The American Lawyer's Code of Conduct:

A Preface

By Theodore I. Koskoff

On the following pages, TRIAL provides you with the text of an important new document: the May 1982 Revised Draft of The American Lawyer's Code of Conduct. This Code was prepared under the auspices of the Roscoe Pound-American Trial Lawyers Foundation, by a Commission on which I am co-chairman. A Public Discussion Draft was issued in June 1980, and published in TRIAL in August of that year.

This Code is quite frankly presented as an alternative to the old Code of Professional Responsibility previously promulgated by the American Bar Association (ABA), and to the new Rules of Professional Conduct that the ABA is apparently about to hawk as the latest thing in legal ethics. It was dissatisfaction with both of these ABA products that both got us going on this Code, and kept us going.

That dissatisfaction was not reduced when the ABA's Kutak Commission published a new draft in mid-1981. It grew. It grew still more when the ABA House of Delegates voted in January 1982 to drop its "old" Code of 1969, and to frame its new Rules only in a new, untried format. Many of us deeply resent the take-it-or-leave-it attitude of the ABA, which seems to be switching codes on us for no better reason than that it has spent so much money on the Kutak Rules that rejecting them would cause it to lose face.

This is not just a squabble over form. It is a serious disagreement over substance. The ABA Commission evidently is trying to win the debate over the substance of legal ethics by side-stepping it. It is trying to make us all not only debate whether and how to amend the present Code, but also debate that question in this very peculiar form: whether and how to amend a code that the Commission has already amended, in ways that even the Commission does not fully understand.

The National Organization of Bar Counsel (NOBC) has demonstrated that the ideas of the Kutak Commission can be integrated into the present Code, so that its proposals can be compared to others, and judged on their merits. NOBC has done this twice, once with each of the Kutak Commission's drafts. The Commission has ignored NOBC's efforts, probably because NOBC rejected some of its proposals. Chairman Kutak and his friends have ramrodded through the ABA a resolution committing the ABA to dropping the present Code.

By publishing this Code in two formats, we are giving notice that we are not going to let the ABA dictate the terms for the debate on lawyer's ethics. We regard the proposed Kutak

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Rules as fundamentally flawed, and we intend to force Kutak & Co. to debate the issues before the state courts and bar bodies that will really decide what the law of lawyers' ethics is to be.

When you write a new code, you have to be careful not just about what you are putting in, but also about what you are leaving out. For example, the Kutak Commission would drop DR 7-105 of the Code, which forbids threatening criminal prosecution solely to gain an advantage in a civil matter. No provision of the Kutak Rules covers such situations. Does this mean that adopting the Kutak Rules would legitimize blackmail? The Commission gives no explanation.

If you are not careful, you may leave out something whose absence completely changes the context, and thus the meaning, of something you are putting in. One of the purposes of codifying a body of law is to make it clear, and to make clear to everyone just what you are doing when you change it. Amending a code should not be like writing a zero-based budget. You want to keep those portions of existing law that work well, and to change only what needs to be changed. Continuity is not a negligible virtue.

That is why our Commission has taken issue with the ABA's conclusion that the Code of Professional Responsibility is old hat. "With all its serious flaws," my co-chairman Irwin Birnbaum said in the Preface to our June 1980 Draft, "the Code of Professional Responsibility is preferable to the Model Rules" of the Kutak Commission.

We have tried to make it clear just what we think should be changed in today's Code of Professional Responsibility, by including in this Revised Draft a "Proposed Revision" of the CPR. Just what we have changed in our own Code, between the June 1980 Draft and this one, is not quite so clear, and should be spelled out.

The introductory materials, including the preamble, have been substantially pruned, without changing our meaning. Similar trimming may be found in the Comment portions, and in the lengthy "Introductory Comment on Knowing" of the 1980 Draft, replaced by two brief paragraphs of "Terminology." None of these omissions will be missed.

The truly substantive changes are in the Rules, and they are not numerous.

First, and most important, is the Commission's resolution of its ambivalence about the alternative versions of Chapter I, on confidentiality, published in the 1980 Draft. Alternative A was a fairly traditional approach. Alternative B was probably the most thoroughgoing embodiment of the lawyer's "first duty...is to keep the secrets of...clients," ever included in a draft code of ethics. It would have allowed lawyers to reveal clients' confidences, without client consent, in only two circumstances:

1) where a client impliedly waived confidentiality, or "opened the door," by accusing the lawyer of misconduct; and

2) when the lawyer's lips were pried open by compulsion of law.

We have tried to keep the spirit of that recommendation, although we have tempered it somewhat. Our first principle remains that a client must be able to confide absolutely in a lawyer, or there may be little point in anyone's having a lawyer. We have rejected one concept that the Kutak Commission apparently espouses, that lawyers have a general duty to do good for society that often overrides their specific duty to serve their clients. Serving clients is the lawyer's basic reason for being a lawyer, and the exceptions to the fundamental rule of absolute loyalty to clients must be minimal, and must be strictly construed.

As revised, Chapter I is closer to the traditional approach of our old Alternative A than it is to the radical position of Alternative B. It is still, however, the strictest set of rules on preserving client confidences in any proposed code of lawyers' conduct. In my view, the Sixth Amendment guarantee of the effective assistance of counsel requires no less.

In Chapter IV, a new Rule 4.2 places a special burden of competence on the lawyer who is held out to a client as having special expertise. This follows the law that has developed in malpractice cases, holding people who call themselves specialists to the standard of care required of such specialists.

A number of other rules have been tightened, but not substantially changed. For example, Rule 2.3 now explicitly requires the client's consent before a lawyer may accept compensation from someone other than the client.

In short, the Commission has refined its product without changing its approach.

We continue to disagree with the Kutak Commission in our basic approach to legal ethics. We believe that a code of lawyers' conduct is important legislation for the entire community, because it affects every person's ability to exercise basic rights. We believe that the basic purpose of such a code should be to enable lawyers to help people—to leave the individual lawyer free to help the individual client.

The Kutak Commission sees lawyers as ombudsmen, who serve the system as much as they serve clients. This is a collectivist, bureaucratic concept. It is the sort of thinking you get from a commission made up of lawyers who work for institutional clients, in institutional firms, and who have lost sight of the lawyer's basic function. Lawyers are not licensed to write prospectuses for giant corporations, or to haggle with federal agencies over regulations and operating rights. We are licensed to represent people in court, which often means people in trouble with the law, and with the government. We are the citizens' champions against official tyranny.

We cannot continue to have a democratic system, as we know it, without a legal profession whose members are free to perform that function. The Kutak Rules contain some useful changes in regulating peripheral aspects of law practice, but they embody a core conviction about the lawyer's role that is fundamentally at odds with the American constitutional system.

That is why we have continued to work on our Code, and why we have issued this Revised Draft. We are not willing to take dictation from the ABA on the standards governing our life's work. We are not willing to allow the Kutak Rules to become the law of legal ethics by default. We intend to fight in the state bar associations, and in the state courts, to preserve the constitutional concept of what a lawyer is, and what a lawyer's duties are.

I invite you to join with us in the fight.T

REVISED DRAFT—MAY 1982

The American Lawyer's Code of Conduct

Including A Proposed Revision of the
Code of Professional Responsibility

Commission on Professional Responsibility

The Roscoe Pound-American Trial Lawyers Foundation

Irwin Birnbaum *and* Theodore I. Koskoff, *Chairs*
Monroe H. Freedman *and* Thomas Lumbard, *Reporters*

THE COMMISSION ON PROFESSIONAL RESPONSIBILITY

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This revised draft reflects extensive comments by the Commission on Professional Responsibility, but has not been finally approved by it. The Commission will continue to review the draft in the light of comments received from members of the bar and the public. Comments should be sent to: Thomas Lumbard, Reporter, The Commission on Professional Responsibility, Roscoe Pound-American Trial Lawyers Foundation, 1050 31st Street, N.W., Washington, DC 20007.

CHAIRMEN'S INTRODUCTION

By Irwin Birnbaum
and
Theodore I. Koskoff

This Revised Draft of The American Lawyer's Code of Conduct is the second published product of the Commission on Professional Responsibility. It consists of two parts. The primary text is the June, 1980, Public Discussion Draft of the Code, amended to reflect both the comments on that Draft, and the Commission's second thoughts on some matters. The appendix is a reworking of our Code in the form of proposed amended Disciplinary Rules of the Code of Professional Responsibility, now the law of lawyers' conduct in almost every state. The purpose of this second part is to show how the provisions of our Code can be adopted, in whole or in part, as amendments to existing law.

