Public Discussion Draft –

The American Code of

Commission on Professional Responsibility
The Roscoe Pound – American Trial Lawyers Foundation

THE COMMISSION ON PROFESSIONAL RESPONSIBILITY

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Lawyer's Conduct

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Note

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FOREWORD

By Thomas E. Cargill, Jr. President, The Roscoe Pound-American Trial Lawyers Foundation

I am proud, as President of the Pound Foundation, to say a brief word at the public unveiling of what I believe will be an important legal landmark, The American Lawyer's Code of Conduct.

The Pound Foundation undertook this project at the request of Theodore I. Koskoff, President of the Association of Trial Lawyers of America. The idea of bringing citizens and lawyers together to write a new code for lawyers originated with Ted, and his Introduction gives an authoritative explanation of what this draft code does. It is, as he says, not just a Code of Conduct for lawyers, but also a Bill of Rights for clients.

Similar concern for clients' rights motivated Roscoe Pound, both when he established this Foundation in 1956, and throughout his distinguished career. Pound also, as a botanist turned lawyer, argued strenuously both for legal codes that would make a law scientific and systematic, and against the excess of systematization that results in "petrification of the subject systematized." He applauded the "restating and rationalizing" of American law, so long as it was kept simple and could be understood.

Dean Pound would have welcomed the Foundation's commissioning this Code, seeing it as seizing the sort of opportunity he described in 1908 in *Mechanical Jurisprudence:*

"Herein is a noble task for the legal scholars of America. To test the conceptions worked out in the common law by the requirements of the new juristic theory, to lay sure foundations for the ultimate legislative

restatement of the law, from which judicial decision shall start afresh – this is as great an opportunity as has fallen to the jurists of any age."

I invite the readers of this Public Discussion Draft to join us in seizing that opportunity by contributing their comments.

INTRODUCTION

By Theodore I. Koskoff President, The Association of Trial Lawyers of America

I am particularly proud to introduce this Public Discussion Draft of The American Lawyer's Code of Conduct, because it was at my instigation that a Commission was formed to write it.

That Commission was called the Commission on Professional Responsibility for Trial Practice when first formed by the Roscoe Pound-American Trial Lawyers Foundation in 1979. The Commission quickly found that the scope implied by that name was too narrow, because the practice of law is a seamless web from which no segment can be separated. The Commission was also motivated by the fact that another group, also originally formed with a narrower jurisdiction, was both arrogating to itself the function of rewriting professional standards for lawyers, and doing so in a way that demanded that this Commission produce a viable alternative Code of Conduct, applicable to all lawyers.

This Public Discussion Draft is the Commission's first corporate effort at such a Code. It is principally the handiwork of our able Reporter, Monroe H. Freedman, but substantial revisions were made at the suggestion of the Commission. I am sure I speak for all other members of the Commission when I say that I do not agree with every Commission decision it reflects, but that I support it as a totality. I support the approach and the philosophy that permeate it.

That approach and philosophy are symbolically expressed by the title, *The American Lawyer's Code of Conduct*. This is an *American* code, firmly rooted in our constitutional system. It carries forward the basic American values incorporated in the Bill of Rights. It is particularly concerned with the fact, so basic that the Constitution does not even mention it, that our system of justice is an adversary system because only such a system protects the liberty of the individual.

The proponents of an alternative to this Code have apparently forgotten that basic fact. Their most recent draft would erode basic constitutional protections by making the lawyer the agent of the state, not the champion of the client, in many important respects.

The second word is equally important. This is the American Lawyer's code, a code to govern the conduct of the individual lawyer in dealings with individual clients. It is not concerned with the responsibilities of the profession, or with the profession's conduct as an institution. Its basic conviction is that the lawyer's primary duty is his or her duty to each individual client that comes to that lawyer for help.

As a Code of Conduct, then, this Code tells the individual lawyer what he or she may or may not do for clients, and what the lawyer shall or shall not do because of the nature of the attorney-client relationship in the American adversary system. It is written from the point of view of the client; it tells the client what conduct he or she is entitled to expect from a lawyer.

Thus, the basic precept of the Code is that American lawyers serve clients, and that they serve the public interest by serving the interests of their individual clients, one at a time. This Code recognizes very few, limited exceptions to the rule that "an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other." Lord Brougham stated the rule thus in 1820, defending Queen Caroline before the House of Lords; but it had already been recognized by the English courts, in the form of the attorney-client privilege, for centuries. Indeed, the privilege existed even before the testimonial trial came into being and provided a forum where it could be formally invoked.

Not long after Brougham threatened to "involve his country in confusion for his client's protection," in 1836, a British court articulated the full scope of the attorney-client privilege: "the first duty of an attorney is to keep the secrets of his client." That was what the American founding fathers understood, in 1789, when they wrote a Sixth Amendment, guaranteeing "the Assistance of Counsel." That deceptively simple phrase, as the Supreme Court has often held, does not just mean having a lawyer at your side in court. It means effective counsel; it means a lawyer with whom you can consult; and it means a lawyer in whom you can confide, because without such confidentiality the lawyer cannot assist you effectively.

It also means that lawyers assist clients, not dictate to them: "an assistant, however expert, is still an assistant," as the Court said in *Faretta* v. *California*. As this Code puts it, it is the client's perception of his or her interests, not the lawyer's perception, to which the lawyer owes undivided fidelity, and which the lawyer seeks to advance.

That is also a basic, and often misunderstood, concept. It does not mean that the lawyer is always bound to stretch the client's cause as far as possible, and let all other considerations be damned. The client may not really want that, and the lawyer has a duty to assist the client in determining what the client wants. This includes advising the client that a particular course of action may have adverse effects on other persons, or on public interests as the lawyer sees them. Those who would substitute the lawyer's judgment for the client's in such matters assume both that clients always want their lawyers to do the wrong thing, and that the lawyer is always right about what is right. Most such supposed conflicts between lawyer's conscience and client's interest can be resolved by consultation; of those that remain, almost all can be avoided by the lawyer's declining to take the case, or withdrawing from it, when consultation fails.

In our secular age, the lawyer's office is fast becoming the last confessional for the troubled individual. As such, it is under attack from those who would make it a listening post

for the state, because they believe that the state must know the truth, that the highest function of a system of justice is to determine truth, and that all secrecy is inimical to truth.

This is not the first time such attacks have been made, nor will it be the last. Jeremy Bentham attacked the attorney-client privilege as not meeting his basic utilitarian test of the greatest good for the greatest number. He did not understand that the greatest good among millions of people is not the result of subtracting one from the total, but the product of multiplying that total by one, or by some higher factor incorporating each individual's maximum need for a lawyer's counsel.

When prominent lawyers similarly attacked attorney-client confidentiality, as inimical to "the cause of justice," earlier in this century, they inspired a former President of the nation (and of the ABA) to reply: "It is essential for the proper presentation of the client's case that he should be able to talk freely to his counsel without fear of disclosure." William Howard Taft opposed "any rule that interfered with the complete disclosure of the client's inmost thoughts."

Taft knew, as a former trial lawyer, whereof he spoke. The trial lawyer members of our Commission also thought they knew, and perhaps knew better—the nation had changed, society had become more complex, law was no longer the cottage industry of Taft's day. We thought we were preserving the attorney-client relationship in the modern age by opposing most of the inroads other lawyer draftsmen would make into it.

We were brought up short, however, by the non-lawyers on the Commission. They were shocked by the concept that a lawyer would reveal a client's secrets except in the most extreme circumstances. They reminded us, eloquently and forcefully, that what we were writing was not just a Code of Conduct for lawyers, but a Bill of Rights for clients. As one of the non-lawyers, Edward Sullivan, put it, "When I need a lawyer, I need him to be *my* lawyer. And if he isn't going to be *my* lawyer, I don't need him." We listened, and we voted. And we rejected, as best we could, every proposal that would have weakened the protection of clients' rights.

Our Code puts attorney-client confidentiality first, in Rules 1.1 and 1.2, because it is still "the first duty of an attorney," and will continue to be. Everything else depends upon it.

I emphasize confidentiality because it is basic, so basic that we lawyers sometimes forget how very basic it is. We need to be reminded of such things, and we cannot be so reminded if we talk only among ourselves. We need to include ordinary people, members of minority groups, and other outsiders of the legal system in our decision-making councils. We don't need token representatives; we need vocal partisans who tell us to get down off our high horses.

We need to realize, not just intellectually but in our bones, that the legal profession exists to serve people, and that, when we write codes to regulate what lawyers may and may not do, we are writing legislation that affects the rights of every person in the country. Just as we cannot regulate trial lawyers apart from other lawyers, we cannot regulate lawyers without profoundly affecting their clients, and their potential clients, in the exercise of basic rights.

The appointers of this Commission realized that, and put several articulate non-lawyers upon the Commission. The Commission listened to them, and heeded their counsel. What you have before you is the result. It is as good as we can make it, but not as good as we want it to be. It is a Public Discussion Draft, and we want your advice – especially your negative advice. We hope and trust that, with the fire of public debate, we will be able to forge a stronger Code than what already is, in its present form, the best Code that American lawyers have yet devised to regulate their own conduct.

PREFACE

By Irwin Birnbaum, Esquire Chair, Commission on Professional Responsibility

The need for a new code of professional conduct for lawyers is manifest. Until 1969, the only comprehensive rules governing lawyers' conduct were the American Bar Association's 1908 Canons of Professional Ethics. In 1969, the ABA repudiated the Canons, declaring that they failed to give adequate guidance, lacked coherence, omitted reference to important areas of practice, and did not lend themselves to disciplinary enforcement. The Canons were therefore replaced, as of 1970, by the Code of Professional Responsibility.

But then the CPR almost immediately came under severe attack, which increased as more scholars and lawyers became familiar with its provisions. Only seven years after promulgating the CPR, the ABA formed a new committee to revise it. That committee determined, in the words of its chairman, that the CPR is "inconsistent, incoherent, and unconstitutional." The ABA committee has therefore proposed a wholly new set of professional standards, called the Model Rules of Professional Conduct.

Unfortunately, the Model Rules make few improvements over the CPR; in several significant respects, they are inferior to it. With all its serious flaws, the Code of Professional Responsibility is preferable to the Model Rules.

The legal profession cannot continue to function, however, under disciplinary rules and ethical considerations that are, as even the ABA has acknowledged, incoherent, inconsistent, and unconstitutional. Accordingly, the Roscoe Pound-American Trial Lawyers Foundation appointed the Commission on Professional Responsibility and commissioned it to prepare a new code.

The following Public Discussion Draft of The American Lawyer's Code of Conduct is the first work product of our Commission. It is not a final product, and it has not been given the final approval of the Commission. It has been drafted by our Reporter, Monroe Freedman, to reflect the views of the Commission, and subsequently revised to reflect the Commission's reaction to that initial draft. As is clear from two Alternatives in Part I, and the Supplementary Provisions to Part IX, we are neither unanimous nor fixed in our views of what this Code should

say. Nothing in it is final, not even the title. We are open to all suggestions for improvement.

The Commission will meet again this Fall to consider such suggestions and to develop another Draft. Because we have not set for ourselves an artificial deadline for submitting a final product to some other body, we are not committed to producing a Final Draft at that time. We are committed to producing the best Code we can devise. To do so, we need your advice. All comments sent to the Commission, or to Professor Freedman, will be appreciated and considered.

