethics Committee¹⁸⁰ held that, where a lawyer served as a member of the board of a legal services organization, neither the Board member nor others in his or her firm could represent clients with interests adverse to those of a client of the organization.¹⁸¹ This opinion was consistent with an informal ABA opinion issued the previous year.¹⁸² In a 1979 formal opinion,¹⁸³ however, the ABA Ethics Committee reversed itself, holding that the board member of a legal services organization and his or her firm may undertake the adverse

176. *Id.*

177. FEBRUARY 1987 DRAFT, *supra* note 43, at 58-59.

178. 1990 CODE, *supra* note 1, EC 5-18.

179. *See, e.g.*, *In re Carter & Johnson*, Fed. Sec. L. Rep. (CCH) ¶ 82,847 (1981).

180. NYSBA Comm. on Professional Ethics, Op. 489 (1978).

181. *Id.*

182. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1395 (1977).

183. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 345 (1979).

representation as long as the organization's legal staff is insulated from influence by the board and lawyers for both sides believe that neither client would be deprived of independent representation.¹⁸⁴ New York did not reconsider its opinion. Nonetheless, the Jones Committee concluded that the ABA was correct.¹⁸⁵

Because the board member of a legal services organization does not represent the clients of the organization, the ethical issue posed is actually an appearance of impropriety under Canon 9 rather than a conflict in representation under Canon 5.¹⁸⁶ Even so, the Jones Committee addressed the issue in Canon 5.¹⁸⁷ New DR 5-110 allows the lawyer to serve a legal services organization even if the organization's clients have interests contrary to those of a client of the lawyer-board member, as long as the lawyer-board member does not knowingly participate in any decision of the organization where such participation would be incompatible with the lawyer's duty of loyalty to a client or the decision could have a material adverse effect on the representation of a client of the organization.

G. Canon 6 — Competent Representation

1. Responding to Client Inquiries

One of the most frequent complaints by clients about lawyers is that lawyers do not return client phone calls or respond promptly to inquiries regarding the status of pending legal matters. The Jones Committee thought it desirable that the 1990 Code stress the importance of responding promptly to client inquiries.¹⁸⁸ In recognition that lawyers require adequate allowance to respond to clients as appropriate, the provision was added as an Ethical Consideration, EC 6-4, rather than as a Disciplinary Rule.¹⁸⁹

2. Limiting Lawyer's Liability to Client

The 1970 Code prohibited a lawyer from seeking to limit his or her individual liability to the client for malpractice. As EC 6-6 stated:

184. *Id.*

185. FEBRUARY 1987 DRAFT, *supra* note 43, at 70.

186. Indeed, the ABA chose to make membership in legal services organizations the subject of Model Rule 6.3, rather than part of the conflicts sections, although Model Rule 6.3 depends upon compliance with the general conflict rule — Model Rule 1.7. See MODEL RULES, *supra* note 3, Rules 6.3, 1.7.

187. FEBRUARY 1987 DRAFT, *supra* note 43, at 69-70.

188. *Id.* at 72.

189. See MODEL RULES, *supra* note 3, Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information).

"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."¹⁹⁰ In practice, this prohibition has been applied to prospective limitation of liability, but not to settlement of malpractice claims threatened or filed by the client.¹⁹¹ The amendments to EC 6-6 and DR 6-102(A) clearly set forth the different rules in these two situations. The lawyer may not seek to limit his or her malpractice liability prospectively; however, the lawyer may settle a claim for malpractice after advising the client that independent representation is appropriate.

H. Canon 7 — Zealous Representation

1. Prosecution Subpoenas of Defense Attorneys

A subject that has generated great controversy in the past few years, as well as charges of overzealousness on the part of prosecutors, is the summoning of defense lawyers in criminal matters. The most common reason for such subpoenas is to elicit information about the fee arrangement in an attempt to show that the client has substantial assets acquired through illegal activity or that the client is associated in a criminal enterprise with another who is paying the attorney's fee. Attorneys generally have viewed these attempts to require lawyers to provide testimony against their clients as an intrusion upon the confidential attorney-client relationship.¹⁹² These subpoenas may have a substantial effect on the willingness of clients to disclose confidential information to their lawyers. Subpoenas may also provide the prosecution with a useful tool to disqualify defense counsel, for DR 5-102(B) provides that a lawyer who must give testimony that may be prejudicial to the client must withdraw as an advocate.

In response to this problem, the Massachusetts Supreme Judicial Court, at the prompting of the Massachusetts State Bar Association, adopted a new disciplinary rule, Prosecution Function 15,¹⁹³ which makes it unprofessional conduct for a prosecutor to issue to a lawyer a grand jury subpoena seeking testimony about a client of such lawyer

190. 1970 CODE, *supra* note 1, EC 6-6.

191. See NYSBA Comm. on Professional Ethics, Op. 591 (1988) ("A lawyer may ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair.").

192. See, e.g., Rudolph and Maher, *The Attorney Subpoena: You are Hereby Commanded to Betray Your Client*, 1 CRIM. JUSTICE 15 (1986).

193. MASS. S.J.C. Rule 3:08, PF 15.

without prior judicial approval. This rule was upheld against a challenge under the Supremacy Clause.¹⁹⁴ Indeed, the First Circuit declared the disciplinary rule to be a "limited, reasonable response to what appears to be a mounting professional problem."¹⁹⁵

The Second Circuit has proved less sympathetic to the plight of criminal defendants and their lawyers. In an *en banc* decision,¹⁹⁶ the Second Circuit unanimously held that the government was not required to make a showing of need before issuing a subpoena to the defendant's lawyer. The court also rejected, at least in a pre-indictment context, the argument that testimony by the lawyer would disqualify the lawyer from further representation of the client: "Before disqualification can even be contemplated, the attorney's testimony must incriminate his client; the grand jury must indict; the government must go forward with the prosecution of the indictment; and ultimately, the attorney must be advised that he will be called as a trial witness against his client."¹⁹⁷ In light of the opposition to requiring prosecutors to obtain prior judicial approval of subpoenas of lawyers, the Jones Committee declined to recommend adoption of any amendment to the 1970 Code that would require such prior judicial approval. Nevertheless, the sentiment against attorney subpoenas in the House of Delegates was so strong that the House approved amendments to EC 7-14 and DR 7-103(C).¹⁹⁸

The first sentence of DR 7-103(C) adopted by the House of Delegates was benign; it provides that a prosecutor or other government lawyer may not seek to compel testimony other than by lawful means, and must comply with all applicable court rules relating to subpoenas. The second sentence, however, was controversial for two reasons:¹⁹⁹ it applied to all government lawyers, not just public prosecutors, and it required prior judicial approval for a subpoena of a lawyer seeking information about a past or present client and required that the application for the subpoena be on notice to the lawyer and the client.²⁰⁰ As a result of the second sentence, the New York standard would

194. *United States v. Klubock*, 639 F. Supp. 117 (D. Mass. 1986), *aff'd*, 832 F.2d 664 (1st Cir. 1987).

