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C. New York State Bar Association
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F. National Association of Attorneys General

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C. Section of Criminal Justice
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B. The Florida Bar
C. Section of General Practice
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E. International Association of Insurance Counsel
F. New Mexico State Bar Association
G. State Bar of Arizona
H. J. R. Crouch
I. Association of the Bar of the City of New York
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E. National Association of Attorneys General

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B. International Association of Insurance Counsel
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A. Section of General Practice

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D. International Association of Insurance Counsel
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G. Los Angeles County Bar Association
H. American College of Trial Lawyers
I. State Bar of Michigan
J. Section of Criminal Justice
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N. Section of General Practice
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A. American College of Trial Lawyers
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A. State Bar of Michigan
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DRAFTING COMMITTEE
OF THE HOUSE OF DELEGATES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION


REPORT

The Drafting Committee of the House of Delegates was assigned the task of preparing a synopsis of the proposed amendments to the Model Rules of Professional Conduct.

The synopsis of proposed amendments to House Report 400 is an attempt by the Drafting Committee to make an orderly presentation of the proposed amendments to the Model Rules of Professional Conduct. Following submission of the final draft on June 30, 1982, thirty-eight organizations and individuals submitted 216 proposed amendments, resulting in a formidable document 266 pages in length.

In preparation of the synopsis, the Drafting Committee and House Committee on Rules and Calendar, contacted the sponsoring organizations to ensure that the synopsis fairly states the sponsor’s position on each proposed amendment.

The overriding objective was to present the views of the amendment sponsors without editorial comment to achieve a fair presentation to the House of Delegates. The sponsor’s comments will be presented more fully in debate, and the synopsis is intended to serve as a guide to that debate. The members of the House should be able to utilize the synopsis as an inclusive document without the necessity of referring to previously submitted reports.
Although the synopsis has been carefully drafted in an attempt to fairly characterize the proposed amendments and sponsor comments, the actual text of those amendments as presented in the synopsis is authoritative and will govern.

N. Lee Cooper, Chairman
Philip S. Anderson
Joseph L. Hardig
Mark I. Harrison
N. Michael Plaut

February, 1983
Explanatory Note

Report 401 sequentially presents the text of the proposed Model Rule, followed by the synopsis of proposed amendments to the Rule, and then the text of each amendment. In addition to the page numbers at the bottom of the page, each page is marked in the upper righthand corner with the Rule number. The text of the Model Rule is marked in capitals. Each synopsis page shows the Rule number in lower case. The text of each amendment shows the Rule number and is cross-referenced to the synopsis pages.

For example:

Rule 1.1

Text of proposed Model Rule

Synopsis pages, each marked

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8.5 JURISDICTION

A. New York State Bar Association
RULE 1.1 COMPETENCE

Model Rule Text:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE

The amendment would retain that part of Rule 1.1 which states the general rule that a lawyer shall provide competent representation. The amendment would define competence as the legal knowledge, skill and care generally afforded to the clients by lawyers in the locality.

Comments of the Sponsor

The amendment would define competence as the legal knowledge, skill, and care generally afforded to clients in the locality by other lawyers in similar matters. Since the Model Rules are intended to describe a standard for measuring competency “incorporating standards from case law,” the amendment is needed if that purpose is to be served. The threshold question that should be addressed is whether the rules should purport to state a standard at all, particularly when the “standard” is stated in vague terms which afford no real guidance to lawyers or protection to clients. The current Code does not purport to state an enforceable standard. DR 6-101(A) provides simply that a lawyer shall not “handle a legal 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.”

B. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would delete Rule 1.1 in its entirety. The substitute standard would consist of a part of DR 6-101 to which would be added the requirement that in “all matters” a lawyer be “familiar” with well-settled legal principles and “use methods and procedures” meeting the standards of “competent practitioners”.

Comments of the Sponsor

The proposed rule, as drafted, imposes an intolerable disciplinary risk upon the sole practitioner. The current rule, together with actions for malpractice, fully protects the public.
RULE 1.1  COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Competence consists of the legal knowledge, skill, and care commensurate with that generally afforded to clients in the locality by other lawyers in similar matters.
RULE 1.1  COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

A lawyer shall not handle a matter which he knows or should know he is not competent to handle. He is required in all matters to prepare adequately, be familiar with well-settled principles of law and use methods and procedures meeting the standards of competent practitioners.

A single instance of ordinary negligence may not be a basis for invoking the disciplinary process.
RULE 1.2  SCOPE OF REPRESENTATION

Model Rule Text:

(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.
Proposed Amendments:

A. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would modify Rule 1.2 in four respects. First, three changes are proposed in paragraph (a): (1) to make clear that the means (as distinguished from the ends) of representation are the lawyers prerogative, (2) to substitute an obligation to keep the client “reasonably informed concerning the means” for the duty to “consult with the client,” and (3) to broaden the client’s control over settlements beyond the final decision, “whether and on what terms” to settle.

Comments of the Sponsor
The Rule should squarely state the lawyer’s right to determine the means whereby the client’s objectives are to be pursued. Secondly, because consult means to “seek the opinion or advice,” the imposition suggests that it is the client’s province to direct the means of representation. Thirdly, all of the basic settlement decisions are for the client to decide, even though negotiations have not yet ripened to the point of consummation.

Finally, the amendment would modify rule 1.2(d) by extending the prohibition on assisting “criminal or fraudulent conduct to encompass prohibition of counseling or assisting known “intentionally tortuous” conduct.

Comments of the Sponsor
The proscription against assisting a client in “criminal or fraudulent” conduct is too narrow. So long as the prohibition applies only in cases where the contemplated offense is known to the lawyer, no lawyer should be permitted to counsel or assist in any intentional tort.

B. INDIANA SATE BAR ASSOCIATION

The amendment would add the following sentence to paragraph (c): “If a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent, the lawyer may withdraw if doing so can be accomplished without material adverse effect on the interest of the client or as otherwise permitted by Rule 1.16(b).”

Comments of the Sponsor
The 1982 Draft has deleted that sentence from the 1981 Draft thereby apparently prohibiting a lawyer from withdrawing when the client pursues an objective that the lawyer considers repugnant or imprudent. That sentence should be retained.
C. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify paragraph (d) in two respects. First, it would (1) rephrase the prohibition in the first clause from “counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent” to “counsel a client to engage, or assist a client” in such conduct, and (2) add language from the Comment to the effect that the lawyer “may discuss the legal consequences of any proposed course of action.”

Comments of the Sponsor

“Counsel or assist in conduct” could be interpreted to prohibit a lawyer’s advising the client of what is and is not illegal or standing by silently while the client commits a crime or fraud.

Second, the amendment would strike the prohibition on inserting in written instruments terms that the lawyer knows are expressly prohibited by law.

Comments of the Sponsor

This would allow lawyers to take into account the relative sophistication of the parties or their wish to express an understanding, which they may recognize as being legally unenforceable, or which they may believe will become enforceable over time.

D. NEW YORK COUNTY LAWYERS’ ASSOCIATION

Supports the amendment proposed by the New York State Bar Association Special Committee.

E. SECTION OF GENERAL PRACTICE

The proposals of the Section of General Practice apparently would not modify Rule 1.2, but two provisions offered by the Section of General Practice may be relevant to Rule 1.2.

First, the Section of General Practice proposes an additional rule (numbered 4.1) which would provide that “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.”

Second, the Section of General Practice would propose as part of an additional rule (numbered 4.2(a)) a prohibition on “knowingly encouraging a client to engage in illegal conduct, except in a good faith effort to test the validity or scope of the law.”
(See the Section’s “Explanatory Note” appended to proposed amendments at Rule 1.6)
RULE 1.2  Scope of Representation

(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), while retaining the right, as lawyer, to determine and shall consult with the client as to the means by which they are to be pursued, subject to the obligation to keep the client reasonably informed concerning the means in accordance with Rule 1.4. A lawyer shall abide by a client’s decision as to whether and on what terms to enter into or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

[(b) and (c) as appears.]*

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is criminal, or fraudulent, or otherwise intentionally tortuous, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law or unenforceable, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

[(e) as appears].
RULE 1.2  SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to by pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of a client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation. If a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent, the lawyer may withdraw if doing so can be accomplished without material adverse effect on the interests of the client or as otherwise permitted by Rule 1.16(b).

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENTS TO RULE 1.2(d)

RULE 1.2  SCOPE OF REPRESENTATION

*  *  *

(d) A lawyer shall not counsel or assist a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
LIMITS ON ADVOCACY

RULE 4.1

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.

RULE 4.2

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

(b) Participate in unlawfully concealing or destroying evidence, or discourage a witness or potential witness from talking to counsel for another party.

(c) Participate in creating perjured testimony, other false evidence, or a misrepresentation upon which another person is likely to rely and suffer material detriment.

(d) File a materially false pleading, present materially false evidence, or make a materially false representation to a court or other tribunal.
This Rule is inapplicable to lawyers in government service, acting pursuant thereto.

The above language to be added to:

RULE 1.2   Scope of Representation
RULE 1.7   Conflict of Interest: General Rule
RULE 1.8   Conflict of Interest: Prohibited Transactions
RULE 1.9   Conflict of Interest: Former Client
RULE 1.10  Imputed Disqualification: General Rule
RULE 1.12 (b) (c) (d) Former Judge or Arbitrator
RULE 1.13  Organization as Client
RULE 1.16 (a) (3) Declining or Terminating Representation
RULE 2.2   Intermediary
RULE 2.3   Evaluation for Use by Third Persons
RULE 3.7 (b) Lawyer as Witness
RULE 4.2   Communication with Person Represented by Counsel
RULE 5.1   Responsibilities of a Partner or Supervisory Lawyer
RULE 5.4 (b) Professional Independence of a Lawyer
RULE 5.5   Restrictions on Right to Practice
RULE 6.2   Accepting Appointments
RULE 6.3   Membership in Legal Services Organization
RULE 6.4   Law Reform Activities Reflecting Client Interests
RULE 7.1   Communications Concerning a Lawyer’s Services
RULE 7.2   Advertising
RULE 7.3   Personal Contact with Prospective Clients
RULE 7.4   Communication of Fields of Practice
RULE 7.5   Firm Names and Letterheads
RULE 8.2   Judicial and Legal Officials

Note: The Association wishes the above sentence to be added to all 24 sections listed above. It is reproduced only at Rule 1.2. The Updated Index is marked at each applicable Rule showing (S) 6-5 as the applicable page number for the wording of the amendment.
RULE 1.3  DILIGENCE

Model Rule Text:

A lawyer shall act with reasonable diligence and promptness in representing a client.
Proposed Amendment:

AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would substitute the term “zeal” for the term “diligence”.
AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 1.3

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness and zeal in representing a client.
RULE 1.4 COMMUNICATION

Model Rule Text:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Proposed Amendments:

A. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would modify Rule 1.4(a) by substituting for the duty to reasonably inform the client a duty to “endeavor” to inform the client.

The amendment would modify paragraph (b) by requiring a lawyer to “endeavor” to explain a matter “so that the client will better understand what the lawyer proposes to do on the client’s behalf and the reasons for such action.”

Comments of the Sponsor
The objective of inserting the word “endeavor” into both paragraphs (a) and (b) is to change this Rule from an imperative to an aspirational rule. In view of the uncertainty as to what constitutes reasonable information, efforts to inform should be a goal rather than a guarantee. The second change is intended to ensure that the client is not misled into believing he is entitled to control the means of representation.

B. NEW YORK STATE BAR SPECIAL COMMITTEE

The amendment would modify Rule 1.4(a) and Rule 1.4(b) by substituting “should” for “shall.”

Comments of the Sponsor
The rule on keeping the client informed should be a guide to sound client relations, and not a standard used for professional discipline or malpractice liability.

C. NEW YORK COUNTY LAWYERS’ ASSOCIATION

Supports the amendment proposed by the New York State Bar Special Committee.
RULE 1.4 Communication

(a) A lawyer shall endeavor to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall endeavor to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation so that the client will better understand what the lawyer proposes to do on the client’s behalf and the reasons for such action.
NEW YORK STATE BAR ASSOCIATION

Proposed Amendment to Rule 1.4

RULE 1.4 Communication

(a) A lawyer shall should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
RULE 1.5 FEES

(a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent. A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee which may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these Rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
(d) A lawyer shall not enter into an arrangement for, charge, or collect any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

1. The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and

2. The client consents, is advised and does not object to the participation of all the lawyers involved; and

3. The total fee is reasonable.

The proposed amendments were previously considered by the House of Delegates.
RULE 1.6  CONFIDENTIALITY OF INFORMATION

Model Rule Text:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(4) To comply with other law.
Proposed Amendments:

A. AMERICAN COLLEGE OF TRIAL LAWYERS

This amendment would modify Rule 1.6 in six respects. First, it would eliminate the discretion to disclose information that is implicitly authorized in order to carry out the representation, for example, in filing a complaint or an answer in litigation. Second, it would restrict disclosure of life-threatening crimes or frauds to situations in which death or bodily injury was imminent. Third, it would eliminate discretion to disclose information when necessary to prevent substantial injury to financial interests or property. Fourth, it would substitute for discretion to disclose information in response to a “disciplinary complaint,” discretion to disclose information, “to respond to the client’s allegations in any legal proceeding concerning the lawyer’s professional conduct for the client.” Fifth, it would eliminate discretion to disclose otherwise confidential information when “necessary to comply with other law.” Sixth, it would eliminate discretion to disclose information when necessary to rectify the consequences of a crime or fraud in which the lawyer’s services were used.

B. SECTION OF GENERAL PRACTICE

The amendment would delete the present language of Rule 1.6 in its entirety and replace it with new language which would limit discretionary disclosure to the following:

(i) disclosures required by law, rule of court or court order, but only after sufficient resistance;

(ii) disclosures necessary to prevent imminent danger to human life whether arising from criminal conduct or not;

(iii) disclosure of bribery or extortion of a judge or juror in a pending case; and

(iv) disclosure necessary to defend formally instituted criminal, malpractice or disciplinary proceedings.

NOTE: The Section of General Practice believes that confidentiality, conflicts and limitations on advocacy are of such importance that they should be treated under separate sections, and that the rules relating to conflict of interest should be treated as a discrete subject. See the Section’s “Explanatory Note” appended hereto, describing a reorganization of the first four sections of the Model Rules.
Comments of the Sponsor

In an effort to facilitate debate on specific issues concerning confidentiality, the amendment incorporates the Section’s rules 2.1 and 2.2 (see “Explanatory Note”) as separate paragraphs under Model Rule 1.6. For the reasons summarized in the “Explanatory Note,” the Section reserves the right to move for reorganization of the first four sections of the Model Rules. If these rules are to serve the stated purpose of guidance to lawyers and their clients, it is imperative that the client be urged not to withhold information from the lawyer and that the lawyer’s obligation of confidentiality be explained. Confidentiality is so basic and essential in establishing client trust that it should be stated fully and separately.

C. SECTION OF CRIMINAL JUSTICE

The amendment would modify Rule 1.6 in three respects. First, disclosure would be mandatory if necessary to prevent death or substantial bodily harm. Second, restrictions in paragraph (b)(1) would be eliminated and a lawyer permitted to disclose information necessary to prevent any crime, including the crime of fraud. Third, disclosure to prevent the consequences of a past crime would be permitted, unless detrimental to the client.

D. STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

The amendments are identical to those proposed by the Section of Criminal Justice.

E. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The amendment would modify Rule 1.6(b)(1) to replace “substantial” injury to the financial interest or property of another with “serious” injury.
The amendment would modify Rule 1.6(b)(2) to permit a lawyer to disclose information necessary

“to rectify the consequences of what the lawyer reasonably believes may be a violation of Rule 1.2(d).”

Rule 1.2 (d) proscribes certain lawyer conduct and requires (1) knowledge by the lawyer of a client’s criminal or fraudulent purpose and (ii) knowing assistance in carrying out that purpose.

F. BEVERLY HILLS BAR ASSOCIATION

Supports the amendments of the Association of the Bar of the City of New York.

G. THE DISTRICT OF COLUMBIA BAR

The amendment would add to Rule 1.6(b)(3) a requirement of notice to the client prior to disclosure.

H. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

Two changes are proposed in paragraph (a): (1) to delete the phrase, “relating to representation of a client,” and substitute the phrase, “relating to the subject matter of the lawyer’s representation:” (2) to add the words, “or former client,” after the word, “client.”

Comments of the Sponsor

A lawyer would normally be free to disclose information relating to the representation of a client; however, facts concerning the subject matter of the representation are ordinarily confidential. The imprecise language of Rule 1.6(a) should be changed accordingly. The duty of confidentiality applies not only to a client but also to a former client, and the Rule should so provide.
Two changes are proposed in (1)(b). The first would permit a lawyer, when he reasonably believes that death or substantial bodily harm is “likely to result,” to reveal information calculated to prevent the client from committing, not only a “criminal or fraudulent act,” but also any other “intentional tort” he considers likely to result in such harm. The second would delete “substantial injury to the financial interests or property of another” as a justification for disclosure. In the interest of consistency, (2)(b) should also be changed to delete “fraudulent act” and substitute “intentional tort.”

Comments of the Sponsor

Since it is the seriousness of the threatened harm which justifies the disclosure, no reason appears why a criminal or fraudulent act likely to result in such harm would permit disclosure whereas an intentional tort would not permit disclosure. The second change is proposed because such a consequence is not serious enough to overbalance the duty of confidentiality.

H. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would strike the term “fraudulent” from paragraphs (b)(1) and (b)(2) of Rule 1.6. It would also limit disclosure to circumstances in which the lawyer “has actual knowledge” that the consequences of a crime will be death, bodily harm, or injury to financial interests or property.

Comments of the Sponsor

The Ohio definition of fraud is so broad that the Rule as drafted would require god-like foresight. The Rule must be limited to actual knowledge.

J. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

The amendment would modify Rule 1.6 in three respects. First, Rule 1.6(b) would be revised to limit disclosure to “information a lawyer actually knows.” Second, disclosure would not be permitted unless “absolutely necessary.” Third, all disclosure of crime or fraud likely to result in substantial injury to financial interests or property would be eliminated.
K. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 1.6 in four respects. First, in paragraph (a) confidential information would be defined by reference to information “gained during” instead of “relating to” the representation.

Comments of the Sponsor
The client should be protected from disclosure even if the information does not relate to the representation, but there is no reason for the requirement of confidentiality to apply to information gained after the representation ends. Such an extension of the Rule could have an unnecessarily adverse impact upon the representation of both present and future clients.

Second, the amendment would delete discretionary authority to disclose confidential information to prevent fraud or injury to financial interest or property.

Comments of the Sponsor
This would allow disclosure only in the most exigent circumstances. Injury through fraud or to financial interests is likely to be compensable by money damages. There is also concern with the possible civil liability implications of broad discretion to disclose client confidences to prevent harm through fraud or to financial interest.

Third, the amendment would eliminate discretion to disclose information “to rectify the consequences of a client’s criminal or fraudulent act in furtherance of which the lawyer’s services had been used.”

Comments of the Sponsor
Withdrawal from representation is the appropriate response to misuse of the lawyer’s services.

Fourth, it would add compliance with “court order” to the list of permitted disclosures.

Comments of the Sponsor
The latter two changes parallel permitted disclosure under the present Code.
L. NEW YORK COUNTY LAWYERS’ ASSOCIATION

Supports the amendment proposed by the New York State Bar Association Special Committee.
A. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would:

1. delete “fraudulent” and “in substantial injury to the financial interests or property of another” from (b)(1) and insert the word “imminent” before “death or substantial bodily harm.”

2. delete (b)(2) in its entirety.

3. delete “disciplinary complaint” from (b)(3) and insert “to respond to the client’s allegations in any legal proceeding concerning the lawyer’s professional conduct for the client.”

The College believes that Proposed Rule 1.6 seriously undermines the attorney’s duty to preserve a client’s confidences. A client’s confidences should only be revealed when disclosure will prevent the client from committing a criminal act that the lawyer believes will cause imminent death or serious bodily harm. The College accepts the view that such consequences are so serious as to tip the scales in favor of permitting, but not requiring, the attorney to disclose confidential information.
AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 1.6

RULE 1.6 CONFIDENTIALITY OF INFORMATION

Model Rule Text:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm; or in substantial injury to the financial interests or property of another;

(2) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved, or to respond to the client’s allegations in any legal proceeding concerning the lawyer’s professional conduct for the client.

