

APPENDIX B

COMPARISON OF PROPOSED MODEL RULES,
AS REVISED, WITH PROVISIONS OF
1969 MODEL CODE OF
PROFESSIONAL RESPONSIBILITY

Rule 1.1 Competence

DR 6-101(A)(1) provides that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it." DR 6-101(A)(2) requires "preparation adequate in the circumstances"; Rule 1.1 more fully particularizes the elements of competence.

Rule 1.2 Scope of Representation

Rule 1.2(a) has no counterpart in the Disciplinary Rules of the Code. EC 7-7 states that "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client. . . ." EC 7-8 states that "In the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. . . . In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provides that "A lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics. . . ."

Rule 1.2(b) has no counterpart in the Code.

Rule 1.2(c) has no counterpart in the Code.

With regard to paragraph (d), DR 7-102(A)(7) provides that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-106 provides that "A lawyer shall not . . . advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal . . .

but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 states that "A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

With regard to Rule 1.2(e), DR 2-110(C)(1)(c) provides that a lawyer may withdraw from representation if a client "insists" that the lawyer engage in "conduct that is illegal or that is prohibited under the Disciplinary Rules." DR 9-101(C) provides that "a lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official."

Rule 1.3 Diligence

DR 6-101(A)(3) requires that a lawyer not "neglect a matter entrusted to him." EC 6-4 states that a lawyer should "give appropriate attention to his legal work." Canon 7 states that "a lawyer should represent a client zealously within the bounds of law." DR 7-101(A)(1) provides that "a lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules" DR 7-101(A)(3) provides that "a lawyer shall not intentionally . . . prejudice or damage his client during the course of the relationship"

Rule 1.4 Communication

This Rule has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provides that a lawyer shall not "neglect a legal matter entrusted to him." DR 9-102(B)(1) provides that a lawyer "shall promptly notify a client of the receipt of his funds, securities, or other properties." EC 7-8 states that "a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

Rule 1.5 Fees

DR 2-106(A) provides that "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(B) provides that "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

DR 2-106(B) further provides that "Factors to be considered . . . in determining . . . reasonableness . . . include . . . : (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or by the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent." The Rule includes the factor of ability to pay; a person of ample means may justly be charged more for a service, and a person of limited means less, other factors being the same. EC 2-17 states that "A lawyer should not charge more than a reasonable fee. . . ."

There is no counterpart to Rule 1.5(b) in the Disciplinary Rules of the Code. EC 2-19 states that "It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

With regard to Rule 1.5(c), DR 2-106(C) prohibits "a contingent fee in a criminal case."

With regard to Rule 1.5(d), DR 2-107(A) permits division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation" Rule 1.5(d) permits division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation.

Rule 1.6 Confidentiality of Information

The principle of confidentiality is enlarged in several respects and narrowed in a few respects compared with the corresponding provisions of the Code.

The general principle is enlarged in the following respects: First, the confidentiality requirement applies to all information about a client "relating to the representation." Under the Code, DR 4-101, the requirement applies only to information governed by the attorney-client privilege

and to information "gained in" the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 thus imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental. Furthermore, this definition avoids the constricted definition of "confidence" that appears in some decisions. See *Allegaert v. Perot*, 434 F. Supp. 790 (S.D.N.Y. 1977); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865 (W.D. Wis. 1977); *City of Wichita v. Chapman*, 521 P.2d 589 (Kan. 1974).

Rule 1.6(a) permits a lawyer to disclose information where impliedly authorized in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer cannot disclose "confidences" unless the client first expressly consents after disclosure.

Second, paragraph (b) redefines the exceptions to the requirement of confidentiality. Under the Code, DR 4-101(C) (3), a lawyer "may reveal the intention of his client to commit a crime and the information necessary to prevent the crime." This option exists regardless of the seriousness of the proposed crime. Also, under DR 7-102(B), the lawyer is required to reveal information necessary to "rectify" a "fraud upon a person or tribunal." DR 7-102(B) applies to past frauds and presumably to future frauds if the client goes on to commit them. DR 7-102(B), as amended by the ABA in 1974 and as adopted in some states, is subject to an amendment that disclosure is not permitted "when the information is protected as a privileged communication." Technically, this exception would only apply if the lawyer is under compulsion of law to testify, for only then would the information be "privileged." However, ABA Formal Opinion 341 (1975) construed the term "privilege" to include "confidences" as defined in DR 4-101(A).