195. 832 F.2d at 657.

196. *In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 781 F.2d 238 (2d Cir. 1985).

197. *Id.* at 245. The standard is actually whether the lawyer "[m]ay be called as a witness. . . ." MODEL CODE, *supra* note 3, DR 5-102(B).

198. FEBRUARY 1987 DRAFT, *supra* note 43, at 79, 90-91 and accompanying Source Notes.

199. *Id.*

200. *Id.*

have surpassed the disciplinary rule adopted in Massachusetts.²⁰¹

The Appellate Divisions agreed with the Jones Committee. In view of *In re Grand Jury Subpoena Served Upon John Doe, Esq.*,²⁰² they determined not to accept either sentence of the proposed Disciplinary Rule.²⁰³ Accordingly, if the State Bar wishes to attack the right of prosecutors to subpoena non-privileged information from lawyers, it will have to seek changes in the rules of criminal and grand jury procedure.

It is interesting to note that the American Bar Association, at its February, 1990 meeting, approved a new Model Rule, 3.8(f),²⁰⁴ which requires prior judicial approval of, and an opportunity for, an adversarial proceeding with respect to a subpoena requiring a lawyer to appear before a grand jury or other criminal proceeding to provide evidence about a past or present client. The rule also requires that the information sought from the lawyer be essential to the successful completion of an ongoing investigation and that no other feasible alternative to obtaining it exists.²⁰⁵ Whether the rule will be adopted by the individual Model Rules states remains to be seen.

2. *Citing Controlling Authority*

The original DR 7-106(B)(1) required a lawyer to disclose legal authority "in the controlling jurisdiction" if it was directly adverse to the position of his or her client and opposing counsel had not disclosed it. As EC 7-23 explains, 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. Unfortunately, the Ethical Consideration fails to explain what is meant by "controlling jurisdiction." An opinion of the New York City Bar explained that the lawyer's obligation is to disclose controlling precedent.²⁰⁶ For example, in the federal courts an attorney must disclose opinions of the United States Supreme Court and the court of appeals of the circuit in which the tribunal is located.²⁰⁷ An amendment to DR 7-106(B)(1) adopts this position and requires a lawyer to disclose "controlling legal authority."

201. The Massachusetts rule is limited to present clients and does not require notice to the clients. MASS. S.J.C. Rule 3:08, PF 15.

202. 781 F.2d 238 (2d Cir. 1985).

203. Compare OCTOBER 1987 DRAFT, *supra* note 12, at 92-93 with 1990 CODE, *supra* note 1, DR 7-103(C).

204. MODEL RULES, *supra* note 3, Rule 3.8(f).

205. *Id.*

206. Ass'n of the Bar of the City of N.Y., Comm. of Professional and Judicial Ethics, Formal Op. 80-4 (1980).

207. *Id.*

3. Trial Publicity

Trial publicity has been a subject of intense debate during the past several years. The Federal Bar Counsel has called for an easing of restrictions on statements to the media by criminal defense lawyers because the rules are perceived to give prosecutors an unfair advantage.²⁰⁸ Surprisingly, the controversy surrounding the Jones Committee's recommended changes to the 1970 Code stemmed not from its general rules concerning statements to the press, but rather from a relatively small change to the "safe harbor" list of permitted statements.

New DR 7-107, as originally proposed by the Jones Committee,²⁰⁹ mirrored Model Rule 3.6.²¹⁰ The amended DR 7-107 varies significantly from DR 7-107 in the 1970 Code, which had been held unconstitutional by several courts.²¹¹ The individual paragraphs of the old rule covered different stages of various legal proceedings, with a list of statements that could or could not be made. Generally, if a statement did not fall within a safe harbor, it was prohibited. This scheme was held unconstitutional because it did not require a showing that a particular prohibited statement actually threatened the fair administration of justice.²¹²

The Jones Committee proposal, like Model Rule 3.6, contained the general rule that a lawyer may not make an extrajudicial statement that a reasonable person would expect to be disseminated if he or she knows, or reasonably should know, that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.²¹³ DR 7-107(B) then set forth statements ordinarily considered prejudicial and DR 7-107(C) set forth a safe harbor listing statements that are not deemed prejudicial.

The Committee received complaints from press groups because it omitted four statements on the safe harbor list in the 1970 Code: dis-

208. See, e.g., Wise, *Lawyer's Press Remarks — Misconduct or Free Speech?*, N.Y.L.J., May 29, 1987, at 1, col. 4; Wise, *Bar Council Would Ease Rule on Lawyer's Press Statements*, N.Y.L.J., May 18, 1987, at 1, col. 4. The rule that produced the complaint of the Federal Bar Council was Local Rule 7(a) of the Eastern and Southern Districts of New York. E.D.N.Y. R.7(a); S.D.N.Y. R.7(a). This rule, however, is identical to DR 7-107 in the 1970 Code.

209. FEBRUARY 1987 DRAFT, *supra* note 43, at 58.

210. MODEL RULES, *supra* note 3, Rule 3.6.

211. See *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Markfield v. Association of the Bar of the City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82 (1st Dep't), *appeal dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1975).

212. *Id.*

213. FEBRUARY 1987 DRAFT, *supra* note 43, at 101-02.

closures about resistance, pursuit, use of weapons and physical evidence seized.²¹⁴ The Committee agreed with the comment in the Code Comparison section of the Model Rules that it is impossible to say that these four disclosures can never be prejudicial.²¹⁵ Revelations about these factors may be substantially prejudicial and are frequently the subject of pre-trial suppression motions.

In a compromise, the House of Delegates restored the four disclosures to DR 7-107(C), so that they would be treated the same as the other disclosures referred to in that paragraph. The House of Delegates also made the entire paragraph subject to the "likelihood of materially prejudicing the proceeding" test in paragraph (A). Thus, in effect, paragraph (C) is no longer a safe harbor. The lawyer must always exercise discretion before making a disclosure, weighing the need for immediate disclosure against the likelihood of potential prejudice. While the existence of the list in DR 7-107(C) indicates that those disclosures ordinarily are not prejudicial, the lawyer still must exercise his or her judgment in every case.

I. Canon 8 — Improving the Legal System

Many lawyers are members of organizations that seek law reform. Occasionally, a lawyer's personal interest in law reform may conflict with a client's economic interest. Those conflicts are addressed by DR 5-101. The Jones Committee spoke to a reverse side of the problem in an amended EC 8-4, derived from the comment to Model Rule 6.4.²¹⁶ After admonishing lawyers to be mindful of the conflicts provisions in DR 5-101 through 5-110, the Ethical Consideration states that, "[a] lawyer is professionally obligated to protect the integrity of the organization by making an appropriate disclosure within the organization when the lawyer knows that a private client might be materially affected."²¹⁷ This formulation applies whether the effect on the client was positive or negative. EC 8-4 differs from Model Rule 6.4, which requires disclosure only if the client would be materially benefitted.