(4) To comply with other law.
B. SECTION OF GENERAL PRACTICE

The amendment would modify (a) to state the general rule regarding the professional obligation of lawyers to maintain inviolate there clients’ confidences and secrets, and to move all exceptions to the general rule to paragraph (b).

The amendment also would modify paragraph (b) in four other respects:

1. add language presently contained in DR4-101 seeking to safeguard the distinction between a “confidence” and “secret,” and providing protection against disclosure of either.

2. amend (1) to permit a lawyer to reveal information only “to prevent death or substantial bodily harm.”

3. delete (2) in its entirety.

4. replace (4) with “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.”
RULE 1.6  CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) If the client consents after consultation;

(2) To serve the client’s interests, provided that the client has not requested that the information be held inviolate and that the disclosure of such information would not be embarrassing or likely to be detrimental to the client;

(3) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(4) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

(4) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(5) 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.
SECTION OF GENERAL PRACTICE

Explanatory Note

The Commission’s proposed Rules 1.6 through 1.16 (with the exception of Rule 1.15 - Safekeeping Property) and Rules 2.1 through 4.4 are deleted and the amendments set forth below are offered.

In the Commission’s Proposed Model Rules of Professional Conduct as revised June 30, 1982 ("Commission Rules"), the subjects of confidentiality, conflicts of interest, and limitations on advocacy are dealt with in a number of places scattered throughout the Commission Rules. Some are found in the section entitled “Client-Lawyer Relationship,” along with a mélange of other subjects of varying importance unrelated to one another. The remainder of them are covered in sections 2, 3, and 4, entitled “Counselor,” “Advocate,” and “Transactions With Persons Other Than Clients,” respectively.

We believe those three subjects are of such transcendent importance that they should be treated under separate sections. Moreover, if the Commission’s Rules are intended to be a “charter to guide” lawyers, (68 ABAJ 807), the rules relating to conflict of interest should be treated as a discrete subject rather than partially covered in a number of places in the Commission’s first section of its latest draft and partly in other sections under the headings of Counselor, Advocate, and Transactions with Persons Other Than Clients. Accordingly, we have collected all the rules relating to the three subjects of confidentiality, conflicts, and limitations on advocacy under sections 2, 3 and 4 in our amendments, which supplant sections 2, 3, and 4 of the Commission Rules.
Confidentiality of Information

This subject is dealt with in a new second section of our proposed amendments (“Revised Rules”). In view of the primacy of the subject, we treat it affirmatively and commence with the guiding principle incorporated in Revised Rule 2.1. The following Revised Rule 2.2 replaces Commission Rule 1.6. The Revised Rules are patterned after The American Lawyer’s Code of Conduct Draft of June, 1980, proposed by a commission under the auspices of the Roscoe Pound—American Trial Lawyers Foundation (“Pound”). Pound is fundamentally different from the Commission Rules in being based upon a strong commitment to the adversary system.

Conflict of Interest

We propose putting rules relating to conflicts in the third section in Revised Rules 3.1 through 3.7. As shown below, they are identical to provisions in the Commission’s May 30, 1981 draft (“Kutak White”), except as noted:

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*Paragraphs (a), (c), and (j) of Kutak White are deleted and paragraph (e) has been modified to incorporate DR 5-103(B) of the Code of Professional Responsibility, thereby eliminating a client’s living expenses from the permissible advancements on behalf of a client.
Commission Rules 1.9, 1.13, 1.14, 1.16, 2.1, 2.2 and 2.3 have been deleted.

**Limits on Advocacy**

Revised Rules 4.1 through 4.6 are an adaptation from Pound. Revised Rule 4.7 is the same as Kutak White Rule 3.8.

Commission Rules 3.1 through 4.4 have been deleted. The Trial Publicity rule (Commission Rule 3.6), in whatever form adopted, can be added following Revised Rule 4.7.
SECTION OF GENERAL PRACTICE PROPOSED RULES

CONFIDENTIALITY OF INFORMATION

RULE 2.1

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.

RULE 2.2

Without a client’s knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client’s confidence, or use it in any way detrimental to the interests of the client, except that:

(a) 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.

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

(c) 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.

(d) A lawyer may reveal a client’s confidence to the extent necessary to defend against formally instituted charges of criminal conduct, malpractice, or disciplinary violation brought against the lawyer or the lawyer’s associates or employees.
SECTION OF CRIMINAL JUSTICE  
and  
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS  
PROPOSED AMENDMENT TO RULE 1.6  

RULE 1.6  CONFIDENTIALITY OF INFORMATION  

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).  

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:  

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;  

(1) To prevent a crime;  

(2) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;  

(2) To prevent the consequences of a past crime, so long as the disclosure is not likely to be detrimental to the client;  

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or  

(4) To comply with other law.  

(c) A lawyer shall disclose such information to the extent the lawyer believes necessary to prevent death or substantial bodily harm to any person.
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

PROPOSED AMENDMENT TO RULE 1.6

RULE 1.6  CONFIDENTIALITY OF INFORMATION

(a)  A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b)  A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

   (1)  To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in serious substantial injury to the financial interest or property of another;

   (2)  To rectify the consequences of what the lawyer reasonably believes may be a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used violation of Rule 1.2(d);

   (3)  To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

   (4)  To comply with other law.
RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

   (1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

   (2) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

   (3) Upon appropriate notice to the client, to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

   (4) To comply with other law.
RULE 1.6 CONFIDENTIALITY OF INFORMATION.

(a) Except as permitted in paragraph (b), a lawyer shall not reveal information relating to the subject matter of the lawyer’s representation of a client or former client unless the client consents after consultation, except for disclosures that are or the lawyer reasonably believes disclosure to be impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary,

(1) To prevent the client from committing a criminal or fraudulent act or an intentional tort that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another;

(2) To rectify the consequences of a client’s criminal, or fraudulent or otherwise intentionally tortious act in the furtherance of which the lawyer’s services had been used;

[ (3) and (4) as appears].
RULE 1.6  CONFIDENTIALITY OF INFORMATION

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes the client has actual knowledge is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) To rectify the consequences of a client’s criminal or fraudulent act in furtherance of which the lawyer’s services had been used;
RULE 1.6  CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer actually knows when he reasonably believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm; or in substantial injury to the financial interests or property of another;

(2) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(4) To comply with other law.

(c) When revealing such information, a lawyer shall use all reasonable means to protect a client’s interests and to avoid disclosure that is not absolutely necessary.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.6

RULE 1.6  CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to gained during representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b);

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another;

(2) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(4) To comply with other law or court order.
RULE 1.6 (Additional Synopsis)

M. THE IOWA STATE BAR ASSOCIATION

The amendment would delete “fraudulent”, “bodily” and “injury to financial interests or property.”

Comments of the Sponsor
The language stricken is redundant.
THE IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.6

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) To rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or

(4) To comply with other law.
Rule 1.7

Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

Model Rule Text:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE

The amendment would reinstate language from the May 30, 1981 proposed Final Draft. The amendment would prohibit representation of a prospective client if the representation would be directly adverse to the interests of another client, the lawyer’s own interests, or a third party to whom the lawyer has responsibilities.

The amendment would permit representation of a prospective client if the representation would be potentially adverse to the interests of another client if the lawyer believes that the best interests of the prospective client would not in fact be affected, and the prospective client consents to the representation after full disclosure.

Comments of the Sponsor
The Section’s Rule 3.1 is identical to Rule 1.7 in the 1981 Draft of the Model Rules, which is far preferable to the 1982 Draft. A distinction should be made between adversity in fact and potential or possible adversity. A lawyer should not undertake representation of interests that are actually adverse. On the other hand, if the interests are only potentially adverse, representation may be proper, subject to the conditions set forth in the rule. The 1982 Draft of the Model Rules is contradictory in terms. How can a lawyer “reasonably believe” there is no adversity if the representation of one client is “directly adverse” to another client?

B. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 1.7 in five respects. First, it would delete (a) (1) and (2) and (b) (1) in their entirety and revise the language of (b) (2) to substitute “undertaken” for “proposed” and delete “advantages.”

Second, it would rewrite the Rule to add a general duty of loyalty to the client.

Comment of the Sponsor
Such a duty is not stated elsewhere in the Rules.
Third, the amendment would prohibit representation when the lawyer’s professional judgment will be adversely affected by the lawyer’s personal interests or responsibilities to other clients.

Fourth, it would add provisions from the May 1981 Draft to make clear that when taking on a new client, the lawyer should judge the effect of the new representation on existing representations on the new one.

Fifth, the amendment would add a provision requiring withdrawal in the event that a conflict of interest develops after commencing the new representation.
A. SECTION OF GENERAL PRACTICE

The amendment would delete the present rule in its entirety and substitute language which in paragraphs (a) through (d) is similar to the language proposed by the New York State Bar Association.

The amendment would:

1. add a general duty of loyalty to the client.

2. prohibit representation when the lawyer’s professional judgment will be adversely affected by the lawyer’s personal interest or professional responsibilities.

3. add provisions from the May 1981 draft to make clear that when taking on a new client, the lawyer should judge the effect of the new representation on existing representations as well as the effect of existing representations on the new one.

4. require withdrawal in the event that a conflict of interest develops after commencing the new representation.

5. add language to make clear that the lawyer shall not continue the representation where there may be conflict unless all parties consent and the lawyer reasonably believes there will be no adverse affect.

6. in the case of multiple clients in a single matter, disclosure shall include an explanation of the implications of the common representation and the risks and advantages involved.
RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless;

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and
(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless

(1) The lawyer reasonably believes the representation will not be adversely affected; and
(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(a) A lawyer owes a duty of loyalty to all clients and, except to the extent permitted by the rules of professional conduct or other law, shall not undertake a representation that is adverse to any client.

(b) A lawyer shall not undertake a representation if the lawyer’s ability to consider, recommend or carry out a course of conduct related to the representation will be adversely affected by the lawyer’s own interests or professional responsibilities.
(c) A lawyer shall not undertake a representation if the lawyer’s ability to consider, recommend or carry out a course of conduct related to the representation may potentially be affected adversely by the lawyer’s own interests or professional responsibilities to others unless:

(1) All those to whom the lawyer owes a professional responsibility and who may be directly affected thereby. Consent to the representation after disclosure and consultation; and

(2) The lawyer reasonably believes that none of the lawyer’s professional responsibilities will be affected adversely by undertaking the representation.

(d) If, after undertaking representation, the lawyer’s ability to consider, recommend or carry out a course of conduct related to representation of a client is affected materially and adversely by the lawyer’s own interests or professional responsibilities to others, the lawyer shall withdraw, subject to Rule 1.16, or otherwise eliminate the conflict of interest.

(e) If, after undertaking representation, the lawyer shall not continue representation if the lawyer’s ability to consider, recommend or carry out a course of conduct related to the representation of a client, may potentially be affected adversely by the lawyer’s own interests or professional responsibilities to others, unless:

(1) All those to whom the lawyer owes a professional responsibility and who may be directly affected thereby, consent to the representation after disclosure and consultation; and

(2) The lawyer reasonably believes that none of the lawyer’s professional responsibilities will be affected adversely by undertaking the representation.

(f) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and of any risks and advantages involved.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.7

RULE 1.7  CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless;

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless

(1) The lawyer reasonably believes the representation will not be adversely affected, and

(a) A lawyer owes a duty of loyalty to all clients and, except to the extent permitted by the Rules of Professional Conduct or other law, shall not undertake a representation that is adverse to any client.

(b) A lawyer shall not undertake a representation if the lawyer’s ability to consider, recommend or carry out a course of conduct related to the representation will be adversely affected by the lawyer’s own interests or professional responsibilities.

(c) A lawyer shall not undertake a representation if there is a reasonable likelihood that the lawyer’s own interests or professional responsibilities will adversely affect, or be affected by, the representation unless:

(1) All persons to whom the lawyer owes a professional responsibility and who may be directly affected thereby, consent to the representation after consultation; and

(2) The lawyer reasonably believes that none of the lawyer’s professional responsibilities will be adversely affected by undertaking the representation.

(d) If, after undertaking the representation, the lawyer has reason to believe that all clients cannot be served to the full extent of the lawyer’s engagement with respect to each, the lawyer shall withdraw, subject to Rule 1.16, or otherwise eliminate the conflict of interests.
Rule 1.7 (B) cont.

(f) The client consents after consultation. When representation of multiple clients in a single matter is undertaken proposed, the consultation shall include an explanation of the implications of a common representation and the advantages and risks involved.
C. THE IOWA STATE BAR ASSOCIATION

The amendment would modify Rule 1.7 in seven respects. First it would delete (a) (1) and (2) and (b) (1) and (2) in their entirety.

Second, it would add a duty of loyalty.

Third, the amendment would prohibit representation when the lawyer’s professional judgment will be adversely affected by the lawyer’s personal interests or professional responsibilities.

Fourth, it provides that the lawyer shall not undertake representation if that representation may be adversely affected by the lawyer’s own interests or responsibilities to others unless the others consent or the lawyer reasonably believes that the responsibilities will not be adversely affected.

Fifth, it provides for withdrawal to eliminate the conflict.

Sixth, the amendment provides that the representation shall not continue if the lawyer’s ability to continue the representation may be adversely affected by the lawyer’s own interests or responsibilities to others unless the others consent or the lawyer reasonably believes that the responsibilities will not be adversely affected.

Seventh, it provides for full disclosure in representing multiple clients.
THE IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.7

RULE 1.7  CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(a) A lawyer owes a duty of loyalty to all clients and, except to the extent permitted by the rules of professional conduct or other law, shall not undertake a representation that is adverse to any client.

(b) A lawyer shall not undertake a representation if the lawyer’s ability to consider, recommend or carry out a course of conduct related to the representation will be adversely affected by the lawyer’s own interests or professional responsibilities.

(c) A lawyer shall not undertake a representation if the lawyer’s ability to consider, recommend or carry out a course of conduct related to the representation may potentially be affected adversely by the lawyer’s own interests or professional responsibilities to others unless:

(1) All those to whom the lawyer owes a professional responsibility and who may be directly affected thereby, consent to the representation after disclosure and consultation; and

(2) The lawyer reasonably believes that none of the lawyer’s professional responsibilities will be affected adversely by undertaking the representation.
(d) If, after undertaking representation, the lawyer’s ability to consider, recommend or carry out a course of conduct related to representation of a client is affected materially and adversely by the lawyer’s own interests or professional responsibilities to others, the lawyer shall withdraw, subject to Rule 1.16, or otherwise eliminate the conflict of interest.

(e) If, after undertaking representation, the lawyer shall not continue representation if the lawyer’s ability to consider, recommend or carry out a course of conduct related to the representation of a client, may potentially be affected adversely by the lawyer’s own interests or professional responsibilities to others, unless:

(1) All those to whom the lawyer owes a professional responsibility and who may be directly affected thereby, consent to the representation after disclosure and consultation; and

(2) The lawyer reasonably believes that none of the lawyer’s professional responsibilities will be affected adversely by undertaking the representation.

(f) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and of any risks and advantages involved.
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

Model Rule Text:

(a) A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is a relative of the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

   (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

   (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement, or settle a claim for such liability unless the client is first advised that independent representation is appropriate in connection therewith.
Rule 1.8  Cont.

(i)  A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
Proposed Amendments:

A. PENNSYLVANIA BAR ASSOCIATION

The amendment would modify paragraph (a) by eliminating the “fair and equitable” standard and substituting a requirement that the client be “advised to seek independent counsel.”

Comments of the Sponsor

The proposed Rule codifies approval of conflict situations and inappropriately requires a determination of fact and law that cannot help but be perceived as self-serving. The amendment removes these defects and affirmatively protects both client and lawyer.

B. THE FLORIDA BAR

The amendment would modify paragraph (a) by eliminating the “fair and equitable” standard and requiring instead consent by the client to the business transaction between lawyer and client after disclosure and under circumstances in which the lawyer and client have differing interests where the client expects the lawyer to exercise his professional judgment therein.

C. SECTION OF GENERAL PRACTICE (GP Rule 3.2)

The amendment would modify Rule 1.8 in four respects. First, it would delete paragraph (a) in its entirety.

Second, it would delete paragraph (c) in its entirety.

Third, it would substitute for paragraph (e) (1) the provisions of DR 5-103, which require that a client remain ultimately liable for repayment of any advances.

Fourth, it would eliminate paragraph (i).
Comments of the Sponsor
The Section deleted 1.8(a) because it is far too sweeping. It would make voidable every business transaction of a lawyer with a client, including those in which the client may be more experienced than the lawyer and where the lawyer is not acting in a professional capacity. Further, paragraphs (e) and (i) are unwise attempts to establish fixed rules that may be totally inappropriate in certain instances. Moreover, the subject is already covered under the general rule in Rule 1.7.

D. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 1.8 in three respects. First, it would add to paragraph (a) a requirement that the client consent to a business transaction between lawyer and client, if the client expects the lawyer to exercise professional judgment for the client’s benefit.

Comments of the Sponsor
This accords with the present Code.

Second, it would modify paragraph (c) by substituting the term “should” for the term “shall” and changing the prohibition from gifts to “a member of the lawyer’s family” to “a person related to the lawyer within the third degree of consanguinity or affimity.”

Comments of the Sponsor
An inflexible rule is inappropriate in this area. The courts have adequately delineated those situations in which the lawyer/beneficiary must not draft the instrument. Also, a definition of “family” is desirable. As proposed, the standard comports with Canon 3(C)(1)(d) of the ABA Code of Judicial Conduct.

Third, the amendment would modify paragraph (e) by eliminating the provision that allows repayment of litigation costs and expenses to be contingent.

Comments of the Sponsor
The public interest in proscribing “maintenance” of litigation is still valid.
E. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would modify (b) in three respects: (1) to create an exception to the prohibition on using information adverse to the client where “otherwise permitted or required under Rule 1.6 or 3.3;” (2) changing the language to read “information relating to “the subject matter” of the lawyer’s representation; and (3) including a prohibition against use of such information “to the lawyer’s personal advantage.”

Comments of the Sponsor

The first change resolves possible conflict between the rules. The second change is prompted by proposed amendments to Rule 1.6. The third change merely incorporates the existing provision of DR 4-101(C).

The amendment would modify (c) in two respects: (1) broadens the exception permitting gifts to a lawyer or his family to include gifts from a “close personal friend;” and (2) adds language affording protection against abuse of the relative or close personal friend exception to the general prohibition against influencing a client to make a gift to the lawyer.

Comments of the Sponsor

A close friend of the client may have a better claim upon the client’s bounty than a distant relative. The second change incorporates the provision of Ethical Consideration 5-5 of the existing Code.

The amendment would modify (e) to prohibit a lawyer, even on behalf of an indigent client, from paying court costs or expenses of litigation without at least a contingent provision for repayment.

F. NEW MEXICO STATE BAR ASSOCIATION

The amendment would modify Rule 1.8 by substituting for paragraph (e) regarding advances of expenses, the provisions of DR 5-103(B) that a client remain ultimately responsible for repayment of any advances. The amendment would also strike the provision in paragraph (e) that would permit a lawyer to pay the expenses of litigation on behalf of an indigent client.
G. STATE BAR OF ARIZONA

The amendment would modify paragraph (e) by striking all reference to repayment of advances.

H. J.R. CROUCH

The amendment would modify paragraph (h) by deleting the requirement that a lawyer advise a client that independent counsel should be consulted in connection with negotiating settlement of a malpractice claim. Instead, the lawyer would be required only to advise the client of the client’s right to obtain legal counsel.

I. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The amendment would modify paragraph (i) by limiting its application to situations involving directly adverse representation of opposing parties by related lawyers.

J. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment adds a new paragraph (j) prohibiting a lawyer from acquiring a proprietary interest in the cause of action subject to certain exceptions.

Comments of the Sponsor

The present Code at DR 5-103(A) contains this prohibition. That part of the Code has been deleted from the 1982 Draft and should be reinserted.
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client is advised to seek independent counsel.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is a relative of the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

   (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

   (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client
Rule 1.8 (A) cont.

consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement, or settle a claim for such liability unless the client is first advised that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
THE FLORIDA BAR

PROPOSED AMENDMENT TO RULE 1.8

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the 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 disclosure.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is a relative of the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

1. A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

2. A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement, or settle a claim for such liability unless the client is first advised that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
The amendment would:

1. replace (a) with language contained in Rule 5-101 of the California Rules of Professional Conduct. The proponents believe that the fiduciary relationship and trust between lawyer and client require stricter standards of professional conduct when a lawyer engages in financial or business transactions with that client.