Under Rule 1.6(b)(1), the lawyer may reveal information about a client to prevent the client from committing a crime or fraud that is likely to result in the specified serious consequences.

Rule 1.6(b)(2) modifies DR 7-101(B)(1) by making the disclosure of a fraud committed in the course of representation optional rather than mandatory. It further modifies DR 7-101(B)(1) by eliminating the reference to "privilege" that

was added to the Code of Professional Responsibility by amendment in 1974. That amendment has not been adopted by the majority of states.

With regard to Rule 1.6(b)(3), DR 4-101(C)(4) provides that a lawyer may reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct." Rule 1.6(b)(3) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for his fee; for example, recovery of property from the client. It narrows the exception dealing with defense against claims of wrongful conduct to situations where the client's conduct was involved.

Rule 1.6(b)(4) is substantially similar to DR 4-101(C)(2). A lawyer is required "by other law" to reveal information when, for example, he is under compulsion of law to testify and the information in question does not fall within the attorney-client privilege.

Rule 1.7 Conflict of Interest: General Rule

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

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

Rule 1.8 Conflict of Interest: Prohibited Transactions

This Rule deals with certain transactions that per se involve conflict of interest.

With regard to Rule 1.8(a), DR 5-104(A) provides that "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 states that "A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

With regard to Rule 1.8(b), DR 4-101(B)(3) provides that a lawyer shall not "use a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."

There is no counterpart to Rule 1.8(c) in the Disciplinary Rules of the Code. EC 5-5 states that "A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Rule 1.8(d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Rule 1.8(e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remain ultimately liable for such expenses."

Rule 1.8(e)(2) has no counterpart in the Code.

Rule 1.8(f) is substantially identical to DR 5-107(A)(1).

Rule 1.8(g) is substantially identical to DR 5-106.

The first clause of Rule 1.8(h) deals with the same subject as DR 6-102(A). There is no counterpart in the Code to the second clause of Rule 1.8(h).

Rule 1.8(i) has no counterpart in the Code.

Rule 1.9 Conflict of Interest: Former Client

There is no counterpart to Rule 1.9(a) or (b) in the Disciplinary Rules of the Code. The problem addressed in Rule 1.9(a) sometimes has been dealt with under the rubric of Canon 9 of the Code, which provides that "A lawyer should avoid even the appearance of impropriety." EC 4-6 states that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

The exception in the last sentence of Rule 1.9(b) permits a lawyer to use information relating to a former client that is in the "public domain," a use that is also not prohibited by the Code. Since the scope of Rule 1.6(a) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

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

Rule 1.10 Imputed Disqualification: General Rule

DR 5-105(D) provides that "If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment."

Rule 1.11 Successive Government and Private Employment

Rule 1.11(a) is similar to DR 9-101(B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

Rules 1.11(b), (c), (d) and (e) have no counterparts in the Code.

Rule 1.12 Former Judge or Arbitrator

Paragraph (a) is substantially similar to DR 9-101(A), which provides that "A lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There is no counterpart in the Code to paragraphs (b), (c) or (d).

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

Rule 1.13 Organization as the Client

There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 5-18 states that "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 states "although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provides that "a lawyer shall not permit a person who employs . . . him to render legal services for another to

direct or regulate his professional judgment in rendering such legal services."

Rule 1.14 Client Under a Disability

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

Rule 1.15 Safekeeping Property

With regard to Rule 1.15(a), DR 9-102(A) provides that "funds of clients" are to be kept in a trust account in the state in which the lawyer's office is situated. DR 9-102(B) (2) provides that a lawyer shall "identify and label securities and properties of a client . . . and place them in . . . safekeeping" DR 9-102(B)(3) requires that a lawyer "maintain complete records of all funds, securities and other properties of a client" Rule 1.15(a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Rule 1.15(b) is substantially similar to DR 9-102(B)(1) and (4).