PREAMBLE

A lawyer's code of conduct should serve at least three major purposes. First, it should provide guidance for the conscientious attorney who is unsure of how to act in particular circumstances. To some extent, therefore, such a code will be aspirational, and perhaps even imprecise, since it will point to goals not always achievable and will express values whose relative weights will depend upon innumerable variations in factual context.

A second purpose of the code should be to establish the basic rules of conduct, violation of which will result in professional discipline, and may result in civil action for malpractice. For that purpose, a code must be sufficiently precise to put the attorney on notice as to what is required, and to enable others to judge whether the rules have been met.

Third, a code of conduct that achieves those goals will serve to inform the public as to what conduct can be expected of lawyers. Thereby, the public—the actual and potential clients whom we serve—will be given a basis for judging the norms that we have set for ourselves, and they will be enabled to take an active part in enforcing rules of professional conduct and in proposing changes that are in the public interest.

The format of this Code embodies an effort to make it as readable and as clear as possible. The Rules, which are intended to be used for disciplinary purposes, are written in declarative sentences in terms of what the lawyer "shall" or "shall not" do. The Rules are followed by Comments, which are not intended to be the basis of disciplinary action, but to enhance understanding of the disciplinary rules. In addition, when useful to avoid ambiguity or to resolve possible conflict between rules, Illustrative Cases are provided.

In formulating and interpreting rules of conduct for lawyers, it is essential to keep in mind the nature of the public interest served by the lawyer. Our form of government is a limited one, which seeks to maximize individual liberty within a rule of law. The fundamental legal structure, as it relates to the role of the lawyer, is in the Bill of Rights of the Constitution. Rules of conduct should be designed and interpreted so as to enhance those rights, not to inhibit them.*

The most obvious individual rights relevant to lawyers' duties relate to what we colloquially call one's "day in court"—the rights to due process of law, counsel, and trial by jury. Also relevant are rights relating to self-incrimination, confrontation, bail, search and seizure, and cruel and unusual punishment. In addition, the right to litigate has become an essential aspect of freedom of speech and of the right to petition for redress of grievances.

Other constitutional rights bear significantly upon lawyers' responsibilities because of our commitment to the rule of law. As a result of the enormous volume and complexity of our constitutional, statutory, and regulatory law, ordinary citizens need the assistance of lawyers simply to comprehend and cope with the rules governing their actions. The lawyer therefore serves that most basic individual right, that of personal autonomy—the right to make those decisions that most affect one's own life and values. Without professional assistance, the individual citizen is often unaware of the full range of choices available, and of the means to pursue particular choices.

The assistance of counsel thus relates significantly to justice under law, in the sense of equal protection of the laws. Leaving each person to his or her own resources alone, without the assistance of counsel in comprehending and coping with the complexities of the legal system, would produce gross disparities in justice under law.

All these basic rights, individually and together, express the high value placed by our constitutional democracy on the dignity of the individual. Before any person is significantly affected by society in his or her person, relationships, or property, our system requires that certain processes be duly followed—processes to which competent, independent, and zealous lawyers are essential. And if it be observed that the stated ideal is too frequently denied in fact, our response must be that standards for lawyers be so drafted and enforced as to strive to make that ideal a consistent reality.

The legal system that gives context and meaning to basic American rights—the rights to autonomy, counsel, trial by jury, due process, equal protection, and others—is the adversary system. It is the adversary system which assures each of us a "champion against a hostile world," and which thereby helps to preserve and enhance our dignity as individuals.

In addition, the adversary system provides the best method we have been able to devise to determine truth in cases in which the facts are in dispute. First, we assign to an advocate on each side of a case the responsibility to ferret out all of the facts, law, and policy considerations relevant to that side. The opposing positions, each expressed as fully and as effectively as possible, are then presented before an impartial judge and/or jury for resolution. Each advocate's position is also subject to searching challenge by an adversary, through cross examination and rebuttal. Thus, the partisanship of the advocates has two important effects—it encourages thoroughness and accuracy in the development of each side of the case, and it permits the judge and jury to remain aloof from partisan involvement until a decision must actually be made.

Stressing the last point, a Joint Committee of the Association of

*Compare Code of Professional Responsibility (1969), DR 2-103 (D)(5), which permits a lawyer to cooperate with the promotion of legal services by a non-profit organization on behalf of its members or beneficiaries, "but only in those instances and to the extent that *controlling constitutional interpretation at the time* of the rendition of the services *requires* the allowance of such legal services activities" (emphasis added).

The CPR thus violated First Amendment rights of freedom of speech and of petition for redress of grievances, as well as Fifth Amendment due process rights relating to vagueness. See also DR 7-107, and Model Rules of Professional Conduct 3.1(f) and 3.8, which also seek to impose the strictest possible limits upon basic rights.

American Law Schools and the American Bar Association issued a Report* concluding:

"What generally occurs in practice [as evidence is developed] is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

"An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."

That conclusion comports with common sense, as well as with the judgments of trial lawyers and judges based upon experience in the courtroom. In addition, it has received significant support from scholarly experimentation.

Recognizing that the American attorney functions in an adversary system, and that such a system expresses fundamental American values, helps us to appreciate the question-begging nature of some cliches of lawyers' ethics. It is sometimes said, for example, that the lawyer is an "officer of the court," or an "officer (or manager) of the legal system." Out of context, such phrases are at best meaningless, and at worst misleading. In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of the court only in the sense of serving the court as a zealous, partisan advocate of one side of the case before it.

Further, the lawyer who litigates is not the only one who serves in an adversarial role. Lawyers function in an adversary system even when their clients are not actually involved in litigation. Parties to negotiations are usually adversaries, and are always potential adversaries. The lawyer drafting a contract or a will must anticipate and guard against interests adverse to the client's that may exist or that may develop in the course of time. The lawyer who prepares tax returns or other documents for filing with the government can adequately protect the client's interests only by recognizing the possibility of an adverse reaction. Similarly, the lawyer who counsels a client about rights, liabilities, and legal choices must be conscious of numerous possible reactions of an adversarial nature.

Unquestionably, there are differences among cases involving litigation, negotiating, drafting, and counseling. Thus, the opportunities to withdraw without prejudicing the client's interests are likely to be greater in counseling than in litigation, and greater in civil litigation than in criminal cases. But the basic principle will remain the same – avoidance of withdrawal unless significant prejudice to the client can be avoided. We have therefore rejected the idea of writing this Code in separate sections for lawyers in litigation, negotiation, and so forth; at the same time, we have tried throughout to be aware of the variety of services lawyers perform and to make distinctions when they appear appropriate.

In sum, the following American Lawyer's Code of Conduct has been drafted with a recognition that all American lawyers function in an adversary system, and with a commitment to strengthening that system as the embodiment of the constitutional values inherent in the administration of justice in the United States.

INTRODUCTORY COMMENT ON 'KNOWING'

Disciplinary rules ordinarily are premised upon standards of knowledge. For example, a lawyer may be forbidden to make a representation when the lawyer *knows* the representation to be false. Clearly, then, the lawyer would not violate that proscription when the lawyer does *not know* the representation to be false.

Further, the enforcement of a rule may be more or less difficult depending upon whether the standard of knowledge is objective or subjective. It is far easier, for example, to prove that a reasonable person in a lawyer's position *should have known* certain facts, than to prove that the particular lawyer in fact *knew beyond a reasonable doubt* that certain facts were true.

Indeed, the most common device for avoiding responsibility, or for declaring apparently strict obligations but ignoring their violations, is to set an impracticable standard of knowledge. The clearest illustration is the lawyer who asserts that he would never knowingly present perjury to the court, but then observes that in years of trial practice, he has never "known" that perjury was being offered. Occasionally, the sophistry is added that one can never "know" what was true or false until the jury returns its verdict. This Code recognizes, however, that in the realm of both law and ethics, there is such a thing as acting on legal or moral notice.

Codifiers of professional rules have used a haphazard variety of standards of knowledge, frequently rendering the rules virtually meaningless for practical purposes. The Code of Professional Responsibility uses a subjective standard, such as *knowingly,* at least half a dozen times, and uses at least four variations on an objective standard, including whether the lawyer *should know* certain facts, and whether certain facts were *obvious* at the time the lawyer acted. There is no apparent pattern in the use of the several standards in different contexts in the CPR. In addition, it is usually unclear whether the lawyer is under a duty to seek knowledge.

An extreme requirement of knowledge appears in the ABA Standards Relating to the Defense Function, Section 7.7. There, a lawyer is placed under a particular obligation only if the lawyer knows of the client's guilt both because (a) the client has admitted guilt, and also (b) the lawyer's "independent investigation" establishes the client's guilt. Neither of those sources of knowledge is alone sufficient to establish the consequent ethical obligation. Accordingly, even if the lawyer's investigation established the client's guilt beyond a reasonable doubt, Section 7.7 would

*Joint Conference on Professional Responsibility, Report, 44 A.B.A.J. 1159 (1958) (emphasis added.) The Joint Conference was significantly influenced by the views of the late Professor Lon L. Fuller, perhaps America's leading scholar in jurisprudence and comparative law.

still not be applicable unless, in addition, the client confessed to the lawyer.

Although criticism of the CPR and the Standards has pointed up the problem, the ABA's new Model Rules use at least nine different standards of knowledge, ranging from whether the lawyer, subjectively, is *convinced beyond a reasonable doubt*, to whether the lawyer, objectively, has *information indicating* that certain facts are so. In addition, the varying standards in the Model Rules are demonstrably inconsistent in their applicability. (See, *e.g.*, Rule 3.1 [a] [3].)

In the present Code, therefore, we generally use the words *know, knowingly,* and *knowledge* whenever the lawyer's mental state is relevant. As used herein, a lawyer knows certain facts, or acts knowingly or with knowledge of facts, when a person with that lawyer's professional training and experience would be reasonably certain of those facts in view of all the circumstances of which the lawyer is aware. A duty to investigate or inquire is not implied by the use of these words, but may be explicitly required under particular rules. Even in the absence of a duty to investigate, however, a studied rejection of reasonable inferences is inadequate to avoid ethical responsibility.*

In some instances, however, the lawyer may be required or permitted to act on the basis of incomplete knowledge of relevant facts. For example, the lawyer may be predicting future events, or may be compelled to act on the basis of assumptions or inferences because there is insufficient opportunity to ascertain all the relevant facts. In such a case, the standard used is the lawyer's reasonable belief or undertanding.

I. THE CLIENT'S TRUST AND CONFIDENCES ALTERNATIVE A

1.1. Beginning with the initial interview with a prospective client, a lawyer shall strive to establish and maintain a relationship of trust and confidence with the client. The lawyer shall impress upon the client that the lawyer cannot adequately serve the client without knowing everything that might be relevant to the client's problem, and that the client should not withhold information that the client might think is embarrassing or harmful to the client's interests. The lawyer shall explain to the client the lawyer's obligation of confidentiality.

1.2. Without the client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence, or use it in any way detrimental to the interests of the client, except as provided in Rules 1.3 to 1.6, and Rule 6.5. (Rules 1.3 to 1.6 permit divulgence under compulsion of law; to prevent imminent danger to life; to avoid proceeding before a corrupted judge or juror; and to defend the lawyer or the lawyer's associates from formally instituted charges of misconduct. Rule 6.5 permits withdrawal in non-criminal cases when the client has induced the lawyer to act through material misrepresentation, even though withdrawal might indirectly divulge a confidence.)

1.3. A lawyer may reveal a client's confidence to the extent required to do so by law, rule of court, or court order, but only after good faith efforts to test the validity of the law, rule, or order have been exhausted.