2. amend (c) to replace a “member of the lawyer’s family” with a “person related to the lawyer as parent, child, sibling, or spouse. The proponents believe that the familial relationship to the lawyer ought to be identified for due process reasons and should be the same as those proposed in Rule 1.8(i).

3. delete (e)(1)

4. add language to (f) containing the substance of DR5-107(B) to clarify that the lawyer’s undivided loyalty and duty of confidentiality runs to the client regardless of the source of payment of legal fees. The language was derived from similar provisions in Rule 5.4(a) and (b).

5. add nolo contendere pleas to (g).

6. add language to (h) to clarify the intent of the rule.
RULE 1.8  CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client’s choice on the transaction, and (3) the client consents in writing thereto.

A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse or a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is related to a relative of the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

   (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

   (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

   (1) The client consents after consultation.

   (2) There is no interference with the lawyer’s independence of professional judgment or with the lawyer client relationship; and

   (3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising such party in writing unless the client is first advised that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.8

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client, and, if the client expects the lawyer to exercise professional judgment on behalf of the client, the client consents after consultation.

* * *

(c) A lawyer shall ordinarily not prepare an instrument giving the lawyer or a member of the lawyer's family or person related to the lawyer within the third degree of consanguinity or affinity any substantial gift from a client, including a testamentary gift, except where the client is related to the donee by blood, adoption or marriage.

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

* * *
INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

PROPOSED REVISION OF RULE 1.8

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

[(a) as appears]

(b) Except as otherwise permitted or required under Rule 1.6 or 3.3, a lawyer shall not use information relating to the subject matter of the lawyer’s representation of a client to the lawyer’s personal advantage or the disadvantage of the client, unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is a relative or close personal friend of the lawyer or the donee.

(d) A lawyer should not seek to influence a client to make a gift, whether by will or lifetime transfer, to or for the benefit of the lawyer or any member of the lawyer’s family, and if the client offers to make any such gift, the lawyer should not accept it without having first urged the client to secure disinterested advice from some independent, competent third person familiar with the circumstances.

[(e) paragraph (d) as appears]

(f) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation unless there is an agreement for repayment, absolute or contingent upon the outcome of the matter, except that

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

[(f), (g), (h) and (i), as appears, but relettered as “(g)”, “(h)”, “(i)” and “(j)”, respectively].
NEW MEXICO STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.8

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is a relative of the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs, and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the lawyer in good faith and not depending upon the outcome of the litigation anticipates reimbursement from the client, and the client remains ultimately liable, for such expenses.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement, or settle a claim for such liability unless the client is first advised that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
J.R. CROUCH, NEW MEXICO STATE DELGATE

PROPOSED AMENDMENT TO RULE 1.8 (h)

(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement, or settle a claim for such liability unless the client is first advised that independent representation may be appropriate in connection therewith. the client has the right to obtain independent counsel.
Rule 1.8 (i)

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

PROPOSED AMENDMENT TO RULE 1.8 (i)

* * *

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

* * *
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is a relative of the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims of pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement, or settle a claim for such liability unless the client is first advised that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may: (1) Acquire a lien granted by law to secure his fee or expenses. (2) Contract with a client for a reasonable contingent fee in a civil case.”
RULE 1.8

K. THE IOWA STATE BAR ASSOCIATION

The amendment would modify (a) by providing for full disclosure, opportunity for advice by independent counsel and the client consents in writing.

The amendment would modify (c) by defining “family” and defining “relative”.

The amendment proposes adding to (f) a requirement that there be no interference with the lawyer’s independence of professional judgment and that any information be protected by the confidentiality rule.

The amendment would add to (h) a requirement that the client be advised in writing that independent counsel is appropriate.

The amendment further would add a new (j) requiring that the lawyer not assist any associates in doing anything prohibited by the rule.
RULE 1.8  CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client’s choice on the transaction, and (3) the client consents in writing thereto.

A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer within the third degree of consanguinity or affinity a member of the lawyer’s family any substantial gift from a client, including a testamentary gift, except where the client is related to a relative of the donee by blood, adoption or marriage.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(Additional) Rule 1.8 (K) pg. 2

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

   (1) The client consents after consultation.

   (2) There is no interference with the lawyer’s independence of professional judgment or with the lawyer client relationship; and

   (3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an agreement settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising such party in writing unless the client is first advised that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client having an interest adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not encourage or assist, directly or indirectly, the members of the lawyer’s firm or professional or business associates, to do anything which the lawyer is prohibited from doing pursuant to this Rule.
RULE 1.9  CONFLICT OF INTEREST: FORMER CLIENT

Model Rule Text:

A lawyer who has represented a client in a matter shall not thereafter:

(a) Represent another client in the same or a substantially related matter in which that client’s interests are materially adverse to the interests of the former client unless the former client consents after disclosure consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.
Proposed Amendments:

A. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment has already been incorporated into the text of Rule 1.9(b).

B. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would delete Rule 1.9 in its entirety and substitute the language of the California Code, which is substantially similar to the provisions of Rule 1.9. The amendment would, however, require “written consent” by a former client. It would reject the “substantial relationship” test in favor of the test “representation relating to a matter where the lawyer has received confidential information.”

C. SECTION OF GENERAL PRACTICE

The amendment would eliminate Rule 1.9 in its entirety without any substituted provision.

Comments of the Sponsor
The rule is unnecessary if Rules 1.6, 1.7, and 1.8 are properly drafted.

D. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would add an additional paragraph to Rule 1.9 addressing the case of the former government or corporate lawyer representing a new client “in an entirely unrelated matter.”

Comments of the Sponsor
Without the additional subparagraph, literal or strict enforcement of the proposed rule would effectively bar lawyers from moving from institutional to private practices.
AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 1.9

RULE 1.9  CONFLICT OF INTEREST: FORMER CLIENT

If the House of Delegates adopts the amendment proposed by the American College of Trial Lawyers to Rule 1.6, then in that event we do not propose to offer an amendment to Rule 1.9.

If Rule 1.6 is adopted in other language than we have proposed, we would then offer again our amendment to Rule 1.6 in place of the language in Rule 1.9 which states

“EXCEPT AS RULE 1.6 WOULD PERMIT WITH RESPECT TO A CLIENT…”
Rule 1.9  (B)

LOS ANGELES COUNTY BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.9

RULE 1.9  CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has represented a client in a matter shall not thereafter:

(a) Represent another client in the same or a substantially related matter in which that client’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Without the informed and written consent of the former client, a lawyer shall not accept employment adverse to a former client relating to a matter in reference to which the lawyer has obtained confidential information, as defined by Rule 1.6, by reason of or in the course of employment by such former client, or use such confidential information to the disadvantage of the former client, unless the information has become generally known or accessible.
SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 1.9

RULE 1.9 CONFLICT OF INTEREST—FORMER CLIENT

Model Rule Text:

A lawyer who has represented a client in a matter shall not thereafter:

(a) Represent another client in the same or a substantially related matter in which that client’s interests are materially adverse to the interests of the former client unless the former client consents after disclosure consultation, or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.
RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has represented a client in a matter shall not thereafter:

(a) Represent another client in the same or a substantially related matter in which that client’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

(c) This Rule shall not prevent a lawyer from representing another client adverse to a former corporate, governmental or institutional client on entirely separate matters where the lawyer has acquired no specific confidential information of the specific case by his prior representation.
RULE 1.10  IMPUTED DISQUALIFICATION: GENERAL RULE

Model Rule Text:

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (c), 1.9 and 2.2.

(b) When lawyers terminate an association in a firm, none of them, nor any other lawyer with whom any of them subsequently becomes associated, shall knowingly represent a client when doing so involves a material risk of violating Rule 1.6 or Rule 1.9.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE (GP Rule 3.5)

The amendment would renumber the Rule as Rule 3.5.

Comments of the Sponsor

The Section’s rule is identical to Rule 1.10 of the 1981 Draft of the Model Rules.

B. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify paragraph (a) to replace “knowingly” represent with “would know or in the exercise of due care should have known” that to do so would be prohibited by certain Rules.

Comments by the Sponsor

The 1982 Draft substantially changed the 1981 Draft by inserting the word “knowingly.” For example, a firm’s New York office represents a corporation and in so doing obtains confidential information from the client. The firm’s Los Angeles office is retained to sue the corporation without knowing of the other representation. The confidential information obtained would permit a successful suit. In the 1981 Draft, the Los Angeles office simply could not prosecute the suit. Under the 1982 Draft, the firm could continue to prosecute until somebody somewhere in the firm actually knows the conflict exists.

C. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would revise (b) to substitute “substantial risk” for “material risk,” and would restrict (b) to disclosures in violation of Rule 1.6 or Rule 1.9(b).
Comments of the Sponsor

Since the restrictions of Rule 1.10 have a substantial limiting effect upon the mobility of lawyers, transferring from one firm to another, only a risk of “clear and weighty” significance should be sufficient to invoke the limitations of Rule 1.10 (b). The restrictions of (b) should not apply broadly to a potential violation of Rule 1.9(a). The term “disadvantage” as used in Rules 1.8, 1.9 and 1.10 should be inserted in the terminology section to mean “that which has potentially damaging economic consequences.”

D. BEVERLY HILLS BAR ASSOCIATION

Supports the amendment of the International Association of Insurance Counsel.
SECTION OF GENERAL PRACTICE PROPOSED RULE

RULE 3.5 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) When lawyers are associated in a firm, none of them shall undertake or continue representation when a lawyer practicing alone would be prohibited from doing so under the provisions regarding conflict of interest stated in Rules 3.1 and 3.3.

(b) When lawyers terminate an association in a firm, none of them, nor any other lawyer with whom any of them subsequently become associated in a partnership, shall undertake or continue representation that involves a material risk of revealing information relating to representation of a client in violation of Rule 2.2.

(c) Subject to the limitations of Rule 3.1, a disqualification prescribed by this Rule may be waived by the consent of the affected client after disclosure.
Rule 1.10 (B)

INDIANA STATE BAR ASSOCIATION – SPECIAL COMMITTEE

PROPOSED AMENDMENT TO RULE 1.10

RULE 1.10  IMPUTED DISQUALIFICATION: GENERAL RULE

(a) When lawyers are associated in a firm, shall not none of them knowingly represent a client if when any one of them, if practicing alone, would know (or in the exercise of due care should have known) that to do so would be prohibited under from doing so by Rules 1.7, 1.8 (c), 1.9 or 2.2.

(b) When lawyers terminate an association in a firm, none of them, nor any other lawyer with whom any of them subsequently becomes associated, shall knowingly represent a client when doing so involves a material risk of violating Rule 1.6 or Rule 1.9.

(c) A disqualification prescribed by the Rule may be waived by the affected client under the conditions stated in Rule 1.7.
PROPOSED REVISION OF RULE 1.10

RULE 1.10  IMPUTED DISQUALIFICATION: GENERAL RULE

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 (c), 1.9 or 2.2.

(b) When any lawyers terminates an association in a firm, neither the terminating lawyer, nor any lawyer remaining in the firm, nor any other lawyer with whom any of them subsequently becomes associated, shall knowingly represent a client when doing so involves a substantial risk of violating Rule 1.6 or Rule 1.9.

(1) Revealing information relating to the subject matter of representation of a client or former client in violation of Rule 1.6, or,

(2) Making use of information to the disadvantage of a former client in violation of Rule 1.9 (b).

[(c) as appears.]
RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

Model Rule Text:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential government information about a person may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.
(d) As used in this Rule, the term “matter” includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term “confidential government information” means information which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose.
Proposed Amendments:

A. THE FLORIDA BAR

The amendment would delete language from (a), “unless the appropriate government agency consents after consultation,” and insert the word “directly” before “apportioned no part of the fee…” in (a) (1).

Comments of the Sponsor

Unless the language is deleted, the prohibition would be meaningless by allowing a lawyer with a government agency to put the agency under pressure to cause its consent. Such unfair pressure is not in the public interest. Where screening occurs and the firm receives any fees at all, the lawyer who is being screened could receive indirect benefits, such as through overall increased compensation, so the term “directly” is necessary for clarification.

B. NEW YORK STATE BAR ASSOCIATION

The amendment would revise Rule 1.11 in two respects. First, it would modify paragraph (a) by requiring that the representation being undertaken by the former government lawyer not be adverse to the affected government agency.

Comments of the Sponsor

This result is required because a government agency cannot consent to a conflict of interests that might be detrimental to the public. In any event, the employee’s former colleagues should not be put in the position of consenting to a conflict.

Second, the amendment would modify paragraph (b) by requiring consent to an adverse representation by the individual about whom the lawyer has gained confidential information through the subpoena power and superior resources of the government.

C. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify (a) to end after “employee,” and delete the remainder of the paragraph. The amendment would also modify (b) to end after “matter,” and delete the remainder of the paragraph.

Comments of the Sponsor

Case law holds that a government agency cannot give such consent. The screening process referred to in these Rules is not acceptable.
D. THE DISTRICT OF COLUMBIA BAR

The amendment would eliminate the screening provisions in paragraph (b) on the grounds that such screening is not necessary as a practical matter.

E. SECTION OF GENERAL PRACTICE (GP Rule 3.6)

The amendment would reinstate the language from the May 30, 1982, proposed Final Draft, and it would renumber Rule 1.11 as Rule 3.6.

F. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would delete Rule 1.11 in its entirety.

Comments of the Sponsor
If the Cuyahoga County Bar Association amendment to Rule 1.9 is adopted, then this proposed amendment will no longer be necessary and will be withdrawn.
RULE 1.11  SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. Unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake representation in the matter the unless:

(1) The disqualified lawyer is screened from any participation in the matter and is directly apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential government information about a person may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.
(d) As used in this Rule, the term “matter” includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict or interest rules of the appropriate government agency.

(e) As used in this Rule, the term “confidential government information” means information which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose.
B. NEW YORK STATE BAR ASSOCIATION

The amendment would revise the Rule by requiring that the representation being undertaken by the former government employee not be adverse to the affected government agency. This result is required because a government agency cannot consent to a conflict of interest that might be detrimental to the public, and the employee’s former colleagues should not be put in the position of being asked to consent to such a conflict.
RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless (1) The interests of the private client in the matter are not adverse to those of the government agency and (2) The appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential government information about a person may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this Rule.
RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

Model Rule Text:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential government information about a person may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.
Amendments proposed by the Ad Hoc Committee appointed by the Board of Governors of the District of Columbia Bar* to Rule 1.11 of the Proposed Model Rules of Professional Conduct (Proposed Final Draft as revised through June 30, 1982)

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as public officer or employee, of confidential government information about a person may not personally represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or
Rule 1.11 (D) cont.

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term “matter” includes:

(1) Any judicial or other proceeding, application, request for a Ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest Rules of the appropriate government agency.

(e) As used in this Rule, the term “confidential government information” means information which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose.
SECTION OF GENERAL PRACTICE PROPOSED RULE

RULE 3.6 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after disclosure.

(b) A lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable the agency to ascertain compliance with the provisions of this rule.
RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential government information about a personal may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
(2)——Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d)——As used in this Rule, the term “matter” includes:

(1)——Any judicial or other proceedings, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2)——Any other matter covered by the Conflict of Interest Rules of the appropriate government agency.

(e)——As used in this Rule, the term, “confidential government information” means information which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose.
G. NORTH CAROLINA BAR ASSOCIATION

The amendment would:

1. add unless “all adverse parties consent after consultation” to (a) and (b)

2. delete (a) (1) and (2) and (b) (1) and (2) in their entirety.

Proponents maintain that all adverse parties involved should be required to waive disqualification, and that screening would frequently not be effective after presenting at least the appearance of a potential for impropriety.
RULE 1.11  SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

Model Rule Text:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the all adverse parties consent after consultation. Further, without such consent appropriate government agency consents after consultation. no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter.

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential government information about a person may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless; all adverse parties consent after consultation.

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or
(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term “matter” includes:

(1) Any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the Conflict of Interest Rules of the appropriate government agency.

(3) As used in this Rule, the term “confidential government information” means information which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose.
Delete subsection (b) in its entirety.
Model Rule Text:

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative office, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

   (1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

   (2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.
Proposed Amendments:

A. STATE BAR OF ARIZONA

The amendment would modify paragraph (a) of Rule 1.12 by eliminating reference to judicial law clerks.

B. YOUNG LAWYERS DIVISION

The amendment would add to Rule 1.12(b) a requirement that judicial law clerks notify an appropriate judicial officer when negotiating for employment with private law firms.

C. SECTION OF GENERAL PRACTICE (GP Rule 3.7)

The amendment would renumber Rule 1.12 as Rule 3.7.
STATE BAR OF ARIZONA

RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.
AMERICAN BAR ASSOCIATION  
YOUNG LAWYERS DIVISION  
PROPOSED AMENDMENT TO RULE 1.12

RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) No change

(b) A lawyer shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as law clerk to a judge or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the Judge or Arbitrator.

(c) No Change

(d) No Change
SECTION OF GENERAL PRACTICE PROPOSED RULE

RULE 3.7 FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.
E. NORTH CAROLINA BAR ASSOCIATION

The amendment would delete (c) in its entirety, deleting the screening provisions.
RULE 1.12 FORMER JUDGE OR ARBITRATOR

Model Rule Text:

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative office, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.
Rule 1.13

RULE 1.13  ORGANIZATION AS CLIENT

Model Rule Text:

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) Asking reconsideration of the matter;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:
(1) The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) Revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.
Proposed Amendments:

A. BEVERLY HILLS BAR ASSOCIATION

The amendment would revise paragraph (a) by adding the language “acting through its duly constituted governing body.”

Comments from the Sponsor
Paragraph (a) in the proposed Rule assumes that an organization is separate and apart from its agents. This correctly recognizes a legal fiction, but a lawyer must deal with substance and actuality. The live persons with whom the lawyer communicates are not the lawyer’s clients. Instead a vague “concept” is the client. This is the fundamental flaw of the proposed Rule.

B. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would revise Rule 1.13 in three respects. First it would delete paragraph (a) and substitute a provision which states that a lawyer representing an organization represents the organization, its directors, employees and shareholders jointly, unless their interests are potentially adverse.

Second, the amendment deletes paragraph (c) in its entirety and substitutes a new paragraph (c) permitting withdrawal under Rule 1.16 if the organization insists on illegal conduct. However, Rule 1.16 would require withdrawal in such circumstances.

Third, the amendment would revise paragraph (d) to conform to the revisions proposed with respect to paragraph (a). If so revised, paragraph (d) would require explanation of the clients’ identity when the interests of the organization and its constituents were adverse.
C. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would revise Rule 1.13 in two respects. First, it would add to paragraph (b) a provision that the lawyer shall consult where possible with general counsel or other regularly employed or retained counsel to the organization.

Second, the amendment would revise paragraph (c) by requiring withdrawal if the organization insists on pursuing a criminal course of action and by prohibiting any disclosure of information unless permitted by Rule 1.6.

D. NEW YORK STATE BAR SPECIAL COMMITTEE

The amendment would strike paragraphs (b) and (c) in their entirety.

Comments of the Sponsor

These paragraphs, in attempting to cover the extremely complex subject of whistle-blowing in a little space, provide little clarity and supply a troublesome source of potential third party liability.

E. NEW YORK COUNTY LAWYERS’ ASSOCIATION

Supports the amendment proposed by the New York State Bar Association Special Committee.

In the event that the NYSBA amendment fails, the NYCLAs will propose an alternative amendment.

The amendment would modify Rule 1.13 in three respects. First, it would delete in 1.13(b)(3) the language “including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.”
Second, it would eliminate the provision in Rule 1.13(c) which allows a lawyer to disclose confidential information upon the lawyer’s reasonable belief that doing so is in the “best interest of the organization.”

Third, it would expressly provide in 1.13(c) that any action taken by the lawyer “may not include revealing information protected by Rule 1.6.”

F. SECTION OF GENERAL PRACTICE

The amendment would delete Rule 1.13 in its entirety.

(Comments of the Sponsor)

This is actually a conflict of interest problem. The only clear consensus on the subject is so general as to offer no real guidance. In its present convoluted form, the proposed Model Rule is apparently not intended to expose a lawyer representing an organization to any significant risk if he carefully follows the escape hatches provided in Rule 1.13(c). However, paragraph (b) is inconsistent with the foregoing construction and requires a lawyer to prejudge motives and actions of agents of an organization at his peril. This subject is better left for development and refinement on a case-by-case basis.
RULE 1.13  ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained to represent an organization represents the organization acting through its duly constituted governing body as distinct from its directors, officers, employees, members, shareholders or other constituents.
B. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would:

1. add the words “as a group, except where the interest of any one or more of the group may be adverse to the organization’s interests” to (a).