We are presenting the Commission's work in these two formats, because we view the substance of the lawyers' code of conduct as more important than its form. The purpose of our work has been to produce a code that embodies the principles we believe are essential to the effective functioning of the legal profession in a democratic society, and to get such a code adopted, as the law of lawyers' conduct, by the courts. We have no special pride of authorship that compels us to insist that the courts adopt all of our ideas, or none of them, or that our ideas be adopted only in a particular form. The issues involved are too important to play such games with them.

Only the first of these drafts, the American Lawyers' Code of Conduct proper, has been voted upon and approved by the Commission, or bears the stamp of the Commission's original Reporter, Professor Monroe H. Freedman. The reworking of the Code of Professional Responsibility is the work of Professor Freedman's successor as Reporter to the Commission, Mr. Thomas Lumbard of Washington, formerly our Associate Reporter, and a consultant to the Commission since its inception.

This Commission was called the Commission on Professional Responsibility for Trial Practice, when founded in 1979. We quickly found that we could not write a code of conduct solely for trial lawyers. We also found that another Commission, that of the American Bar Association "on Evaluation of Professional Standards," was rewriting the profession's basic code in a way that demanded from us a viable alternative code, applicable to all lawyers.

We obviously believe that our Code is better than the so-called "Model" Rules of Professional Conduct produced by the A.B.A. Commission.[1] Even as amended in 1981, significantly and substantially, and in part reflecting (if not acknowledging) doctrine that we had published, the proposed Model Rules are inferior to the existing Code of Professional Responsibility. With all its flaws, the Code is preferable to the proposed Rules.

Accordingly, we here present our views both in the form we prefer, the *ALCC*, and in the generally accepted form of the *CPR*. This avoids the "take it or leave it" attitude expressed by the A.B.A's recent endorsement of the proposed Rules drafted by its Commission. It also acknowledges that we, and all other members of today's generation of revisers of the law of lawyers' conduct, are only able to reach higher than our predecessors because we stand upon their shoulders. While flattering ourselves that we are correcting their mistakes, we are neither so blithe as to suggest that we are not introducing errors of our own, nor so foolhardy as not to try to reduce such errors to a minimum.

Our work and our attitude thus stand in stark contrast to those of the A.B.A. Commission. That Commission has refused to build on the wisdom of the past. It has rejected the good faith efforts of others, such as the National Organization of Bar Counsel, to accommodate its ideas to the form of the *CPR*. It has even gone so far as to publish a huge "Alternative Draft" that the New York State Bar Association correctly concluded was not a good faith effort to amend the *CPR*. It was merely an elaborate charade, designed to make the Commission's "Proposed Final Draft" look good by invidious comparison.

The reader will find no such deception in the present document. Unlike the A.B.A. Commission's "Alternative Draft," our Code's Appendix is a good faith effort to improve upon the *CPR* by preserving and amending it. It was drafted by a Reporter who believes in the wisdom of that approach.[2] It is relatively short, and considerably easier to read than either the elephantine "Alternative Draft" or the "Proposed Final Draft" of the proposed A.B.A. Rules.

We have not called this a "Final Draft," because experience has shown that no draft of such a code is ever "final." The A.B.A has published amendments to the "Final Draft" of its Code almost annually since 1969. We continue to seek suggestions to improve this Code.

PREAMBLE

This Code of Conduct embodies a traditional and constitutional concept of the role of the American lawyer in our limited form of government, which seeks to maximize individual liberty within a rule of law. The fundamental structure of the role of the American lawyer is fixed by the Bill of Rights of the Constitution; rules of conduct should be designed and interpreted to enhance those rights, not to inhibit them.

The individual rights most relevant to lawyers' duties relate to what we 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. The right to litigate is also an essential aspect of freedom of speech and of the right to petition for redress of grievances.

As a result of the enormous volume and complexity of our law, ordinary citizens need the assistance of lawyers simply to comprehend and cope with the rules governing their actions. The lawyer therefore serves the 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 range of choices available, and of the means to pursue particular choices.

The assistance of counsel is thus essential to justice under law, and to equal protection of the laws. Leaving each person to his or her own resources, without the aid 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 reality.

The legal system that gives context and meaning to basic American rights 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.

Recognizing that the American attorney functions in an adversary system, and that such a system expresses fundamental American values, helps us to appreciate the emptiness of some cliches of lawyers' ethics. It is said, for example, that the lawyer is an "officer of the court," or an "officer 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 a court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.

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 a client's interests only by recognizing the possibility of an adverse reaction. Any 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 a 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: avoid withdrawal unless significant prejudice to the client can be avoided. We

[1] The A.B.A. first added the adjective "Model" to the title of its Code to avoid federal charges that its promulgation of The Code was restraint of trade. The A.B.A. Commission now seems to make a virtue of necessity; it always refers to its work-product as the *Model* Rules, although it courts federal displeasure by always calling the CPR "the Code," never the "Model Code."

Refusing to take any A.B.A product for a model, we consistently refer to existing law as "the Code of Professional Responsibility" and to what the A.B.A Commission has recommended as "the proposed Rules of Professional Conduct."

[2] See Lumbard, Setting Standards: The Courts, the Bar, and the Lawyers' Code of Conduct, 30 Cath. Univ. Law Rev. 249 (1981).

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.

The format of this Code embodies an effort to make it as readable and as clear as possible. The Rules are intended to be used for disciplinary purposes; they are written in declarative sentences stating 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.

TERMINOLOGY

Attorney is used as a synonym for "lawyer," but only to distinguish between the lawyer to whom the rule applies and another attorney.

A client's confidence, protected by this Code, includes any information obtained by the client's lawyer in the course of and by reason of the lawyer-client relationship.

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.

Reasonable belief, reasonably believes or **reasonable understanding** is the standard used to denote a lawyer's mental state when the lawyer may be required or permitted to act on the basis of incomplete knowledge of relevant facts, as when the lawyer is predicting future events, or is compelled to act on the basis of assumptions or inferences because all the relevant facts cannot be ascertained. The lawyer must understand or suppose the fact or circumstance to be so, and the circumstances must make that understanding or supposition a reasonable one.

CHAPTER I. THE CLIENT'S TRUST AND CONFIDENCES

Rules

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 confidence of a client or former client, 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 avoid proceeding before a corrupted judge or juror; to defend the lawyer or the lawyer's associates from charges of misconduct; and to prevent imminent danger to human life. 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 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.

1.5 A lawyer may reveal a client's confidence to the extent necessary to defend the lawyer or the lawyer's associate or employee against charges of criminal, civil, or professional misconduct asserted by the client, or against formally instituted charges of such conduct in which the client is implicated.

[1.6 A lawyer may reveal a client's confidence when and to the extent that the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life. The lawyer shall use all reasonable means to protect the client's interests that are consistent with preventing loss of life.]

NOTE: Rule 1.6 was not approved by the Commission, but was supported by so many members that it is included in this Revised Draft as a Supplemental Rule.

Comment

One of the most difficult and delicate responsibilities of the lawyer is to establish and maintain a relationship of trust and confidence with the client.Clients frequently 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. For lawyers to provide effective assistance, however, it is essential that they know everything about the clients' affairs that might be relevant.

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 relevant 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 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. But the lawyer must also obtain 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, "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.

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.

The Rules to this Chapter are more protective of confidentiality than the Code of Professional Responsibility or the A.B.A. Commission's Rules. The exceptions permit divulgence, but do not require it, under compulsion of law; to avoid proceeding before a corrupted judge or juror; to defend the lawyer or the lawyer's associates against formally instituted charges of misconduct, or charges made by the client; and to prevent imminent danger to human life. (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; see also Rule 6.6).

The corruption cases are an appropriate exception because the corruption of the impartial judge or jury vitiates the adversary system itself. 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, when a lawyer or the lawyer's associate is 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, and the Comment to Chapter II.) 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.

This Code rejects permitting violation of confidentiality in all cases of "future (or continuing) crimes." First, the category of "crimes" is too broad; it lumps offenses 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. The exception for 'future or continuing' offenses has also proved unsatisfactory; it is all too easily interpreted to include a failure to relinquish the proceeds of a past crime, or a fugitive's refusal to surrender, thereby permitting or even requiring lawyers to violate confidentiality in situations where their clients are desperately in need of counsel.

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 deposition, 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 committed a disciplinary violation, if supplementary Rule 1.6 is not adopted as part of the Code.

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 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 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.

CHAPTER II. FIDELITY TO THE CLIENT'S INTERESTS

Rules

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. With the consent of a client, 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, as early as possible in 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

Because our society places the highest value on the dignity and autonomy of the individual, its lawyers serve the public interest by undivided fidelity to each client's interests as the client perceives them.

That is not to say that lawyers should ignore possible harm to other persons or to public interests, or assume that clients' choices will be made in narrowly selfish terms. On the contrary, in counseling clients, lawyers should advise them fully of all significant potential consequences of 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.