Rule 1.15(c) is substantially similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

Rule 1.16 Declining or Terminating Representation

With regard to Rule 1.16(a), DR 2-109 provides that a lawyer "shall not accept employment . . . if he knows or it is obvious that (the prospective client) wishes to . . . bring a legal action . . . or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person . . . (or to) present a claim or defense . . . that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal or existing law." DR 2-110(B) provides that a lawyer "shall withdraw from employment . . . if . . . he knows or it is obvious that the client is bringing the legal action . . . or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person (or) he knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule (or) his mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively (or) he is discharged by the client."

With regard to Rule 1.16(b), DR 2-110(C) has no provision for permissive withdrawal without cause even if withdrawal would not prejudice the client. It permits withdrawal regardless of the effect on the client if:

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

"(2) [The lawyer's] continued employment is likely to result in a violation of a Disciplinary Rule.

"(3) [The lawyer's] inability to work with co-counsel indicates the best interests of the client likely will be served by withdrawal.

"(4) [The lawyer's] mental or physical condition render it difficult for him to carry out the employment effectively.

"(5) [The] client knowingly and freely assents to termination of his employment.

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

With regard to Rule 1.16(c), DR 2-110(A)(1) provides that "If permission for withdrawal from employment is required by the rules of a tribunal, the lawyer shall not withdraw . . . without its permission."

The provisions of Rule 1.16(d) are substantially identical to DR 2-110(A)(2) and (3) except for the reference to applicable lien law. DR 5-103(A)(1) provides that a lawyer may "acquire a lien granted by law to secure his fee or expenses."

Rule 2.1 Advisor

There is no direct counterpart to Rule 2.1 in the Disciplinary Rules of the Code. DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 states that "Advice of a lawyer to his client need not be confined to purely legal considerations In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, . . . the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. . . ."

Rule 2.2 Intermediary

There is no direct counterpart to Rule 2.2 in the Disciplinary Rules of the Code. EC 5-20 states that "A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships." DR 5-105(B) provides that "A lawyer shall not continue multiple employment if the exercise of his independent judgment in behalf of a client

will be or is likely to be adversely affected by his representation of another client, or if it would involve him in representation of differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Rule 2.3 Evaluation for Use by Third Persons

There is no counterpart to Rule 2.3 in the Code.

Rule 3.1 Meritorious Claims and Contentions

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

Rule 3.2 Expediting Litigation

DR 7-102(A)(1) provides that "A lawyer shall not . . . file a suit, assert a position, conduct a defense (or) delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Rule 3.3 Candor Toward the Tribunal

Rule 3.3(a)(1) is substantially identical to DR 7-102(A)(5), which provides that a lawyer shall not "knowingly make a false statement of law or fact."

Rule 3.3(a)(2) is implicit in DR 7-102(A)(3), which provides that "a lawyer shall not . . . knowingly fail to disclose that which he is required by law to reveal."

Rule 3.3(a)(3) is identical to DR 7-106(B)(1).

With regard to Rule 3.3(a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provides that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of Rule 3.3(a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, does not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with Rule 1.6, provides that "a lawyer who receives information clearly establishing that . . . his client has . . . perpetrated a fraud upon . . . a tribunal shall [if the client does not rectify the situation] . . . reveal the fraud to the . . . tribunal. . . ." Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently requires disclosure by the lawyer in such circumstances. However, some states have amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer has a duty to disclose the perjury.

Rule 3.3(c) confers discretion on the lawyer to refuse to offer evidence that he "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibits the lawyer from offering evidence the lawyer "knows" is false.

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

Rule 3.4 Fairness to Opposing Party and Counsel

With regard to Rule 3.4(a), DR 7-109(A) provides that "a lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provides that "a lawyer shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness. . . ." DR 7-106(C)(7) provides that a lawyer shall not "intentionally or habitually violate any established rule of procedure or of evidence."

With regard to Rule 3.4(b), DR 7-102(B)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109 provides that "a lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) a reasonable fee for the professional services of an expert witness." EC 7-28 states that "witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Rule 3.4(c) is substantially similar to DR 7-106(A), which provides that "A lawyer shall not disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

Rule 3.4(d) has no counterpart in the Code.

Rule 3.4(e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribes asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," is too vague to be a rule of conduct enforceable as law.