214. See letter from Jay B. Wright, Executive Director, New York Fair Trial Free Press Conference to the Honorable Thomas M. Whalen, III, Mayor of Albany (March 25, 1989) (subsequently transmitted to the Jones Committee); Western Union Mailgram from New York State Society of Newspaper Editors to Marjorie Gross (June 26, 1987) (delivered at the House of Delegates meeting). Compare 1970 CODE, *supra* note 1, DR 7-107 with FEBRUARY 1987 DRAFT, *supra* note 43, at 99-100.

215. See *supra* note 10.

216. MODEL RULES, *supra* note 3, Rule 6.4.

217. 1990 CODE, *supra* note 1, EC 8-4.

J. Canon 9 — The Appearance of Impropriety

Canon 9 has drawn disfavor in the past decade. For example, the Second Circuit has refused to base an attorney disqualification on the appearance of impropriety alone, holding that it is “simply too slender a reed on which to rest a disqualification order except in the rarest of cases.”²¹⁸ The Model Rules completely abandoned the concept. Nevertheless, the New York State Bar Association decided to retain Canon 9²¹⁹ and to add two new disciplinary rules.

1. *The Revolving Door*

During the 1970s, the issue of law practice by former government lawyers was a topic of major concern. The Ethics in Government Act,²²⁰ a variety of court cases²²¹ and ethics opinions²²² have dealt with the ability of a former government lawyer and his or her law firm to represent, or to continue representing, clients on whose matters the lawyer worked while in government service. Formerly, DR 9-101(B) prohibited a lawyer from accepting private employment in a matter in which he or she had substantial responsibility while a public employee. Moreover, DR 5-105(D) extended the disqualification to the entire firm. New DR 9-101(B)(1) codifies the cases and ethics opinions interpreting these standards.

The new rule generally provides that, unless the law expressly authorizes it, a former government lawyer may not represent a private client in a matter in which the lawyer participated personally and substantially as a government employee. Other lawyers in the firm, however, may undertake the representation as long as the disqualified lawyer is effectively screened from any participation in the matter and is apportioned no part of the fee, and there are no other circumstances of the representation that create an appearance of impropriety. The latter requirement refers to the inability to screen in small firms where it is impossible for the lawyers who undertake the representation to

218. Board of Education of the City of New York v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979).

219. Because the Appellate Divisions adopted only the Disciplinary Rules, Canon 9 itself should not be enforceable. Nevertheless, Canon 9 was often cited in conjunction with other sections of the 1970 Code as supporting disciplinary charges.

220. 18 U.S.C. § 207 (1978).

221. E.g., General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (*en banc*), vacated on other grounds, 449 U.S. 1106 (1981).

222. E.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

avoid contact with the disqualified lawyer.²²³

Two differences exist between new DR 9-101(B)(1) and Model Rule 1.11.²²⁴ The comment to Model Rule 1.11 explains that the language, "apportioned no part of the fee," does not prevent the disqualified lawyer from being paid a fixed salary, but only prevents the lawyer from receiving a pro rata share of all income or profits of the firm.²²⁵ Moreover, the Model Rules define the term "matter" broadly for purposes of determining when the former government lawyer worked on a "matter" for the government.²²⁶ The Jones Committee left the interpretation of these terms to the courts and ethics committees.²²⁷

New DR 9-101(B)(2) prohibits a former government lawyer who possesses information gained while in government service from representing other clients who could use that information to the material disadvantage of any person. Thus, a lawyer who participated in the investigation or prosecution of criminal charges against a party may not bring a civil suit against that same party. Therefore, third parties are protected against the use of information gained with the government's power of subpoena.²²⁸ A law firm may continue representation, however, as long as the tainted lawyer is screened.

DR 9-101(B)(1) and (2) strike an appropriate balance between the need of the government to recruit able attorneys from the private sector without making such attorneys unemployable following government service and the need of private clients to be protected against conflicts of interest.

New DR 9-101(B)(3), like Model Rule 1.11(c),²²⁹ addresses lawyers who go from private to public employment. The new rule provides that the lawyer may not participate in a matter in which he or she participated personally and substantially while in private practice unless, under applicable law, no one else is authorized or can be delegated to act in place of the tainted lawyer. This rule is sensible, because it protects the private client in all cases unless the public would otherwise be harmed because no one is authorized to act on its behalf.

223. *Cheng v. G.A.F. Corp.*, 631 F.2d 1052 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981).

224. MODEL RULES, *supra* note 3, Rule 1.11.

225. MODEL RULES, *supra* note 3, Rule 1.11 comment.

226. MODEL RULES, *supra* note 3, Rule 1.11(d).

227. Gillers, *Amending the Ethics Code — Conflicts of Interest, Screening*, N.Y.L.J., November 12, 1986, at 1, col. 4.

228. *See General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974).

229. MODEL RULES, *supra* note 3, Rule 1.11(c).

2. *Conflicts Involving Relatives*

In 1975, the New York City Bar Association deemed it necessary to publish a formal opinion regarding whether the separate practice of law in the same community by a husband and wife constituted a conflict of interest on the part of either spouse.²³⁰ Ethics opinions generally held that the husband and wife could not represent opposing parties and that their firms could represent opposing parties only with the consent of both clients, on the grounds of conflict of interest, potential compromise of client confidences and appearance of impropriety.²³¹ This rationale also was held applicable to a father and his son or daughter.²³² In a 1975 opinion of the ABA Ethics Committee,²³³ however, the ABA held that the Model Code did not expressly prohibit the acceptance of representation where a husband, wife, son, daughter, brother, father or other close relative represents the opposing party. Rather, the ABA allowed the clients to consent to such representation after full disclosure of the effect on the lawyers' loyalty, unless the interest of one of the relatives created a financial or personal interest that reasonably might affect the ability of the related lawyer to represent his or her client with undivided loyalty.²³⁴

DR 9-101(D) allows two related lawyers to appear opposite each other as long as each lawyer determines that he or she can adequately represent the interests of the client, the lawyer discloses the relationship to the client and the client consents. If either of the two lawyers is disqualified from representation, however, the other lawyers in his or her firm would not automatically be disqualified, since they presumably would not be subject to the same appearance of impropriety in appearing opposite someone else's relative.

3. *Handling Property of Others*

The final section of the 1990 Code governs the lawyer's handling of a client's property, including both funds and files. Lawyers' treatment of client property has created negative publicity for lawyers. Indeed, the court rules governing lawyers' fiduciary accounts, adopted by the First and Second Departments in December, 1988,²³⁵ were designed

230. NYSBA Comm. on Professional Ethics, Op. 886 (1975).

231. *See, e.g.*, NYSBA Comm. on Professional Ethics, Op. 368 (1974); Md. Formal Ethics Op. 77-2, 10 MD. B.J. 39 (Summer 1977).