Just as it would be improper for a lawyer to impose other values upon a client, the lawyer should not impose upon the client an adversarial attitude toward others. 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. The clients should also 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 assumes 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 such 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, one 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. Another board might prefer to know everything the lawyer knows. In that event the officers would be on notice that 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.

The requirement is that the lawyer have the issue resolved as early as possible in the lawyer-client relationship. If a conflict arises before the issue is resolved, the lawyer should act in accordance with the lawyer's reasonable belief as to what the board of directors would consider to be in the best interests of the corporation.

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.

CHAPTER III. ZEALOUSNESS ON THE CLIENT'S BEHALF

Rules

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 a client of the client's rights, liabilities, and possible lawful alternatives regarding issues of substantial importance related to the matter for which the lawyer has been retained, 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 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 an attorney, 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 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. Except as permitted by law, 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, a lawyer has complete discretion whether to accept a particular client. Once a lawyer is committed to represent a client, how-

ever, 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 belief as to what the client would perceive to be in the client's interest.

This Code both emphasizes the client's autonomy as a basic value and assumes 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 isues 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 subpoena.

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.

CHAPTER IV. COMPETENCE

Rules

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 who has held himself or herself out to a client as having special skill and competence relative to a matter in which the client has retained the lawyer shall serve the client with that skill and care generally afforded to clients by lawyers of such skill and competence.

4.3. 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.

4.4. 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. In so doing, the lawyer shall give due regard not only to established rules of law, but also to developing legal concepts that might affect the 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.

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.)

CHAPTER V. RETAINER AGREEMENTS AND FINANCIAL ARRANGEMENTS WITH CLIENTS

Rules

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. As soon as practicable after 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 to 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 5.4, 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 of 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 1.5(d) of the proposed Rules of Professional Conduct.

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 proposed Rules of Professional Conduct 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 rules exalt 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.

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."

Such a practice conflicts most clearly with the fair administration of justice when a plaintiff is in need of immediate funds for food, housing, medical attention, etc., and is therefore under unconscionable pressure to settle for less than a claim is worth. In such a case, the lawyer contributes to the fair administration of justice by giving or lending the 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 any 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 criminal cases, 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.

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.

CHAPTER VI. WITHDRAWAL FROM REPRESENTATION

Rules

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, unavoidable and substantial difficulties in working with co-counsel or with the client.

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 the lawyer knows that 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 reasonably believes that refusal to present false evidence could 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.

CHAPTER VII. INFORMING THE PUBLIC ABOUT LEGAL SERVICES

Rules

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 thus 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 substantial requirements for such certification. 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 pays 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.

CHAPTER VIII. MAINTAINING PROFESSIONAL INTEGRITY AND COMPETENCE

Rules

8.1. A lawyer shall not engage in criminal or otherwise unlawful conduct 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 an attorney 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 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 Chapter 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, and 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. Thus, lawyers not only must comply with rules of professional conduct; they also must be seen as complying with them. For the profession to promulgate ethical rules, 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. Embodying that concept in specific rules is, however, exceedingly difficult.

An early draft of this Code included 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.

This views the appearance of impropriety 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 cases, and on 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 Chapter 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 if that conduct is relevant to one's performance as a lawyer.

Here again, an effort has 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 create a substantial doubt that the lawyer will comply with the rules of conduct required of lawyers.

This Code has no 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 inherently so vague as to be unenforceable and unenforced, and therefore hypocritical.

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.

CHAPTER IX. RESPONSIBILITIES OF GOVERNMENT LAWYERS

Rules

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 an accused in several counts for what is essentially a single offense, or charging an 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 an 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.

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

Comment

Government lawyers are, of course, covered by rules that relate to lawyers generally. But government lawyers have significantly different roles and functions from lawyers representing private parties, and 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 a 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 person who has that discretionary power.

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.

Thus a 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. Obviously, however, the prosecutor is not similarly privileged to withhold material evidence; the constitutional command is 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."

As the Code of Professional Responsibility states, the responsibility of a public prosecutor "differs from that of the usual advocate; his duty is to seek justice, not merely to convict." The ABA Standards Relating to the Prosecution and the Defense Function 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 proposed Rules of Professional Conduct 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. A further ethical obligation is assumed by many conscientious prosecutors; they will not seek an indictment or proceed to trial unless they are satisfied that the accused is guilty beyond a reasonable doubt, on the basis of all the facts known to them, 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 makes it impossible to enforce.

Along with other unique powers of 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 proceedings. There is no similar justification, however, for a prosecutor to engage in press conferences, press releases, and other publicity efforts that have the effect of impairing or destroying the reputation of an accused without the due process of a trial or hearing. Yet, on the other hand, an accused may never be more in need of the First Amendment rights to freedom of speech than when officially labeled a wrongdoer before family, friends, neighbors, and business associates. Many defendants are inarticulate; almost all need the special skills of a lawyer as spokesperson. That is why this Code places restrictions on preconviction publicity by public officials, who act under color of law, but recognizes 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;* one 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.

This function is sometimes described as quasi-judicial: 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 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 Chapter. 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 concern, such as a grudge. One way for a prosecutor to attempt to avoid such appearances is to move for the appointment of special prosecutors 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.

Whenever this Chapter imposes special obligations upon lawyers serving as public prosecutors, that category includes 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 government 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. 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 an attorney, or to give an 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: once we recognize that 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 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 expect to make similar requests when they leave government service.

*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.

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. But if concern over the denial of waivers would indeed result in the unemployability of former government lawyers, 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.

It should be emphasized, however, that these rules are not motivated by disapproval of the so-called revolving door between government service and private practice, 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 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.

APPENDIX

A PROPOSED REVISION OF THE CODE OF PROFESSIONAL RESPONSIBILITY

Thomas Lumbard, Reporter

CONTENTS

REPORTER'S FOREWORD

This Revision of the Code of Professional Responsibility (Code) has been prepared to demonstrate how the provisions of The American Lawyer's Code of Conduct (ALCC) may be adopted by a state that does not wish to abandon the framework of the Code. It consists entirely of mandatory Disciplinary Rules, without hortatory Ethical Considerations, a format suggested by the National Organization of Bar Counsel (NOBC).

NOBC has also suggested some reorganization of the Code. This Revision follows most of NOBC's suggestions, but goes further in two important respects. First, it drops the often meaningless Canons and replaces them with straightforward headings (e.g., "Canon 6. Competence" instead of "Canon 6. A Lawyer Should Represent a Client Competently"). Second, it subdivides the Canons into Subchapters for different subtopics and assigns a separate set of 100 possible rule numbers to each subchapter. Thus DR 2-106 and 107 become DR 2-201 and 202, showing that they involve a subject completely separate from that of DR 2-105. This new numbering system should make the Code easier both to understand and to amend.

The text is printed in four type styles so that the reader may readily determine the source of any provision.

"Regular Roman type" is used for language of the present Code that is unchanged.

"Bold Face type" is used to show that the substance, and usually the exact language, is from a provision of the ALCC, which is duly noted in the text.

"Italic Bold Face" is used for the Rules not approved by the commission but published as "Supplementary Provisions" in Chapter IX of the ALCC and in Canon 8 below, for the reasons stated.

"Italic type" is used for changes in the present Code that are primarily editorial, and that do not effect substantive change. Some of these changes are necessary to eliminate the Code's use of pronouns implying that every lawyer is male. Some appear necessary to make the Code harmonious with the ALCC. A few are suggestions by the Reporter to fill what he considers gaps in the Code, not filled by the ALCC. Some of these are taken from the Proposed Amended Disciplinary Rules to the ABA Code of Professional Responsibility, adopted and published by NOBC in 1981; each is noted in the text as "[DR - , NOBC]." Explanations of the substance of such provisions may be found in the earlier Report on a Study of the Proposed ABA Model Rules of Professional Conduct, With Recommendations, adopted by NOBC in 1980, which is referenced in the Notes as "NOBC (1980)."

Changes in the titles of Disciplinary Rules, and the titles and numbers of new DR's are indicated by brackets.

Numbers in brackets are used to identify both old DR's that have been moved, and the provisions of the ALCC that have been introduced into the Code. Notes at the end of each Canon explain some changes. These have been kept to a minimum, on the basis that the Comments to the ALCC are adequate for such purposes, and are easy to locate through the in-text references to the ALCC Rules.

It is hoped that these references are sufficiently full to render unnecessary any table of CPR-to-ALCC cross-references. Because the ALCC text contains no similar guides, an ALCC-to-CPR cross-reference table is included. That table should allow the reader to ascertain how this Reporter has allocated the ALCC Rules in this Proposed Revision of the Code.

THOMAS LUMBARD
Washington, D.C.
May 3, 1982

Canon 1. INTEGRITY OF THE LEGAL PROFESSION

SUBCHAPTER 1. *Lawyers.*

DR 1-101. MAINTAINING INTEGRITY [OF ADMISSION TO THE BAR.]