2. delete (c) in its entirety and replace it with a provision permitting the lawyer to resign in accordance with Rule 1.16 if the organization insists upon or refuses action which is clearly a violation of law and is likely to result in substantial injury to the organization.

3. replaces language in (d) permitting the lawyer to explain the identity of the client when it is “apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”

The College is opposed to proposed (a) because it creates an artificial and unrealistic distinction between an organizational client and the persons who act for it, ignoring the fact that the organizational client cannot act except through its directors, officers, employees, members, shareholders or other constituents. The College is also opposed to proposed (c) because the provision would extend the rule of permissive disclosure under Rule 1.6 to allow an attorney to reveal a corporate client’s confidences if the attorney believes that the highest authority has acted to further interest of members of the organization and the attorney believes that such disclosures is in the best interest of the client.
(Revised) Rule 1.13 (B)

AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 1.13

RULE 1.13 ORGANIZATION AS CLIENT

Model Rule Text:

(a) A lawyer employed or retained to represent by an organization represents the organization, as distinct from including its directors, officers, employees, members, shareholders or other constituents, as a group, except where the interests of any one or more of the group may be adverse to the organization’s interest.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies for the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) Asking reconsideration of the matter;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial
action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

(c) If, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(1) The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) Revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.
Rule 1.13  (C)

LOS ANGELES COUNTY BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.13

RULE 1.13  ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall, where possible, consult with the general counsel or chief legal officer or other lawyers employed by or representing the organization and having responsibility for the relevant matter or lawyers specially engaged for purposes of such consultation. The lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and shall avoid the risk of revealing information relating to the representation to persons outside the organization, except as provided by Rule 1.6. Such measures may include among others:

(1) Asking reconsideration of the matter;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
(c) When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall resign from employment with or representation of the organization when the lawyer would, by continuing in such capacity, be engaged in criminal conduct, or shall consider resigning where the lawyer ceases to be effective as counsel; but the lawyer or lawyers shall continue to preserve confidences received in the course of such employment or representation, except as provided by Rule 1.6. May take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

1. The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

2. Revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.
Rule 1.13 ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) Asking reconsideration of the matter;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization, and

(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(e) When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that.
(1) The highest authority in the organization has acted to further the personal or financial interests or members of that authority which are in conflict with the interests of the organization, and

(2) Revealing the information is necessary in the best interest of the organization.

(db) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.

(ec) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent organization other than the official of the organization other than the individual who is to be represented or by the shareholders.
NEW YORK COUNTY LAWYER’S ASSOCIATION

Alternative Proposed Amendment to Rule 1.13

RULE 1.13 ORGANIZATION AS CLIENT

* * *

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) Asking reconsideration of the matter;
(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may not include revealing information otherwise protected by Rule 1.6. Only if the lawyer reasonably believes that:

(1) The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization, and
(2) Revealing the information is necessary in the best interest of the organization.
F. SECTION OF GENERAL PRACTICE

The amendment would:

1. Amend (a) to define the client as the organization as directed and represented by the highest official or body authorized by law to act, or until such action, the official having operational responsibility for the matter.

2. Delete (b) in its entirety and replace it with language which states that information relating to the representation obtained by the lawyer from anyone in the organization shall be governed by Rule 1.6.

3. Deletes (c) in its entirety.
SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENTS TO RULE 1.3

RULE 1.13 ORGANIZATION AS THE CLIENT

(a) When a lawyer is employed or retained to represent an organization, the client is represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents directed and represented by the highest official or body in the organization authorized by law to act for the organization in the matter or, until the highest official or body acts, the official having operational responsibility for the matter.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) Asking reconsideration of the matter;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(b) Information relating to the representation obtained by the lawyer from anyone in the organization, including employees, directors, and shareholders shall be governed by the provisions of Rule 1.6.
When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

(1) The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) Revealing the information is necessary in the best interests of the organization.

In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part.

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.
Rule 1.13

G. THE IOWA STATE BAR ASSOCIATION

The amendment strikes (b)(1), (2) and (3) and adds a provision stating that the confidentiality rule applies. It also strikes (c)(1) and (2).
THE IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.13

RULE 1.13  ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the presentation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) Asking reconsideration of the matter;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(b) Information relating to the representation obtained by the lawyer from anyone in the organization, including employees, directors, and shareholders shall be governed by the provisions of Rule 1.6.
(c) When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

1. The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

2. Revealing the information is necessary in the best interests of the organization.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.
H. THE FLORIDA BAR

The amendment (1) deletes (c); (2) rearranges the subsections of the rule to emphasize the general principle of allegiance to the organization; and (3) amends the proposed rule to make it explicit that the duty owed to a partnership, including a limited partnership is the same duty as is owed to any other organization.
RULE 1.13 ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, partners or other constituents.

(b) (d) In dealing with an organization’s directors, officers, employees, members, shareholders, partners or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part by them.

(c) When a matter has been referred to the organization’s highest authority in accordance with paragraph (b), and that authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information relating to the representation of the organization only if the lawyer reasonably believes that:
(1) The highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) Revealing the information is necessary in the best interest of the organization.

(c) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, partners or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization, person or authority other than the individual who is to be represented or by the shareholders or partners.

(d) If a lawyer for an organization knows, in a matter related to the representation, that an officer, employee, partner or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
In determining how to proceed, in such event the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization, and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

1. Asking reconsideration of the matter;

2. Advising that a separate legal opinion on the matter be sought for presentation to the appropriate authority in the organization; and

3. Referring the matter to higher authority in the organization, the lawyer’s concerns including, if warranted by the seriousness of the matter violation, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
Rule 1.14

RULE 1.14  CLIENT UNDER A DISABILITY

Model Rule Text:

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.
Proposed Amendments:

A. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify paragraph (a) by substituting the term “should” for the term “shall.”

(Comments of the Sponsor)

This Rule should be a guide to sensible practice and sound client relations when dealing with the disabled client, but should not be used as a basis for professional discipline or malpractice liability.

B. IOWA STATE BAR ASSOCIATION

The amendment would add to paragraph (b), reference to appointment of a “conservator” in addition to reference to a “guardian.”

C. SECTION OF GENERAL PRACTICE

The amendment would eliminate Rule 1.14 in its entirety.

Comments of the Sponsor

Rule 1.14(a) is so vague as to be without any real meaning or guidance. It should be obvious that if a lawyer represents a client who is or becomes disabled, he shall “as far as reasonably possible maintain a normal client-lawyer relationship with the client,” but this solves no problem whatever. Rule 1.14(b) is unnecessary and redundant.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.14

RULE 1.14 CLIENT UNDER A DISABILITY

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall should, as far as is reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.
IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.14

RULE 1.14 CLIENT UNDER A DISABILITY

(b) A lawyer may seek the appointment of a guardian or conservator or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.
RULE 1.14 CLIENT UNDER A DISABILITY

Model Rule Text:

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.
RULE 1.15 SAFEKEEPING PROPERTY

Model Rule Text:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s officer is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
Proposed Amendments:

A. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would delete from paragraph (a) any requirement that the lawyer keep or maintain records of client funds or property.

Comments of the Sponsor
The record-keeping requirement is unrealistic for individual practitioners.

B. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would change the requirement of paragraph (a) that records of client funds and property be maintained for a specific period of one that they be maintained “as required by law.”

Comments of the Sponsor
There is no reason to have an arbitrary period established as a rule of ethics. For example, applicable rules in New York require that such records be maintained for seven years.

C. THE CHICAGO BAR ASSOCIATION

The amendment would revise paragraph (b) by requiring an accounting for client funds or property only when specifically requested by the client.

D. PHILADELPHIA BAR ASSOCIATION

The amendment would delete reference in the Comment to client security funds and instead would create a new Rule 6.5 requiring every lawyer to “encourage the creation of and contribute” to client security funds. While Comments are not being considered at this time, since this amendment actually creates a new Rule, it is being included here.
Rule 1.15

Comments of the Sponsor

If the Model Rules are to guide the state regulatory systems of lawyer conduct for the benefit of the public and the profession, then these Rules should affirmatively require a method for the public’s protection from the acts of those who breach their clients’ trust.

E. SECTION OF GENERAL PRACTICE

The Section offers no amendments to this Rule, which, under the Section’s proposed rules, would become Rule 1.6.

F. IOWA STATE BAR ASSOCIATION

The amendment would modify paragraph (b) to include “or third person” within the provision and add a requirement for a prompt full accounting upon request.
RULE 1.15 SAFEKEEPING OF PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be presented for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.15

RULE 1.15  SAFEKEEPING PROPERTY

   (a) A lawyer shall hold property of clients or third persons that is in the lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a such period of five years after termination of the representation as is required by law.

*     *     *
Rule 1.15 (C)

CHICAGO BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.15

RULE 1.15  SAFEKEEPING PROPERTY

* *
* *

(b) Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive and, upon request by the client, shall promptly render a full accounting regarding such property.

*
RULE 1.15  SAFEKEEPING PROPERTY

COMMENT:

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

PROPOSED AMENDMENT: DELETE COMMENT AND SUBSTITUTE THE FOLLOWING NEW RULE 6.5

RULE 6.5  PROPOSED NEW RULE: “CLIENTS’ SECURITY FUND”

“CLIENTS’ SECURITY FUND”

A lawyer shall encourage creation of and contribute to the support of a clients’ security fund or other mechanism to reimburse clients who have lost money or property due to the misappropriation or defalcation of lawyers.
RULE 1.15 SAFEKEEPING PROPERTY

(a) (No change)

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive; and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) (No change)
STANDING COMMITTEE ON CLIENTS’ SECURITY FUND

PROPOSED AMENDMENT TO RULE 1.15

RULE 1.15  SAFEKEEPING PROPERTY

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

PROPOSED ACTION: DELETE COMMENT
AND ADD THE FOLLOWING NEW RULE

RULE 6.5  CLIENTS’ SECURITY FUND

A lawyer shall contribute to the support of a clients’ security fund or other mechanism to reimburse clients who have lost money or property due to a misappropriation or defalcation by a lawyer.
RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

Model Rule Text:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(3) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(4) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
Proposed Amendments:

A. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would add to paragraph (a) a new provision that specifically refers to conduct by the lawyer that would constitute violation of Rule 3.1.

The amendment also would add new paragraphs (b)(5) and (6) which permit withdrawal if “conduct on the part of the client makes it unreasonably difficult for the lawyer to work with the client” or “a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.”

B. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would revise Rule 1.16 in three respects. First it would modify paragraph (a) to replace “will result” with “would result”. Second, it would modify (b)(1) to replace “criminal or fraudulent” with “criminal, fraudulent, or otherwise intentionally tortious.” Third, it would amend (c) to clarify the power of a tribunal to order continued representation, not only in any case where withdrawal would otherwise be permitted under (b), but also in cases where withdrawal would otherwise be required under paragraph (a).

Comments of the Sponsor

The first change corrects terminology inasmuch as (a) presumes representation which has been declined or discontinued. The second change is proposed because no reason appears why a lawyer should not be entitled to withdraw from representation of a client who persists in the commission of any intentional tort. The third proposed change is to clarify and broaden the scope. Paragraph (c) could be construed as limiting a tribunal’s power to order a lawyer to continue representation of a client to cases involving withdrawal pursuant to the “good cause” provision of paragraph (b)(4).
C. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would revise Rule 1.16 in two respects. First, it would add a new paragraph (b) which would permit a lawyer to decline representation if the client desires to pursue objectives.

Second, the amendment would add a provision permitting a lawyer to withdraw from representation when the client insists on pursuing an imprudent or repugnant objective.

D. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would add the word “unreasonably” before “fails to pay” in paragraph (b)(2).

Comments of Sponsor
This would make it clear that the lawyer may not have an absolute right to withdraw if an unforeseen change of circumstance prevents the client from paying an agreed upon fee.

E. SECTION OF GENERAL PRACTICE (GP Rule 4.1 and 4.2)

The amendment would delete Rule 1.16 in its entirety because the subject matter is treated in the Section’s proposed Rules 4.1 and 4.2, except that subparagraph (a) of 1.16 would be eliminated without a counterpart.
RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer knows or should know that the client is bringing the legal action, conducting the defense, asserting a position in the litigation, or otherwise having steps taken for him merely for the purpose of harassing or maliciously injuring any person;

(3) The lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(4) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) Withdrawal can be accomplished without material adverse effect on the interests of the client or if:

(2) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent; or

(3) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(4) The representation will result in an unreasonably financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(5) Conduct on the part of the client makes it unreasonably difficult for the lawyer to work with the client; or

(6) A client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; or

(7) Other good cause for withdrawal exists.

(c) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
B. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

In addition, the revised amendment also would substitute “substantial” for “material” in (b).
INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

PROPOSED REVISION OF RULE 1.16

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct cross-referenced in the comments to this Rule, or other a violation of law;

[(2) and (3) as appears].

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes to be criminal, or fraudulent, or otherwise intentionally tortious;

[(2), (3), and (4) as appears].

(c) When ordered to do so by a tribunal, a lawyer shall undertake or continue representation, notwithstanding good cause for terminating the fact that the lawyer would otherwise be required or permitted to decline or terminate the representation under any preceding provision of this Rule.

[(d) as appears.]
Rule 1.16 (C)

AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 1.16

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (ed) a lawyer shall not represent a client or, where the representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) The lawyer is discharged.

(b) A lawyer may decline representation if the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

(bc) Except as stated in paragraph (ed), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(3) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

(4) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; or

(45) Other good cause for withdrawal exists.
(ed) When ordered to do so by a tribunal a lawyer should continue representation notwithstanding good cause for terminating the representation.

(ecd) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 1.16

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

*   *   *

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client unreasonably fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled:

*   *   *
SECTION OF GENERAL PRACTICE
PROPOSED AMENDMENT TO RULE 1.16

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

Model Rule Text:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(3) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(4) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
SECTION OF GENERAL PRACTICE PROPOSED RULES

LIMITS ON ADVOCACY

RULE 4.1

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.

RULE 4.2

A lawyer shall not knowingly

(a) Encourage a client to engage in illegal conduct, except in a good faith effort to test the validity or scope of the law.

(b) Participate in unlawfully concealing or destroying evidence, or discourage a witness or potential witness from talking to counsel for another party.

(c) Participate in creating perjured testimony, other false evidence, or a misrepresentation upon which another person is likely to rely and suffer material detriment.

(d) File a materially false pleading, present materially false evidence, or make a materially false representation to a court or other tribunal.
RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

*    *    *

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client unreasonably fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(3) The representation will result in an unreasonable financial burden to the lawyer or has been rendered unreasonably difficult by the client;

(4) The client has utilized the representation to perpetuate a crime or fraud;

(45) Other good cause for withdrawal exists.

*    *    *

(d) Upon termination of the representation, subject to the requirements of paragraph (a) and the authorization contained in paragraph (b), a lawyer shall take steps reasonably practicable to protect a client’s interests, such as giving reasonable notice allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
RULE 2.1 ADVISOR

Model Rule Text:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE

The amendment would delete Rule 2.1 in its entirety.

Comments of the Sponsor

The Rule is both unnecessary and inappropriate in a body of rules intended to be the basis for disciplinary sanctions.
SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 2.1

RULE 2.1—ADVISOR

Model Rule Text:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.
RULE 2.2  INTERMEDIARY

Model Rule Text:

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer explains to each client the implications of the common representation, including the advantages and risks involved, and obtains each client’s consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the client’s best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall explain fully to each client the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients unless doing so is clearly compatible with the lawyer’s responsibilities to the other client or clients.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE (GP Rule 3.3)

The amendment would renumber Rule 2.2 as Rule 3.3.

**Comments of the Sponsor**

The Rule treats with a conflicts question and belongs in the chapter dealing with that subject.

B. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would revise Rule 2.2 in three respects. First, in paragraphs (a) and (b), it would revise the terminology by replacing the term “explain” with the terms “consult with”. The revision would conform with standard terminology employed in the Rules and would not have any substantive effect.

Second, it would add to paragraph (a)(1), a specific requirement that the effect of intermediation on the attorney-client privilege be explained to the clients.

Third, it would modify paragraph (c) by limiting the prohibition on continuing to represent any of the multiple clients to a prohibition on continued representation in the subject matter of the intermediation.

C. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would amend (a) by permitting a lawyer to act as intermediary between clients “only” if…, deleting (a)(1) and substituting “the lawyer obtains each client’s written consent to the common representation after adequate disclosure.”

The amendment would further delete (a)(2) and (3), paragraph (b), and reword paragraph (c) to require withdrawal as intermediary if any of the clients so requests; the lawyer reasonably believes that the matter cannot be resolved on terms compatible with the clients’ best interests; or he reasonably believes that the common representation cannot be impartially continued. Paragraph (c) is further modified to authorize
continued representation of any client in a common matter only upon the written consent of all clients and former clients involved in that matter.

**Comments of the Sponsor**

Paragraph (a)(1) is amended to require informed and written consent as the normal practice for waiver of conflicts in a more succinct and less confusing manner. The latter portions of (a)(2) and (3) should be moved to the Comment section because they are not an appropriate subject matter for discipline. They are explanatory of the first portions of (a)(2) and (3). The first portions of (a)(2) and (3) should be moved to paragraph (c). Consideration of these impairments to representation should continue throughout the negotiations upon their occurrence and should initiate withdrawal. Paragraph (b) should be deleted because it is covered by (a)(1), and to the extent that it is not, it is an inappropriate basis for lawyer discipline. Written consent of all affected clients and former clients in a common matter should be required to continue representation under (c) instead of upon the attorney’s own determination of the property of the continued representation.

**D. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE**

The amendment would add the words “or continued” to (a)(3) directly after the word “undertaken.”

**Comments of the Sponsor**

Although the lawyer may at first believe that the common representation can be undertaken impartially, later events may lead to a contrary belief, and the lawyer should withdraw.
RULE 3.3 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer discloses to each client the implications of the common representation, including the advantages and risks involved, and obtain each client’s consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the client’s best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall explain fully to each client the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, if the conditions stated in paragraph (a) cannot be met or if in the light of subsequent events, the lawyer reasonably should know that a mutually advantageous resolution cannot be achieved. Upon withdrawal, the lawyer shall not continue to represent any of the clients unless doing so is clearly compatible with the lawyer’s responsibilities to the other client or clients.
NEW YORK STATE BAR ASSOCIATION

Proposed Amendment to Rule 2.2

RULE 2.2  INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

   (1) The lawyer explaining to consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privilege, and obtains each client’s consent to the common representation;

*     *     *

(b) While acting as intermediary, the lawyer shall explain fully to consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in the paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation. Unless doing so is clearly compatible with the lawyer’s responsibilities to the other client or clients.
2.2 Intermediary

(a) A lawyer may act as intermediary between clients only if:

(1) The lawyer explains to each client the implications of the common representation, including the advantages and risks involved, and obtains each client’s consent to the common representation; obtains each client’s written consent to the common representation after adequate disclosure.

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients’ best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall explain fully to each client the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
(c) A lawyer shall withdraw as intermediary if in any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied.

Following circumstances:

(1) Any of the clients so requests; or

(2) The lawyer reasonably believes that the matter cannot be resolved on terms compatible with the clients’ best interests; or

(3) The lawyer reasonably believes that the common representation cannot be impartially continued.

Upon withdrawal, the lawyer shall not continue to represent any of the clients in the common matter without the written consent of all of the clients and former clients involved in that matter unless doing so is clearly compatible with the lawyer’s responsibilities to the other client or clients.
RULE 2.2 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer explains to each client the implications of the common representation, including the advantages and risks involved, and obtains each client’s consent to the common representation:

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients’ best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken or continued impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall explain fully to each client the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients unless doing so is clearly compatible with the lawyer’s responsibilities to the other client or clients.
RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

Model Rule Text:

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client;

(2) The conditions of the evaluation are described to the client in writing, including contemplated disclosure of information otherwise protected by Rule 1.6; and

(3) The client consents after consultation.

(b) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE  (GP Rule 3.4)

   The amendment would renumber Rule 2.3 as Rule 3.4.