1.4. A lawyer may reveal a client's confidence when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life. In such a case, the lawyer shall use all reasonable means to protect the client's interests, consistent with preventing loss of life.

1.5. A lawyer may reveal a client's confidence when the lawyer knows that a judge or juror in a pending proceeding in which the lawyer is involved has been bribed or subjected to extortion. In such a case, the lawyer shall use all reasonable means to protect the client, consistent with preventing the case from going forward with a corrupted judge or juror.

1.6. A lawyer may reveal a client's confidence to the extent necessary to defend against formally instituted charges of criminal conduct, malpractice, or disciplinary violation brought against the lawyer or the lawyer's associates or employees.

ALTERNATIVE B

1.1. Beginning with the initial interview with a prospective client, a lawyer shall strive to establish and maintain a relationship of trust and confidence with a client. The lawyer shall impress upon the client that the lawyer cannot adequately serve the client without knowing everything that might be relevant to the client's problem, and that the client should not withhold information that the client might think is embarrassing or harmful to the client's interests. The lawyer shall explain to the client the lawyer's obligation of confidentiality.

1.2. Without the client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence, or use it in any way detrimental to the interests of the client, as the client perceives them, or as the lawyer reasonably understands the client to perceive them if there is inadequate opportunity for consultation.

1.3. A lawyer may reveal a client's confidence to the extent required to do so by law, rule of court, or court order, but only after good faith efforts to test the validity of the law, rule, or order have been exhausted.

1.4. A lawyer may reveal a client's confidence to the extent necessary to defend against formally instituted charges of criminal conduct, malpractice, or disciplinary violation brought against the lawyer or the lawyer's associates or employees, but only when the charge, claim, or complaint is at the initiation or insistence of the client.

Comment

One of the most difficult and delicate responsibilities of the lawyer in any area of practice is to establish and maintain a relationship of trust and confidence with the client. Frequently, clients mistrust their lawyers, are embarrassed about the truth, or assume that their lawyers would prefer not to be burdened with knowledge about illegal or immoral conduct. In order for the lawyer to provide effective assistance, however, it is essential that the lawyer know everything about the client's affairs that might be relevant to the problem at hand.

If the client were able to distinguish the legally relevant from the legally irrelevant, the useful from the useless, and the incriminatory from the exculpatory, the client would have little need for the lawyer's professional training and skills. And when the lawyer does not have all of the rele-

*E.g., when one of the Watergate principals, responsible for Republican campaign funds, was asked by a young associate why large sums were being turned over to Gordon Liddy, he has been quoted as responding: "I don't want to know, and you don't want to know."

vant facts, the lawyer's professional abilities are of limited value. Accordingly, the effective functioning of the lawyer-client relationship requires complete candor by the client to the lawyer.

Such candor is in the public interest because only through the counsel and advocacy of a lawyer can each individual fully exercise his or her autonomy and realize other important rights under our Constitution and laws. Further, as every experienced lawyer knows, a substantial part of the lawyer's time is devoted to advising clients that a particular course of conduct should not be followed on grounds of legality or morality. Unless clients are candid with their lawyers, those critical functions cannot be served. The client's sense of trust in the lawyer is therefore vital, and the lawyer's obligation of confidentiality is essential to establishing and maintaining that trust.

The most obvious concern of confidentiality is, of course, with protecting the client's direct communications to the lawyer. In addition, however, the lawyer must be encouraged to seek relevant information from sources other than the client, often through leads provided by the client, and unauthorized divulgence of such information to the client's detriment would seriously impair lawyer-client relationships and could induce clients to limit the scope of their lawyers' investigatory efforts. Accordingly, a "confidence," as protected by these rules, is any information obtained by the lawyer in the course of the lawyer-client relationship.

Since candor may be no less important in preliminary interviews, the lawyer-client relationship includes discussions between the lawyer and client to determine whether the lawyer will be retained by the client. Also, the obligation to maintain confidentiality extends beyond the lawyer-client relationship.

It is sometimes suggested that confidentiality is inimical to the truth-seeking function of our system of justice. That is true, however, only in a superficial and short-sighted sense. Certainly, under the adversary system, lawyers frequently have knowledge that the court or other parties would want to have. Most often, however, lawyers have such knowledge precisely because of the established rule of confidentiality. If we were to remove that safeguard by permitting lawyers to divulge their clients' confidences, lawyers would come to have few truths to divulge at all.

Nevertheless, in some narrowly circumscribed exceptions, this Code permits lawyers to reveal some confidences. Such exceptions should reflect values of such overriding concern that some minimal systemic risk would be justified. Also, such exceptions should be limited to situations that arise infrequently, to further minimize the risk of impairing lawyer-client trust.

Even with consensus on those premises, however, the Commission was closely divided on which exceptions to permit. Accordingly, two alternative sets of rules for Part I are provided.

The rules under Alternative A, set forth at page 50, are more protective of confidentiality than are the Code of Professional Responsibility or the ABA's Model Rules. The exceptions permit divulgence, but do not require it, under compulsion of law; in cases involving imminent danger to life; to avoid proceeding before a corrupted judge or juror; and to defend the lawyer or the lawyer's associates against formally instituted charges of misconduct. (Rules 1.3 to 1.6.) Also, withdrawal is permitted in non-criminal cases, even when a confidence might thereby be divulged indirectly, when the client has induced the lawyer to act through material misrepresentation. (Rule 6.5.)

The corruption cases are an appropriate exception because the corruption of the impartial judge or jury vitiates the adversary system itself. Also, since cases of corruption are infrequent, the exception should not have significant impact on the lawyer-client relationship. By contrast, cases of false testimony are more frequent, and the adversary system anticipates and is specifically designed to cope with false testimony through cross-examination, rebuttal, and observation of demeanor during testimony.

These rules reject the previously recognized exception permitting lawyers to violate confidentiality to collect an unpaid fee. The reason for that exception—the lawyer's financial interest—is not sufficiently weighty to justify impairing confidentiality. On the other hand, a limited exception is permitted, but not required, when a lawyer or the lawyer's associates have been formally charged with criminal or unprofessional conduct.

Rule 1.2 refers to using a confidence in a way detrimental to "the interests of the client." Here, as elsewhere in this Code, the interests of the client are determined by the client after having been counseled by the lawyer. (See Rules 2.1, 3.1 and 3.2, the Comment to Part II, and the Preamble.) If there is inadequate opportunity for consultation, the lawyer should act in accordance with the lawyer's reasonable understanding of what the client would perceive to be in the client's interest.

The rules under Alternative B (page 50) are even more protective of confidentiality. Rule 1.1 is the same. Rule 1.2 eliminates the express cross-reference to exceptions (although not all of the exceptions are eliminated), and adds an express reference to the definition of "the interests of the client." Rule 1.3 is the same, permitting the lawyer to divulge a confidence under compulsion of law. Omitted entirely are the exceptions under Rules 1.4 and 1.5, permitting the lawyer to divulge a confidence in cases involving imminent danger to life, and to avoid proceeding before a corrupted judge or juror. Rule 1.6 is retained in Alternative B (renumbered 1.4), but is considerably narrowed; it would permit divulgence to the extent necessary to defend the lawyer or the lawyer's associates from formal charges, but only when it is the client who has initiated or is insisting upon maintaining the charge, claim, or complaint.

Both Alternatives reject the formulation permitting violation of confidentiality in all cases of "future (or continuing) crimes." First, the category of "crimes" is too broad, including those that are openly done and relatively harmless, with those that are clandestine and involve life and death. At the same time, the requirement of a crime may be too narrow; if saving a life, for example, is sufficiently important to justify an exception to confidentiality, then the exception should not turn on technicalities. Further, the concept of future or continuing crime has proved unsatisfactory, particularly in suggesting that a failure to relinquish the proceeds of a past crime, or the refusal of a fugitive to surrender, might be considered a future or continuing crime, thereby permitting or even requiring the lawyer to violate confidentiality.

Illustrative Cases

1(a). A lawyer representing the wife in a divorce and custody case learns from his client that she had sexual relations with a man other than her husband during the time of separation. The client insists upon not disclosing that fact. The lawyer knows that the judge would want to know it, and would weigh it against the wife in deciding custody. The lawyer would commit a disciplinary violation by informing the judge.

1(b). The same facts as 1(a), and the wife testifies falsely on deposition that she has not had sexual relations with anyone other than her husband during the marriage. The lawyer would commit a disciplinary violation by revealing the perjury.

1(c). A lawyer representing the husband in a divorce case learns that his client's tax returns have understated his income. At depositions, the client produces his tax returns, and testifies that they are complete and accurate. The lawyer would commit a disciplinary violation by revealing knowledge of the false returns to the wife, her lawyer, the judge, or the Internal Revenue Service.

1(d). A lawyer represents a client negotiating the purchase of real estate. During negotiations, the parties and their lawyers discuss the adverse effect of existing zoning restrictions, which prevent commercial development of the property. Just prior to formalizing an agreement of sale, however, the buyer learns that his lawyer has persuaded the zoning board to change the zoning to permit commercial use. The buyer decides not to tell the seller about the imminent zoning change. The buyer's lawyer would commit a disciplinary violation by informing the seller.

1(e). A lawyer representing a client accused of murdering a man learns from his client that the client has killed a young woman and hidden the body in a woods. The lawyer goes to the woods and finds the dead body. Because the client could be implicated through his relationship with the lawyer, or even through circumstantial evidence alone, the lawyer tells no one about the body. The lawyer has not committed a disciplinary violation.

1(f). The same facts as 1(e), but the lawyer, without authorization of the client, tells the young woman's parents. The lawyer has committed a disciplinary violation.

1(g). The same facts as 1(e), but the woman is not dead. However, she is seriously injured and unable to help herself or to get help. The lawyer calls an ambulance for her, but takes care not to be personally identified. The lawyer has not committed a disciplinary violation under Alternative A.

1(h). A lawyer learns from a client that the latter is hiding out, in violation of bail or probation. The lawyer would commit a disciplinary violation by revealing the client's location to the authorities.

1(i). A lawyer learns from the client during the trial of a civil or criminal case that the client intends to give testimony that the lawyer knows to be false. The lawyer does not present the client's testimony as she otherwise would, but instead simply requests a narrative from the client and returns to her seat at the counsel table. On summation to the jury, the lawyer makes no reference to her client's false testimony, contrary to what she would have done had she not known it to be false. The lawyer has committed disciplinary violations, both in the manner of presenting the client's testimony and in the manner of summation.

1(j). A lawyer learns from a client during the trial of a civil or criminal case that the client intends to give testimony that the lawyer knows to be false. The lawyer reasonably believes that a request for leave to withdraw would be denied and/or would be understood by the judge and by opposing counsel as an indication that the testimony is false. The lawyer does not seek leave to withdraw, presents the client's testimony in the ordinary manner, and refers to it in summation as evidence in the case. The lawyer has not committed a disciplinary violation.

1(k). A lawyer represents a client charged with possessing narcotics. The client is acquitted. In the course of the representation, however, the lawyer has learned from the client that the client is regularly engaged in selling heroin. If the lawyer does not disclose the information about the client to the police, therefore, the client will continue to sell drugs, thereby causing death or serious bodily harm to others. The lawyer would commit a disciplinary violation by revealing the client's confidence.

1(l). A lawyer is retained by an insurance company to represent its insured, who is being sued in a personal injury action. Without the insured client's consent, the lawyer informs the insurance company of possible defenses of the company against the insured client under the policy. The lawyer has committed a disciplinary violation.