(A) *A lawyer's license to practice may be revoked or suspended if the lawyer made a materially false statement, or deliberately failed to disclose a material fact, in applying for admission to practice.*

(B) A lawyer who has material, adverse information about a candidate for admission to the bar shall make that information known to the appropriate admission authorities, to the extent that the lawyer can do so without revealing a confidence or secret of a client. [ALCC 8.2]

DR 1-102 MISCONDUCT.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule **or knowingly assist or induce another lawyer to do so.** [ALCC 8.14]

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Knowingly assist a judge or judicial officer in violation of applicable rules of judicial conduct [or other law]. [DR 1-102(A)(8), NOBC]

(4) Engage in illegal conduct that creates a substantial doubt that the lawyer will comply with this Code. [ALCC 8.1, replacing DR 1-102(A)(3), (4), (5), and (6)]

DR 1-103. [DUTY TO REPORT DISCIPLINARY VIOLATIONS.]

(A) A lawyer **who knows that a lawyer or judge has acted in violation of a Disciplinary Rule or a rule of judicial conduct shall convey** that knowledge to a tribunal or other authority empowered to investigate or act upon such a violation. [ALCC 8.2]

(B) A lawyer *who knows of facts or evidence* concerning another lawyer or judge shall fully reveal *the same* upon proper request of a tribunal or other authority empowered to investigate or act upon violations *of applicable rules of professional or judicial conduct.*

(C) A lawyer shall comply with this rule only to the extent that the lawyer can do so without revealing a confidence or secret of a client in violation of Canon 4, or other privileged communications. [ALCC 8.2]

[DR 1-104. SUPERVISORY RESPONSIBILITY.]

(A) A lawyer shall take reasonable care to assure that none of the lawyer's partners, associates, or employees commits an act that would *violate a Disciplinary Rule* **if committed by the lawyer.** [ALCC 8.15]

(B) *A lawyer having supervisory authority over another attorney shall* **take** *reasonable* **care** *to ensure that the attorney conforms to the Disciplinary Rules.* [DR 1-104 (B), NOBC]
(C) *A lawyer shall be responsible for another attorney's violations of a Disciplinary Rule if:*

(1) *The lawyer orders or ratifies the conduct involved; or*

(2) *The lawyer is a partner in the law firm in which the attorney is a partner or associate, or has supervisory authority over the attorney, and knows of the conduct at a time its consequences can be avoided or mitigated but fails to take reasonable remedial action.* [DR 1-104 (C), NOBC]

[DR 1-105. SUBORDINATE LAWYER.] [NOBC]
(A) *A lawyer acting under the supervisory authority of another person is bound by the Disciplinary Rules notwithstanding the fact that the lawyer's conduct was ordered by the supervisor.*
(B) *A subordinate lawyer does not violate a Disciplinary Rule if the lawyer acts in accordance with a supervisory attorney's reasonable resolution of an arguable question of professional duty.* [DR 1-105, NOBC]

SUBCHAPTER 2.
Judicial Officers.

DR 1-201 [DR 8-102]. STATEMENTS CONCERNING [JUDICIAL OFFICERS AND CANDIDATES.]
(A) A lawyer shall not knowingly make *a* false statement of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
(B) A lawyer shall not knowingly [*or with reckless disregard for the truth*] make *a* false accusation against a judge or other adjudicatory officer.

DR 1-202 [DR 8-103]. LAWYER CANDIDATE FOR JUDICIAL OFFICE.
(A) A lawyer who is a candidate for judicial office shall comply with the applicable *rules of judicial conduct or other law, including* Canon 7 of the Code of Judicial Conduct.

[DR 1-203. LAWYER HOLDING JUDICIAL OFFICE.]
(A) *A lawyer holding judicial office shall not violate applicable rules of judicial conduct.*

NOTES

DR 1-101(B), forbidding lawyers' furthering the bar admission of candidates they 'know' "to be unqualified," is replaced by part of ALCC Rule 8.2, which uses more enforceable means to attain the same end.

Proposed DR 1-102(A)(3), an NOBC innovation, has no counterpart in either ALCC or Code.

DR 1-104 (B) and (C) and DR 1-105 are taken from the NOBC, but have been slightly edited.

Subchapter 2 has been moved from Canon 8. Proposed DR 1-203, subjecting a lawyer to bar discipline for misconduct in judicial office, appears in no other code but seems a logical corollary to DR 1-102(A)(3), which subjects to bar discipline a lawyer who merely assists judicial misconduct.

Canon 2.
MAKING LEGAL SERVICES AVAILABLE

SUBCHAPTER 1.
Publicity and Advertising.

DR 2-101. PUBLICITY: [GENERAL RULE.]
(A) A lawyer shall not knowingly make a representation that might reasonably be expected to induce reliance by a member of the public in the selection of counsel, that is false or misleading. [ALCC 7.1]

DR 2-102. [ADVERTISING AND SOLICITATION.]
(A) A lawyer shall not advertise for or solicit clients:

(1) In a way that violates a valid law imposing reasonable restrictions regarding time or place. [ALCC 7.2]

(2) 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. [ALCC 7.3]

DR 2-103. [RECOMMENDATION BY AGENT.]
(A) 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. [ALCC 7.5]

DR 2-104. SUGGESTION OF NEED OF LEGAL SERVICES.
(A) A lawyer shall not initiate contact with a prospective client for the purpose of obtaining professional employment:

(1) If the lawyer has been informed by that person, or by someone acting on behalf of that person, that the person does not want to receive communications from the lawyer. [ALCC 7.4] or

(2) If the lawyer knows or reasonably should know that the physical, emotional, or mental state of that person is such that the person could not exercise reasonable judgment in employing a lawyer. [DR 2-104(B)(1), NOBC]

DR 2-105. LIMITATION [OR SPECIALIZATION] OF PRACTICE.
Provided that such statements otherwise comply with this subchapter:
(A) *A lawyer may communicate the fact that the lawyer or the lawyer's firm does or does not practice in particular fields of law.*
(B) *A lawyer may state that the lawyer's practice or that of the lawyer's firm is concentrated in or primarily limited to one or more fields of law.*
(C) A lawyer may state that he or she is currently certified as a specialist in a field of law by a bona fide board or other entity that imposes substantial requirements for such certification. [ALCC Ill. Case 7(a)]

SUBCHAPTER 2.
Agreements To Provide Legal Services.

DR 2-201 [Now 106]. [AGREEMENTS.]
(A) A lawyer shall not enter into an agreement for, charge, or collect a fee

that is illegal or clearly excessive or unreasonable.

(B) **A lawyer shall treat a client fairly and in good faith, giving due regard to the client's position of dependence on 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.** [ALCC 5.1]

(C) **A lawyer shall make known to a client in writing the material terms of their agreement for legal services, 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. This writing shall be delivered to the client when the lawyer is retained or as soon thereafter as reasonably practicable.** [ALCC 5.2]

(1) *A lawyer representing a corporation shall, to comply with this paragraph, provide to the board of directors the information as to potential conflicts of interest required by DR 5-107.*

(D) **A lawyer shall not contract with a client to limit the lawyer's liability to the client for malpractice.** [ALCC 5.3]

(E) **A lawyer may limit the scope of the matter entrusted to the lawyer, if the agreement otherwise complies with this Rule.** [ALCC 2.2]

DR 2-202 [Now 107]. DIVISION OF FEES AMONG LAWYERS.

(A) A lawyer shall not share a fee for legal services with another lawyer who is not **openly associated in the same firm** unless:

(1) The division **reflects the proportion of work performed by, and the normal billing rate of, each attorney, or**

(2) **The client has been informed pursuant to DR 2-201(C) of the fact of fee-sharing and the effect on the total fee, and the client consents.** [ALCC 5.4]

SUBCHAPTER 3.
Termination of Services.

DR 2-301 [Now 110]. WITHDRAWAL: [GENERAL RULE]

(A) **A lawyer who withdraws from the representation of a client, for whatever reason, shall take reasonable care to avoid foreseeable harm to the client, including:**

(1) **Giving due notice to the client;**

(2) **Allowing reasonable time for substitution of new counsel;**

(3) **Cooperating with new counsel;**

(4) **Promptly turning over all papers and property to which the client is entitled; and**

(5) **Promptly returning any unearned or unexpended advances.** [ALCC 6.7]

DR 2-302 [Now DR 2-110(B)]. MANDATORY WITHDRAWAL.

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

(1) The lawyer knows or it is obvious that the client is bringing the litigation, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(2) **The lawyer knows or it is obvious that withdrawal is necessary to avoid violation of a Disciplinary Rule, unless such withdrawal would result in direct or indirect divulgence of a client's secrets or confidences in violation of Canon 4.** [ALCC 6.6; see also ALCC 8.4]

(3) [The lawyer's mental or physical condition renders it unreasonably difficult for the lawyer to carry out the employment effectively.]