232. Mich. S.B. Ethics Comm., Informal Op. 340, 57 MICH. ST. B.J. 336 (1978).

233. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975).

234. *Id.*

235. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 603.15 (1989) (First Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.12 (1989) (Second Department); Fox, *Rules for Fiduciaries Revised by Courts*, N.Y.L.J., Dec. 6, 1988, at 1, col. 3.

to buttress and ensure compliance with DR 9-102.

The most significant change in DR 9-102 was added by the Appellate Divisions. The Appellate Divisions incorporated into the Disciplinary Rule the provisions of the First and Second Department court rules on lawyer trust accounts and recordkeeping,²³⁶ with two modifications.²³⁷ The provisions of the court rules include the following requirements:²³⁸ (a) to establish in a bank or trust company in New York one or more special accounts for the safekeeping of property of others; (b) to designate those accounts in a manner sufficient to distinguish them from other accounts of the lawyer and (c) to maintain for seven years a variety of records, including those of the lawyer's bank accounts and client billing. In addition, the court rules provisions set forth specific requirements with respect to authorized signatories on the lawyer's special accounts, disposition of monies due to missing clients, and maintenance of records upon the dissolution of a law firm. Additional changes made by the Appellate Divisions would allow lawyers to withdraw funds from the trust account by international (as well as domestic) bank wire transfer with the written consent of the party entitled to the funds. These changes would also permit lawyers whose principal offices are outside New York State to maintain the required records outside the state but to make them available at their principal New York office when requested.²³⁹

Two other changes in DR 9-102 are worthy of note. First, new provision DR 9-102(B)(1) recognizes that a lawyer may hold funds of non-clients in the special account, for example, where a lawyer is acting as an escrow agent. Second, a minor change to the prohibition against the lawyer commingling a lawyer's own funds in the special account has been made. DR 9-102(B)(3) allows a lawyer to deposit enough of his or her own funds in the account not only to pay bank charges but also to maintain the account. In that way, if the bank's rules contain a minimum deposit amount to avoid service charges or to be eligible to bear interest, a lawyer can deposit a sufficient amount to meet the bank requirement.

On January 4, 1991, the Appellate Divisions jointly adopted several

236. See N.Y. COMP. CODES R. & REGS. tit. 22, § 603.15 (1989) (First Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.12 (1989) (Second Department).

237. Compare OCTOBER 1987 DRAFT, *supra* note 12, at 116-17 with 1990 CODE, *supra* note 1, DR 9-102.

238. N.Y. COMP. CODE R. & REGS. tit. 22, § 603.15 (1989) (First Department); N.Y. COMP. CODE R. & REGS. tit. 22, § 691.12 (1989) (Second Department); see 1990 CODE, *supra* note 2, DR 9-102.

239. OCTOBER 1987 DRAFT, *supra* note 12, at 116-17.

additional changes to DR 9-102.²⁴⁰ The most significant changes involve permissible locations of a lawyer's "special account" for funds of clients and others, and provisions for maintenance of records upon dissolution of a firm. These amendments, which were effective immediately, resulted from comments made by the Association of the Bar of the City of New York (New York City Bar).²⁴¹

The New York City Bar had argued that lawyers should be permitted to maintain escrow accounts outside New York.²⁴² The Appellate Divisions amended DR 9-102(B)(1) to provide that "special account" funds may be maintained in a bank or trust company located outside New York specifying the name and address of the bank or trust company where the funds are to be maintained.²⁴³ Similarly, the New York City Bar had argued that the rule on dissolved law firms, which required the partners to agree as to who should keep the firm's records, was impractical, given the amount of discord in many firm dissolutions. The Appellate Divisions amended DR 9-102(G) to provide that if the partners cannot agree on arrangements for maintaining the firm's records, any partner or former partner may apply for direction to the Appellate Division in which the principal office of the firm is located, or to the court's designee (presumably the clerk of the court).²⁴⁴ Any such direction will be binding.

240. Joint Order of the Appellate Divisions of the Supreme Court, First, Second, Third and Fourth Judicial Departments, In the Matter of the Amendments of DR 9-102 of the Disciplinary Rules of the Lawyer's Code of Professional Responsibility (January 4, 1991) (as yet unpublished order).

241. Letter from the Committee on Professional Responsibility of The Association of the Bar of the City of New York to the Justices of the Appellate Division (February 8, 1990, and amended February 14, 1990).

242. *Id.*

243. New DR 9-102(B)(1) now reads:

B. SEPARATE ACCOUNTS

1. A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law, shall maintain in a bank or trust company within the State of New York in the lawyer's own name, or in the name of a firm of lawyers of which he or she is a member, or in the name of the lawyer or firm of lawyers by whom he or she is employed, a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts which the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity, into which special account or accounts all funds held in escrow or otherwise intrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a bank or trust company located outside the State of New York with the prior written approval of the person to whom such funds belong specifying the name and address of the bank or trust company where such funds are to be maintained.

244. As amended, DR 9-102(G) states:

IV. Thoughts on the Concept of Uniformity of Regulation, the Adoption Process and the Results

A. Uniformity

Although thirty-nine states have adopted the Model Rules,²⁴⁵ substantial variation exists from state to state, particularly with respect to the rules governing disclosure of client confidential information.²⁴⁶ The major industrial and financial states, including New York, have customized the Model Code to their individual needs.²⁴⁷ Even if most of the concepts in the various codes are the same, this balkanization of the rules of professional responsibility at a time when the practice of law is becoming increasingly national is indeed ironic.

Traditionally lawyers have been subject to discipline only in the state in which they are admitted to practice.²⁴⁸ Nevertheless, both Nevada and Arkansas have asserted jurisdiction over lawyers not admitted in the state.²⁴⁹ Thus, the lack of uniformity among the states should be of concern to all lawyers with clients in other states.²⁵⁰

B. The Process For Change

The process for change in New York has proved exceedingly cumbersome. The current Disciplinary Rules have evolved over 6½ years from the time the ABA approved the Model Rules in August, 1983 until the Appellate Divisions approved the amended Disciplinary Rules in April, 1990. Several reasons existed for this delay. The proposed changes were extensive, and the time needed for careful consideration was even greater. The State Bar Association House of

G. DISSOLUTION OF A FIRM.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in DR 9-102(D). In the absence of agreement on such arrangements, any partner or former partner or member of a firm in dissolution may apply to the Appellate Division in which the principal office of the law firm is located or its designee for direction and such direction shall be binding upon all partners, former partners or members.

245. See, e.g., Law. Man. on Prof. Conduct (ABA/BNA) No. 99, at 01:3 - 01:4 (December 19, 1990).

246. See *id.*, No. 42, at 01:11 - 01:41.

247. *Id.*

248. See ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 4.1 (1983).

249. See NEV. SUP. CT. R. 99.1; ARKANSAS MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1989).

250. See generally ABA Committee on Counsel Responsibility, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229 (1990).