II. FIDELITY TO THE CLIENT'S INTERESTS

2.1. In a matter entrusted to a lawyer by a client, the lawyer shall give undivided fidelity to the client's interests as perceived by the client, unaffected by any interest of the lawyer or of any other person, or by the lawyer's perception of the public interest.

2.2. A lawyer may limit the scope of the matter entrusted to the lawyer, subject to Rules 5.1 and 5.2, which relate to the obligation to treat a client fairly and in good faith, and to make clear the scope of the representation.

2.3. A lawyer may accept a fee or salary from a person or organization other than the client, subject to Rules 2.1, 2.2, and 2.4.

2.4. A lawyer may serve one or more clients, despite a divided loyalty, if each client who is or may be adversely affected by the divided loyalty is fully informed of the actual or potential adverse effects, and voluntarily consents.

2.5. A lawyer representing a corporation shall, at the outset of the lawyer-client relationship, inform the board of directors of potential conflicts that might develop among the interests of the board, corporate officers, and shareholders. The lawyer shall receive from the board instructions in advance as to how to resolve such conflicts, and shall take reasonable steps to ensure that officers with whom the lawyer deals, and the shareholders, are made aware of how the lawyer has been instructed to resolve conflicts of interest.

Comment

In a society such as ours, which places the highest value on the dignity and autonomy of the individual, lawyers serve the public interest by undivided fidelity to each client's interests as the client perceives them.

That is not to say that the lawyer should ignore possible harm to other persons or to public interests, or assume that the client's choices would

be made in narrowly selfish terms. On the contrary, in counseling a client, the lawyer should advise the client fully of all significant consequences that might result from particular courses of conduct, and that advice should include moral and public interest concerns along with strictly legal ones. The lawyer's ultimate fidelity, however, is to the client. By maintaining that fidelity, the lawyer acts in the highest public interest. (See Preamble, *supra.*)

Just as it would be improper for a lawyer to impose other values upon the client, so too the lawyer should not impose upon the client an adversarial attitude toward other people. For example, if two people seeking a divorce prefer to proceed in an amicable way with a single lawyer, it may be entirely proper for the lawyer to represent both at once. (Whether it would be prudent for the lawyer to do so, and risk subsequent criticism by one party or the other, is a matter of judgment for the lawyer.) Similarly, a lawyer might properly represent two or more partners, or co-defendants in a criminal or civil case, or the driver and the passenger in an automobile negligence action against a third party. In each such case, the clients might well decide that it is in their financial interest and/or in the best interest of their personal relationship to conduct their affairs in a cooperative rather than an adversarial way.

The essential responsibility of the lawyer in such a case is to make sure that each party is fully aware of the actual and potential conflicts of interest, and that each voluntarily consents. One problem that should be addressed particularly is the effect of joint representation on the lawyer-client privilege under applicable law. Also, the clients should be informed of the likelihood that the lawyer would subsequently be disqualified from representing either party in any dispute that might arise between them.

One of the conundrums of professional ethics has been the responsibility of a corporate lawyer who learns from a corporate official that the official has engaged in illegal conduct, either against or on behalf of the company. In informing the lawyer, the official has assumed a confidential relationship. Nevertheless, the lawyer may feel compelled to inform the board of directors, which is generally regarded as the embodiment of the corporate entity. If the board fails to take appropriate action, however, the lawyer may then feel an obligation to inform the shareholders (although the general public will then learn about the problem, to the likely disadvantage of the company). As the question is frequently posed, who is the lawyer's client in those circumstances?

Although it has not been generally recognized, the problem is, basically, a familiar and relatively simple one of conflict of interest. The lawyer's difficulty is insoluble only because the lawyer has failed to inform the board of readily foreseeable conflicts of interest and to receive guidance in advance. On the basis of the board's instructions, the lawyer can then make sure that each interested party is informed in advance and is thereby in a position to seek adequate protection.

For example, the board might prefer to maximize candor between its officers and the lawyer, and therefore instruct the lawyer to honor the officers' confidences, even in reporting to the board. The shareholders would then be in a position to approve or disapprove that policy, or to relinquish their shares. As an alternative, the board might prefer to know everything the lawyer knows. In that event the officers would be on notice that in some circumstances they might want to consult with personal counsel before disclosing certain information to corporate counsel. Rule 2.5 requires the lawyer to take the reasonable steps necessary to avoid the situation in which the lawyer has awkward information, and cannot either disclose it or keep it confidential without betraying someone's reasonable expectations of trust.

Illustrative Cases

2(a). A lawyer represents a defendant charged with tax fraud. It is apparent to the lawyer that the fraud was actually committed by the client's wife, who has not been charged. The client insists that the lawyer conduct the defense without in any way implicating the client's wife. The lawyer would commit a disciplinary violation by violating those instructions.

2(b). A lawyer represents the accused in a criminal case. The lawyer interviews a potential witness whose story strongly supports the defense. Shortly thereafter, however, the lawyer learns that the prosecution has interviewed the same witness and has received a story highly damaging to the defense. At trial, the prosecution does not present the witness. The defendant insists upon calling the witness for the defense. The defense lawyer does not do so, because of concern with the conflicting story the witness has given the prosecution, and the lawyer's judgment that the witness will hurt the defense. The lawyer has committed a disciplinary violation.

2(c). A lawyer represents the driver and passenger of an automobile, who were both injured through the alleged negligence of the driver of another car in an intersection accident. The lawyer has not advised them of potential conflicts in their interests. The lawyer has committed a disciplinary violation.

2(d). A lawyer represents the plaintiff in a civil action. The case is one in which the defendant can be held responsible for the plaintiff's attorney's fees. The lawyer negotiates a settlement for the client, and also negotiates with the defense regarding the lawyer's own fee. The lawyer does not inform the client of the conflict thereby created between the client's interests and the lawyer's. (For example, the client might feel, if fully informed of the circumstances, that the liability settlement should be larger in view of what is available for the lawyer's fee.) Because the client was not in a position to evaluate the settlement with full awareness of the lawyer's conflict, or to consider having additional counsel represent the client's interests in the negotiations, the lawyer has committed a disciplinary violation, even though the ultimate liability settlement and fee were in fact fair.

III. ZEALOUSNESS ON THE CLIENT'S BEHALF

3.1. A lawyer shall use all legal means that are consistent with the retainer agreement, and reasonably available, to advance a client's interests as the client perceives them.

3.2. A lawyer shall fully inform the client of a client's rights and possible courses of conduct regarding issues of substantial importance to the client, except (a) to the extent that the client has instructed the lawyer to exercise the lawyer's judgment without further consultation with the client, or (b) as provided in Rule 3.3.

3.3. A lawyer shall not advise a client about the law when the lawyer

knows that the client is requesting the advice for an unlawful purpose likely to cause death or serious physical injury to another person.

3.4. A lawyer shall not knowingly encourage a client to engage in illegal conduct, except in a good faith effort to test the validity or scope of the law.

3.5. A lawyer shall not knowingly participate in unlawfully concealing or destroying evidence, or discourage a witness or potential witness from talking to counsel for another party.

3.6. A lawyer shall not knowingly participate in creating perjured testimony, other false evidence, or a misrepresentation upon which another person is likely to rely and suffer material detriment.

3.7. A lawyer shall not knowingly file a materially false pleading, present materially false evidence, or make a materially false representation to a court or other tribunal, except as required to do so by Rule 1.2, which proscribes direct or indirect divulgence of a client's confidence.

3.8. A lawyer shall not give legal advice to a person who the lawyer knows is not represented by a lawyer, other than the advice to secure counsel, when the lawyer knows that the interests of that person are in conflict or likely to be in conflict with the interests of the lawyer's client.

3.9. A lawyer shall not communicate regarding a legal matter with an adverse party who the lawyer knows is represented in that matter by an attorney, unless the lawyer has been authorized to do so by that party's attorney. However, a lawyer may send a written offer of settlement directly to an adverse party, seven days or more after that party's attorney has received the same offer of settlement in writing.

3.10. A lawyer shall not give a witness money or anything of substantial value, or threaten a witness with harm, in order to induce the witness to testify or dissuade the witness from testifying. However, a lawyer may pay a fee, including a contingent fee, to an expert witness; a lawyer may reimburse a witness' actual, reasonable financial losses and expenses of appearing; a lawyer may give a witness protection against physical harm; and a prosecutor may immunize a witness from prosecution in order to avoid an assertion of the constitutional privilege against self-incrimination.

3.11. A lawyer representing an interested party shall not initiate communication with a judge or hearing officer about the facts or issues in a case that the lawyer knows is pending or likely to be pending before the judge or hearing officer, unless the lawyer has first made a good faith effort to apprise opposing counsel. If a lawyer has an ex parte discussion with a judge or hearing officer regarding the issues in a case, the lawyer shall fully inform opposing counsel of the ex parte communication at the earliest opportunity, except to the extent prohibited by Rule 1.2, which proscribes unauthorized divulgence of a client's confidences.

Comment

Except when ordered by a court to represent a client, the lawyer has complete discretion whether to accept a particular client. Once the lawyer is committed to represent a client, however, the lawyer has no discretion, short of grounds for withdrawal, to fail to provide the client with every legal recourse that is consistent with the retainer agreement, reasonably available, and in the client's interests as the client perceives them. When there is inadequate opportunity for consultation regarding the client's interests, the lawyer shall act in accordance with the lawyer's reasonable understanding of what the client would perceive to be in the client's interest.

The rules in this Part and elsewhere in this Code that emphasize the client's autonomy as a basic value assume that the client is competent to make the decisions at issue. Accordingly, the lawyer who represents a person who is incompetent is not bound by the literal terms of those rules. Nor does it appear to be possible to draft disciplinary rules that will adequately deal with the many variations that might arise regarding clients who are altogether or in part incompetent to make decisions in their own interest. Two guidelines can be stated, however. First, the lawyer's controlling concern should be the client's interest as the client would be most likely to perceive it if competent to make the decision. Second, depending upon the circumstances, the lawyer might be well advised to seek guidance from other professionals, such as psychiatrists or social workers, and from members of the client's family.

The phrase "materially false" in Rule 3.7 means false and likely to affect the resolution of one or more issues before the tribunal.

Illustrative Cases

3(a). A lawyer represents the defendant in a bank robbery. The lawyer suggests that the client give the lawyer the gun used in the robbery and the stolen money, so that the lawyer can put them in a place less likely to be searched. The lawyer has committed a disciplinary violation.

3(b). A lawyer represents a client in a murder case. The client leaves the murder weapon with the lawyer. The lawyer fails to advise the client that the weapon might be more accessible to the prosecution in the lawyer's possession than in the client's, and that, if the lawyer retains the weapon, he will produce it if ordered to do so by a valid subpoena. The lawyer has committed a disciplinary violation by failing to fully advise the client.

3(c). The same facts as 3(b). The lawyer would not commit a disciplinary violation by returning the weapon to the client, unless the lawyer also encouraged the client to make it unavailable as evidence.

3(d). The same facts as 3(b). The lawyer would not commit a disciplinary violation by producing the gun in response to a subpoena, unless the lawyer failed first to make a good faith effort to test the validity of the subpeona.

3(e). A lawyer is conducting the defense of a criminal prosecution. The judge calls the lawyer to the bench and asks her whether the defendant is guilty. The lawyer knows that the defendant is guilty, and reasonably believes that an equivocal answer will be taken by the judge as an admission of guilt. The lawyer assures the judge that the defendant is innocent. The lawyer has not committed a disciplinary violation.