(4) **The lawyer is discharged by the client.** [ALCC 6.1]

(5) **The lawyer knows that the lawyer's testimony is likely to be required on a material, disputed issue in a litigated matter, unless withdrawal would cause serious and irreparable injury to the client.** [ALCC 8.4]

DR 2-303 [Now DR 2-110(C)]. PERMISSIVE WITHDRAWAL.

(A) A lawyer may withdraw from representing a client:

(1) **In any matter other than criminal litigation, if withdrawal can be accomplished without a direct disclosure of a confidence or secret of the client in violation of Canon 4, if the lawyer comes to know that the client has knowingly induced the lawyer to undertake the representation, or to take action on behalf of the client in the course of the representation, on the basis of material misrepresentations of fact.** [ALCC 6.5]

(2) **Unless the lawyer knows that withdrawal would result in significant and irreparable harm to the client, if:**

(a) **The client commits a clear and substantial violation of a written agreement regarding payment of fees or expenses.**

(b) **The lawyer encounters continuing and unavoidable difficulties in working with co-counsel or with the client.** [ALCC 6.4]

(3) **If the lawyer reasonably believes that continued representation of the client would be likely to have a seriously adverse effect upon the lawyer's health.** [ALCC 6.3]

(4) **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 the withdrawal and voluntarily assents to it; or**

(c) **The withdrawal is pursuant to the terms of a written retainer agreement.** [ALCC 6.2]

SUBCHAPTER 4.
Transactions With Clients.

DR 2-401 [Now DR 5-103]. [TRANSACTIONS RELATED TO THE CLIENT RELATIONSHIP.]

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that:

(1) A lawyer may acquire [or impose] a lien granted by law to secure the lawyer's fee or expenses, **other than a lien prohibited by paragraph (C).**

(2) A lawyer may contract with a client for a reasonable fee that is contingent **in whole or in part on the outcome of a matter.** [ALCC 5.6(d)]

(3) A lawyer may advance or guarantee the expenses of litigation, *even if repayment is contingent on the outcome of the matter.* [DR 5-103(B)(1), NOBC]

(B) A lawyer shall not give money or anything of substantial value to any person in order to induce that person to become or to remain a client, or to induce that person to retain or to continue the lawyer as counsel on behalf of a third person, except that:

(1) A lawyer may advance money to a client on terms that are fair.

(2) A lawyer may give money to a client as an act of charity.

(3) A lawyer may give money to a client to enable the client to withstand delays in litigation that would otherwise induce the client to settle a claim because of financial hardship, rather than on the merits of the claim.

(4) A lawyer may provide legal services and advance or guarantee the expenses of litigation on a contingent basis pursuant to paragraph (A). [ALCC 5.6]

(C) A lawyer shall not impose a lien upon any part of a client's file, except upon the lawyer's own work product, and then only:

(1) To the extent that the client has not paid for the work product, and is able to do so.

(2) To the extent that withholding the lawyer's work product presents no significant risk to the client of imprisonment, deportation, destruction of essential evidence, loss of custody of child, or similar irreparable harm. [ALCC 5.5]

(D) 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 a person who is partner, associate, or of counsel to the lawyer. [ALCC 8.11]

[DR 2-402. LIMITS ON OTHER RELATIONS WITH A CLIENT.]

(A) A lawyer shall not enter into a commercial transaction or other business relationship with a person who is or recently was a client (except a transaction related to representation of the client permitted by DR 2-401), unless the person is represented by independent counsel. [ALCC 8.7] [DR 5-104]

(B) A lawyer shall not commence having sexual relations with a client during the lawyer-client relationship. [ALCC 8.8]

(C) 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 to whom the lawyer is of counsel. [ALCC 8.9]

NOTES

All of Subchapter 1 is wholly reworked to reflect the ALCC provisions on publicity and advertising.

Proposed DR 2-105 is an interpolation by the Reporter to clarify the ALCC position on what lawyers may say about their practice and their expertise. Paragraphs (A) and (B) are necessarily implied from the previous DR's. Paragraph (C) is taken from an Illustrative Case in the ALCC. NOBC (1980) suggests that such a provision is redundant.

If detailed regulation of specialists' advertising is desired, e.g. by a "designation" plan, the matter should be included in a sub-subchapter beginning with DR 2-121.

DR 2-201(C)(1) is included as a cross-reference to DR 5-107, derived from ALCC 2.5.

DR 2-302(A)(3) is bracketed because it has no direct parallel in the ALCC. Inasmuch as the purpose of the present DR 2-110(B)(2) is to assure that counsel be effective, no reason to delete it appears. Compare DR 2-303(A)(3); ALCC Rule 6.3.

DR 2-401(A)(2) is amended, pursuant to the ALCC, to allow contingent fees in all matters.

DR 2-401(A)(3) is not stated by ALCC 5.6 but appears implicit in that Rule.

Canon 3. UNAUTHORIZED PRACTICE

DR 3-101. AIDING [OR ENGAGING IN] UNAUTHORIZED PRACTICE.

(A) A lawyer shall not assist the practice of law by a person not authorized to practice.

(B) A lawyer shall not practice law in a jurisdiction in violation of *the rules governing the practice* in that jurisdiction.

DR 3-102. DIVIDING LEGAL FEE WITH NON-LAWYER.

(A) A lawyer or law firm shall not share a legal fee with a non-lawyer, except:

(1) *Pursuant to a written partnership agreement or other instrument that complies with DR 3-103(A).*

(2) Pursuant to an agreement to make payments to the estate or specified survivors of a deceased lawyer, *or, pursuant to an agreement that complies with DR 3-103, of a non-lawyer,* if payment to the decedent would not violate this Code. [DR 3-102 (A)(1) and (2)]

(3) Pursuant to a compensation or retirement plan for non-lawyer employees, even if based in whole or in part on a profit-sharing arrangement, providing such plan [does not circumvent another Disciplinary Rule] [otherwise complies with this Code]. [DR 3-102(A)(3)]

DR 3-103. FORMING PARTNERSHIP WITH NON-LAWYER.

(A) A lawyer shall not join with a non-lawyer in a partnership, professional corporation, or other organization, the activities of which include the practice of law, **unless the terms of the lawyer's association with the organization are stated in writing and are consistent with the lawyer's obligations under this Code, with particular reference to DR 5-100, requiring the lawyer's undivided loyalty to the client.** [ALCC 4.7]

NOTES

This Canon does not prohibit an association either between lawyers admitted to practice in different states, or between a lawyer and a non-lawyer admitted to a specialized federal jurisdiction (e.g., before the Interstate Commerce Commission or the Patent Office), for the purpose of handling a matter within that jurisdiction. DR 3-103 allows permanent associations with such non-lawyers, and should not be construed to forbid *ad hoc* relationships that comply with its terms. See DR 3-102. Such non-lawyers, including certified public accountants authorized by 5 U.S.C. §

500 to practice before the Internal Revenue Service, are not persons "not authorized to practice," under DR 3-101(A), within their areas of special competence.

The italicized portions of DR 3-102 are necessary to implement DR 3-103, allowing lawyers to associate professionally with non-lawyers. See also DR 6-101, requiring lawyers to seek out the services of experts in non-legal disciplines. Such associations could presumably be made on an *ad hoc* basis, for the purpose of handling single matters, if the arrangements otherwise complied with this Code.

Canon 4. PROTECTING CONFIDENTIALITY

DR 4-101. [CONFIDENTIAL NATURE OF ATTORNEY-CLIENT RELATIONSHIP.]