With regard to Rule 3.4(f), DR 7-104(A)(2) provides that a lawyer shall not "give advice to a person who is not represented . . . other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

Rule 3.5 Impartiality and Decorum of the Tribunal

With regard to Rule 3.5(a), DR 7-108(A) provides that "before the trial of a case a lawyer . . . shall not communicate with . . . anyone he knows to be a member of the venire" DR 7-108(B) provides that "during the trial of a case . . . a lawyer . . . shall not communicate with . . . a juror concerning the case." DR 7-109(C) provides that a lawyer shall not "communicate . . . as to the merits of the cause with a judge or an official before whom the proceeding is pending except . . . upon adequate notice to opposing counsel . . . (or) as otherwise authorized by law."

With regard to Rule 3.5(b), DR 7-106(C)(6) provides that a lawyer shall not "engage in undignified or discourteous conduct which is degrading to a tribunal."

Rule 3.6 Trial Publicity

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criteria of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice. Finally, Rule 3.6 omits DR 7-107(C)(7), which provides that a lawyer may reveal "at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pre-trial suppression motions, which, if successful, may be circumvented by prior disclosure to the press.

Rule 3.7 Lawyer as Witness

DR 5-102(A) prohibits a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provides that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client . . . until it is apparent that his testimony is or may be prejudicial to his client." DR 5-101(B) permits a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the

testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested issue," and is redundant.

Rule 3.8 Special Responsibilities of a Prosecutor

DR 7-103(A) provides that "A public prosecutor . . . shall not institute . . . criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "A public prosecutor . . . shall make timely disclosure . . . of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

Rule 3.9 Advocate in Nonadjudicative Proceedings

EC 7-15 states that "A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 states that "When a lawyer appears in connection with proposed legislation, he . . . should comply with applicable laws and regulations." EC 8-5 states that "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a . . . legislative body should never be participated in . . . by lawyers." DR 7-106(B)(1) provides that "In presenting a matter to a tribunal, a lawyer shall disclose . . . unless privileged or irrelevant, the identity of the clients he represents and of the persons who employed him."

Rule 4.1 Truthfulness in Statements to Others

Rule 4.1(a) is substantially similar to DR 7-102(A)(5), which states that "In his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact."

With regard to Rule 4.1(b), DR 7-102(A)(3) provides that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."

Rule 4.2 Communication with Person Represented by Counsel

This Rule is substantially identical to DR 7-104(A)(1).

Rule 4.3 Dealing with Unrepresented Person

There is no direct counterpart to this Rule in the Code. DR 7-104(A)(2) provides that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel"

Rule 4.4 Respect for Rights of Third Persons

DR 7-106(C)(2) provides that a lawyer shall not "ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provides that a lawyer shall not "take . . . action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-108(D) provides that "after discharge of the jury . . . the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror" DR 7-108(E) provides that "a lawyer shall not conduct . . . a vexatious or harassing investigation of either a venireman or a juror."

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer

There is no direct counterpart to this Rule in the Code. DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to . . . authority empowered to investigate or act upon such violation."

Rule 5.2 Responsibilities of a Subordinate Lawyer

There is no counterpart to this Rule in the Code.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

There is no direct counterpart to this Rule in the Code. DR 4-101(D) provides that "A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client" DR 7-107(J) provides that "[a] lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107."

Rule 5.4 Professional Independence of a Lawyer

DR 3-102(A) provides that "A lawyer or law firm shall not share legal fees with a nonlawyer" DR 3-103(A) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(C) provides that "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) A nonlawyer owns any interests therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) A nonlawyer is a corporate director or officer thereof; or (3) A nonlawyer has the right to direct or control the professional judgment of the lawyer." EC 5-24 states that "[A] lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a nonlawyer. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant"

Rule 5.5 Restrictions on Right to Practice

Rule 5.5 is substantially similar to DR 2-108.

Rule 6.1 Pro Bono Publico Service

There is no counterpart of Rule 6.1 in the Disciplinary Rules of the Code. EC 2-25 states that "The basic responsibility for providing legal services for those unable to pay

ultimately rests upon the individual lawyer Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." EC 8-9 states that "The advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 states that "Those persons unable to pay for legal services should be provided needed services."

Rule 6.2 Accepting Appointments

There is no counterpart to Rule 6.2 in the Disciplinary Rules of the Code. EC 2-29 states that "When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reason. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-30 states that "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

Rule 6.3 Membership in Legal Services Organization

There is no counterpart to this Rule in the Code.