3(f). The same facts as in 3(e), but the lawyer replies to the judge, "I'm sorry, Your Honor, but it would be improper for me to answer that question." The lawyer has committed a disciplinary violation.

3(g). The same facts as in 3(e), but the lawyer is an assistant public defender, and the public defender has publicly announced that the office's policy is to refuse to answer such questions and to report every judge who asks such questions to the state Judicial Discipline Commission. For that reason, a refusal to answer would not be taken as an admission of guilt. The lawyer reminds the judge of her office's policy, and asks the judge to withdraw the question. The lawyer has not committed a disciplinary violation.

IV. COMPETENCE

4.1. At a minimum, a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

4.2. A lawyer shall take such legal action as is necessary and reasonably available to protect and advance a client's interests in the matter entrusted to the lawyer by the client.

4.3. A lawyer shall seek out all facts and legal authorities that are reasonably available and relevant to a client's interests in the matter entrusted to the lawyer by the client.

4.4. A lawyer shall give due regard not only to established rules of law, but also to legal concepts that are developing and that might affect a client's interests.

4.5. A lawyer shall keep a client currently apprised of all significant developments in the matter entrusted to the lawyer by the client, unless the client has instructed the lawyer to do otherwise.

4.6. A lawyer shall seek out reasonably available resources that are necessary to protect and advance a client's interests, such as experts in specialized areas of the law or experts in non-legal disciplines.

4.7. If a lawyer forms a partnership with a non-lawyer for the purpose of more effectively serving clients' interests, the terms of the partnership shall be consistent with the lawyer's obligations under this Code, with particular reference to Rule 2.1, requiring undivided fidelity to the client.

Comment

It is generally agreed that a lack of competence is unprofessional and that a code of professional conduct should prescribe competence. Drafting rules to that end, however, has proved difficult.

Canon 6 of the Code of Professional Responsibility proscribes the failure to act competently, but defines competence in circular terms as conduct that the lawyer "knows or should know...is not competent." The CPR also requires preparation that is "adequate in the circumstances," but adequacy is neither defined nor given a reference point. Also, the CPR forbids a lawyer to "neglect a legal matter."

The ABA's Model Rules of Professional Conduct are also vague and so minimal as to provide little protection to the client. Competence is defined as "adequate competence," which in turn is defined in terms of "acceptable practice" by lawyers undertaking similar matters. What practice is acceptable, to whom, and on what standards is also undefined (except requirements for promptness and "adequate attention" to the client's matter).

This Code requires, at a minimum, a level of skill and care commensurate with that generally provided by other lawyers in similar matters. Recognizing, however, that what is provided by other lawyers may not always amount to an adequate standard of competence, the Rules prescribe specific duties that are defined in terms of what is relevant or necessary to protect and advance the client's interests, and is reasonably available. The client's interests are determined by the client, and delineated by "the matter entrusted to the lawyer." (See Rules 2.2, 5.1, and 5.2, permitting the lawyer to limit the scope of the matter, subject to the requirements of fairness and good faith.)

V. RETAINER AGREEMENTS AND FINANCIAL ARRANGEMENTS WITH CLIENTS

5.1. A lawyer shall treat a client fairly and in good faith, giving due regard to the client's position of dependence upon the lawyer, the lawyer's special training and experience, and the high degree of trust which a client is entitled to place in a lawyer.

5.2. Upon being retained, a lawyer shall make clear to a client, in writing, the material terms of the retainer agreement, including the scope of what the lawyer is undertaking to do for the client, the limits of that undertaking, and the fee and any other obligations the client is assuming.

5.3. A lawyer shall not contract with a client to limit the lawyer's liability to the client for malpractice.

5.4. Lawyers who are not openly associated in the same firm shall not share a fee unless: (a) the division reflects the proportion of work performed by each attorney and the normal billing rate of each; or (b) the client has been informed pursuant to Rule 5.2 of the fact of fee-sharing and the effect on the total fee, and the client consents.

5.5. A lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work-product exception shall be inapplicable when the client is in fact unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of imprisonment, deportation, destruction of essential evidence, loss of custody of a child, or similar irreparable harm.

5.6. A lawyer shall not give money or anything of substantial value to any person in order to induce that person to become or remain a client, or to induce that person to retain or to continue the lawyer as counsel on behalf of someone else. However, a lawyer may (a) advance money to a client on any terms that are fair; (b) give money to a client as an act of charity; (c) give money to a client to enable the client to withstand delays in litigation that would otherwise induce the client to settle a case because of financial hardship, rather than on the merits of the client's claim; or (d) charge a fee that is contingent in whole or in part on the outcome of the case.

Comment

Rule 5.6(c) permits a lawyer to give money to a client to enable the client to have access to the legal system or to withstand delay as a form of coercion to settle on unfavorable terms not related to the merits of the case. A not uncommon practice is revealed, for example, in *Abramson v. Kenwood Laboratories, Inc.*, 223 N.Y.S.2d 1005 (1961). There the attorney "frankly stated in the course of the...pretrial hearings that he is 'running a business.' He indicated the generally known policy of his insurance carrier to offer payment in settlements of personal injury suits of sums less than what may reasonably be anticipated as the probable recovery upon trial."

That kind of practice conflicts most clearly with the fair administration of justice when the plaintiff is in need of immediate funds for food, housing, medical attention, etc., and is therefore under unconscionable pressure to settle for less than the claim is worth on the merits. In such a case, the lawyer contributes to the fair administration of justice by giv-

ing or lending the client funds that are necessary to enable the client to obtain a fair recovery on the merits of the case, uninfluenced by financial pressures resulting from delay.

Rule 5.6(d) permits fees to be contingent in whole or in part on the outcome of the case. Such fees have long been recognized as proper when the client is a plaintiff in civil litigation. The principal reason is that, as a practical matter, most people would not be in a position to seek vindication of their legal rights, however meritorious, if litigating those rights could result in substantial financial loss as well as loss in time and the other burdens of litigation. Since there is little if any incentive to lawyers to take frivolous cases on contingent fees, such cases are screened out through a contingent fee system more effectively than they might be in a system based exclusively upon retainers. Moreover, any concern that contingent fees will induce unethical conduct on the part of lawyers seems fanciful. A lawyer unscrupulous enough to fabricate a case to earn a contingent fee will undoubtedly not hesitate to do so to earn a retainer or to establish a reputation for winning cases.

Similarly, there appears to be no justification, on ethical grounds, to forbid contingent fees to defendants in civil cases. Indeed, the only apparent reason for such a prohibition is that anyone who is worth suing is likely to be able to pay a retainer, and is effectively coerced into doing so because of the pending claim. Thus, a rule against charging contingent fees to defendants has every appearance of being less a matter of ethics than a restraint of trade. If a lawyer considers a complaint to be so lacking in merit as to justify basing the fee in whole or in part on the lawyer's success in defending against it, the lawyer and client should be free to contract on that basis.

There is even more reason for allowing contingent fees for the accused in a criminal case, because the accused who goes to prison, thereby losing any opportunity to earn a living, is far less able to pay a fee than is the accused who is acquitted. Also, lawyers would accept such arrangements only when the defense appeared sufficiently strong to warrant it, and the unscrupulous lawyer would be no more likely to fabricate a defense to earn a contingent fee than to earn a retainer.

When a contingent fee is proposed by an attorney, it is desirable, although it is not required, that a reasonable retainer arrangement be offered to the client in the alternative.

These rules do not preclude any particular mode or terms of payment, such as credit cards or interest on unpaid fees. The lawyer may also accept in payment shares of stock, literary rights, or other property. The only limitation is that the mode and terms of payment be consistent with fairness, good faith, full disclosure, and undivided fidelity to the client's interests, and otherwise be consistent with the provisions of this Code.

Rule 5.4, governing the division of fees by lawyers not openly associated in the same firm, is less restrictive than any other provision or proposal known to the Commission.

First, it allows a fee to be divided, without express client consent, if the division reflects the proportion of each lawyer's contribution to the work for the client, and each lawyer's normal billing rate. (Note that each lawyer would have been retained either by the client, pursuant to Rule 5.2, or by another lawyer pursuant to Rule 4.6, which requires the lawyer to seek out experts in specialized areas of the law to the extent available and necessary, with such notice to the client as is required by Rule 4.5.) Compare DR 2-107 of the Code of Professional Responsibility, and Rule 1.6(e) of the ABA's Model Rules.

Second, Rule 5.4 allows any division to which the client consents after being informed of the fact that the lawyers intend to divide the fee, and of the effect of the division on the total fee. In addition, Rule 5.2 requires that this information be provided in writing, including the scope of what each lawyer is to do for the client. That requirement should be sufficient to prevent unfairness to clients.

It must be emphasized that the purpose of allowing fee-splitting is to encourage lawyers to refer clients to competent specialists. The ABA's Model Rules would continue the existing practice of penalizing such referrals outside one's own firm; even the Massachusetts and California rules prohibit a division that increases the amount of the fee but only when the two lawyers are not members of the same firm. Such a rule exalts the form of association over the substance of client consent and providing better service for the client, particularly in the context of recent increases in the number and size of multi-office firms. It prohibits some lawyers from doing something that other lawyers may do with impunity, and that many lawyers in fact do. It is more realistic to regulate a common practice than to prohibit it on a discriminatory basis, especially when the practice may actually improve the quality of service made available to clients.

Illustrative Cases

5(a). A lawyer represents the widow of a railroad employee killed in a switching accident; the railroad is the defendant. After many months, the case is near trial, but the plaintiff tells the lawyer that she urgently needs money for food and rent, and must therefore settle immediately for whatever she can get. The lawyer reasonably believes that she will receive substantially more in settlement on the eve of the trial or as a result of jury verdict. He therefore gives her money, with the understanding that she will pay it back only if there is a recovery in the case. The lawyer has not committed a disciplinary violation.

5(b). A lawyer advances litigation expenses on behalf of a client on the clear understanding, in writing, that the client will reimburse the lawyer on a monthly basis, and that the client will pay interest at a specified, reasonable rate for any amounts in default. The lawyer has not committed a disciplinary violation.

5(c). A law firm is counsel to a corporation. An officer of the corporation asks a member of the firm to represent him in a divorce. The lawyer does so, without charging the firm's customary fee. The lawyer has committed a disciplinary violation.

VI. WITHDRAWAL FROM REPRESENTATION

6.1. A lawyer shall withdraw from representing a client when the lawyer is discharged by the client.

6.2. A lawyer may withdraw from representing a client at any time and for any reason if (a) withdrawal will cause no significant harm to the client's interests, (b) the client is fully informed of the consequences of withdrawal and voluntarily assents to

it, or (c) withdrawal is pursuant to the terms of the retainer agreement required by Rules 5.1 and 5.2 of this Code.

6.3. A lawyer may withdraw from representing a client if the lawyer reasonably believes that continued employment in the case would be likely to have a seriously adverse effect upon the lawyer's health.

6.4. Unless the lawyer knows that withdrawal would result in significant and irreparable harm to the client, a lawyer may withdraw from representing a client if (a) the client commits a clear and substantial violation of a written agreement regarding fees or expenses, or (b) the lawyer encounters continuing and unavoidable difficulties in working with co-counsel.

6.5. In any matter other than criminal litigation, a lawyer may withdraw from representing a client if the lawyer comes to know that the client has knowingly induced the lawyer to take the case or to take action on behalf of the client on the basis of material misrepresentations about the facts of the case, and if withdrawal can be accomplished without a direct violation of confidentiality.