(A) Beginning with the initial interview with a prospective client, a lawyer shall strive to establish and maintain a relationship of trust and confidence. 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 interest. The lawyer shall explain to the client the lawyer's obligation of confidentiality, and the exceptions thereto. [ALCC 1.1]

(B) Without the client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence or secret, or use it in any way detrimental to the interests of the client, as the client perceives them, or, if there is inadequate opportunity to consult the client, as the lawyer reasonably understands the client to perceive them, except pursuant to DR 4-102. [ALCC 1.2]

(C) A "confidence" is *any* information *provided to the attorney by the client, as to which* the attorney-client privilege *has not been waived by the client* under applicable law. A "secret" *is any* other information gained *by the lawyer in the course of the lawyer-client relationship.* [DR 4-101(A)]

DR 4-102. DISCLOSURE OF CONFIDENCE [OR SECRET.] [Now DR 4-101(C)]

(A) A lawyer may reveal confidences or secrets:

(1) With the knowing and voluntary consent of all clients affected. [DR 4-101(C)(1); ALCC 1.2]

(2) 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. [DR 4-101(C)(2); ALCC 1.3]

(3) To the extent that the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life. [ALCC 1.6, *substantially amending* DR 4-101(C)(3)]

(4) To the extent necessary to defend the lawyer or the lawyer's associate or employee against a charge of criminal, civil, or professional misconduct asserted by the client, or against a formally instituted charge of such conduct in which the client is implicated. [DR 4-101(C)(4); ALCC 1.5]

(5) 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, to the extent necessary to prevent the matter from going forward with a corrupted judge or juror. [ALCC 1.5)

(6) To the extent that indirect disclosure is necessarily caused or occasioned by the lawyer's withdrawal from representation induced by the client's material misrepresentation, pursuant to DR 2-303(A)(1). [ALCC 1.2]

(7) *To other lawyers and other persons, employed by or associated with the client or the lawyer, who are similarly bound to preserve the confidences and secrets of the client, for the purpose of providing services to the client.*

(B) *When revealing a confidence or secret pursuant to subparagraph (2), (3), (4) or (5) of paragraph (A), a lawyer shall use all reasonable means to protect a client's interests and to avoid disclosure that is not absolutely necessary.*

DR 4-103 [Now DR 4-101(B)]. [PROHIBITED DISCLOSURE OR USE OF CONFIDENCE OR SECRET.]

(A) Except when permitted under DR 4-102, a lawyer shall not:

(1) Reveal a confidence or secret of a client.

(2) Use a confidence or secret of a client to the disadvantage of the client. [See ALCC 1.2]

(3) Use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client *knowingly and voluntarily* consents.

NOTES

The Code puts this Canon entirely under one Disciplinary Rule. It is proposed that it be subdivided into three DR's.

The substantial differences between this Canon and the present Code are discussed in the Comment to ALCC Chapter 1.

DR 4-101 follows the ALCC except that it uses the Code term "confidence *or secret;*" the term is defined, by paragraph (C), to comply with the Terminology of the ALCC and the Comment to ALCC Chapter IV. The following language has been deleted from the definition of "secret" now in DR 4-101(A), and should not be reinstated, particularly without the words in bold face appended at the end:

> ..., the disclosure of which would be, or the lawyer has reason to believe would be likely to be, embarrassing or detrimental to the interests of the client, **as the client perceives them.**

Paragraph (B) of DR 4-102 incorporates a *caveat* that is included in the equivalent separate Rules 1.3 through 1.6 of the ALCC.

A new subparagraph (7) is added to DR 4-102 (or present DR 4-101(C)) to make it clear that a lawyer's disclosure to other confidential agents of a client is neither improper nor a waiver of privilege.

Canon 5. INDEPENDENT PROFESSIONAL JUDGMENT

[DR 5-100. GENERAL RULE.]

(A) In a matter entrusted to a lawyer by a client, the lawyer shall give un-

divided fidelity to the client's interests as perceived by the client, unaffected by any interest of the lawyer or of any person, or by the lawyer's perception of the public interest [,except as the lawyer may and should advise the client of the lawyer's independent professional judgment as to the client's interests]. [ALCC 2.1]

DR 5-101. [INDEPENDENT PROFESSIONAL JUDGMENT AFFECTED BY LAWYER'S OWN INTERESTS.]

(A) A lawyer shall not accept employment if the exercise of *the lawyer's* professional judgment will be or reasonably may be affected by *the lawyer's* own financial, business, property, or personal interests, except:

(1) When it is obvious that the lawyer can adequately represent the interests of the client.

(2) With the written consent of the client **pursuant to DR 5-110.**

DR 5-102. [LAWYER AS WITNESS.]

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

(1) *This paragraph shall not apply to* testimony related solely to the nature and value of legal services rendered by the lawyer or *the lawyer's* firm to the client. [DR 5-101(B)(3)]

(B) When a lawyer is disqualified from representing a client under paragraph (A), no partner or associate of that lawyer, and no one with an of counsel relation to the lawyer, shall represent the client *[,unless disqualification of such other lawyer would cause serious and irreparable injury to the client].* [ALCC 8.5; DR 5-101(B), 5-102(B)]

(C) Disqualification of a lawyer pursuant to paragraph (A) or (B) may be waived by the voluntary and informed consent of all adverse parties. [ALCC 8.6]

DR 5-103. [Transferred to DR 2-401.]

DR 5-104. [Transferred to DR 2-402(A).]

DR 5-105. [INDEPENDENT PROFESSIONAL JUDGMENT AFFECTED BY INTERESTS OF ANOTHER CLIENT.]

(A) *A lawyer shall not accept or continue employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except with the consent of each client who may be adversely affected, pursuant to DR 5-110.*

(B) *If a lawyer is disqualified from a representation by this Rule, no partner or associate of, or counsel to the lawyer or the lawyer's firm may accept or continue the representation.* [DR 5-105(D)]

DR 5-106 [Now DR 5-107]. AVOIDING INFLUENCE BY OTHERS.

(A) A lawyer shall not permit another person who recommends, employs, or pays the lawyer to render legal services for *a client* to direct or regulate the lawyer's professional judgment in rendering such legal services. [DR 5-107(B)]

(B) A lawyer may, with the consent of a client, accept a fee or salary respecting services to the client from a person or organization other than the client, if the arrangement otherwise complies with DR 2-201, respecting agreements for legal services and fees, and with this Canon. [ALCC 2.3][DR 5-107(A)]

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if a non-lawyer has the right to direct or control the professional judgment of the lawyer.

(D) 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. [ALCC 8.10]

(E) 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, except to the extent that lawyers in a partnership or similar professional relationship may make reasonable agreements regarding the allocation among themselves of fees with respect to clients who elect to continue with one lawyer or another upon termination of the professional relationship between the lawyers. [ALCC 8.13]

[DR 5-107. CORPORATION AS CLIENT: RESOLVING CONFLICTS OF INTEREST.]

(A) A lawyer representing a corporation shall, as early as possible in the lawyer-client relationship, inform the board of directors of potential conflicts that might arise among the interests of the board, the officers, and the shareholders [*or members*] of the corporation. The lawyer shall [receive] [*obtain*] from the board instructions in advance as to how to resolve such conflicts of interest, and shall take reasonable steps to insure that officers with whom the lawyer deals, and shareholders [*or members*], are made aware of how the lawyer has been instructed to resolve the conflicts. [ALCC 2.5]

[DR 5-110. CLIENT CONSENT TO DIVIDED LOYALTY.]

(A) 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. [ALCC 2.4]

NOTES

This Chapter has been completely reorganized, but most of the changes clarify, rather than change the law. Two rules on relations and transactions with clients, DR 5-103 and 5-104, have been transferred to Subchapter 4 of Chapter 2, which deals with the lawyer-client contractual relationship.

In DR 5-106(C), the subparagraphs forbidding any ownership of law firms by non-lawyers have been omitted. See DR 3-103, authorizing associations with non-lawyers under certain conditions.

For explanation of DR 5-107, see the Comment to ALCC Chapter 2. See also DR 2-201(C)(1), supra, which requires the lawyer to put this information in writing.

Canon 6. COMPETENCE

DR 6-101. [DUTY] TO ACT COMPETENTLY.

(A) At a minimum, a lawyer shall serve a client with the skill and care generally afforded to clients by other lawyers in similar matters. [ALCC 4.1]

(B) A lawyer who has held himself or herself out as having special skill or competence shall serve a client with the skill and care generally afforded to clients by lawyers having such special skill or competence. [ALCC 4.2]

(C) In addition, a lawyer shall, in a matter entrusted to the lawyer by a client:

(1) Seek out all facts and authorities that are reasonably available and relevant to the client's interests. [ALCC 4.4]

(2) Take such legal action as is necessary and reasonably available to protect and advance the client's interests. [ALCC 4.3]

(3) Give due regard not only to established rules of law, but also to developing legal concepts that might affect the client's interests. [ALCC 4.4]

(4) Seek out reasonably available resources that are necessary to protect and advance the client's interests, such as experts in specialized areas of the law or in nonlegal disciplines. [ALCC 4.6].

[DR 6-102. DUTY OF DILIGENCE]

(A) 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. [ALCC 4.5]

NOTES

This Canon has only one DR in the present Code. The ALCC expands it to seven Rules. To preserve Code numbering as closely as possible, six of those Rules are compressed into two DR's. (ALCC Rule 4.7 appears in DR 3-103.)

Canon 7. ZEALOUS REPRESENTATION WITHIN LEGAL LIMITS

DR 7-101. REPRESENTING A CLIENT ZEALOUSLY.