   **Comments of the Sponsor**
   The 1982 Draft of the Model Rules is an improvement and would have been used if available when the Council was considering these amendments.

B. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

   The amendment would delete the writing requirement in paragraph (a)(2).

C. BEVERLY HILLS BAR ASSOCIATION

   Supports the amendment proposed by the Association of the Bar of the City of New York.

D. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

   The amendment would provide a special exception in (a)(2) for insurance counsel who, under the terms of the amendment, would not be required to discuss the terms and conditions of an evaluation with the client.

   **Comments of the Sponsor**
   The amendment is proposed because the present language presents major practical problems if applied to lawyers making preliminary evaluations of cases for insurers, usually on the basis of the insurer’s claim file. In making such evaluation, the lawyer is acting on behalf of the insurer, not the insured, but would be forbidden to make any disclosure to the insurer in violation of the confidentiality requirements of Rule 1.6.
E. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would revise Rule 2.3 in two respects. First, it would delete the writing requirement in paragraph (a)(2).

Comments of the Sponsor
Past practice has shown no need for such a rigid requirement, and the consultation required under (a)(3) provides sufficient protection to the client.

Second, it would delete paragraph (b) in its entirety.

Comments of the Sponsor
Where any material limitations are not disclosed, the recipient is adequately protected by principles of tort law, and, in many kinds of transactions, by custom and negotiation. It is not either wise or possible to reduce to a few paragraphs the entire field of legal opinions given to third parties. Whether it is necessary to disclose limitations on the scope of the inquiry often depends on the sophistication of the recipient and the type of transaction.
SECTION OF GENERAL PRACTICE PROPOSED RULE

RULE 3.4 Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client;

(2) The terms upon which the evaluation is to be made are stated in writing, particularly the terms relating to the lawyer’s access to information, the contemplated disclosure of otherwise confidential information, and the persons to whom report of the evaluation is to be made; and

(3) The implications to the client are disclosed and the client consents.

(b) In reporting the evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) Except as disclosure is required in connection with a report of the evaluation, information relating to an independent evaluation is confidential under Rule 2.2.
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

PROPOSED AMENDMENT TO RULE 2.3

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client;

(2) The conditions of the evaluation are described to the client in writing including contemplated disclosure of information otherwise protected by Rule 1.6; and

(3) The client consents after consultation.

(b) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

*    *    *
D. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The revision amends (a)(2) to include “any” contemplated disclosure not protected by Rule 1.6 or “1.8.”

The revision also adds a new (4) which clarifies that preliminary evaluations may be made “without prior consent or consultation with the insured” provided that no breach of confidentiality is involved.
RULE 2.3 Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

[(1) as appears]

(2) The conditions of the evaluation are described to the client in writing, including any contemplated disclosure of information otherwise protected by Rule 1.6 or 1.8(b), and

(3) The client consents after consultation.

(4) Notwithstanding the foregoing, a lawyer may make a preliminary evaluation for and upon request of an insurance company without prior consent of or consultation with the insured, provided that such preliminary evaluation involves no disclosure by the lawyer of information otherwise protected by Rule 1.6 or 1.8(b).

[(b) and (c) as appears]
NEW YORK STATE BAR ASSOCIATION

Proposed Amendment to Rule 2.3

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client; and

(2) The conditions of the evaluation are described to the client in writing, including contemplated disclosure of information otherwise protected by Rule 1.6, and

(3) The client consents after consultation.

(b) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(eb) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.
RULE 3.1  MERITORIOUS CLAIMS AND CONTENTIONS

Model Rule Text:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
Proposed Amendments:

A. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would delete the first sentence of Rule 3.1 and substitute language prohibiting a lawyer from bringing or defending a proceeding “merely to harass or maliciously injure another.”

Comments of the Sponsor
The use of “frivolous” and “good faith” call for subjective judgments by judges and others who may or may not understand the theories advanced.

B. SECTION OF GENERAL PRACTICE

The amendment would delete Rule 3.1.

Comments of the Sponsor
The Section deleted this rule as apparently intended to be meaningless and mere window dressing. However, it could be dangerous. Many legal doctrines may be considered “frivolous” one year and embraced by some court the next year. Is a lawyer to be subjected to disciplinary sanctions if he makes this highly subjective determination in a manner that some disciplinary authority decides is wrong?
CUYAHOGA COUNTY BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.1

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding when he knows or it is obvious it would serve merely to harass or maliciously injure another.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
RULE 3.1  MERITORIOUS CLAIMS AND CONTENTIONS

Model Rule Text:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
RULE 3.2  EXPEDITING LITIGATION

Model Rule Text:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
Proposed Amendments:

A. PHILADELPHIA BAR ASSOCIATION

The amendment would delete Rule 3.2 in its entirety and substitute a provision prohibiting a lawyer from unreasonably impeding or delaying litigation.

Comments of the Sponsor
The proposed Rule, in its present form, might well subject a lawyer to discipline who, in the client’s best interest, should not make reasonable efforts to expedite litigation.

B. SECTION OF GENERAL PRACTICE

The amendment would delete Rule 3.2 in its entirety.

Comments of the Sponsor
The rule is stated in such vague terms as to be meaningless.

C. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would delete Rule 3.2 in its entirety.

Comments of the Sponsor
Court rules and statutes of limitations now provide every incentive for expediting litigation. To make this subject to discipline is redundant.

D. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would revise Rule 3.2 by deleting the obligation to expedite litigation consistent with the client’s interest and substitute a prohibition on delaying litigation merely to harass or injure another.
Rule 3.2 (A)

PHILADELPHIA BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.2

RULE 3.2  EXPEDITING LITIGATION

[A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.]

Proposed Amendment: Delete Rule in its entirety and substitute the following:

“A lawyer shall not unreasonably impede or delay litigation.”
SECTION OF GENERAL PRACTICE and
CUYAHOGA COUNTY BAR ASSOCIATION
PROPOSED AMENDMENT TO RULE 3.2

RULE 3.2  EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
NEW YORK STATE BAR ASSOCIATION

Proposed Amendment to Rule 3.2

RULE 3.2  EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client not knowingly delay litigation when such action would serve merely to harass or maliciously injure another.
RULE 3.3  CANDOR TOWARD THE TRIBUNAL

Model Rule Text:

(a) A lawyer shall not knowingly:

    (1) Make a false statement of material fact or law to a tribunal;

    (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

    (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

    (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
Proposed Amendments:

A. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would modify Rule 3.3 in four respects. First, the amendment would add language to (a)(1) providing that a lawyer shall not fail to disclose that which he is required by law to reveal, provided that in a criminal case disclosure is not required to the prosecutor or tribunal of evidence adverse to the accused, except as provided by law.

Second, it would delete paragraph (a)(2) in its entirety.

Third, it would delete the last sentence of (a)(4).

Comments of the Sponsor

Proposed Rue 3.3(a)(4) as drafted, requires a standard (“falsity”) that, if not modified, is totally unrealistic in the context of litigation. The proposed rule would require the lawyer to practice at his or her peril for there are very few, if any, absolute blacks and whites at trial.

Fourth, it would delete paragraph (b) in its entirety.

B. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 3.3 in five respects. First, it would eliminate paragraph (a)(2).

Comments of the Sponsor

Not disclosing a client’s confidence would not constitute “assisting” a criminal or fraudulent act by the client. This amendment restores the exception contained in DR7-102(B) of the Code as interpreted by ABA 341 (1975).

Second, it adds a qualification in paragraph (a)(3) to make clear that the lawyer’s obligation to take reasonable remedial measures to correct false evidence does not include disclosure of client confidences.

Comments of the Sponsor

The lawyer should call upon his client to rectify the fraud, but should not take the additional step of disclosure of confidences.
Rule 3.3

Third, it would strike the requirement in paragraph (b) that the lawyer disclose the client’s confidences, even if they are protected by Rule 1.6.

Fourth, it would eliminate paragraph (c) in its entirety.

Comments of the Sponsor
The appropriate standard is contained in paragraph (a)(4) which prohibits the introduction of evidence the lawyer knows to be false.

Fifth, it would eliminate paragraph (d) in its entirety.

Comments of the Sponsor
Given the other obligations of the Rule and the sophistication of the courts, no rule is necessary, whereas (d) is so broad and subject to hindsight interpretation as to be unwise.

C. NEW YORK COUNTY LAWYERS’ ASSOCIATION

Supports the amendment proposed by the New York State Bar Association.

D. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment adds an exception to the disclosure requirements of (a)(2) to incorporate information protected from disclosure under Rule 1.6. The amendment would also add “including where necessary, prompt disclosure to the tribunal” to (a)(4).

Comments of the Sponsor
The exception proposed is consistent with the existing Code. DR 7-102(B)(1) does not require a lawyer to reveal to a tribunal the fact that his client has committed a fraud “when the information is protected as a privileged communication.” See the comments to preceding rules in support of the change to “or otherwise intentionally tortious act.”

E. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would add language to (a)(2) which reads “subject to the provisions of Rule 1.6 regarding confidential information.”

Comments of the Sponsor
This Rule and Rule 4.1(b) would require the lawyer to reveal confidential information obtained from the client under the circumstances
stated in those Rules. It is vital to the lawyer-client relationship that the lawyer should never be required to reveal such information although he may do so in the exercise of sound judgment under certain very limited circumstances.

F. IOWA STATE BAR ASSOCIATION

The amendment would eliminate paragraph (a)(3) in its entirety.

G. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would modify Rule 3.3 in five respects. First, it would delete paragraph (a)(3) regarding disclosure of legal authority to a tribunal.

Second, it would delete the requirement in paragraph (a)(4) that a lawyer take reasonable remedial measure upon a subsequent discovery that evidence offered by the lawyer is false, except as covered in (a)(1).

Third, the amendment would add new provisions that would distinguish between criminal cases and civil cases for purposes of applying the rule prohibiting introduction of evidence known to be false.

Fourth, the amendment would strike the cross-reference to Rule 1.6 in paragraph (b).

Fifth, the amendment would eliminate the requirement in paragraph (d) that a lawyer apprise the court of all relevant facts if involved in an ex-parte proceeding, and substitute the requirement that the lawyer not knowingly mislead the court as to the facts.

H. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would modify Rule 3.3 in two respects. First, it would revise the language of paragraph (b) so as to require disclosure of a subsequently discovered offering of false evidence “unless such disclosure is prohibited by Rule 1.6.”
Second, it would add a provision to the effect that a lawyer, who is prohibited by Rule 1.6 from disclosing the fact that evidence previously offered by the lawyer is false, is permitted to withdraw unless withdrawal is prohibited by Rule 1.16.

I. RULE 3.3

The amendment would delete paragraph (c) in its entirety.

Comments of the Sponsor
When a lawyer does not know of his or her own knowledge that the evidence is untrue, the client’s decision and direction must govern.

J. SECTION OF CRIMINAL JUSTICE

The amendment would modify Rule 3.3 so as to prohibit a lawyer from disclosing that evidence offered by the lawyer at trial has subsequently been discovered to be false during the proceeding.

Moreover, the amendment would require a lawyer to permit a criminal defendant to testify in his own behalf despite knowledge that the client will testify falsely. The amendment would prohibit assisting such testimony unless required to do so by rules of confidentiality, and would prohibit using the false testimony in argument to the jury unless required to do so by rules of confidentiality.

K. STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

The amendment is identical to that proposed by the Section of Criminal Justice.

L. BEVERLY HILLS BAR ASSOCIATION

Supports the amendment proposed by the Section of Criminal Justice.
M. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

The amendment is substantially identical to that proposed by the Section of Criminal Justice.

N. SECTION OF GENERAL PRACTICE (GP Rule 4.2(d) and 4.6)

The amendment would delete Rule 3.3 in its entirety. However, the Section of General Practice would propose a new Rule (numbered 4.2(d)), which would prohibit “knowingly filing a materially false pleading, present materially false evidence, or make a materially false representation to a court or other tribunal.” The Section’s proposed Rule 4.6 also deals with the same general subject.
Rule 3.3 (A)

CUYAHOGA COUNTY BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.3

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal; not shall a lawyer fail to disclose that which he is required by law to reveal; provided that in a criminal case the lawyer is not required to apprise the prosecutor or the tribunal of evidence adverse to the accused, except as otherwise provided by law.

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO MODEL RULE 3.3

Rule 3.3  CANDOR TOWARD THE TRIBUNAL

(a)  A lawyer shall not knowingly:

(1)  Make a false statement of material fact or law to a tribunal:

(2)  Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3)  Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4)  Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures but shall not disclose information protected by Rule 1.6.

(b)  The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c)  A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d)  In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
D. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The revision also deletes from (b) the provision that (a) obligations would apply “even if compliance requires disclosures of information otherwise protected by Rule 1.6.”
RULE 3.3  CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) as appears

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal, or fraudulent, or otherwise intentionally tortious act by the client, except where disclosure is barred by Rule 1.6.

(3) as appears

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures including, where necessary and not barred by Rule 1.6, prompt disclosure to the tribunal.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

[(c) and (d) as appears].
RULE 3.3  CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make false statement of material fact or law to a tribunal;

(2) Subject to the provisions of Rule 1.6 regarding confidential information, fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.
RULE 3.3  CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to
    avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction
    known to the lawyer to be directly adverse to the position of the client and not disclosed
    by opposing counsel; or

(4) Except as provided in paragraph (b), offer evidence that the lawyer knows
    to be false. If a lawyer has offered material evidence and comes to know of its falsity, the
    lawyer shall take reasonable remedial measures.

(b) A lawyer for a defendant in a criminal case may withdraw pursuant to Rule 1.6(b)
    where a client demands that he or she be permitted to testify and the lawyer knows that the
    testimony is false, or may offer testimony of a client who demands that he or she be permitted to
    testify in his or her own behalf, regardless of the lawyer’s knowledge that the testimony is false,
    provided:

(1) The lawyer shall not assist the client in preparing such testimony; and

(2) The lawyer shall not assist the client in testifying to the extent necessary to
    avoid revealing to the fact finder the lawyer’s knowledge that the testimony is false; and

(3) The lawyer shall not refer to such testimony in his argument to the fact
    finder unless the circumstances of the case require such a reference in order to avoid
    revealing to the fact finder the lawyer’s knowledge that the testimony is false; and
(4) The lawyer shall not offer any evidence to corroborate the false testimony of the client.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(e) In an ex parte proceeding, a lawyer shall not knowingly make a statement which a lawyer should reasonably know would result in a misapprehension of material fact by the court. Inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
H. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would:

1. add language to (a)(2) “unless such disclosure is prohibited by Rule 1.6;”

2. delete the last sentence of (a)(4).

3. delete the last phrase of (b).

4. add new sections (c) and (d) requiring the lawyer to disclose to the tribunal if he comes to know of the falsity of material evidence unless such disclosure is prohibited by Rule 1.6, and if such disclosure is prohibited by Rule 1.6, he shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses, the lawyer may seek to withdraw in accordance with Rule 1.16.

5. add a Caveat that constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in the rule.

The College strongly agrees that an attorney’s duty to his client does not include lying or presenting false evidence to a tribunal. However, proposed Rule 3.3 with regard to disclosure is inconsistent with the College’s position of Rule 1.6 insofar as it may require the disclosure of client confidences.
AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 3.3

RULE 3.3  CANDOR TOWARD THE TRIBUNAL

Model Rule Text:

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to
    avoid assisting a criminal or fraudulent act by the client unless such disclosure is
    prohibited by Rule 1.6;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction
    known to the lawyer to be directly adverse to the position of the client and not disclosed
    by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered
    material evidence and comes to know of its falsity, the lawyer shall take reasonable
    remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding. And apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall disclosure the fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall make reasonable efforts to convince the client to consent to disclose. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.
(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Caveat: Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this Rule.
STATE BAR OF MICHIGAN

PROPOSED AMENDMENT TO RULE 3.3

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

Model Rule Text:

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to
avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction
known to the lawyer to be directly adverse to the position of the client and not disclosed
by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered
material evidence and comes to know of its falsity, the lawyer shall take reasonable
remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding,
and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts
known to the lawyer that should be disclosed to permit the tribunal to make an informed
decision, whether or not the facts are adverse.
Rule 3.3  (J), (K) & (L)

CRIMINAL JUSTICE SECTION
AND STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS

PROPOSED AMENDMENT TO RULE 3.3

RULE 3.3  CANDOR TOWARD THE TRIBUNAL

(a)  A lawyer shall not knowingly:

   (1)  Make a false statement of material fact or law to a tribunal;

   (2)  Fail to disclose a material fact to a tribunal when disclosure is necessary to
        avoid assisting a criminal or fraudulent act by the client;

   (3)  Fail to disclose to the tribunal legal authority in the controlling jurisdiction
        known to the lawyer to be directly adverse to the position of the client and not disclosed
        by opposing counsel; or

   (4)  Offer evidence that the lawyer knows to be false.  If a lawyer has offered
        material evidence, concerning a person other than his or her client, and comes to know of
        its falsity, the lawyer shall take reasonable remedial measures.

(b)  The duties stated in paragraph (a), concerning a person other than his or her client,
     continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of
     information otherwise protected by Rule 1.6.

(c)  A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d)  In an exparte proceeding, a lawyer shall inform the tribunal of all relevant facts
     known to the lawyer that should be disclosed to permit the tribunal to make an informed
     decision, whether or not the facts are adverse.

(e)  Notwithstanding subsections (a) through (d), a lawyer for a defendant in a
     criminal case shall not disclose that the client has perpetrated a fraud or testified falsely.
     However if the lawyer knows that the client will testify falsely, the lawyer shall:

     (1)   Counsel the client against such testimony; and
     (2)   Not assist the client in preparing such testimony; and
     (3)   Not assist the client in testifying except to the extent necessary to avoid
           revealing to the fact finder the lawyer’s knowledge that the testimony is false; and
     (4)   Not refer to such testimony in the lawyer’s argument to the fact finder
           unless the circumstances of the case require such a reference in order to avoid revealing
           to the fact finder the lawyer’s knowledge that the testimony is false.
RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. In a criminal proceeding it must be information a lawyer knows to be false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

(e) Notwithstanding subsections (a) through (d), a lawyer for a defendant in a criminal case shall not disclose that the client has perpetrated a fraud. However, if the lawyer knows that the client will testify falsely, the lawyer shall:

(1) Counsel the client against such testimony;

and

(2) Not assist the client in preparing such testimony; and
(3) Not assist the client in testifying except to the extent necessary to avoid revealing the lawyer’s knowledge that the testimony is false; and

(4) Not refer to such testimony in the lawyer’s argument to the fact finder unless the circumstances of the case require such a reference in order to avoid revealing the lawyer's knowledge that the testimony is false.

(f) When revealing such information, a lawyer shall use all reasonable means to protect a client’s interest and to avoid disclosure that is not absolutely necessary.
N. SECTION OF GENERAL PRACTICE

The amendment would:

1. delete (a)(2) and (3) in their entirety and delete the second sentence of (a)(4).

2. amend (b) to state that the duties in “this Rule” continue to the conclusion of the proceeding.

3. replace (c) with language requiring disclosure to the tribunal of material evidence which is learned to be false, unless such disclosure is prohibited by Rule 1.6.

4. replace (d) with language requiring the lawyer to make a reasonable effort to convince the client to consent to disclosure of false evidence, and if the client refuses, may seek to withdraw in accordance with Rule 1.16.

5. add a new paragraph (e) permitting the lawyer to refuse to offer evidence that the lawyer believes to be false, and if the client insists, may withdraw if permitted by Rule 1.16.

6. add a new (f) stating that notwithstanding (a) through (e), applicable law defining the right to counsel in criminal cases may supercede the obligation stated in the rule. The lawyer’s good faith efforts to comply with that law shall constitute a complete defense in any disciplinary proceeding.
SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 3.3

RULE 3.3  CAN DOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in this Rule paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6. The lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

(e) A lawyer may refuse to offer evidence that the lawyer believes to be false; and if the client nonetheless insists on the presentation of that evidence, may, if permitted to do so by Rule 1.16, withdraw.