6.6. A lawyer shall decline or withdraw from representing a client when such action is necessary to avoid commission by the lawyer of a disciplinary violation, unless such action would result in a violation of Rule 1.2, proscribing direct or indirect divulgence of a client's confidences.

6.7. Whatever the reason for withdrawing from representation, a lawyer shall take reasonable care to avoid foreseeable harm to a client, including giving due notice to the client, allowing reasonable time for substitution of new counsel, cooperating with new counsel, promptly turning over all papers and property to which the client is entitled, and promptly returning any unearned advances.

Comment

Withdrawal from representing a client is the termination of the lawyer's authority to act for the client. What that entails will vary in different situations. Some of the duties that attach at the time of withdrawal are stated by Rule 6.7; others appear in Rule 1.2, relating to continuing confidentiality, and Rule 5.5, limiting the assertion of attorney's liens.

Most of the Rules in this Part state the circumstances under which lawyers are permitted to initiate withdrawal, and the conditions that may circumscribe such withdrawals.

Rule 6.1 is absolute. The lawyer discharged by the client must terminate the representation.

It sometimes appears that this Rule is overridden by a court's refusal to accept the withdrawal of counsel. In such cases, however, the client has the right either to persist in discharging the lawyer, and to go forward without counsel, or to revoke the discharge. Continuing with an unwanted lawyer is a true Hobson's choice, but it is still the client's choice of that course that continues, or revives, the representation.

Rule 6.6 is not absolute, because the duty it embodies, that of avoiding violating the Code, is sometimes subordinate to the paramount duty not to reveal clients' confidences. It should also be noted that Rule 6.5 allows indirect divulgence of confidences by withdrawal from a class of cases also covered by Rule 6.6, those non-criminal matters where the client has knowingly induced the lawyer either to take the case or to take action on the client's behalf, on the basis of material factual misrepresentations.

A lawyer is forbidden by Rule 3.7 to knowingly present false evidence. Therefore, withdrawal from representation would be required by Rule 6.6 when the lawyer knows through a confidence that the client intends to present false evidence, and when withdrawal would not result in violating a confidence. When the lawyer's refusal to present false evidence would result in violating a confidence, however, Rules 1.2, 3.7, and 6.6 require the lawyer to continue in the case.

Rule 6.5 permits withdrawal in a matter, other than criminal litigation, when the lawyer has been induced to take action by misrepresentations by the client, even though withdrawal might result indirectly in divulging a confidence. When the facts of a case fall within Rule 6.5, therefore, Rules 1.2, 3.7, and 6.6 are in part subordinated to it.

Illustrative Cases

6(a). A lawyer representing the accused in a criminal case learns from the client that he intends to present a false alibi. The lawyer knows that he will be required to give an explanation to the judge if he makes motion for leave to withdraw as counsel; he also knows that the judge will take an equivocal explanation as an indication that the client intends to commit perjury. The lawyer nevertheless asks leave to withdraw, telling the judge only, "I have an ethical problem," or, "My client and I do not see eye to eye." The lawyer has committed a disciplinary violation.

6(b). A lawyer represents a client required to file documents with a government agency. The lawyer comes to know that there are material misrepresentations in documents filed by the lawyer on the client's behalf, and subsequent uncorrected filings would further the misrepresentation. The client insists upon making the subsequent filings. The lawyer's withdrawal would cause no significant harm to the client's interest. The lawyer would commit a disciplinary violation by failing to withdraw.

6(c). The same facts as in 6(b), but the agency has a rule requiring a lawyer to give the agency the reason for any withdrawal. The lawyer would commit a disciplinary violation by withdrawing and thereby directly violating the client's confidences in making the required explanation.

6(d). The same facts as in 6(b). In addition, the lawyer was induced to participate in the earlier filing by knowing misrepresentations by the client to the lawyer; the lawyer's withdrawal would adversely affect the client's ability to meet important deadlines; and the lawyer would not be required to explain his withdrawal to the agency, but the agency would be likely to scrutinize the client's filings more closely. The lawyer would not commit a disciplinary violation either by withdrawing or by going forward with the client.

VII. INFORMING THE PUBLIC ABOUT LEGAL SERVICES

7.1. A lawyer shall not knowingly make any representation that is materially false or misleading, and that might reasonably be expected to induce reliance by a member of the public in the selection of counsel.

7.2. A lawyer shall not advertise for or solicit clients in a way that violates a valid law imposing reasonable restrictions regarding time or

place.

7.3. A lawyer shall not advertise for or solicit clients through another person when the lawyer knows, or could reasonably ascertain, that such conduct violates a contractual or other legal obligation of that other person.

7.4. A lawyer shall not solicit a member of the public when the lawyer has been told by that person or someone acting on that person's behalf that he or she does not want to receive communications from the lawyer.

7.5. A lawyer who advertises for or solicits clients through another person shall be as responsible for that person's representations to and dealings with potential clients as if the lawyer acted personally.

Comment

Access to the legal system is essential to the exercise of fundamental rights, particularly those rights relating to personal autonomy, freedom of expression, counsel, due process, and equal protection of the laws. Yet members of the public are frequently unaware of their need for legal assistance and of its availability. It is therefore important for lawyers to provide members of the public with information regarding the availability of lawyers to serve them, the ways in which legal services can be useful, and the costs of legal services. Lawyers are therefore encouraged to advertise and to solicit clients, subject only to restrictions relating to false and misleading representations, harassment, violation of reasonable time and place regulations, and inducing violations by others of contractual or other legal obligations.

Solicitation refers to spoken communication, in person or by telephone, intended to induce the other person to become a client.

Illustrative Cases

7(a). A lawyer advertises truthfully that she has been certified as a specialist in international law by the Trans-World Bar Association, which is a bona fide association of lawyers imposing substantive requirements for certification as a specialist. The lawyer has not committed a disciplinary violation.

7(b). A lawyer advertises truthfully that he has been certified as a specialist in Family Law by the State Lawyers Association. The membership of the State Lawyers Association consists only of the lawyer himself, his two partners, and his neighbor. The advertisement is materially misleading, and the lawyer has committed a disciplinary violation.

7(c). A lawyer telephones the fifteen-year-old victim of a recent automobile accident, and is told by her parents that they are arranging for legal representation for their daughter, that she is in the hospital, and that they do not want him to contact her. The lawyer nevertheless calls upon the girl in the hospital and attempts to induce her to retain him. The lawyer has committed a disciplinary violation.

7(d). A lawyer visits the fifteen-year-old victim of an automobile accident in the hospital, and she retains him on reasonable terms for work he is competent to perform. He has not been instructed not to visit the girl, and the hospital has no regulations against solicitation of patients by lawyers. The lawyer has not committed a disciplinary violation.

Note: A client can discharge a lawyer with or without cause. The liability of the client to the lawyer in that event is a matter of state contract law.

7(e). A lawyer offers a hospital orderly a fee to distribute his professional cards to patients. The hospital has a rule against such conduct by its personnel. The lawyer has committed a disciplinary violation.

VIII. MAINTAINING PROFESSIONAL INTEGRITY AND COMPETENCE

8.1. A lawyer shall not engage in unlawful conduct of a kind that creates a substantial doubt that the lawyer will comply with this Code of Conduct.

8.2. Subject to Rule 1.2, proscribing unauthorized divulgence of a client's confidences, a lawyer who knows that a lawyer or judge has committed a disciplinary violation, or who has material, adverse information about a candidate for the bar, shall convey that knowledge to the appropriate disciplinary or admission authorities.

8.3. When a lawyer has represented a client, or when, because of the lawyer's association with a law firm, a client of that firm could reasonably believe that the lawyer has had access to the client's confidences, the lawyer shall not thereafter accept employment by any other party whose interests are in any way adverse to the client's and could be materially affected by the lawyer's presumed knowledge of the client's confidences.

8.4. When a lawyer knows that the lawyer's testimony is likely to be offered on a material, disputed issue in a case, the lawyer shall decline or withdraw from representation in the case, unless doing so would cause serious and irreparable injury to the client.

8.5. When a lawyer is disqualified from representing a client under Rule 8.3 or 8.4, no partner or associate of that lawyer, and no one with an of counsel relation to the lawyer, shall represent the client.

8.6. When a lawyer is disqualified by Rule 8.3, 8.4, or 8.5 from representing a client, the disqualification may be waived by the voluntary and informed consent of each person whose interests are protected by the applicable rule.

8.7. A lawyer shall not enter into a commercial transaction or other business relationship with a person who is or was recently a client, unless that person is represented by independent counsel. This Rule does not affect the specific transactions covered by Part V of this Code, relating to retainer agreements and financial arrangements with clients.

8.8. A lawyer shall not commence having sexual relations with a client during the lawyer-client relationship.

8.9. A lawyer shall not act as officer or director of a publicly held corporation that is a client of the lawyer, of the lawyer's partner or associate, or of any firm or attorney with whom the lawyer has an of counsel relationship.

8.10. A lawyer serving on the board of a charitable or public organization shall not participate in discussing or voting upon any matter before the board that the lawyer knows might materially affect the interests of a client of the lawyer or of the lawyer's firm.

8.11. A lawyer shall not participate in arranging for a gift from a client to the lawyer, to a member of the lawyer's family, or to one who is a partner, associate, or of counsel to

the lawyer.

8.12. When a lawyer holds money or property in whole or in part for the benefit of someone else, the lawyer shall hold it in trust, separate from the lawyer's own money and property, and appropriately identified, recorded, and safeguarded. When another person becomes entitled to receive any part of the money or property, the lawyer shall promptly deliver it to that person. If a dispute develops regarding entitlement to any part of the money or property, the lawyer may take action in accordance with applicable law, such as by depositing with a court the money or property that is in dispute, pending determination of the dispute.

8.13. A lawyer shall not enter into an agreement that unreasonably restricts a lawyer's right to practice law or to communicate with members of the public, and which thereby interferes with the freedom of clients to obtain counsel of their choice. However, lawyers in a partnership or similar professional relationship may make reasonable agreements regarding the allocation of fees among themselves with respect to clients who elect to continue with one or another lawyer upon termination of the professional relationship between the lawyers.

8.14. A lawyer shall not knowingly assist or seek to induce a disciplinary violation by another lawyer.

8.15. A lawyer shall take reasonable care to assure that none of the lawyer's partners, associates, or employees commits an act that would be a disciplinary violation if committed by the lawyer.

Comment

Satisfying each person's sense of justice is a high value in a society that respects the dignity of the individual. In addition, public confidence in the administration of justice is necessary to maintain respect for law. For those reasons, it is a truism that justice must not only be done but that it must be seen to be done.

The role of lawyers is an essential element of the administration of justice, and rules of lawyers' conduct define that role. Accordingly, lawyers must not only comply with rules of professional conduct; they must also be seen as complying with them. For the profession to promulgate ethical rules, and yet appear to wink at violations, can only result in disrespect for the profession and, thereby, in disrespect for the administration of justice. Thus, the concept that a lawyer should avoid the appearance of impropriety is an extremely important one. Even more so than with other important concepts of professional conduct, however, the problem of drafting has been an exceedingly difficult one.

For example, Canon 9 of the Code of Professional Responsibility provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Except for a few specific proscriptions, however (such as commingling funds), the canon is given no content. What is an impropriety? To whom must there appear to be one? To what degree of certainty? On what facts? (Also, since a conflict of interest under the CPR depends in part upon appearances, a lawyer could be disciplined for the doubly vague offense of apparently being guilty of what appears to be an impropriety.)