Delegates meets only quarterly; thus, any consideration that could not be completed at one meeting automatically was delayed for at least three months. The State Bar Association's rejection of the Halpern Committee's modified version of the Model Rules produced an additional 19-month delay during which the Jones Committee drafted amendments to the 1970 Code. Finally, the Appellate Divisions have no established procedures for dealing with recommendations regarding Disciplinary Rules. This accounts for at least some of the delay between the time the State Bar transmitted the proposed changes to the Appellate Divisions in October, 1987 and the final action of the Appellate Divisions in April, 1990.

The old method by which the Appellate Divisions adopted the Disciplinary Rules recommended by the State Bar ensured uniformity among the departments. The new procedure produced a uniform set of court rules only because of the strong desire for uniformity expressed by the members of the Kane Committee and the four Presiding Justices of the Appellate Divisions. There were several issues that might have produced different rules in one or more departments.

Formerly, the rules of professional responsibility changed so rarely that there was no need for a formal procedure for amending them. Given the current pace at which the profession is changing, however, it is desirable to establish a more formal mechanism for revising the rules. To ensure the greatest acceptance of such revisions, and to reduce the amount of time that the Appellate Divisions must devote to proposed revisions, the State Bar should continue to play a key role in initiating changes. The State Bar should establish a permanent committee, or a subcommittee of the Committee on Professional Ethics, to act as a clearinghouse for suggestions to amend the Code. It would also be useful for the Appellate Divisions to adopt procedures for uniformly addressing changes to the Disciplinary Rules recommended by the State Bar.

C. The Results

Is the 1990 Code substantially different from the version of the Model Rules recommended by the Halpern Committee²⁵¹ or from the Model Rules as adopted by the ABA²⁵² and, with some variation, by thirty-nine states?²⁵³ Generally, there are few major substantive differences. Significantly, the Model Rules do not address discrimina-

251. HALPERN COMMITTEE REPORT, *supra* note 8.

252. MODEL RULES, *supra* note 3.

253. See Law. Man. on Prof. Conduct (ABA/BNA) No. 42, at 01:11 - 01:41 (December 21, 1987).

tion by lawyers. The most notable difference between the 1990 Code and the Model Rules, however, is that New York has refused to follow the ABA's new balance between the lawyer's obligation to preserve the confidences and secrets of the client and the lawyer's duty to prevent frauds upon the court. The Model Rules, in Model Rule 3.3(a) and (b),²⁵⁴ provide that a lawyer must disclose a material fact to the tribunal when disclosure is necessary to avoid "assisting a criminal or fraudulent act by the client," even if compliance requires disclosure of confidential client information. DR 7-102(B)(1) of the Code, on the other hand, exempts from disclosure any information protected as a confidence or secret.

In addition, the Model Rules contain special provisions governing the lawyer's role as a negotiator or mediator and as a provider of legal opinions to third parties,²⁵⁵ a role not considered crucial by the Jones Committee. The Model Rules, as most recently amended, are also somewhat more liberal with respect to in-person solicitation of employment. For example, Model Rule 7.3(a)²⁵⁶ would allow a lawyer to engage in in-person solicitation of a person with any prior professional relationship with the lawyer. The comment to that section explains that a lawyer is less likely to engage in abusive practices against an individual with whom he or she has a prior professional relationship.²⁵⁷ In contrast, DR 2-104(D) authorizes the lawyer to solicit employment from a former client only if the solicited employment is *germane* to the former employment. Moreover, Model Rule 7.3 would allow in-person solicitation of any client where the pecuniary gain of the lawyer is not a significant motive of the solicitation (e.g. the solicitation is for *pro bono* representation).²⁵⁸

Most lawyers will find no practical differences between the 1990 Code and the Model Rules. Nevertheless, the State Bar preferred the existing format, and declined to make wholesale changes in language where no change in substance was intended. In that regard, the amendments will enable practitioners to ascertain immediately changes that have been effected.

Perhaps the most important contribution made by the lengthy effort to amend the 1970 Code is the substantial public debate on the ethics of the profession that it engendered. The responsibilities of the

254. MODEL RULES, *supra* note 3, Rules 3.3(a),(b).

255. MODEL RULES, *supra* note 3, Rules 2.2, 4.1-4.4.

256. MODEL RULES, *supra* note 3, Rule 7.3(a).

257. MODEL RULES, *supra* note 3, Rule 7.3(a) comment.

258. See also *Matter of Alessi*, 60 N.Y.2d 229, 236, 457 N.E.2d 682, 686, 469 N.Y.S.2d 577, 581 (1983) (a solicitation by a public interest group presents no potential for conflict of interest), *cert. denied*, 465 U.S. 1102 (1984).

lawyer to an individual client and to society at large were extensively discussed, and both lawyers and the public have become sensitized to the dilemmas that face practitioners in their everyday law practice, where gritty reality and aspirational ethical goals intersect. The 1990 Code is designed to provide both high ethical aspirations and practical guidance to the lawyer. While no code can provide a complete roadmap, the recent revisions should better serve the profession in the coming years.

APPENDIX A

EXCERPTS FROM THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY

Adopted by the New York State Bar Association, effective January 1, 1970, as amended effective September 1, 1990.

* * *

PRELIMINARY STATEMENT

* * *

No codification of principles can expressly cover all situations that may arise. Accordingly, conduct that does not appear to violate the express terms of any Disciplinary Rule nevertheless may be found by an enforcing agency to be the subject of discipline on the basis of a general principle illustrated by a Disciplinary Rule or on the basis of an accepted common law principle applicable to lawyers.

DEFINITIONS

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

* * *

2. "Law firm" includes, but is not limited to, a professional legal corporation, the legal department of a corporation or other organization and a legal services organization.

* * *

6. "Tribunal" includes all courts and all other adjudicatory bodies. A tribunal shall be deemed "available" when it would have jurisdiction to hear a complaint, if timely brought.

CANON 1

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

ETHICAL CONSIDERATIONS

* * *

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 knowledge, other than knowledge protected as a confidence or secret, of conduct of another lawyer which the lawyer believes clearly to be a violation of the Disciplinary Rules that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness in other respects as a lawyer. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

* * *

EC 1-7 A lawyer should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees, and other persons involved in the legal process.

EC 1-8 A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics.

DISCIPLINARY RULES

* * *

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. Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status.

Where there is available a tribunal of competent jurisdiction, other than a Departmental Disciplinary Committee, a complaint of professional misconduct based on unlawful discrimi-

nation shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute *prima facie* evidence of professional misconduct in a disciplinary proceeding.

7. Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

DR 1-103 Disclosure of Information to Authorities.

- A. A lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, 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.