(f) Notwithstanding paragraphs (a) through (e) applicable law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this Rule and the lawyer’s good faith efforts to comply with that law shall constitute a complete defense in any disciplinary proceeding against the lawyer.
The amendment would substitute “material” for “relevant” in (d) in order to be consistent with (a)(1), (2) and (4). Since the two terms do not mean the same thing, the amendment is offered for purposes of internal consistency and to render the rule consistent with other rules of conduct.
SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW
AND
AMERICAN PATENT LAW ASSOCIATION

RULE 3.3  CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant material facts known to the lawyer that should be disclosed to permit which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
RULE 3.3

P. THE IOWA STATE BAR ASSOCIATION

The amendment proposes to strike (a)(1) and (2) and all but the first sentence in (3). It also proposes to strike a portion of (b) and adds a new (c) providing that if the lawyer has offered evidence and comes to know of its falsity, he shall advise the tribunal unless prohibited by the confidentiality rule.

The amendment would also strike (c) and add a new (d) providing that if the lawyer has offered evidence and learns of its falsity but is prohibited by the rule on confidentiality from making disclosure, he or she shall make reasonable efforts to convince the client to allow disclosure, and upon failure to convince the client, he or she may withdraw.

The amendment proposes striking (d).

Comments of the Sponsor

It places an undue burden on the lawyer and other provisions of the code protect the court.

The amendment also proposes adding a new (e) providing that if the client insists on offering false evidence the lawyer may withdraw.

It also proposes adding a new (f) which would protect the lawyer if he or she is unable to make disclosure because of constitutional provisions.
THE IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.3

RULE 3.3  CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in this Rule paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
(e) A lawyer may refuse to offer evidence that the lawyer believes to be false; and if the client nonetheless insists on the presentation of that evidence, may, if permitted to do so by Rule 1.16, withdraw.

(f) Notwithstanding paragraphs (a) through (e), a lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with the requirements of applicable law defining the right to assistance of counsel in criminal cases.
Q. NORTH CAROLINA BAR ASSOCIATION

The amendment would restate (a)(2) to read “fail to disclose that which he is required by law to reveal.”

Proponents maintain that the language of DR 7-102(A)(3) is more appropriate than that proposed.
NORTH CAROLINA BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.3

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

Model Rule Text:

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; that which he is required by law to reveal;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

Model Rule Text:

A lawyer shall not:

(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter than the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
Proposed Amendments:

**A. AMERICAN COLLEGE OF TRIAL LAWYERS**

The amendment would modify paragraph (a) of Rule 3.4 so as to prohibit alteration, destruction of concealment of evidence the lawyer knows to be “relevant to a pending proceeding.”

**B. LOS ANGELES COUNTY BAR ASSOCIATION**

The amendment would modify Rule 3.4 in five respects. First, it would revise paragraph (a) by substituting for the standard “potential evidentiary value” a standard “material that a lawyer knows or reasonably should know is relevant to a pending proceeding or one that can be reasonably expected.”

Second, the amendment would strike paragraph (c) in its entirety.

Third, it would delete paragraph (d) in its entirety.

*Comments of the Sponsor*

This is not a matter governed by Rules of Conduct but rather by Rules of Practice.

Fourth, it would delete paragraph (e) in its entirety and substitute a provision prohibiting only assertion by the lawyer of a personal opinion of the guilt or innocence of an accused.

*Comments of the Sponsor*

This matter should be covered by Rules of Procedure rather than Rules of Conduct.

Fifth, the amendment would delete paragraph (f) in its entirety.

*Comments of the Sponsor*

This is a Rule of Practice rather than a Rule of Conduct.
C. PHILADELPHIA BAR ASSOCIATION

The amendment would delete paragraph (d).

Comments of the Sponsor
The proposed Rule would move sanctions for discovery abuse from being the responsibility of the trial judge to the disciplinary process.

The amendment would also delete subparagraphs (f)(1) and (g)(2).

Comments of the Sponsor
The proposed rule oversteps the boundaries of fair play of the adversary system in requiring lawyers to inform third party witnesses that they may volunteer their testimony to the adverse party before trial or before being contacted by the other side.

D. YOUNG LAWYERS DIVISION

The amendment would delete paragraph (d) in its entirety.

E. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would eliminate paragraphs (d), (e) and (f) in their entirety. The substantive effect of such an amendment is the same as the amendment proposed by the Los Angeles County Bar Association.

Comments of the Sponsor
The effects of paragraph (d), (e) and (f) is to destroy advocacy and requires the lawyer to practice at his or her peril. The proposed rule totally ignores the dynamics of litigation.

F. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 3.4 in two respects. First, it would change the prohibition in paragraph (d) from “failing to make a reasonably diligent effort to comply” with a discovery request to “advising a client not to make” such an effort.
The primary responsibility for compliance is the client’s, not the lawyer’s, and further, the extent of any obligation of the lawyer should be left to development by the courts.

Second, the amendment would strike paragraph (f) in its entirety.

Comments of the Sponsor
The prohibition should not go beyond unlawfully obstructing access to evidence. There may often be valid reasons for adverse counsel to suggest that a third party witness insist upon compulsory process or examination in the more open context of a deposition.

G. IOWA STATE BAR ASSOCIATION

The amendment would delete from paragraph (e) the provision prohibiting a lawyer from stating “a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or, the guilt or innocence of an accused.”

H. SECTION OF GENERAL PRACTICE (GP Rules 4.1 through 4.6)

The amendment would eliminate Rule 3.4 in its entirety. However, the Section of General Practice proposals do contain provisions bearing on the subject matter of parts of Rule 3.4 in the Section’s proposed Rules 4.1 through 4.6.

I. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment adds paragraphs (g), (h) and (i) relating to courtesy on the part of the lawyer.

Comments of the Sponsor
These added paragraphs add the language of DR 7-1016(C)(5), (6), and (7) of the present Code.
Rule 3.4  (A)

AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 3.4

RULE 3.4  FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request, or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and
Rule 3.4 (A) cont.

(2) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
RULE 3.4  FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value that the lawyer knows or reasonably should know is relevant to a pending proceeding or one that can be reasonably expected. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(e) Knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request, or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(c) (e) In trial, assert a personal opinion of the guilt or innocence of an accused. Allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

   (1) The person is a relative or an employee or other agent of a client; and

   (2) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
PROPOSED AMENDMENT TO RULE 3.4(d), f(1), and f(2)

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

[… (d) In pretrial procedure, make a frivolous discovery request that has no reasonable basis, or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;]

[(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.]

(d) Proposed Amendment: Delete Rule in its entirety

(f)(1) and (f)(2) Proposed Amendment: Delete Rules in their entirety
RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request, or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
Rule 3.4  (E)

CUYAHOGA COUNTY BAR ASSOCIATION
PROPOSED AMENDMENT TO RULE 3.4

RULE 3.4  FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter than the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

   (1) The person is a relative or an employee or other agent of a client; and

   (2) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.4

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to advise a client not to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) In trial, allude to any matter than the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
RULE 3.4  FAIRNESS TO OPPOSING PARTY AND COUNSEL

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.
SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 3.4

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

Model Rule Text:

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.
SECTION OF GENERAL PRACTICE PROPOSED RULES

LIMITS ON ADVOCACY

RULE 4.1

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.

RULE 4.2

A lawyer shall not knowingly

(a) Encourage a client to engage in illegal conduct, except in a good faith effort to test the validity or scope of the law.

(b) Participate in unlawfully concealing or destroying evidence, or discourage a witness or potential witness from talking to counsel for another party.

(c) Participate in creating perjured testimony, other false evidence, or a misrepresentation upon which another person is likely to rely and suffer material detriment.

(d) File a materially false pleading, present materially false evidence, or make a materially false representation to a court or other tribunal.

RULE 4.3

A lawyer shall not give legal advice to a person who the lawyer knows is not represented by a lawyer, other than the advice to secure counsel, when the lawyer knows that the interests of that person are in conflict or likely to be in conflict with the interests of the lawyer’s client.
SECTION OF GENERAL PRACTICE PROPOSED RULES

RULE 4.4

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.

RULE 4.5

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.

RULE 4.6

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 2.2, which proscribes unauthorized divulgence of a client’s confidence.
Rule 3.4  (I)

INDIANA STATE BAR ASSOCIATION – SPECIAL COMMITTEE

PROPOSED AMENDMENT TO RULE 3.4

RULE 3.4  FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a)   Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b)   Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c)   Knowingly disobey an obligation under the Rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d)   In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e)   In trial, allude to any matter than the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f)   Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

   (1)   The person is a relative or an employee or other agent of a client; and

   (2)   The lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

(g)   Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
(h) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(i) Intentionally or habitually violate any established rule of procedure or of evidence.
RULE 3.5  IMPARTIALITY AND DECORUM OF THE TRIBUNAL

Model Rule Text:

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate ex parte with such a person except as permitted by law; or

(c) Engage in conduct intended to disrupt a tribunal.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE  (GP Rule 4.6)

This amendment would delete Rule 3.5 in its entirety. A substitute provision (numbered as Rule 4.6) provides “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 2.2, which proscribes unauthorized divulgence of a client’s confidence.”

B. CUYAHOGA COUNTY BAR ASSOCIATION

This amendment would delete the provision in paragraph (c) that a lawyer shall not engage in conduct intended to disrupt a tribunal.

Comments of the Sponsor

Paragraph (c) gives a hunting license to an abusive or unqualified judge and particularly forecloses vigorous advocacy for an unpopular client.
Rule 3.5 (A)

SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 3.5

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

Model Rule Text:

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate ex parte with such a person except as permitted by law; or

(e) Engage in conduct intended to disrupt a tribunal.
SECTION OF GENERAL PRACTICE PROPOSED RULE

RULE 4.6

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 2.2, which proscribes unauthorized divulgence of a client’s confidence.
Rule 3.5 (B)

CUYAHOGA COUNTY BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.5

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate ex parte with such a person except as permitted by law; or

(e) Engage in conduct intended to disrupt a tribunal.
RULE 3.6  TRIAL PUBLICITY

Model Rule Text:

(a) A lawyer shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantially likelihood of materially prejudicing an adjudicative proceeding. An extrajudicial statement, other than one permitted by paragraph (b), ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, or a criminal matter or proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(b) A lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of a person involved, when there is reason to believe that such danger exists; and

(7) In a criminal case:

   (i) The identity, residence, occupation and family status of the defendant or suspect;

   (ii) If the defendant or suspect has not been apprehended, information necessary to aid in apprehension of that person;

   (iii) The fact, time and place of arrest; and

   (iv) The identity of investigating and arresting officers or agencies and the length of the investigation.
Proposed Amendments:

A. STATE BAR OF MICHIGAN

The amendment would add to paragraph (a) a new subsection (6) which would require that a press release indicating that a defendant has been charged with a crime include a statement that the charge is merely an accusation and that the defendant is presumed innocent until proven guilty.

B. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would delete Rule 3.6 in its entirety and substitute a standard to the effect that “a lawyer should try his cases in court and not in the newspapers or through other news media.” The amended provision would apply to “material concerning a case…which might reasonably be expected to interfere in any manner or to any degree with a fair trial…or otherwise prejudice the due administration of justice.”

C. LOS ANGELES COUNTY BAR

The amendment would delete from paragraph (a) the second sentence and subparagraphs (a)(1) through (a)(5). The amendments would limit the application of the Rule to statements to the media.

D. THE CHICAGO BAR ASSOCIATION

The amendment would eliminate the test in paragraph (a) that a prohibited public statement have a “substantial likelihood” of prejudicing a fair trial. The amendment would substitute a test that the prohibited public statement “pose a serious and imminent threat” to a fair trial.
E. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment adds a caveat to the end of the Rule stating that constitutional law concerning such statement may supersede the obligations stated in this Rule.

Comments of the Sponsor

The Comment notes the constitutional law problems connected with Rule. In order to alert the bar to those problems, the caveat should be added at the end of the Rule.
Rule 3.6 (A)

State Bar of Michigan
Amendment 4

Add a subsection (6) to Rule 3.6(a) providing: The release of a public statement in a criminal case that a defendant has been charged with a crime without including therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
RULE 3.6 TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantially likelihood of materially prejudicing an adjudicative proceeding. An extrajudicial statement, other than one permitted by paragraph (b), ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, or a criminal matter or proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(b) A lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim or defense;

(2) The information contained in a public record;
(3) — That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) — The scheduling or result of any step in litigation;

(5) — A request for assistance in obtaining evidence and information necessary thereto;

(6) — A warning of danger concerning the behavior of a person involved, when there is reason to believe that such danger exists; and

(7) — In a criminal case:

(i) — The identity, residence, occupation and family status of the defendant or suspect;

(ii) — If the defendant or suspect has not been apprehended, information necessary to aid in apprehension of that person;

(iii) — The fact, time and place of arrest; and

(iv) — The identity of investigating and arresting officers or agencies and the length of the investigation.

A lawyer should try his cases in court and not in the newspapers or through other news media. He should not publish, cause to be published, or aid or abet in any way, directly or indirectly, the publication in any newspaper or other documentary medium, or by radio, television or other device, of any material concerning a case on trial or any pending or anticipated litigation, calculated or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice. If extreme circumstances of a particular case requires a statement to the public, it should not be made anonymously and reference to the facts should not go beyond quotation from the records and papers on file in court or other official documents. No statement should be made which indicates intended proof of what witnesses will be called, or which amounts to comment or argument on the merits of the case.
(a) A lawyer shall not make, directly or indirectly, an extrajudicial statement to the media that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. An extrajudicial statement, other than one permitted by paragraph (b), ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, or a criminal matter or proceeding that could result in incarceration, and the statement relates to:

1. The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

2. In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;

3. The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

4. Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

5. Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(b) A lawyer involved in the investigation or litigation of a matter may state without elaboration:
Rule 3.6 (C) cont.

(1) The general nature of the claim or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigations, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
CHICAGO BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.6

RULE 3.6  TRIAL PUBLICITY

  (a) A lawyer shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing pose a serious and imminent threat to the fairness of an adjudicative proceeding.

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RULE 3.6  TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. An extrajudicial statement, other than one permitted by paragraph (b), ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, or a criminal matter or proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(b) A lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim or defense;
Rule 3.6 (E) cont.

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of a person involved, when there is reason to believe that such danger exists; and

(7) In a criminal case:

   (i) The identity, residence, occupation and family status of the defendant or suspect;

   (ii) If the defendant or suspect has not been apprehended, information necessary to aid in apprehension of that person;

   (iii) The fact, time and place of arrest; and

   (iv) The identity of investigating and arresting officers or agencies and the length of the investigation.

Caveat: Constitutional law concerning such statement may supersede the obligations stated in this Rule.
F. THE FLORIDA BAR

The amendment would modify (a) to include a “reasonable person” standard and would amend (b) to expand the applicable area to any proceedings that could result in incarceration.
THE FLORIDA BAR

PROPOSED AMENDMENT TO RULE 3.6

RULE 3.6  TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantially likelihood of materially prejudicing an adjudicative proceeding:

(b) An extrajudicial statement, other than one permitted by paragraph (b), ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, or a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness:

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;
(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) (b) Notwithstanding the foregoing, a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of a person involved, when there is reason to believe that such danger exists there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) In a criminal case:

(i) The identity, residence, occupation and family status of the defendant or suspect accused;

(ii) If the defendant or suspect accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) The fact, time and place or arrest; and

(iv) The identity of investigating and arresting officers or agencies and the length of the investigation.
RULE 3.7 LAWYER AS WITNESS

Model Rule Text:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
Proposed Amendment:

A. LOS ANGELES COUNTY BAR ASSOCIATION
   The amendment would strike Rule 3.7 in its entirety and substitute the provisions of the California Code.

B. BEVERLY HILLS BAR ASSOCIATION
   Supports the amendment proposed by the Los Angeles County Bar Association.

C. SECTION OF GENERAL PRACTICE
   The amendment would eliminate Rule 3.7 in its entirety.
RULE 3.7  LAWYER AS WITNESS

(a) — A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) — The testimony relates to an uncontested issue;

(2) — The testimony relates to the nature and value of legal services rendered in the case; or

(3) — Disqualification of the lawyer would work substantial hardship on the client.

(b) — A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

(a) If upon or after undertaking employment, a lawyer knows or should know that the lawyer ought to be called as a witness on behalf of the lawyer’s client in litigation concerning the subject matter of such employment, the lawyer may continue employment only with the written consent of the client given after the client has been fully advised regarding the possible implications of such dual role as to the outcome of the client’s cause and has had a reasonable opportunity to seek the advice of independent counsel on the matter. In civil proceedings, the written consent of the client shall be filed with the court not later than the commencement of trial. In criminal proceedings, the written consent need not be filed with the court but the lawyer has the duty, before testifying, of satisfying the court that such consent has been obtained from the client if representing the defendant. The lawyer may continue employment and the client’s consent need not be obtained in the following circumstances:

(1) If the lawyer’s testimony will relate solely to an uncontested matter; or

(2) If the lawyer’s 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; or
Rule 3.7 (A) & (B) cont.

(3) If the lawyer’s 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; or

(4) If the lawyer is representing the people, if the lawyer obtains the consent of the head of the particular office representing the people, and if the lawyer’s continued representation is not inconsistent with the principles of recusal.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns that or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.
SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 3.7

RULE 3.7—LAWYER AS WITNESS

Model Rule Text:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Model Rule Text:

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; and

(d) Make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
Proposed Amendments:

A. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

The amendment would delete from paragraph (a) the term “knows” and substitute therefore the terms “reasonably should know.”

B. ROBERT WEINBERG

The amendment would strike from paragraph (d) “supports the innocence” and substitute therefore “tends to negate the guilt,” which imposes a greater obligation of disclosure on the prosecution.

C. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would change the requirement for disclosure in paragraph (d) “that supports innocence or mitigates the offense” to “that is required by law to be so disclosed.”

Comments of the Sponsor
Paragraph (d) overstates the prosecutor’s legal obligation to disclose. The ethical standard should follow, and allow for further changes in, the governing law.

D. SECTION OF GENERAL PRACTICE (GP Rule 4.7)

The amendment would renumber Rule 3.8 and would add to paragraph (d) a requirement that a prosecutor “make reasonable effort to seek all evidence, whether or not favorable to the defendant.” The amendment would also delete from paragraph (d) the exception to the prosecutor’s disclosure obligation when the prosecutor is relieved of such obligation by a protective order of the court.

Comments of the Sponsor
The Section used the 1981 Draft as Section Rule 4.7. The changes made in the 1982 Draft appear to be an improvement.
RULE 3.8  SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows reasonably should know is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; and

(d) Make timely disclosure to the defense of all evidence known to the prosecutor reasonably should know that supports innocence or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
Replace paragraph (d) with the following language:

“Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

Note: The language from “or mitigates” to the end of the paragraph is unchanged from the Proposed Final Draft. The language “that tends to negate the guilt of the accused” is taken from DR 7-103(B) of the present Code. The words “or information” are added after “evidence”.

NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 3.8

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

* * *

(d) Make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense, that is required by law to be so disclosed, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
D. SECTION OF GENERAL PRACTICE

The amendment modifies (d) to replace “evidence” with “information to the extent required by law to be disclosed.”

Proponents maintain that a prosecutor should disclose information supporting innocence of mitigating the offense, even though the information is not or not contemplated to be evidence in the criminal proceeding.
RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; and

(d) Make timely disclosure to the defense of all information evidence to the extent required by law to be disclosed and known to the prosecutor that supports innocence or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
E. THE FLORIDA BAR

The amendment would add a new paragraph (e) which makes a prosecutor responsible for the actions of other personnel in his office or association with him on the case.
THE FLORIDA BAR

PROPOSED AMENDMENT TO RULE 3.8

RULE 3.8  SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; and

(d) Make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
RULE 3.9  ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

Model Rule Text:

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.
Proposed Amendments:

SECTION OF GENERAL PRACTICE

The amendment would delete Rule 3.9 in its entirety.
Rule 3.9 (A)

SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 3.9

RULE 3.9—ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

Model Rule Text:

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.
Rule 4.1

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

Model Rule Text:

(a) In representing a client a lawyer shall not knowingly:

(1) Make a false statements of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
Proposed Amendments:

A. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would add at the beginning of (a) “subject to the provisions of Rule 1.6 regarding confidential information,” and delete paragraph (b).

Comments of the Sponsor
A literal reading of this Rule require defense counsel in both a criminal case and in a civil fraud cause to disclose to the court or to opposing counsel any material facts known to defense counsel received from any source, including the client, which would help opposing counsel win the case.

B. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would delete paragraph (a)(2).

The amendment would also eliminate paragraph (b) in its entirety.

C. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment is identical to that proposed by the American College of Trial Lawyers.

Comment of the Sponsor
The proposed rule simply goes too far in destroying confidentiality and requires that judgments be made without the benefit of hindsight.

D. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment is identical to the amendment proposed by the American College of Trial Lawyers.

Comment of the Sponsor
As to (a)(2), merely failing to disclose the client’s confidences would not constitute “assisting” a criminal or fraudulent act by the client. As to (b), any requirement to disclose information protected by Rule 1.6 is objectionable.
E. NEW YORK COUNTY LAWYERS’ ASSOCIATION

Supports the amendment proposed by the New York State Bar Association.

F. SECTION OF CRIMINAL JUSTICE

The amendment would delete paragraph (b) in its entirety. This would eliminate any reference to the interplay between rules of confidentiality and prohibitions on fraudulent statement or fraudulent omission.

G. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

The amendment would move the cross-reference to the rules of confidentiality presently in paragraph (b) to paragraph (a)(2). (Would such movement of the cross-reference limit application of the cross-reference to fraudulent omissions, leaving unclear the relationship of rules of confidentiality to the prohibition of fraudulent statement?)

G. SECTION OF GENERAL PRACTICE (GP Rules 2.2. and 4.2(c))

The amendment would eliminate Rule 4.1 in its entirety. The Section of General Practice would propose in a new Rule (numbered 4.2(c)) a prohibition on “knowingly participating in a misrepresentation upon which another person is likely to rely and suffer material detriment.” The subject matter is also covered in the Section’s proposed Rule 2.2 on Confidentiality.

Comments of the Sponsor

This is a matter of confidentiality and should be dealt with in the rule on that subject. Except to the extent that a lawyer is serving a client, he has no obligation to third parties different from that of obligation to third parties different from that of other citizens. The provision in the Section’s Rule 4.2(c) makes it clear that a lawyer acting in his professional capacity is not thereby insulated from civil and criminal laws relating to perjury and fraud. There is nothing in the proposed rule which would limit its application to statements made to a court.
RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

(a) Subject to the provisions of Rule 1.6 regarding confidential information, in representing a client a lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
B. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would:

1. add “in the course of representing” a client to (a)(1) and (2), and add “unless disclosure is prohibited by Rule 1.6” to (a)(2).

2. delete (b) in its entirety.

The College objects to the proposed Rule insofar as it would require disclosure of client confidences. The College maintains the position that the lawyer shall not have the right to disclose his client’s confidence where disclosure is prohibited by the College’s proposed Rule 1.6.
AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 4.1

RULE 4.1  TRUTHFULNESS IN STATEMENTS TO OTHERS

Model Rule Text:

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) In the course of representing a client, fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6.
RULE 4.1  TRUTHFULNESS IN STATEMENTS TO OTHERS

In representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;

(c) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 4.1

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(c) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
Rule 4.1 (F)

CRIMINAL JUSTICE SECTION

PROPOSED AMENDMENT TO RULE 4.1

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(e) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
Rule 4.1 (G)

NATURAL LEGAL AID & DEFENDER ASSOCIATION

PROPOSED AMENDMENT TO RULE 4.1

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Except as noted in Section 1.6, fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(e) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
H. SECTION OF GENERAL PRACTICE

The amendment deletes the language of the proposed rule and replaces it with “in representing a client a lawyer shall not knowingly make a false statement of material fact of law.”
SECTION OF GENERAL PRACTICE

PROPOSED AMENDMENT TO RULE 4.1

RULE 4.1  TRUTHFULNESS IN STATEMENTS TO OTHERS

In representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law, to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;

(c) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
Section of General Practice Proposed Rules

Rule 2.2

Without a client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence, or use it in any way detrimental to the interests of the client, except that:

(a) 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.

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

Rule 4.2

A lawyer shall not knowingly

(a) Encourage a client to engage in illegal conduct, except in a good faith effort to test the validity or scope of the law.

(b) Participate in unlawfully concealing or destroying evidence, or discourage a witness or potential witness from talking to counsel for another party.

(c) Participate in creating perjured testimony, other false evidence, or a misrepresentation upon which another person is likely to rely and suffer material detriment.

(d) File a materially false pleading, present materially false evidence, or make a materially false representation to a court or other tribunal.
RULE 4.1

I. THE IOWA STATE BAR ASSOCIATION

The amendment would strike the rule.

Comments of the Sponsor

The rule is redundant. Other provisions of the proposed code already have the same requirement. It would be sufficient if the rule read “A lawyer shall be honest.”
RULE 4.1  TRUTHFULNESS IN STATEMENTS TO OTHERS

(a) In representing a client a lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent fact by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
J. NORTH CAROLINA BAR ASSOCIATION

The amendment would modify (a)(2) to substitute “required by law” for the last phrase, retaining the language in DR 7-102 (A)(3).
NORTH CAROLINA BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 4.1

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

Model Rule Text:

(a) In representing a client a lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is required by law.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
RULE 4.2  COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

Model Rule Text:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE (GP Rule 4.4)

The amendment would renumber Rule 4.2 as Rule 4.4 and add a provision permitting transmittal of an offer of settlement directly to an opposing party seven days after transmittal to that party’s counsel.

B. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would add to Rule 4.2 the phrase “or cause another to communicate.”

Comments of the Sponsor

This would prohibit a suggestion that the client contact the opposing party directly. Such a suggestion is prohibited under the existing Code.
A. SECTION OF GENERAL PRACTICE

The amendment would delete 4.2 in its entirety and restate the provision adding language permitting transmittal of an offer of settlement directly to an opposing party seven days after transmittal to that party’s counsel.
RULE 4.2  COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate on about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

RULE 4.2

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.
NEw YORK STATE BAR ASSOCIATION

Proposed Amendment to rule 4.2

RULE 4.2  COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
RULE 4.3 DEALING WITH UNREPRESENTED PERSON

Model Rule Text:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
Proposed Amendments:

A. SECTION OF GENERAL PRACTICE (GP Rule 4.3)

The amendment would delete Rule 4.3 in its entirety and substitute a prohibition on giving legal advice to an unrepresented person where the interests of a client are likely to conflict with the interests of the unrepresented person.

Comments of the Sponsor

The Section strongly opposes this rule in its present form. The Section’s Rule 4.3 is similar to existing DR 7-104(A)(2) of the Code, which simply provides that a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel. The proposed Model Rule, on the other hand, would place an affirmative obligation upon all lawyers which is far greater than the Code imposes and does it in terms so general as to invite claims being asserted against a lawyer by third parties who are not his clients.
RULE 4.3  DEALING WITH UNREPRESENTED PERSON

Model Rule Text:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
SECTION OF GENERAL PRACTICE PROPOSED RULE

RULE 4.3

A lawyer shall not give legal advice to a person who the lawyer knows is not represented by a lawyer, other than the advice to secure counsel, when the lawyer knows that the interests of that person are in conflict or likely to be in conflict with the interests of the lawyer’s client.
RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

Model Rule Text:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
Rule 4.4.

Proposed Amendments:

A. SECTION OF GENERAL PRACTICE

The amendment would delete Rule 4.4 in its entirety.

Comments of the Sponsor
The Model Rule is unnecessary at best. Why must we state that a lawyer must not violate legal rights of others? The last clause of the Model Rules implies that lawyers may have the right to violate legal rights of others if they do not do so in trying to obtain evidence.

B. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would delete Rule 4.4 in its entirety.

Comment of the Sponsor
The proposed rule calls for subjective standards that might well penalize effective advocacy. The proposed rule is vague, indefinite and without standards of measure.

C. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would delete the word “substantial.”

Comments of the Sponsor
As presently worded, the Rule could inhibit zealous advocacy and is inconsistent with the present Code.
SECTION OF GENERAL PRACTICE
AND CUYAHOGA COUNTY BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 4.4

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

Model Rule Text:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

COMMENT:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.
RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

Model Rule Text:

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

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

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

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
Proposed Amendments:

A. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would modify paragraph (a) and (b) by deleting the term “shall” and substituting “should endeavor.”

The amendment would also modify paragraph (c)(2) to delete any reference to partners.

Comments of the Sponsor
A lawyer should be responsible for the conduct of another lawyer in situations where the lawyer has “supervisory authority over the other lawyer.” If such supervisory authority exists, it would be immaterial whether the lawyer in question is a partner or not.

B. PENNSYLVANIA BAR ASSOCIATION

The amendment would modify paragraph (c)(1) by requiring “knowledge of the specific conduct” for a lawyer to be deemed to have ratified misconduct of another lawyer.

Comments of the Sponsor
The amendment improves the proposed rule by eliminating vicarious liability of those who have no knowledge and preserves liability for those who do have knowledge.

C. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would modify rule 5.1 (c)(2) by replacing “conduct at a time when its consequences can be avoided or mitigated” with “prospective violation before it occurs.” The amendment would also replace “remedial action” with “steps to prevent it.”
Rule 5.1

Comments of the Sponsor

It should be made clear that only when prospective conduct is involved need the lawyer take action. Otherwise, where the act had already occurred, one lawyer trying to take “remedial” action (whatever that might encompass) can be worse than useless, especially where one might be unsure as to whether a violation had actually occurred. Where the supposed violation has not yet occurred, mandatory intervention under penalty of discipline is unworkable and in some cases may cause more harm than doing nothing.
INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

PROPOSED REVISION OF RULE 5.1

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm should endeavor shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm other than lawyers in the firm over whom the partner has direct supervisory authority conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer should endeavor shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

[(1) as appears]

(2) The lawyer is a partner in the law firm in which the other lawyer is a partner or associate or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated reasonable remedial action could have prevented the violation or mitigated its consequences but fails to take such action.
Rule 5.1 (B)

PENNSYLVANIA BAR ASSOCIATION
PROPOSED AMENDMENT TO RULE 5.1

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

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

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

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

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated before it occurs but fails to take reasonable steps to prevent it remedial action.
RULE 5.1

D. THE IOWA STATE BAR ASSOCIATION

The amendment proposes to strike (a).

Comments of the Sponsor
It is unreasonable to ask someone in a law firm to oversee legal ethics. All lawyers are supposed to be bound by the rules.
THE IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 5.1

RULE 5.1   RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

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

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

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

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

Model Rule Text:

   (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

   (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

Proposed Amendments:

None
RULE 5.2

A. THE IOWA STATE BAR ASSOCIATION

The amendment proposes to strike (b).

Comments of the Sponsor
The proposal does not make sense. If it is an arguable question, there is probably no violation involved.
THE IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 5.2

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.
Rule 5.3

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

Model Rule Text:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
Proposed Amendments:

A. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would delete from paragraph (b)(2) reference to partners.

Comments of the Sponsor
Since vicarious responsibility for the other person’s misconduct depends upon the existence of “supervisory authority” over the other person, there is no need to deal specifically with a case of a partner.

B. STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

The amendment would modify Rule 5.3 in three respects. First, it would strike the term “direct” from paragraph (b).

Second, it would delete the term “direct” from paragraph (c)(2).

Third, it would modify paragraph (c)(2) by inserting the terms “reasonably should know.”
A. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The revision modifies (a) b deleting “shall” and substituting “should endeavor,” and amends (c)(2) to delete any reference to partners.
RULE 5.3 RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer,

(a) A partner in a law firm \textit{should endeavor} shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct of any person under the partner’s direct supervisory authority \textit{is} compatible with the professional obligations of the lawyer partner;

[(b) as appears].

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

[(1) as appears].

(2) The lawyer \textit{is} a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action \textit{could have prevented} such conduct or mitigated its consequences, but fails to take such action.
STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

PROPOSED AMENDMENT TO RULE 5.3

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable effort to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
RULE 5.3

C. THE IOWA STATE BAR ASSOCIATION

The amendment would strike (a).

Comments of the Sponsor
The proposal is unreasonable that a partner has to oversee everyone’s ethics. We are all bound by the rules.
THE IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 5.3

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(3) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

Model Rule Text:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.
Proposed Amendments:

A. SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES

The amendment would add to Rule 5.4 a requirement that the terms of the relationship be set forth in a writing. Other aspects of the amendment have already been incorporated into Rule 5.4.

B. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would modify Rule 5.4 in two respects. First, it would add a requirement of a writing. Second, it would prohibit all nonlawyer ownership of a financial interest in a law firm.

C. THE FLORIDA BAR

The amendment would delete Rule 5.4 in its entirety.

Comments of the Sponsor
The substance of existing DR3-103 and 5-107(c) should be retained to cover this area while maintaining the prohibition against non-lawyer ownership of law firms, either directly or indirectly.

D. STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

The amendment would modify Rule 5.4 in two respects. First, it would add a requirement that the terms of the relationship be set forth in a writing.

Second, it would add a prohibition on offering interests in a law firm on a public financing basis.
E. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 5.4 by adding two new paragraphs generally prohibiting financial interests in a law firm to be held by nonlawyers.

Comments of the Sponsor

Law partners and shareholders will ultimately interfere with the lawyer’s independence or professional judgment. However, the writing requirement in paragraph (c) should be eliminated on the grounds that the lawyer should not be subject to discipline as long as he or she exercises independent professional judgment.

F. NEW YORK COUNTY LAWYERS’ ASSOCIATION

Supports the amendment proposed by the New York State Bar Association.
Rule 5.4 (A)

SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES

PROPOSED AMENDMENT TO RULE 5.4

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER FIRM

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:

(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rules 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.
A. SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES

The amendment would add to Rule 5.4 a requirement that the terms of the relationship be set forth in writing. The amendment changes the language back to the May 1981 draft.
AMERICAN COLLEGE OF TRIAL LAWYERS
PROPOSED AMENDMENT TO RULE 5.4

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

RULE 5.4 PROFESSIONAL INDEPENDENCE

A lawyer shall not practice in a law partnership, professional law corporation or similar association in which a financial interest is owned by a non-lawyer, nor shall a lawyer practice with a firm in which managerial authority is exercised by a non-lawyer or by a lawyer acting in a capacity other than representing clients unless services can be rendered by the firm in accordance with the Rules of Professional Conduct. The terms of the relationship shall expressly provide in writing that:

(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.
A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(e) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.
STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

PROPOSED AMENDMENT TO RULE 5.4

RULE 5.4  PROFESSIONAL INDEPENDENCE OF A LAWYER FIRM

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that or representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:

(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(c) The arrangement does not involve The arrangement does not involve advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rules 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.

This Rule shall not be construed to allow law firms to offer an interest in the law firm to nonlawyers on a public financing basis.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO MODEL RULE 5.4

RULE 5.4  PROFESSIONAL INDEPENDENCE OF A LAWYER

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

(b) A lawyer may not be employed by a professional legal corporation if any of its directors, officers or stockholders is a nonlawyer.

(c) Except as provided in paragraph (b), a lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

   (a1) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

   (b2) Information relating to representation of a client is protected as required by Rule 1.6;

   (c3) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

   (d4) The arrangement does not result in charging a fee that violates Rule 1.5.
G. SECTION OF GENERAL PRACTICE
The amendment would delete the rule in its entirety and replace it with existing provisions of the Model Code of Professional Responsibility:
   DR3-102 for paragraph (a)
   DR3-103 for paragraph (b)
   DR5-107 (B) for paragraph (c)
   DR5-107 (C) for paragraph (d)
RULE 5.4 PROFESSIONAL INDEPENDENCE OF A FIRM-LAWYER

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization, and provide in writing that:

(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;
(b) Information relating to representation of a client is protected as required by Rule 1.6;
(e) The organization does not involve advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rules 7.2 or 7.3; and
(d) The arrangement does not result in charging a fee that violates Rule 1.5.
(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement.
(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) 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.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

2) A non-lawyer is a corporate director or officer thereof; or

3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.
I. NORTH CAROLINA BAR ASSOCIATION
The amendment would add “or a fee that is paid to or shared with a non-lawyer directly or indirectly.” to (d), retaining existing prohibitions against payment of legal fees to non-lawyers as found in DR 3-102(A).
RULE 5.4  PROFESSIONAL INDEPENDENCE OF A LAWYER

Model Rule Text:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5, or a fee that is paid to or shared with a non-lawyer directly or indirectly.
RULE 5.5  RESTRICTIONS ON RIGHT TO PRACTICE

Model Rule Text:

A lawyer shall not participate in offering or making:

(a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) An agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.

Proposed Amendments:

None
RULE 6.1 PRO BONO PUBLICO SERVICE

Model Rule Text:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession.
Proposed Amendment:

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The amendment would modify Rule 6.1 by adding financial contribution to organizations providing legal services to the poor as a means of meeting a lawyer’s pro bono responsibility.
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

PROPOSED AMENDMENT TO RULE 6.1

PUBLIC SERVICE

RULE 6.1    PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

*    *    *
RULE 6.2       ACCEPTING APPOINTMENTS

Model Rule Text:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law; or

(b) Representing the client is likely to result in an unreasonable financial burden on the lawyer.
Proposed Amendments:

A. THE FLORIDA BAR

The amendment would add a paragraph (c) which would permit a lawyer to decline an appointment if the client or cause was so repugnant as to interfere with the client-lawyer relationship. In contrast, the proposed Rule 6.2 would permit the lawyer to decline an appointment in such circumstances if the repugnancy were so great as to create an impermissible conflict or interest, interfere with the lawyer’s diligence, or otherwise be likely to result in violation of professional standards.

Comments of the Sponsor
The standards in Rule 6.2 (a) and (b) are narrow in a sense that is unfair to both the lawyer and the client.

B. NEW YORK STATE BAR SPECIAL COMMITTEE

The amendment would modify Rule 6.2 by deleting the term “shall” and substituting the term “should.”

Comments of the Sponsor
The constitutional validity of compelling a lawyer to accept an appointment or to perform legal services without compensation is uncertain. It would therefore be more appropriate to address the subject of the Rule in terms of a professional aspiration.
Rule 6.2 (A)

THE FLORIDA BAR

PROPOSED AMENDMENT TO RULE 6.2

RULE 6.2  ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause such as:

   (a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law; or

   (b) Representing the client is likely to result in an unreasonable financial burden on the lawyer; or

   (c) The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.
Rule 6.2 (B)

NEW YORK STATE BAR ASSOCIATION
PROPOSED AMENDMENT TO RULE 6.2

RULE 6.2 ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause such as:

(a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law; or

(b) Representing the client is likely to result in an unreasonable financial burden on the lawyer.
RULE 6.3  MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

Model Rule Text:

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

   (a) If participating in the decision would be incompatible with the lawyer’s obligations to a client under Rule 1.7; or

   (b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.
Proposed Amendment:

A. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 6.3 in four respects. First, it would require that any participation by a lawyer in a legal services organization other than his own firm meet the requirements of Rule 5.4 (Professional Independence of a Lawyer).

Second, the amendment would retain, but reword, the provision requiring that the lawyer refrain from participating in a decision that would be incompatible with his obligations to a client under Rule 1.7.

Third, it would eliminate (b).

Fourth, the amendment would add a provision requiring, “either the organization’s client and the private client consent after disclosure, or one of the clients is represented by independent counsel in the matter.”

Comments of the Sponsor

An indigent client would thus have to consent to being represented by the legal services organization where the adverse party is represented by a board member’s firm, and if he refused consent, either he or the private client would have to retain independent counsel. This requirement is necessary if both clients are to be confident that they are receiving independent and uninhibited representation.

B. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would delete Rule 6.3 in its entirety.

Comments of the Sponsor

Any conflict of interest which may arise in connection with a legal service organization should be governed by Rules 1.7 through 1.10. The special exception made by this Rule is not justified.
NEW YORK STATE BAR ASSOCIATION

The amendment would modify MR 6.3 in three respects.

First, it would require that any participation by a lawyer in a legal services organization other than his own firm meet the requirements of MR 5.4 (“Professional Independence of a Lawyer”).

Second, the amendment would retain, but reword, the provision requiring that the lawyer refrain from participating in a decision that would be incompatible with his obligation to a client under MR 1.7 (“Conflict of Interest: General Rule”).