In an early draft of this Code, the Reporter attempted to cope with those problems with the following provision:

"A lawyer shall avoid acting in such a way that a fair-minded person, knowing all of the relevant facts that are readily available, would conclude that, in the generality of such cases, disciplinary violations are likely to occur in a significant number of instances."

Thus, the appearance is viewed from the perspective of a fair-minded person, not that of either a naif or a cynic. The appearance depends upon the facts readily available. The question is not whether the lawyer has in fact acted improperly, since the issue of appearances ordinarily arises in situations in which the impropriety would be extremely difficult to detect or to prove. The focus is on the generality of such cases, and whether improprieties are likely to occur in a significant number of instances.

Phrased otherwise: lawyers should avoid situations in which temptation and opportunity for wrongdoing are high, and detection or proof of wrongdoing would be difficult—situations, that is, in which common sense and experience inform us that a significant number of people will not be able to resist temptation. An obvious example is the lawyer who puts the client's funds into the lawyer's checking account.

The Commission accepted the proposed Rule as an aspirational guide, but found it too vague to be an acceptable basis for disciplinary action. Instead, this Part consists solely of rules proscribing particular conduct that gives rise to reasonable inferences of impropriety.

For example, Rule 8.8 forbids a lawyer to commence having sexual relations with a client during the lawyer-client relationship. This rule, like Rule 5.1, recognizes the dependency of a client upon a lawyer, the high degree of trust that a client is entitled to place in a lawyer, and the potential for unfair advantage in such a relationship. Other professionals, such as psychiatrists, have begun to face up to analogous problems.

Rule 8.1 provides for discipline of a lawyer who, either as a lawyer or as a private citizen, engages in unlawful conduct not specifically covered by other provisions of this Code. It provides that unlawful conduct should result in professional discipline only if it is relevant to one's performance as a lawyer.

In setting the standard, an effort has again been made to avoid unfairly vague terms. The elusive concept of moral turpitude is not used, nor is the undefined standard of "fitness to practice law." To warrant professional sanctions, the conduct must be unlawful – a felony, misdemeanor, or violation of rule of court – and must be of a kind that creates a substantial doubt that the lawyer will comply with the rules of conduct required of lawyers.

This Code does not have a rule requiring each lawyer to do a particular amount of uncompensated public interest or *pro bono publico* work, on pain of professional discipline. That does not mean that the attorney members of the Commission are unwilling to perform such services or that the non-lawyer members do not want to share in the benefits of *pro bono* work. Rather, it is apparent to the Commission that such a rule would be unenforceable and unenforced, and therefore hypocritical.

One good reason for the unenforceability of a *pro bono* rule is the inherent vagueness of any such rule. What is "in the public interest," and who is to decide? Are services contributed to the American Civil Liberties Union, the American Enterprise Institute, or the Anti-Trust Section of the local bar association "in the public interest"? Nor is it clear that the organized bar, or the courts or

legislatures should be telling lawyers how they must spend their non-business time. If a lawyer prefers to do work for his church or synagogue, or contribute non-professional services to the Red Cross or to a famine relief organization, it seems absurd to say that the lawyer should be professionally disciplined for failing, instead, to serve on the board of a legal aid society or a bar association.

Certainly, there are failings in the administration of justice, and lawyers as a group can and should be helping to improve it. However, compelling a lawyer who is unsympathetic with poor people or with racial minorities to represent indigent minority group members is not truly a service to the clients or to the system of justice.

In sum, all lawyers should do work in the public interest. But some lawyers should not be telling other lawyers how much *pro bono* work they should be doing, and for whom, and disciplining them if they do not. Nor should codes of conduct purport to impose disciplinary requirements that the codifiers know will not be enforced.

Illustrative Cases

8(a). A lawyer represents the D Company, which is the defendant in an anti-trust action brought by the government. Subsequently, the lawyer represents the P Company, which is suing the D Company in a private anti-trust action involving the same alleged violation. Unless the D Company has knowingly and voluntarily assented to the lawyer's representation of the P Company, the lawyer has committed a disciplinary violation.

8(b). The same facts as in 8(a), but another attorney in the lawyer's firm represents the P Company, and the firm undertakes to "insulate" the lawyer from any involvement in the case. Unless the D Company has knowingly and voluntarily assented to the insulating or screening arrangement, and to the other attorney's representation of the P Company, the other attorney has committed a disciplinary violation.

8(c). A lawyer expects to cross examine a witness who previously was acquitted in a criminal case. The lawyer offers to pay the witness' previous attorney to provide information, learned by representing the witness in the criminal case, that could be used to discredit the witness on cross examination. The lawyer has committed a disciplinary violation.

IX. RESPONSIBILITIES OF GOVERNMENT LAWYERS

9.1. A lawyer serving as public prosecutor shall not seek evidence to support a prosecution against a particular individual unless that individual is identified as a suspect in the course of a good faith investigation into suspected criminal conduct.

9.2. In exercising discretion to investigate or to prosecute, a lawyer serving as public prosecutor shall not show favoritism for, or invidiously discriminate against, one person among others similarly situated.

9.3. A lawyer serving as public prosecutor shall not seek or sign formal charges, or proceed to trial, unless a fair-minded juror could conclude beyond a reasonable doubt that the accused is guilty, on the basis of all of the facts that are known to the prosecutor and likely to be admissible into evidence.

9.4. A lawyer serving as public prosecutor before a grand jury shall not interfere with the independence of the grand jury, preempt a function of the grand jury, or use the processes of the grand jury for purposes not approved by the grand jury.

9.5. A lawyer serving as public prosecutor shall not use unconscionable pressures in plea bargaining, such as charging the accused in several counts for what is essentially a single offense, or charging the accused with a more serious offense than is warranted under Rule 9.3.

9.6. A lawyer serving as public prosecutor shall not condition a dismissal, *nolle prosequi,* or similar action on the accused's relinquishment of constitutional rights, or of rights against the government, a public official, or any other person, other than relinquishment of those rights inherent in pleading not guilty and proceeding to trial.

9.7. A lawyer serving as public prosecutor shall promptly make available to defense counsel, without request for it, any information that the prosecutor knows is likely to be useful to the defense.

9.8. A lawyer serving as public prosecutor shall not strike jurors on grounds of race, religion, national or ethnic background, or sex, except to counteract the use of such tactics initiated by the defense.

9.9. A lawyer serving as public prosecutor, who knows that a defendant is not receiving or has not received effective assistance of counsel, shall promptly advise the court, on the record when possible.

9.10. A lawyer representing the government before a court or other tribunal shall inform the tribunal of any facts or legal authorities that might materially affect the decision in the case, and that have not been brought to the attention of the tribunal by other counsel.

9.11. A lawyer in public service shall not engage in publicity regarding a criminal investigation or proceeding, or an administrative investigation or proceeding involving charges of wrongdoing, until after the announcement of a disposition of the case. However, the lawyer may publicize information that is (a) necessary to protect the public from an accused who is at large and reasonably believed to be dangerous; (b) necessary to help in apprehending a suspect; or (c) necessary to rebut publicized allegations of improper conduct on the part of the lawyer or the lawyer's staff.

9.12. A lawyer in public service shall not knowingly violate the rights of any person, or knowingly tolerate the violation of any person's rights by any other public employee.

9.13. A lawyer in public service shall not use the powers of public office for personal advantage, favoritism, or retaliation.

9.14. A lawyer shall not accept private employment relating to any matter in which the lawyer participated personally and substantially while in public service.

9.15. When a lawyer is disqualified from representing a client under Rule 9.14, no partner or associate of the lawyer, and no one with an of counsel relationship to the lawyer, shall represent the client.

9.16. A lawyer in public service shall not participate in any matter in which the lawyer participated personally and substantially in private practice.

9.17. While a lawyer in public service is participating personally and substantially in a matter in which a private attorney's client has a material interest, neither lawyer shall comment to the other about the government lawyer's private employment possibilities.

SUPPLEMENTARY PROVISIONS*

9.18. For one year after leaving public service, a lawyer shall not counsel or otherwise represent a client who was previously involved in any matter in which the lawyer participated personally and substantially within one year prior to leaving public service.

9.19. For one year after leaving public service, a lawyer shall not become a partner or associate of, or have an of counsel relationship with, any law firm that represented an interested party in any matter in which the lawyer participated personally and substantially within one year prior to leaving public service.

9.20. For one year after entering public service, a lawyer shall not participate in any matter in which an interested party was the lawyer's client within one year before the lawyer entered public service, or in which an interested party is represented by a lawyer who was the partner or associate of, or had an of counsel relationship to, the lawyer within one year before the lawyer entered public service, unless (a) the lawyer was appointed to office by the chief executive officer of the jurisdiction, with approval of a legislative body, or (b) the lawyer's participation is approved by a superior who was appointed by the chief executive officer with approval of a legislative body, or (c) the lawyer was elected to office.

9.21. When a lawyer is disqualified from representing a client under Rules 9.18 or 9.19, no partner or associate of the lawyer, and no one of counsel to the lawyer, shall represent the client.

Comment

Government lawyers are, of course, covered by rules that relate to lawyers generally. Under Rule 3.10, for example, just as a private lawyer would act improperly by giving the witness ten dollars, so too a prosecutor is forbidden to induce desired testimony by promising in exchange to reduce or dismiss criminal charges, or by deferring sentence until after the desired testimony has been given. In view of the special nature of the privilege against self-incrimination, however, it is permissible for a prosecutor to immunize a witness in order to avoid assertion of the privilege.

The special rules for prosecutors derive from the generally recognized fact that government lawyers have significantly different roles and functions from lawyers representing private parties, and that their ethical difficulties and the solutions to them must vary accordingly. Those differences stem principally from important distinctions between the government and the individual citizen. One such distinction is the paramount value given the sanctity of the individual in our society. Another is the awesome power of the government, a power that the founders of our nation had good reason to circumscribe in the Bill of Rights and elsewhere in the Constitution. A third difference is the majesty and dignity of our government. Conduct that may be tolerable in individuals may be reprehensible when done "under color of law" on behalf of the nation or a state.

In addition, the prosecutor has extraordinary powers of a quasi-judicial nature. The discretion to select what person to investigate has been described by Justice Robert Jackson (a former Attorney General) as "the most dangerous power" of the prosecutor. The prosecutor also decides the crime to be charged, affects the punishment, and even decides whether to prosecute at all. In the course of exercising that awesome discretion, the prosecutor is frequently called upon to make decisions which, in private litigation, would be made by a client rather than by the lawyer. Thus, to say that the prosecutor has special responsibilities in wielding the vast discretionary powers of government, is simply to recognize that the prosecutor is the attorney who has that discretionary power to wield.

Further, defense counsel has special professional responsibilities deriving from the importance of confidentiality between attorney and client, the presumption of innocence, the constitutional right to counsel, and the constitutional privilege against self-incrimination. The prosecutor, who does not represent a private client, is not affected by those considerations in the same way.

For example, the defense attorney may be professionally bound to withhold evidence. There is nothing unethical in keeping a guilty defendant off the stand and putting the government to its proof. The Constitution guarantees the defendant nothing less than that. Obviously, however, it does not follow that the prosecutor is similarly privileged to withhold material evidence, and the constitutional command is, of course, precisely the contrary.