DR 1-104 Responsibilities of a Supervisory Lawyer.

- A. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:
 - (1) The lawyer orders the conduct; or
 - (2) The lawyer has supervisory authority over the other lawyer or the non-lawyer, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

CANON 2

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

ETHICAL CONSIDERATIONS

* * *

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

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 a claim, and (2) a successful prosecution of the claim produces a fund 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 considerations 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 fund out of which the fee can be paid.

* * *

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

* * *

EC 2-25 A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by providing professional services at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or

organizations, or by participation in programs and organizations specifically designed to increase the availability of legal services. In addition, lawyers or law firms are encouraged to supplement this responsibility through the financial and other support of organizations that provide legal services to persons of limited means.

Acceptance and Retention of Employment

* * *

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

* * *

DISCIPLINARY RULES

DR 2-101 Publicity and Advertising.

- A. A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.
- B. Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of the lawyers' legal services, or claims that cannot be measured or verified.
- C. It is proper to include information, provided its dissemination does not violate the provisions of subdivisions (A) and (B) of this section, as to:
 - 1. education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;
 - 2. names of clients regularly represented, provided that the client has given prior written consent;

3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates; and
 4. legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing whether percentages are computed before or after deduction of costs and disbursements; range of fees for services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal services.
- D.** Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in subdivision (C) of this section that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.
- E.** A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be delivered to the client at the time of retainer for any such service. Such legal services shall include all those services which are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.
- F.** If the advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than one year following such transmission. All advertisements of legal services that are mailed, or are distributed other than by radio, television, directory, newspaper, magazine or other periodical, by a lawyer or law firm with an office for the practice of law in this state, shall also be subject to the following provisions:
1. A copy of each advertisement shall at the time of its initial mailing or distribution be filed with the Departmental Disciplinary Committee of the appropriate judicial department.
 2. Such advertisement shall contain no reference to the fact of filing.
 3. If such advertisement is directed to a predetermined address, a list, containing the names and addresses of all persons to whom the advertisement is being or will thereafter be mailed

- or distributed, shall be retained by the lawyer or law firm for a period of not less than one year following the last date of mailing or distribution.
4. The advertisements filed pursuant to this subdivision shall be open to public inspection.
 5. The requirements of this subdivision shall not apply to such professional cards or other announcements the distribution of which is authorized by DR 2-102(A).
- G.** If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm may not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm may not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.
- H.** Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Disciplinary Rule in a publication which is published more frequently than once 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 authorized under this Rule in a publication which is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule 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 90 days.
- I.** Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.
- J.** A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.
- K.** All advertisements of legal services shall include the name, office

address and telephone number of the attorney or law firm whose services are being offered.

DR 2-102 Professional Notices, Letterheads, and Signs.

- A. A lawyer or law firm may use professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with DR 2-101, including the following:
1. A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates.
 2. A professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm. It may state biographical data, the names of members of the firm and associates and the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.
 3. A sign in or near the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.
 4. A letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

* * *

DR 2-103 Solicitation and Recommendation of Professional Employment.

- A. A lawyer shall not, directly or indirectly, seek professional employment for the lawyer or a partner or associate of the lawyer from a person who has not sought advice regarding employment of the lawyer in violation of any statute or existing court rule in the judicial department in which the lawyer practices.

* * *

- C. A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, other than by advertising or publicity not proscribed by DR 2-101, except that:

* * *

3. The lawyer may request such a recommendation from another lawyer or an organization performing legal services.
- D. A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer if there is no interference with the exercise of independent professional judgment on behalf of the 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, non-profit community organization;
 - c. Operated or sponsored by a governmental agency; or
 - d. Operated, sponsored, or approved by a bar association;
 2. A military legal assistance office;
 3. A lawyer referral service operated, sponsored or approved by a bar association.
 4. Any bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
 - a. Neither the lawyer, no[r] the lawyer's partner, nor associate, nor any other affiliated lawyer 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.
- b. 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.
 - c. The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
 - d. 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.
 - e. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations.
 - f. Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription 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.

* * *

DR 2-104 Suggestion of Need of Legal Services.

- A. A lawyer who has given unsolicited advice to an individual to obtain counsel or take legal action shall not accept employment resulting from that advice, in violation of any statute or court rule.
- B. A lawyer may accept employment by a close friend, relative, for-

- mer client (if the advice is germane to the former employment) or one whom the lawyer reasonably believes to be a client.
- C. A lawyer may accept employment which results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.
 - D. 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.
 - E. Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.
 - F. Subject to compliance with the provisions of DR 2-103(A), if success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept employment from those contacted for the purpose of obtaining their joinder.

* * *

DR 2-106 Fee for Legal Services.

- A. A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee.
- B. A fee is 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 or made known 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 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:
1. A contingent fee for representing a defendant in a criminal case; or
 2. 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 maintenance, support, equitable distribution, or property settlement; or
 3. A fee proscribed by law or rule of court.
- D. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating 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 method of its determination.

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 the lawyer's 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 in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation.
 3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

* * *

DR 2-110 Withdrawal from Employment.**A. In general.**

* * *

2. Even when withdrawal is otherwise permitted or required under DR 2-110(A)(1), (B), or (C), a lawyer shall not withdraw from employment until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the 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.

* * *

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:

* * *

2. The lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule.
3. The lawyer's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

* * *

C. Permissive withdrawal.

Except as stated in DR 2-110(A), 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:
 - 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. Persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.
 - c. Insists that the lawyer pursue a course of conduct which is illegal or prohibited under the Disciplinary Rules.

- d. By other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.
 - e. Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which 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.
 - g. Has used the lawyer's services to perpetrate a crime or fraud.
2. The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.
 3. The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
 4. The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.
 5. The lawyer's client knowingly and freely assents to termination of the employment.
 6. The lawyer 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 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

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EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client consents after full disclosure, when necessary to perform the lawyer's 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 the client to partners or associates of his or her 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 employees so that the sanctity of all confidences and secrets of 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 the client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in the professional relationship. Thus, in the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should the lawyer, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or the client's confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer 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 the 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, the lawyer should avoid professional discussions in the presence of persons to whom the privilege 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 4-7 The lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination. A lawyer is afforded the professional discretion to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and cannot be subjected to discipline either for revealing or not revealing such intention or information. In exercising this discretion, however, the lawyer should consider such factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to

which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any other possibly aggravating or extenuating circumstances. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

DISCIPLINARY RULES

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

* * *

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 a client to commit a crime and the information necessary to prevent the crime.
4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

* * *

CANON 5

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

ETHICAL CONSIDERATIONS

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Interests of a Lawyer That May Affect the Lawyer's Judgment

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EC 5-4 If, in the course of the representation of a client, a lawyer is permitted to receive from the client a beneficial ownership in literary or media rights relating to the subject matter of the employment, the

lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the 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 the employment has previously ended.