Rule 6.4 Law Reform Activities Affecting Client Interests

There is no counterpart to this Rule in the Code.

Rule 7.1 Communications Concerning a Lawyer's Services

DR 2-101 provides that "A lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement of claim." DR 2-101(B) provides that a lawyer "may publish or broadcast . . . the following information . . . in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information . . . complies with DR 2-101(A), and is presented in a dignified manner. . . ." DR 2-101(B) then specifies 25 categories

of information that may be disseminated. DR 2-101(C) provides that "Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to (the agency having jurisdiction under state law). . . . The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers."

Rule 7.2 Advertising

With regard to Rule 7.2(a), DR 2-101(B) provides that a lawyer "may publish or broadcast, subject to DR 2-103 . . . , in print media . . . or television or radio. . . ."

With regard to Rule 7.2(b), DR 2-101(D) provides that "If the advertisement is communicated over television or radio . . . , a recording of the actual transmission shall be retained by the lawyer."

With regard to Rule 7.2(c), DR 2-103(B) provides that "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment . . . except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D)." (DR 2-103(D) refers to legal aid and other legal services organizations.) DR 2-101(I) provides that "A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item."

Rule 7.3 Personal Contact with Prospective Clients

DR 2-104(A) provides with certain exceptions that "a lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice" The exceptions include DR 2-104(A)(1), which provides that "A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(2) through DR 2-104(A)(5) provide other exceptions relating, respectively, to employment resulting from public educational programs, recommendation by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

Rule 7.4 Communication of Fields of Practice

DR 2-105(A) provides that "A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice . . . except as follows:

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

"(2) A lawyer who publicly discloses fields of law in which the lawyer . . . practices or states his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].

"(3) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself out as such, but only in accordance with the rules prescribed by that authority."

EC 2-14 states that "In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted."

Rule 7.5 Firm Names and Letterheads

With regard to Rule 7.5(a), DR 2-102(B) provides that "A lawyer . . . shall not use . . . professional cards . . . letterheads, or similar professional notices or devices, . . . (except) if they are in dignified form . . . (and are limited to information) permitted under DR 2-105. . . ." DR 2-102(B) provides that "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . a firm may use as . . . its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession."

With regard to Rule 7.5(b), DR 2-102(D) provides that "A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction."

With regard to Rule 7.5(c), DR 2-102(B) provides that "A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm . . . during any significant period in which he is not actively and regularly practicing law as a member of the firm. . . ."

Rule 7.5(d) is substantially identical to DR 2-102(C).

Rule 8.1 Bar Admission and Disciplinary Matters

DR 1-101(A) provides that "A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar." DR 1-101(B) provides that "A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute." With respect to paragraph (b) of Rule 8.1, DR 1-102(A)(5) provides that "a lawyer shall not engage in conduct that is prejudicial to the administration of justice."

Rule 8.2 Judicial and Legal Officials

With regard to Rule 8.2(a), DR 8-102(A) provides that "A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102(B) provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

Rule 8.2(b) is substantially identical to DR 8-103.

Rule 8.3 Reporting Professional Misconduct

DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of (a Disciplinary Rule) shall report such knowledge to . . . authority empowered to investigate or act upon such violation."

Rule 8.4 Misconduct

With regard to Rule 8.4(a) and (b), DR 1-102(A) provides that "A lawyer shall not:

- "(1) Violate a Disciplinary Rule.
- "(2) Circumvent a Disciplinary Rule through actions of another.
- "(3) Engage in illegal conduct involving moral turpitude.
- "(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- "(5) Engage in conduct that is prejudicial to the administration of justice.
- "(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Rule 8.4(c) is substantially similar to DR 9-101(C).

Rule 8.4(d) is substantially similar to DR 3-101(B).

Rule 8.4(e) is substantially similar to DR 3-101(A).

There is no direct counterpart to Rule 8.4(f) in the Disciplinary Rules of the Code. EC 7-34 states in part that "A lawyer . . . is never justified in making a gift or a loan to a [judicial officer] except as permitted by . . . the Code of Judicial Conduct." EC 9-1 states that "A lawyer should promote public confidence in our [legal] system and in the legal profession."

Rule 8.5 Jurisdiction

There is no counterpart to this Rule in the Code.