In recognition of the different roles of defense counsel and prosecutor, the American Bar Association and the Association of American Law Schools, in their Joint Conference Report on Professional Responsibility, concluded: "The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on the behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged."

Similarly, the Code of Professional Responsibility states that the responsibility of a public prosecutor "differs from that of the usual advocate; his duty is to seek justice, not merely to convict." In addition, the ABA Standards Relating to the Prosecution and the Defense Function are divided into a separate body of rules for each. The Standards also emphasize the unique role of the prosecutor: "Although the prosecutor operates within the adversary system, it is fundamental that his obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." Unfortunately, however, neither the Code nor the Standards provides adequate rules governing prosecutorial misconduct, and the ABA's Model Rules are similarly deficient.

Rule 9.3 forbids a prosecutor to seek an indictment or proceed to trial unless a fair-minded juror could conclude that the accused is guilty beyond a reasonable doubt, on the basis of the facts known to the prosecutor and likely to be admissible at trial. This rule is in recognition of the fact that a criminal proceeding is itself a punishing event, financially, emotionally, and in the accused's reputation. For that reason, a further ethical obligation is assumed by many conscientious prosecutors; that is, a prosecutor should not seek an indictment or proceed to trial unless the prosecutor is satisfied that the accused is guilty beyond a reasonable doubt, on the basis of all the facts

*These provisions have not been approved by the Commission, principally because of concern about their effect in smaller communities served by very few lawyers.

known to the prosecutor, regardless of admissibility. That rule should be followed in all cases, but is not here made the basis of a disciplinary violation, because the subjective nature of the standard would make such a rule impossible to enforce.

Along with other unique powers of the office, a prosecutor is privileged, in an indictment, to publish severely defamatory information against a private person. Despite their inherent harmfulness, indictments must be publicly available to prevent the abuses of secret indictments. There is no adequate justification, however, for a public official to promote publicity by engaging in press conferences, press releases, or other publicity efforts having the effect of impairing or destroying the reputation of an accused person without the due process of a trial or hearing. An accused, on the other hand, may never be more in need of the First Amendment rights to freedom of speech than when he or she stands accused as a wrongdoer before family, friends, neighbors, and business associates. Moreover, the private person may well be inarticulate and, in any event, will need the special skills of a lawyer as spokesperson. Accordingly, this Code places restrictions on preconviction publicity by public officials, who are acting under color of law. The Code recognizes, however, that the First Amendment precludes such restrictions on the speech of private persons and their attorneys.

The prosecutor working with a grand jury has peculiar responsibilities. The grand jury resembles an adjudicative tribunal, but its procedures are usually not adversary. Suspects who appear before it usually cannot be accompanied by counsel. The entire process is usually conducted *ex parte,* at least to the extent that the other side, the defense, cannot appear. The prosecutor presents evidence before the grand jury, as an advocate does before other tribunals, but also advises the grand jury, which is the representative of the people, regarding the course of action it should take.

That latter function is sometimes described as quasi-judicial, in that the prosecutor has much the same relation to a grand jury as a judge instructing a petit jury on the law. It is also, however, akin to the relationship of a lawyer in private practice to a client, particularly to the board of directors of a corporate client. The prosecutor has much the same obligations to a grand jury as the private lawyer to the private client, particularly the duty to serve the client's interests not as the lawyer perceives them, but as the client perceives them, and therefore to act as the servant, not the master, of the grand jury. Indeed, the grand jury prosecutor is almost the only lawyer for the public who has a real opportunity to consult directly with a duly constituted body, representative of the public, whose members have no conflicting interest (such as the desire to stay in office).

Ironically, however, the American grand jury has been criticized as a "rubber stamp for the prosecutor," because some prosecutors have used it improperly as an investigative tool and as a device for obtaining unwarranted indictments. Prosecutors have had grand juries dissolved because they would not indict, or because they wished to indict, quite properly, persons the prosecutor did not want to have indicted. Prosecutors have routinely issued "grand jury subpoenas" for documents they wished to examine, without obtaining the consent of "their" grand juries, or even consulting the grand jury.

Rule 9.4 proscribes such abuses by prosecutors of the extraordinary powers of grand juries, when it is read in conjunction with other applicable rules in this Part. Particularly applicable are Rule 9.1, which proscribes seeking evidence to prosecute persons not identified as bona fide suspects; Rule 9.2, proscribing discriminating among potential defendants; and Rule 9.3, prohibiting seeking or signing indictments not likely to result in proper convictions. Most significant is Rule 9.10, which requires the prosecutor to inform the grand jury of all facts and legal authorities that might materially affect its decisions, because it is a tribunal before which no other counsel has the right to present facts or argument. Taken together with Rule 9.4, these rules should substantially contribute to returning the grand jury to its constitutional role as a bulwark between the citizen and the power of the state, and reducing its use as a cat's paw for the overzealous prosecutor.

Rule 9.13 forbids a lawyer in public service to use the powers of public office for personal advantage, favoritism, or retaliation. The use of an Enemies List in a prosecutor's office would be a clear violation of that rule. See also Rule 9.1. A lawyer in public service should also take pains to avoid participating in any matter in which members of the public might reasonably, though erroneously, believe that the lawyer is motivated by personal concerns, such as a grudge. One way for a prosecutor to attempt to avoid such an appearance is to move for the appointment of a special prosecutor in cases in which the prosecutor's own motives might reasonably be questioned.

There is a common error of ethical discourse that should be avoided in interpreting the rules in this Code: When an appellate court affirms a conviction, that does not necessarily mean that the prosecutor's conduct has comported with professional ethics. A court might well decide that particular conduct by a prosecutor does not warrant reversal of a conviction on constitutional grounds, yet that same conduct might be a serious disciplinary violation.

Several rules in this Part impose special obligations upon lawyers serving as public prosecutors. Included in that category are enforcement lawyers for regulatory agencies, regardless of whether criminal or civil sanctions are being invoked. Also included are lawyers serving as bar counsel or in a similar disciplinary role.

One of the most controversial areas of appearance of impropriety has been, paradoxically, that in which the public nature of the profession is most obvious – conflicts of interest of the lawyer in (or formerly in) public service. In order to resolve that problem, it is important to note how narrow the area of dispute actually is.

First, there is virtual unanimity that when a lawyer has had substantial, personal participation in a matter while in public service, that lawyer should be disqualified from subsequently participating in the same matter on behalf of a private client.* Also, a lawyer in public service should not negotiate for private employment with a party or law firm whose interests the lawyer is able to affect.

There are several reasons for such rules. The present or former govern-

*The reference to lawyers "in public service" includes judges and their law clerks; "matter" includes any judicial, administrative, or other proceeding, application, request for a ruling or other determination, contract negotiation, claim, controversy, charge, accusation, arrest, or other particular matter.

ment attorney might be in a position to give one private party an unfair advantage over others through the favored use of confidential government information. There is also the possibility of favoritism to the former colleague on the part of lawyers still involved in the matter. Another concern that has been expressed (*e.g.*, by the Securities and Exchange Commission) is with private firms hiring away the government's best people. Further, the Association of the Bar of the City of New York has found "inevitable pressure" on government lawyers to show favoritism to private firms with whom they might later seek employment. Cases have also arisen in which there was an appearance of abuse of official power to create subsequent private employment for the attorney, or to give the attorney an advantage against a private party in subsequent private litigation.

A second principle on which there is general agreement is that of imputed disqualification. That is, when a lawyer is disqualified from representing a private client because of previous public service in the same matter, then that lawyer's partners and associates – those with whom the lawyer shares daily conversation and annual profits – should also be disqualified.

The narrow focus of disagreement has been whether the imputed disqualification of partners and associates should be subject to a waiver. A waiver would be based on a determination by the government agency involved that the disqualified attorney has been "screened" or "insulated" from any participation in the case. There are three major objections to the screening-waiver device, however, and none of them has been successfully answered.

The first unanswered objection is that no adequate standards for screening and granting waivers have been articulated. That is, once we recognize that the disqualification is appropriate, it is hardly sufficient to base a waiver on the mere assurance of the disqualified lawyers that they will not do anything improper.

The second unanswered objection (expressed by the general counsel for the Department of Health, Education and Welfare), is the virtual impossibility of policing violations once a waiver has been given.

Finally, the screening-waiver device compounds the initial conflict of interest by adding another. Agency lawyers who are called upon to grant or deny a waiver on behalf of a former colleague's law firm will have a substantial personal incentive to be generous in granting the waiver, because they will be making similar requests on their own behalf when they leave government service.

The principal argument in favor of permitting a screening-waiver device is that the government would find it impossible to hire competent lawyers if the screening-waiver exception is rejected, because lawyers would fear becoming unemployable. That contention has been characterized by former ABA President Chesterfield Smith as "pure hogwash." If concern over the denial of waivers would indeed result in the unemployability of former government lawyers, then that problem would prevail as long as there were any significant risk that waivers would be denied in particular cases. That is, unless the waiver device were a sham, and waivers were to be granted as a matter of course whenever requested, the asserted risks of hiring former government employees would still discourage law firms from employing them, and would thus discourage lawyers from entering government service.

In fact, however, no instance has ever been given of a government employee who would be rendered unemployable by the rejection of a waiver-screening exception. Unquestionably, a particular lawyer might have to forgo employment with a particular law firm, or even with three or four firms, but that is hardly the sweeping effect that has been projected by opponents of the ethical rule.

In addition, the so-called revolving door between government service and private practice has itself been identified as the cause of low morale among government lawyers. Ironically, the former Chairman of the Federal Trade Commission (FTC) has contended that rejection of a waiver-screening exception would impair professionalism in his agency. A recent study commissioned by the FTC revealed, however, that the FTC is in fact suffering from a critically high turnover rate and low morale among its attorneys. The reason given is that too many lawyers are using the agency as a "stepping-stone" to jobs outside of government. In short, slowing down the revolving door could well lead to higher morale and a higher degree of dedication and efficiency in government service.

It should be emphasized, however, that these rules are not motivated by disapproval of the revolving door, but by the serious likelihood of professional impropriety inherent in the lawyer's switching from one side to the other.

In addition to dealing with the problem of the lawyer who switches sides in the same matter, these rules seek also to discourage the situation in which a lawyer is representing the government's interests and, at the same time, may be contemplating leaving government service and going to work for a party or a law firm whose interests the government lawyer is able to affect. Because it is so easy for understandings of future employment to be reached without any realistic opportunity to discover or to prove that to have been the case, the Supplementary Provisions establish time bars to employment of former government lawyers by some parties and firms in some circumstances.

Illustrative Cases

9(a). A police officer tells a prosecutor that he is sure a cache of contraband can be found in a particular dwelling. The prosecutor learns, in questioning the officer, that the officer cannot substantiate his hunch with evidence sufficient to obtain a search warrant. The prosecutor does not tell the officer to invent a pretext for entering the premises and to seize the contraband, but says nothing when the officer says he is going to do so. The prosecutor has committed a disciplinary violation.

9(b). A lawyer with the Public Contracts Award Board is advising the Board regarding the award of a contract for widgets. The attorney for Multinational Widgets, Inc., discusses his client's proposal with the Board lawyer. During the discussion, the attorney comments to the Board lawyer that his firm is looking for young lawyers with the Board lawyer's background, and that the Board lawyer should be sure to see him if he decides to leave government service. The attorney for Multinational has committed a disciplinary violation.

9(c). The same facts as 9(b). The Board lawyer fails to report the Multinational lawyer's comment to the disciplinary board. The Board lawyer has committed a disciplinary violation.