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EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to the 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 a cause of action, but the ultimate liability for such costs and expenses must be that of the client except, where not prohibited by law or court rule, in the case of an indigent client represented on a pro bono basis.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether the lawyer will be a witness or an advocate. If a lawyer is both counsel and witness, the lawyer 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 or her 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.

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EC 5-18 A lawyer employed or retained by a corporation or similar entity owes 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 the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occa-

sionally, the lawyer may learn that an officer, employee or other person associated with the entity is engaged in action, refuses to act, or intends to act or to refrain from acting in a matter related to the representation that is a violation of a legal obligation to the entity, or a violation of law which reasonably might be imputed to the entity, and is likely to result in substantial injury to the entity. In such event, the lawyer should proceed as is reasonably necessary in the best interest of the entity. In determining how to proceed, the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the entity and the apparent motivation of the person involved, the policies of the entity concerning such matters and any other relevant considerations. Any measures taken should be designed to minimize disruption of the entity and the risk of revealing confidences and secrets of the entity. Such measures may include among others: asking reconsideration of the matter, advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the entity, and referring the matter to higher authority in the entity not involved in the wrongdoing, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the entity as determined by applicable law. Occasionally a lawyer for an entity is requested to represent a stockholder, director, officer, employee, representative, or other person connected with the entity 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.

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DISCIPLINARY RULES

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

- A. Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.
- B. A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on behalf of the client, except that the lawyer may act as an advocate and also testify:

1. If the testimony will relate solely to an uncontested issue.
 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 the lawyer's firm to the client.
 4. As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.
- C. Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

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 the lawyer ought to be called as a witness on behalf of the client, the lawyer shall withdraw as an advocate before the tribunal, except that the lawyer may continue as an advocate and 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 the lawyer or a lawyer in his or her firm may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

DR 5-103 Avoiding Acquisition of Interest in Litigation.

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- B. While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
 1. 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.

2. Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.

DR 5-104 Limiting Business Relations with a Client.

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- B. Prior to conclusion of all aspects of the matter giving rise to employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the 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 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 the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C).
- B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, 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 the lawyer 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 the lawyer's independent professional judgment on behalf of each.
- D. While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-

101(A), DR 5-105(A), (B) or (C), DR 5-108, or DR 9-101(B) except as otherwise provided therein.

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DR 5-108 Conflict of Interest—Former Client.

- A. Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:
1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
 2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known.

DR 5-109 Conflict of Interest—Organization as Client.

- A. When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

DR 5-110 Membership in Legal Service Organization.

- A. A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization:
1. If participating in the decision or action would be incompatible with the lawyer's duty of loyalty to a client under Canon 5; or
 2. Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

CANON 6*A Lawyer Should Represent a Client Competently***ETHICAL CONSIDERATIONS**

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EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of the client. If a lawyer has accepted employment in a matter beyond the lawyer's competence but in which the lawyer expected to become competent, the lawyer should diligently undertake the work and study necessary to be qualified. In addition to being qualified to handle a particular matter, the lawyer's obligation to the client requires adequate preparation for and appropriate attention to the legal work, as well as promptly responding to inquiries from the client.

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EC 6-6 A lawyer should not seek, by contract or other means, to limit prospectively the lawyer's individual liability to the client for malpractice nor shall a lawyer settle a claim for malpractice with an otherwise unrepresented client without first advising the client that independent representation is appropriate. A lawyer who handles the affairs of the client properly has no need to attempt to limit liability for professional activities and one who does not handle the affairs of the 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 the lawyer's liability for malpractice of 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 the lawyer knows or should know that he or she is not competent to handle, without associating with 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 the lawyer.

DR 6-102 Limiting Liability to Client.

A. A lawyer shall not seek, by contract or other means, to limit pro-

spectively the lawyer's individual liability to a client for malpractice, or, without first advising that person that independent representation is appropriate in connection therewith, to settle a claim for such liability with an unrepresented client or former client.

CANON 7

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

ETHICAL CONSIDERATIONS

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Duty of the Lawyer to a Client

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

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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 the lawyer should so advise his or her 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 should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results. The responsibilities of government lawyers with respect to the compulsion of testimony and other information are generally the same as those of public prosecutors.

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Duty of the Lawyer to the Adversary System of Justice

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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 the client. Where a lawyer knows of controlling legal authority directly adverse to the position of the client, the lawyer should inform the tribunal of its existence unless the adversary has done so; but, having made such disclosure, the lawyer may challenge its soundness in whole or in part.

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DISCIPLINARY RULES

DR 7-101 Representing a Client Zealously.

A. A lawyer shall not intentionally:

1. Fail to seek the lawful objectives of the 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 the 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 the lawyer may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
3. Prejudice or damage the client during the course of the professional relationship, except as required under DR 7-102(B).

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

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B. A lawyer who receives information clearly establishing that:

1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected per-

son or tribunal, except when the information is protected as a confidence or secret.

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DR 7-106 Trial Conduct.

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- B.** In presenting a matter to a tribunal, a lawyer shall disclose:
1. Controlling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel.

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DR 7-107 Trial Publicity.

- A.** A lawyer participating in or associated with a criminal or civil matter shall not 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 prejudicing an adjudicative proceeding.
- B.** A statement ordinarily is likely to prejudice materially an adjudicative proceeding 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 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.

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. Provided that the statement complies with DR 7-107(A), a lawyer involved with the investigation or litigation of a matter may state the following 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.
 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.
 7. In a criminal case:
 - a. The identity, age, residence, occupation and family status of the accused.
 - b. If the accused has not been apprehended, information necessary to aid in apprehension of that person.
 - c. The fact, time and place of arrest, resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission, or statement.
 - d. The identity of investigating and arresting officers or agencies and the length of the investigation.

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CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

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EC 8-4 Whenever a lawyer seeks legislative or administrative changes, the lawyer should identify the capacity in which he or she appears,

whether on behalf of the lawyer, a client, or the public. A lawyer may advocate such changes on behalf a client even though the lawyer does not agree with them. But when a lawyer purports to act on behalf of the public, the lawyer should espouse only those changes which the lawyer conscientiously believes to be in the public interest. Lawyers involved in organizations seeking law reform generally do not have a lawyer-client relationship with the organization. In determining the nature and scope of participation in law reform activities, a lawyer should be mindful of obligations under Canon 5, particularly DR 5-101 through DR 5-110. A lawyer is professionally obligated to protect the integrity of the organization by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially affected.

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CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

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DISCIPLINARY RULES

DR 9-101 Avoiding Even the Appearance of Impropriety.

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- B.** Except as law may otherwise expressly permit:
1. 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, and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - a. The disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom; and
 - b. There are no other circumstances in the particular representation that create an appearance of impropriety.
 2. 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. A firm with which that lawyer is associated may knowingly undertake or continue representation in the matter only if the disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom.