(A) 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. [ALCC 3.1] [DR 7-101(A)(2) and (3), and (B), omitted]

(B) A lawyer shall fully inform a client of the client's rights, liabilities, and lawful alternatives regarding issues related to the matter entrusted to the lawyer by the client, except:

(1) To the extent that the client has instructed the lawyer to exercise the lawyer's judgment without further consultation [*with the client*].

(2) As required by DR 7-102(C), proscribing advice for unlawful purposes. [ALCC 3.2]

DR 7-102. REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW.

(A) A lawyer shall not knowingly file a materially false pleading, present materially false evidence, or make a materially false representation to a court, except as required to do so to avoid direct or indirect divulgence of a client's confidence or secret in violation of Canon 4. [ALCC 3.7]

(B) 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. [ALCC 3.4]

(C) 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]. [ALCC 3.3]

(D) A lawyer shall not knowingly participate in fabricating evidence or a misrepresentation upon which another person is likely to rely to that person's material detriment. [ALCC 3.6]

DR 7-103. PERFORMING THE DUTY OF PUBLIC PROSECUTOR OR OTHER GOVERNMENT LAWYER. [See Canon 8.]

DR 7-104. COMMUNICATING WITH ONE OF ADVERSE INTEREST.

(A) *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,* [DR 7-104(A)(1)] **except that:**

(1) A lawyer may send a written offer of settlement directly to an adverse party [represented by an attorney] seven days or more after that party's attorney has received the same offer of settlement in writing. [ALCC 3.9]

(B) *A lawyer shall not give legal advice to a person who the lawyer knows is not represented by an attorney, other than the advice to secure counsel, when the lawyer knows that the interests of the person are in conflict or likely to be in conflict with the interests of the lawyer's client.* [ALCC 3.8; DR 7-104(A)(2)]

DR 7-105. THREATENING CRIMINAL PROSECUTION.

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

DR 7-106. TRIAL CONDUCT.

(A) A lawyer shall not disregard or advise a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, *except* in a good faith effort to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the persons *whose interests* the lawyer represents.

(C) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert personal knowledge of the facts in issue, except when

testifying as a witness.

(4) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but *a lawyer* may argue, on an analysis of the evidence, for any position or conclusion with respect to *such* matters.

(5) Engage in conduct intended to disrupt a tribunal.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107. TRIAL PUBLICITY. [Omitted. No provisions in ALCC except limitations on behavior of public prosecutors and other government lawyers; see Canon 8.]

DR 7-108. COMMUNICATION WITH OR INVESTIGATION OF JURORS. [Omitted. No provisions in ALCC.]

DR 7-109. CONTACT WITH WITNESSES.

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

(B) [Omitted]

(C) **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 [to dissuade the witness from testifying] [*not to testify*], except that:**

(1) A lawyer may pay a fee to an expert witness.

(2) A lawyer may reimburse a witness' actual, reasonable financial losses and expenses of appearing.

(3) A lawyer may give a witness protection against physical harm.

(4) A lawyer serving as a public prosecutor may promise or obtain immunity from prosecution in order to overcome a witness' assertion of the constitutional privilege against self-incrimination. [ALCC 3.10]

DR 7-110. CONTACT WITH [ADJUDICATORY] OFFICIALS.

(A) **A lawyer representing an interested party shall not initiate communication with a judge or other adjudicatory officer about the facts or issues in a matter that the lawyer knows is pending or likely to be pending before the judge or officer, unless the lawyer has first made a good faith effort to apprise opposing counsel.**

(B) **If a lawyer has an *ex parte* discussion with a judge or other adjudicatory 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** *provisions of Canon 4 proscribing unauthorized divulgence of a client's confidence or secret.* [ALCC 3.11]

NOTES

DR 7-104 is changed in substance only by subparagraph (A)(1). The rest has been rewritten only to make it clearer. DR 7-104(B) is identical to ALCC Rule 3.8, but is printed in italics because it makes no substantive change in present DR 7-104(A)(2).

DR 7-106 has no direct equivalent in the ALCC but is included here to the extent that it is not inconsistent with the ALCC. Subparagraph (B)(1), requiring lawyers to disclose adverse legal authority not cited by opposing counsel, is omitted. The ALCC imposes such a duty only upon government counsel (see DR 8-102, below) and in *ex parte* proceedings.

DR 7-107 is omitted, reflecting the ALCC determination that limitations on pre-trial publicity, except publicity initiated by the government, violate the First Amendment. See the Comment to ALCC Chapter IX.

DR 7-108 is omitted as surplusage. The conduct it forbids (jury tampering) is, in all jurisdictions, punishable either as a crime or as contempt of court, and is thus "illegal conduct that creates a substantial doubt that the lawyer will comply with this Code," which violates DR 1-102(A)(4).

DR 7-109(B), which forbids encouraging a witness to be unavailable to testify, is now subsumed in paragraphs (A) and (C) of that rule.

Canon 8.
PUBLIC SERVICE
SUBCHAPTER 1.
Lawyer in Public Office.

DR 8-101. ACTION AS A PUBLIC OFFICIAL.

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

(1) Use *that* public position *for the purpose of obtaining* a special advantage in *a* legislative matter for *the lawyer or a client of the lawyer* [under circumstances where the lawyer knows or it is obvious that such action is not in the public interest].

(2) Use *that* public position for the purpose of influencing a tribunal to act in favor of *the lawyer or a client of the lawyer.*

(3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing *the lawyer's* action as a public official.

(4) Use the powers of public office for personal advantage, favoritism, or retaliation. [ALCC 9.13]

(5) Participate in any matter in which the lawyer participated personally and substantially in private practice. [ALCC 9.16]

(6) ***For one year after entering public office, participate in any matter in which an interested party:***

(a) ***Was the lawyer's client within one year before the lawyer entered public office; or***

(b) ***Is represented by a lawyer who was a partner or associate of, or of counsel to, the lawyer within one year before the lawyer entered public office, unless: (i) The lawyer was appointed to office by the chief executive officer of the jurisdiction, with the approval of a legislative body, or the lawyer's participation is approved by a superior so appointed; or (ii) The lawyer was elected to office.*** [ALCC 9.20]

(7) Knowingly violate the rights of any person or knowingly tolerate the violation of any person's rights by any other public [employee] [*official*]. [ALCC 9.12]

(8) Engage in publicity regarding a criminal investigation or proceeding, or an administrative investigation or proceeding involving charges of wrongdoing, until after the disposition of the matter is announced, except to make public information that is necessary:

(a) To protect the public from

an accused who is at large and reasonably believed to be dangerous;

(b) To help in apprehending a suspect;

(c) To rebut publicized allegations of improper conduct on the part of the lawyer or the lawyer's staff or associates in public office. [ALCC 9.11]

DR 8-102. [Transferred to DR 1-201]

DR 8-103. [Transferred to DR 1-202]

[DR 8-104. REPRESENTING THE GOVERNMENT IN COURT.]

(A) 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 of the tribunal, and that have not been brought to the attention of the tribunal by other parties or counsel. [ALCC 9.10]

SUBCHAPTER 2.
Former Public Official.

[DR 8-201. ACTION AFTER LEAVING PUBLIC OFFICE.]

(A) A lawyer who has held public office shall not:

(1) Accept private employment relating to any matter in which the lawyer participated personally and substantially while in public office. [ALCC 9.14][DR 9-101(A) and (B)]

(2) *For one year after leaving public office, 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 office.* [ALCC 9.18]

(3) *For one year after leaving public office, become a partner or associate of, or be of counsel to, a lawyer or law firm that represented an interested party in any [substantial] matter in which the lawyer participated personally and substantially within one year prior to leaving public office.* [ALCC 9.19]

(4) *Allow another lawyer who is a partner or associate of, or of counsel to the lawyer or the lawyer's firm, to accept private employment that would violate subparagraph (A)(1), (2), or (3) of this Rule if accepted by the lawyer.* [ALCC 9.21]

SUBCHAPTER 3.
Public Prosecutor.

[DR 8-301. ACTING AS A PUBLIC PROSECUTOR.]

(A) A lawyer serving as a public prosecutor shall not:

(1) Seek or sign a formal charge, or proceed to trial thereon, unless a fair-minded juror could conclude 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. [ALCC 9.3]

(2) Use unconscionable pressures in bargaining for pleas of guilty, such as charging an accused with a more serious offense, or with more offenses, than warranted under paragraph (A)(1). [ALCC 9.5]

(3) In exercising discretion to investigate or to prosecute, show favoritism for, or invidiously discriminate against, one person among several similarly situated. [ALCC 9.2]

(4) Interfere with the independence of a grand jury, preempt a function of a grand jury, or use the processes of the grand jury for purposes not approved by the grand jury. [ALCC 9.4]

(5) 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 relinquishing those rights inherent in pleading not guilty and proceeding to trial. [ALCC 9.6]

(6) 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 [violation of law] [criminal conduct]. [ALCC 9.1]

(7) Strike prospective jurors on grounds of race, religion, national or ethnic background, or sex, except to counteract the use of such tactics initiated by the defense. [ALCC 9.8]

(B) A lawyer serving as a public prosecutor shall:

(1) Promptly make available to defense counsel, without request, any information that the prosecutor knows is likely to be useful, or that is obviously likely to be useful to the defense. [ALCC 9.7]

(2) Promptly advise the court, on the record when possible, if the lawyer comes to know that an accused has received or is receiving ineffective assistance of counsel. [ALCC 9.9]

(3) Comply with the Rules of this Canon applicable to a lawyer representing the government or in public service.

SUBCHAPTER 4.
Private Counsel's Relationships With Public Officials.

[DR 8-401. SUGGESTION OF INFLUENCE.]

(A) A lawyer shall not state or imply that the lawyer is able to influence any tribunal, legislative body, or public official, improperly or upon irrelevant grounds. [DR 9-101(C)]

DR 8-402. EMPLOYMENT DISCUSSION BETWEEN PRIVATE ATTORNEY AND PUBLIC OFFICIAL.

(A) While a lawyer in public office is participating personally and substantially in a matter in which a private attorney has a material interest, neither lawyer shall comment to the other about the government lawyer's private employment possibilities. [ALCC 9.17]

NOTES

DR 8-101(A)(1): The language in brackets, now in the Code, should be deleted.

Present DR 8-102 and DR 8-103 appear above, without any substantive change, as DR 1-201 and DR 1-202.

Note that ALCC Rules 9.18 through 9.21, which appear as proposed DR 8-101(A)(6) and DR 8-201(A)(2), (3), and (4), were not approved by the Commission "because of concern about their effect in communities served by very few lawyers." These "Supplementary Provisions" of the ALCC are therefore presented in Italic Bold Face type.

Canon 9. HOLDING PROPERTY FOR OTHERS

DR 9-101. [Omitted. Transferred to DR 8-201 and DR 8-401.]

DR 9-102. PRESERVING IDENTITY OF FUNDS AND PROPERTY [OF OTHERS].

(A) All funds of clients *or other persons* paid to a lawyer or law firm *or placed in the possession of a lawyer, in trust or otherwise,* other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client *or other person* and in part presently or potentially to the lawyer or law firm *may* be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client *or other person having an interest,* in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client *or other person* of the receipt of funds, securities, or other property *on behalf of the person.*

(2) Identify and label securities and property of a client *or third person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other property of a client *or other person* coming into the possession of the lawyer and render appropriate accounts to the client *or other person* regarding them.

(4) Promptly pay or deliver to a client *or other person* the funds, securities, or other property in the possession of the lawyer which the client *or other person* is entitled to receive.

(5) Not commingle the funds or property of a client or other person with the lawyer's own funds or property.

NOTES

The Commission concurs in the NOBC recommendation that this Canon of the Code, "A lawyer should avoid even the appearance of professional impropriety," should be replaced. See the Comment to ALCC Chapter VIII. The Reporter has adopted the further NOBC recommendation that Canon 9 become a Canon devoted to prophylactic measures intended to prevent lawyers' violating their fiduciary duties as to property entrusted to them. The text of DR 9-102 is that recommended by the NOBC, which is more comprehensive than ALCC Rule 8.12.

Cross-Reference Table to Provisions of The American Lawyer's Code of Conduct

ALCC CHAPTER I. THE CLIENT'S TRUST AND CONFIDENCES

1.1	4-101(A)
1.2	4-101(B), 4-102(A)(1), (6)
1.3	4-102(A)(2)
1.4	4-102(A)(4)
1.5	4-102(A)(4)
1.6	4-102(A)(3)

ALCC CHAPTER II. FIDELITY TO THE CLIENT'S INTERESTS

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2.2	2-201(E)
2.3	5-107(B)
2.4	5-110(A)
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ALCC CHAPTER III. ZEALOUSNESS ON THE CLIENT'S BEHALF

3.1	7-101(A)
3.2	7-101(B)
3.3	7-102(C)
3.4	7-102(B)
3.5	7-109(A)
3.6	7-102(D)
3.7	7-102(A)
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3.10	7-104(C)
3.11	7-110

ALCC CHAPTER IV. COMPETENCE

4.1	6-101(A)
4.2	6-101(B)
4.3	6-101(C)(2)
4.4	6-101(C)(1), 6-101(C)(3)
4.5	6-102(A)
4.6	6-101(C)(4)
4.7	3-102(A)(1), 3-103(A)

ALCC CHAPTER V. RETAINER AGREEMENTS AND FINANCIAL ARRANGEMENTS WITH CLIENTS

5.1	2-201(B)
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ALCC CHAPTER VI. WITHDRAWAL FROM REPRESENTATION

6.1	2-302(A)(4)
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6.4	2-303(A)(2)
6.5	2-303(A)(1)
6.6	2-302(A)(2)
6.7	2-301(A)

ALCC CHAPTER VII. INFORMING THE PUBLIC ABOUT LEGAL SERVICES

7.1	2-101(A)
7.2	2-102(A)(1)
7.3	2-102(A)(2)
7.4	2-104(A)(1)
7.5	2-103(A)

ALCC CHAPTER VIII. MAINTAINING PROFESSIONAL INTEGRITY AND COMPETENCE

8.1	1-102(A)(5)
8.2	1-101(B), 1-103(A)
8.3	1-103(D)
8.4	2-302(A)(5), 5-102(A)
8.5	5-102(B)
8.6	5-102(C)
8.7	2-402(A)
8.8	2-402(B)
8.9	2-402(C)
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8.12	9-102
8.13	5-106(E)
8.14	1-102(A)
8.15	1-104

ALCC CHAPTER IX. RESPONSIBILITIES OF GOVERNMENT LAWYERS

9.1	8-301(A)(6)
9.2	8-301(A)(3)
9.3	8-301(A)(1)
9.4	8-301(A)(4)
9.5	8-301(A)(2)
9.6	8-301(A)(5)
9.7	8-301(B)(1)
9.8	8-301(A)(7)
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9.10	8-106(A)
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9.17	8-402(A)
9.18	8-201(A)(2)
9.19	8-201(A)(3)
9.20	8-101(A)(6)
9.21	8-201(A)(4)

The principal financial support for the writing and publication of the American Lawyer's Code of Conduct was provided by the Roscoe Pound-American Trial Lawyers Foundation.

The Foundation was established in 1956 by Roscoe Pound (1870-1964), Dean Emeritus of the Harvard Law School, and the National Association of Claimants' Compensation Attorneys (now the Association of Trial Lawyers of America). The Foundation's original headquarters in Watertown, Massachusetts, was Dean Pound's home of many years, which he gave to the Foundation together with his remarkable library.

The Foundation's original purposes were research and education "relating to personal injury problems." It has retained that central focus, but broadened the scope of its activities in recent years. Pound's world famous private library now includes the Samuel Horowitz Workmen's Compensation Library, as well as the 8800 priceless legal and literary tomes that Dean Pound collected over the nine decades of his life.

In the 1960s, the Pound Foundation pioneered the use of audio-visual training films in the education of the trial bar. Long before videotape simplified production and reduced costs, the Foundation developed forty training films and distributed them to many law schools throughout the United States.

When Earl Warren, then Chief Justice, laid the cornerstone of the Foundation's Research Center in Cambridge, Massachusetts, the Foundation announced the creation of an annual "Chief Justice Earl Warren Conference on Advocacy." The first Warren Conference was held in June 1972 at the Research Center in Cambridge. The Final Report of that Conference, entitled *A Program For Prison Reform,* was reprinted and given wide distribution by the Federal Law Enforcement Assistance Administration.

Notable subsequent conferences included the 1976 Conference on Trial Advocacy as a Specialty. The creation of the National Board of Trial Advocacy, the first national specialty-certification board for lawyers, was a direct result of that Conference. The 1978 Conference on Ethics and Advocacy focused on defects in the American Bar Association's Code of Professional Responsibility. That Final Report, and the dissatisfaction of Foundation leaders with the ABA proposals to remedy those defects, led the Foundation to create the Commission that devised The American Lawyer's Code of Conduct.

The 1982 Earl Warren Conference was held in Charlottesville, Virginia. The subject under investigation was *Ethics in Government.* The Final Report of that Conference will be available for public review early in 1983.

The Foundation's publications are presently distributed by the ATLA Education Fund. Additional copies of the American Lawyer's Code of Conduct ($5.00), as well as the Final Reports of the last three Warren Conferences, entitled *Church, State and Politics* (1981) ($10.00); *The Penalty of Death* (1980) ($7.50); and *The Courts: The Pendulum of Federalism* (1979) ($7.50), can be obtained by contacting:

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