3. A lawyer serving as a public officer or employee shall not:
 - a. Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental 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
 - b. 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.

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- D. A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

**DR 9-102 Preserving Identity of Funds and Property of Others;
Fiduciary Responsibility; Maintenance of Bank
Accounts; Recordkeeping; Examination of
Records.**

- A. **Prohibition Against Commingling.**
A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not commingle such property with his or her own.
- B. **Separate Accounts.**
 1. A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law, shall maintain in a bank or trust company within the State of New York in the lawyer's own name, or in the name of a firm of lawyers of which he or she is a member, or in the name of the lawyer or

firm of lawyers by whom he or she is employed, a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts which the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity, into which special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited.

2. Other than accounts maintained by a lawyer as executor, guardian, trustee or receiver, or in any other such fiduciary capacity, all special accounts as well as all deposit slips relating to and checks drawn upon such special accounts, shall be designated in a manner sufficient to distinguish them from all other bank accounts maintained by the lawyer or the lawyer's firm.
 3. Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.
 4. Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm shall be kept in such special account or accounts, 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 or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
- C. Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.
- A lawyer shall:
1. Promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest.
 2. Identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
 3. Maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them.
 4. Promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.
- D. Required Bookkeeping Records.

A lawyer shall maintain for seven years after the events which they record.

1. The records of all deposits in and withdrawals from the accounts specified in subdivision (B) of this Disciplinary Rule and of any other bank account which concerns or affects the lawyer's practice of law. These records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement.
2. A record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.
3. Copies of all retainer and compensation agreements with clients.
4. Copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf.
5. Copies of all bills rendered to clients.
6. Copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed.
7. Copies of all retainer and closing statements filed with the Office of Court Administration.
8. All checkbooks and checkstubs, bank statements, prenumbered cancelled checks and duplicate deposit slips. Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

E. Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only an attorney admitted to practice law in New York State shall be an authorized signatory of a special account.

F. Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court

in which the action was brought, or, if no action was commenced, to the Supreme Court in the county in which the lawyer has his or her office, for an order directing payment to the lawyer of his or her fee and disbursements and to the clerk of the court of the balance due to the client.

G. Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in subdivision (D) of this Disciplinary Rule.

H. Availability of Bookkeeping Records; Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Disciplinary Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this subdivision shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the lawyer-client privilege.

I. Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Disciplinary Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

APPENDIX B

**EXCERPTS FROM
THE LAWYER'S CODE OF PROFESSIONAL
RESPONSIBILITY**

**Adopted by the New York State Bar Association, effective January
1, 1970, as amended through April 29, 1978.**

CANON 1

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

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ETHICAL CONSIDERATIONS

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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.

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DISCIPLINARY RULES

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DR 1-102 Misconduct.

A. A lawyer shall not:

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3. Engage in illegal conduct involving moral turpitude.

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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

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ETHICAL CONSIDERATIONS

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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.

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DISCIPLINARY RULES

DR 2-100 **Publicity and Advertising Violative of Statute or Rule of Court.**

- A. A lawyer shall not advertise or publicize himself or herself in violation of any statute or rule of court.
- B. Any rule of court applicable to advertising and publicity by law-

yers, adopted by one or more of the appellate divisions of the Supreme Court, shall automatically become a part of DR 2-101. Should any such rule be adopted by fewer than all of the appellate divisions, such provisions shall be applicable only in the judicial departments in which they have been adopted.

**DR 2-101 Rules of Court Applicable to Advertising and Publicity
by Lawyers.**

- A. A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.
- B. Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of the lawyers' legal services, or claims that cannot be measured or verified.
- C. It is proper to include information, provided its dissemination does not violate the provisions of subdivisions (A) and (B) herein, as to
 1. education, degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;
 2. names of clients regularly represented, provided that the client has given prior written consent;
 3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates;
 4. legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing whether percentages are computed before or after deduction of costs and disbursements; range of fees for services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal services.
- D. Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Informa-

- tion other than that specifically authorized in subdivision (C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this rule.
- E.** A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be delivered to the client at the time of retainer for any such service. Such legal services shall include all those services which are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.
- F.** If the advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than one year following such transmission.
- G.** If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm may not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm may not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.
- H.** Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this rule in a publication which is published more frequently than once 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 authorized under this rule in a publication which is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this rule 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 90 days.
- I.** Unless otherwise specified, if a lawyer broadcasts any fee infor-

mation authorized under this rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

- J. A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

DR 2-102 Professional Notices, Letterheads, Offices and Signs.

- A. A lawyer or law firm may use professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with DR 2-101, including the following:

* * *

2. A professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends and relatives. It may state biographical data, the names of members of the firm and associates and the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

* * *

DR 2-103 Solicitation and Recommendation of Professional Employment.

- A. A lawyer shall not solicit employment as a private practitioner of himself or herself, a partner or an associate from a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR 2-104 and advertising in accordance with DR 2-101 shall not be deemed solicitation in violation of this provision.

* * *

- D. A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a part-

ner or associate or any other affiliated lawyer if there is no interference with the exercise of independent professional judgment on behalf of the client:

* * *

4. Any bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
 - 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 member or beneficiary.
 - b. Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer 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.
 - 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.
 - d. The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
 - 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.
 - f. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court

or other legal requirements that govern its legal service operations.

- 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 subscription 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.

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DR 2-104 Suggestion of Need of Legal Services.

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- F. If success in asserting rights or defenses of a 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.

* * *

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 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 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 the lawyer's 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.

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DR 2-110 Withdrawal from Employment.

- A. In general.

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2. In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the 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.

* * *

- 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. The 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 which is illegal or prohibited under the Disciplinary Rules.
 - d. By other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.
 - e. Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which 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. The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.
 3. The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
 4. The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.
 5. The lawyer's client knowingly and freely assents to termination of the employment.
 6. The lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

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CANON 5

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

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ETHICAL CONSIDERATIONS

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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 5-8 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 5-18 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.

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DISCIPLINARY RULES

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

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B. A lawyer shall not accept employment in contemplated or pend-

ing 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.

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- 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.

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DR 5-104 Limiting Business Relations with a Client.

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- 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.

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- 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.

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CANON 6

A Lawyer Should Represent a Client Competently.

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ETHICAL CONSIDERATIONS

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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 6-6 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

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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*

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ETHICAL CONSIDERATIONS

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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.

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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.

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DISCIPLINARY RULES

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DR 7-106 Trial Conduct.

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- 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.

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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 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 extrajudicial 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 extrajudicial statement that he would be prohibited from making under DR 7-107.

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CANON 8

Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

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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.

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CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

DISCIPLINARY RULES

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DR 9-101 Avoiding Even the Appearance of Impropriety.

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B. A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

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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 safekeeping 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:

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2. "Law firm" includes a professional legal corporation.

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6. "Tribunal" includes all courts and all other adjudicatory bodies.

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