Third, the amendment would add a provision alternatively requiring that (i) the lawyer not knowingly participate in any decision of the organization that would be incompatible with the lawyer’s obligations to a client under MR 1.7 or that could have a material adverse effect on the representation of a client of the organization; or (ii) either the organization’s client and the private client consent to their continued representation by present counsel or one of the clients obtains independent counsel in the matter. Thus, with respect to the latter alternative, an indigent client would have to consent to being represented by the legal services organization where the adverse party is represented by a board member, and if the indigent refused consent, independent counsel would have to be secured.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO MODEL RULE 6.3

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if the lawyer complies with Rule 5.4 and: The lawyer shall not knowingly participate in a decision or action of the organization:

(a) If participating in the decision would be incompatible with the lawyer’s obligations to a client under Rule 1.7; or

(b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

(a) The lawyer does not knowingly participate in any decision of the organization when such participation would be incompatible with the lawyer’s obligations to a client under Rule 1.7 or the decision could have a material adverse effect on the representation of a client of the organization; or

(b) Either the organization’s client and the private client consent after consultation or one of the clients is represented by independent counsel in the matter.
RULE 6.3 — MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) If participating in the decision would be incompatible with the lawyer’s obligations to a client under Rule 1.7; or

(b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.
Rule 6.4

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

Model Rule Text:

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.
A. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would delete Rule 6.4 in its entirety.

**Comments of the Sponsor**

Any conflict of interest which may arise in connection with an organization involved in reform of the law or its administration should be governed by Rules 1.7 through 1.10. The special exception made by this Rule is not justified.
RULE 6.4—LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.
RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

Model Rule Text:

A lawyer shall not make false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) Compares the lawyer’s services with other lawyer’s services, unless the comparison can be factually substantiated.
Proposed Amendments:

A. STATE BAR OF ARIZONA

The amendment would delete Rule 7.1 in its entirety and substitute DR 2-101.

B. COMMISSION ON ADVERTISING

The amendment would delete from the black-letter Rule everything following the first sentence. That material would be incorporated into the Comment accompanying Rule 7.1. Therefore, the amendment does not respond to any substantive disagreement, but simply expresses a different preference with respect to placement of the definition of “false or misleading.”

C. STATE BAR OF MICHIGAN & ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

The amendment would delete Rule 7.1 in its entirety and substitute substantially DR2-101 with one added category of permissible information.

Comments of the Sponsor

The proposed general standard of “false or misleading” is by itself unenforceable because of vagueness and therefore cannot be the basis of effective regulation. It, moreover, fosters advertising which concentrates on packaging rather than on furnishing information concerning the lawyer or the lawyer’s practice which is useful to the prospective client. The proposed amendment to Rule 7.3 (see comments of sponsor under 7.3) specifies the information which may be advertised under the general standard and provides a mechanism for adding categories whenever necessary.
STATE BAR OF ARIZONA

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

(This proposed rule should be deleted in its entirety. The American Bar Association’s majority position, as found in the ABA Code, should be substituted. A copy is attached to this page.)
Rule 7.1 (A) cont.

DR 2-101 Publicity and Advertising.

(A) A lawyer shall not, on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim.

(B) Without limitation, false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

(1) contains a material misrepresentation of fact;

(2) omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

(3) is intended or is likely to create an unjustified expectation;

(4) states or implies that a lawyer is a certified or recognized specialist other than as permitted by DR 2-105;
Rule 7.1  (A) cont.

the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

(6) relates to legal fees other than:

(a) a statement of the fee for an initial consultation;

(b) a statement of the fixed fee or contingent charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(c) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(d) a statement of specified hourly rates, provided the statement makes a clear that the total charge will vary according to the number of hours devoted to the matter; and
Rule 7.1 (A) cont.

(e) the availability of credit arrangements;

or

(7) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

(C) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:

(1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) contains statistical data or other information based on past performance or prediction of future success;

(3) contains a testimonial about or endorsement of a lawyer;

(4) contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;

Rule 7.1 (A) cont.

(5) appeals primarily to a lay person's fear, greed, desire for revenge, or similar emotion; or

(6) is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles or garish or sensational language or format.

(7) utilizes electronic media including television, radio and motion picture until the agency (having jurisdiction under state law) shall have determined that the use of such media is necessary in the light of the existing provisions of the code, in accordance with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

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

(A) A lawyer or law firm shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the restrictions contained in DR 2-101(C).
RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(e) Compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated.
Rule 7.1 (C)

STATE BAR OF MICHIGAN AND
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
PROPOSED AMENDMENT TO RULE 7.1

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER’S SERVICES
Model Rule Text:
   A lawyer shall not make false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:
      (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
      (b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
      (e) Compares the lawyer’s services with other lawyer’s services, unless the comparison can be factually substantiated. Rule 7.1 (C) cont.
RULE 7.1   ADVERTISING

(a) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(b) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast the following information distributed or broadcast 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 disclosed by the lawyer in such publication or broadcast complies with Rule 7 (a), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under Rule [7.4];
(3) Date and place of birth;
(4) Date and place of admission to the bar of state and federal courts;
(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices with dates held;
(7) Military service with dates of service;
(8) Legal authorships with dates of publication;
(9) Legal teaching positions with dates held;
(10) Memberships, offices, and committee assignments, in bar associations with dates held;
(11) Membership and offices in legal fraternities and legal societies with dates held;
(12) Technical and professional licenses with dates held;
(13) Memberships in scientific, technical and professional associations and societies with dates held;
(14) Foreign language ability;
(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Fee for an initial consultation;

(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;

(22) Contingent fee rates subject to Rule 1.5 (c), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(26) A description of the situations in which the services of a lawyer may be helpful.
(c) Any person desiring to expand the information authorized for disclosure in Rule 7.1 (b) may apply to [the agency having jurisdiction under state law]. Any such application shall be served upon [the agencies having jurisdiction under state law over the regulation of the legal profession and consumer matters] who shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of these Rules, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as an amendment to Rule 7.1 (b), universally applicable to all lawyers.

(d) If the advertisement is communicated to the public over television or radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer for [one year].

(e) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(f) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under Rule 7.1 (b) in a publication that is published more frequently than once time per month, the lawyer shall be bound by any representation made therein for a period of no less than 30 days after such publication. If a lawyer publishes any fee information authorized under Rule 7.1 (b) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under Rule 7.1 (b) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than [one year].
(g) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under Rule 7.1 (b), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(h) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.
RULE 7.2  ADVERTISING

Model Rule Text:

(a) Subject to the requirements of Rules 7.1 and 7.3 (b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact.

(b) A copy or recording of an advertisement or written communication shall be kept for [one year] after its dissemination along with a record of when and where it was used.

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

A. AMERICAN COLLEGE OF TRIAL LAWYERS

The amendment would modify Rule 7.2 by adding provisions to paragraph (a) that would restrict mailings to written communications “not seeking professional employment with respect to a specific event or transaction.”

B. BEVERLY HILLS BAR ASSOCIATION

Supports the amendment proposed by the American College of Trial Lawyers.

C. COMMISSION ON ADVERTISING

The amendment would modify Rule 7.2(a) by expressly permitting “outdoor” advertising.

The amendment would also modify paragraph (b) by extending the recommended time for retention of any advertisement from one year to two.

D. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would delete “or television, or through written communication not involving personal contact.” from (a). The amendment would also delete (b) and replace it with a new (b) which reads, “Nothing in this Rule shall prohibit advertising made by a lawyer which is afforded constitutional protection.”

Communication of the Sponsor

The Discussion Draft of the Model Rules permitted lawyer advertising not afforded First Amendment protection by *Bates*. It was there pointed out that *Bates* as reaffirmed by *Ohralik* approved lawyer advertising of only “routine” legal services. The harm done to both the public and the profession by lawyer advertising, taken as a whole, outweighs the superficial benefits of lawyer advertising to the public.
E. THE CHICAGO BAR ASSOCIATION

The amendment would modify Rule 7.2 by adding a cross-reference to Rule 1.5(d) (division of fees among lawyers) and by adding a requirement that any advertisement contain the name of at least one lawyer responsible for its content.

F. BEVERLY HILLS BAR ASSOCIATION

Supports the amendment proposed by the Chicago Bar Association.

G. STATE BAR OF MICHIGAN

The amendment would delete Rule 7.2 in its entirety and substitute in substantial part the provisions of DR 2-101 with one added category of permissible information. The amendment would also renumber the Rule as 7.1. (See comments of Sponsor under Rule 7.1 preceding)

H. STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

The amendment is identical to that submitted by the State Bar of Michigan.
AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 7.2

RULE 7.2  ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3 (b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact and not seeking professional employment with respect to a specific event or transaction.

(b) A copy or recording of an advertisement or written communication shall be kept for [one year] after its dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.
Rule 7.2 (C)

COMMISSION ON ADVERTISING

PROPOSED AMENDMENT TO RULE 7.2

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rule 7.1 and 7.3(b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving personal contact.

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

c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal services organization.
RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3 (b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, or radio, or television, or through written communication not involving personal contact.

(b) A copy or recording of an advertisement or written communication shall be kept for [one year] after its dissemination along with a record of when and where it was used.

(b) Nothing in this rule shall prohibit advertising made by a lawyer which is afforded constitutional protection.

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

PROPOSED AMENDMENT TO RULE 7.2

RULE 7.2 ADVERTISING

  (c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule, may pay a portion of a fee pursuant to Rule 1.5 (d) and may pay the usual charges of a not-for-profit lawyer referral service or equivalent legal service organization.

  (d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.
Rule 7.2 (G) & (H)

STATE BAR OF MICHIGAN AND
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
PROPOSED AMENDMENT TO RULE 7.2

RULE 7.2 ADVERTISING

Model Rule Text:

(a) Subject to the requirements of Rules 7.1 and 7.3 (b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact.

(b) A copy or recording of an advertisement or written communication shall be kept for [one year] after its dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.
RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

Model Rule Text:

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):

1. If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;
2. Under the auspices of a public or charitable legal services organization; or
3. Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

1. The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;
2. The person has made known to the lawyer a desire not to receive communications from the lawyer; or
3. The communication involves coercion, duress or harassment.
Proposed Amendment:

A. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would delete paragraph (a) in its entirety. This would permit direct contact with prospective clients generally subject only to the limits set forth in paragraph (b).

B. COMMISSION ON ADVERTISING

The amendment is substantially similar to that proposed by the Los Angeles County Bar Association, except for the words “directly or indirectly” inserted in (b) of the LACBA proposal which are not contained herein.

C. BEVERLY HILLS BAR ASSOCIATION

Supports the amendment proposed by the Los Angeles County Bar Association.

D. STATE BAR OF ARIZONA

The amendment would modify Rule 7.3 in two respects. First, it would rephrase paragraph (a) so as to express the prohibition on personal solicitation more directly. If so amended, the Rule would state that a lawyer “may not” initiate personal contact “except” in specified circumstances.

Second, the amendment would delete paragraph (a)(1), and thereby prohibit initiating personal contact with a close friend, relative, former client or person reasonably believed to be a client to obtain professional employment.

E. AMERICAN COLLEGE OR TRIAL LAWYERS

The amendment would prohibit sending a letter to a prospective client regarding a specific event or transaction unless the prospective client requested such a letter.
F. STATE BAR OF MICHIGAN

The amendment would change the title to Rule 7.3 by deleting “personal” and substituting “direct,” and renumbering the Rule as 7.2.

The amendment would also strike current Rule 7.3 in its entirety and substitute a provision prohibiting direct contact with a prospective client concerning a specific event where such contact has pecuniary gain as a significant motive.

Comments of the Sponsor
Direct mail solicitation for pecuniary gain encourages, over-reaching by the lawyer in a one-on-one situation. In-person solicitation only exacerbates this situation. Whatever justification there might have been for providing a means by which the lawyer can make his qualifications known to prospective clients has been adequately addressed by the removal of the prohibition against advertising.

G. STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

The amendment is identical to that proposed by the State Bar of Michigan.

H. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 7.3 in four respects. First, it would add “by written communication” after “prospective client” in (a) and delete the words “and subject to the requirements of paragraph (b).”

Second, it would add at the end of (a)(1) “with all of whom he may also communicate orally.”

Third, it would add at the beginning of (b) “subject to (a) above” and fourth, it would add a new paragraph (c) stating that nothing in the Rule shall prohibit solicitation by a lawyer which is afforded constitutional protection.
Comments of the Sponsor

The Discussion Draft of the Model Rules permitted solicitation not afforded First Amendment protection by Bates, Ohralik, and Primus. Ohralik for example specifically held constitutional those portions of the Ohio Code which are substantially the same as Code DR 2-103. The Rule is too permissive.
RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization;

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not directly or indirectly contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress or harassment.
RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) (a) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) (b) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) (c) The communication involves coercion, duress or harassment.

Comment:

Unrestricted solicitation involves definite social harms. Among these are harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these harms are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under relevant decisions of the United States Supreme Court.
RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer may not initiate personal contact with a prospective client for the purpose of obtaining professional employment only except in the following circumstances and subject to the requirements of paragraph (b):

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) (1) Under the auspices of a public or charitable legal services organization; or

(2) (2) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.
Rule 7.3 (E)

AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED AMENDMENT TO RULE 7.3

RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress or harassment.

(c) A lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment with respect to a specific event or transaction unless first requested to do so by the prospective client.
STATE BAR OF MICHIGAN

PROPOSED AMENDMENT TO RULE 7.3

RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

Model Rule Text:

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress or harassment.
STATE BAR OF MICHIGAN AND
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
PROPOSED AMENDMENT TO RULE 7.3

The amendment would delete Rule 7.3 in its entirety and replace it with the following provision which would be renumbered as 7.2

RULE 7.2  DIRECT CONTACT WITH PROSPECTIVE CLIENTS

A lawyer may not solicit professional employment from a prospective client by mail, in-person or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.
RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer may initiate personal contact with a prospective client by written communication for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client, with all of whom he may also communicate orally,

(2) Under the auspices of a public or charitable legal services organization; and

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(b) Subject to (a) above, a lawyer not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress or harassment.

(c) Nothing in this rule shall prohibit solicitation by a lawyer which is afforded constitutional protection.
RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

Model Rule Text:

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “patent attorney” or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation “admiralty,” “proctor in admiralty” or a substantially similar designation; and

(c) (Provisions on designation of specialization of the particular state).
Proposed Amendments:

A. SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

The amendment would delete Rule 7.4 in its entirety.

B. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would delete Rule 7.4 in its entirety.

Comments of the Sponsor

The deletion is recommended because adequate protection is provided by Rule 7.1 which prohibits false or misleading communications respecting a lawyer’s services. Specialists may mislead the public if they do not indicate their specialization in advertising, whether or not they are certified. If advertising as a specialist should be limited to those who are certified, recognition should be given for certification by national and other certification groups, as well as by state licensing authorities. The recent U.S. Supreme Court decision In Re R.M.J. clearly prohibits restriction of the word “specialist,” and probably also of the word “certified,” by states.

C. PENNSYLVANIA BAR ASSOCIATION

The amendment would delete everything after the first sentence of Rule 7.4. Substantively, this would have the same effect as the amendment proposed by the Section of Individual Rights and Responsibilities.

Comments of the Sponsor

Proposed Rule 7.1 governs the standards of advertising and the addition of a laundry list in proposed 7.4 adds nothing and may well be in contravention of In Re R.M.J, ________ US __________; 50 Law Week 4185 (1982).
D. YOUNG LAWYERS DIVISION

The amendment would eliminate the term “imply” from the second sentence of Rule 7.4. If so amended, the Rule would permit a lawyer to state that his practice is “limited to” or “concentrated in” certain fields.

E. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would eliminate paragraphs (a) and (b) in their entirety.

Comments of the Sponsor

All fields of law should be governed by the same standards regarding claims of specialization, and there is no reason to single out patent, trademark or admiralty lawyers for more favorable treatment than is accorded lawyers practicing in other fields.
Delete Rule 7.4 in its entirety.
A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “patent attorney” or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation “admiralty,” “proctor in admiralty” or a substantially similar designation; and

(e) [Provisions on designation of specialization of the particular state].
RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “patent attorney” or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation “admiralty,” “proctor in admiralty” or a substantially similar designation; and

(c) —— [Provisions on designations of specialization of the particular state]
RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) No Change
(b) No Change
(c) No Change
NEW YORK STATE BAR ASSOCIATION
Proposed Amendment to Rule 7.4

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist [except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “patent attorney” or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation “admiralty,” “proctor in admiralty” or a substantially similar designation; and

(c) [Provisions on designation of specialization of the particular state].
RULE 7.4

F. THE IOWA STATE BAR ASSOCIATION

The amendment would strike everything but the first sentence.

Comments of the Sponsor
Any language other than the first sentence is verbose. Rule 7.1 covers other situations.
RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “patent attorney” or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation “admiralty,” “proctor in admiralty” or a substantially similar designation; and

(e) [Provisions on designation of specialization of the particular state].
RULE 7.5  FIRM NAMES AND LETTERHEADS

Model Rule Text:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

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

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

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

A. PENNSYLVANIA BAR ASSOCIATION

The amendment would delete the second sentence of paragraph (a) and paragraphs (b) and (c) in their entirety.

Comments of the Sponsor
When the proposed rule attempts to exemplify the standard of proposed Rule 7.1 in paragraph (1) it invites dispute; (b) attempts to preempt the authority of the highest courts of the respective jurisdictions; (c) discriminates adversely against practitioners in sparsely populated areas – all in diminution of Rule 7.1.

B. STATE BAR OF ARIZONA

The amendment would modify Rule 7.5 by revising the second sentence of paragraph (a) to prohibit any use of a trade name.

C. INDIANA STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would delete (a) in its entirety and replace it with a new (a) which reads “a lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1 or is a trade name.”

Comments of the Sponsor
DR 2-102(B) clearly states, “A lawyer in private practice shall not practice under a trade name,…” Use of trade names by lawyers cannot benefit the public and may be misleading.
RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

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

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

(bd) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.
STATE BAR OF ARIZONA

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may not be used by a lawyer in private practice, if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
RULE 7.5  FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

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

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

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.
RULE 8.1  BAR ADMISSION AND DISCIPLINARY MATTERS

Model Rule Text:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) Knowingly make a false statement of material fact; or

(b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Proposed Amendments:

None
RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

Model Rule Text:

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.
Proposed Amendments:

A. CHICAGO BAR ASSOCIATION

The amendment would add to paragraph (a) a restriction on statements concerning “the integrity” of judicial officials. This would be in addition to restrictions on statements concerning “the qualifications” of judicial officials.
Rule 8.2 (A)

CHICAGO BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 8.2 (a)

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

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RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

Model Rule Text:

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.
Proposed Amendments:

A. STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

The amendment would delete paragraphs (a) and (b) in their entirety and substitute provisions requiring a lawyer to report any knowledge he may have of another lawyer’s violation of Rules of Professional Conduct.

B. IOWA STATE BAR ASSOCIATION

The amendment would require reporting of any knowledge of a violation of the Rules of Professional Conduct. The amendment would also add a requirement that a lawyer who is subject to disciplinary proceedings truthfully and fully respond to a lawful demand for information. Rule 8.1 as drafted addresses that problem.

Comments of the Sponsor

The amendment seeks to preserve the comprehensive reporting duty of lawyers which presently exists under DR 1-103 (A). The reason for the latter requirement is that disciplinary counsel often needs a rather strong statement in order to compel information from a lawyer who is subject to disciplinary proceedings.

C. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The amendment would modify Rule 8.3 by deleting the term “shall” and substituting the term “should”.

Comments of the Sponsor

Rule 8.3 is so uncertain in its application and difficult to enforce that it should be changed from a disciplinary imperative to an aspirational rule.

D. BEVERLY HILLS BAR ASSOCIATION

Support the amendment proposed by the International Association of Insurance Counsel.
E. NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE

The amendment would modify Rule 8.3 by requiring disclosure of known violations only if the violation raises a substantial question as to the transgressor’s honesty or trustworthiness. Lawyers would be urged but not required to report violations that raise a substantial question as to the transgressor’s fitness as a lawyer in other respects.

Comments of the Sponsor
A Rule mandating the reporting of violations that raise questions of fitness to practice would be generally ignored but would have serious potential for third-party liability.

F. LOS ANGELES COUNTY BAR ASSOCIATION

The amendment would delete Rule 8.3 in its entirety.

Comments of the Sponsor
This would eliminate the obligation to report known violations of the Rules of Professional Conduct.

G. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment is identical to that proposed by the Los Angeles County Bar Association.

Comments of the Sponsor
Experience teaches that the proposed rule will not be observed. Therefore, its existence would be an embarrassment to the profession.
Standing Committee on Professional Discipline
Amendment 4

Strike the present provisions of Rule 8.3 (a) and (b) and substitute therefor:

(a) A lawyer possessing knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer possessing knowledge that a judge has committed a violation of the rules governing judicial conduct shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer or a judge has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority empowered to investigate or act upon such violation.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer who is the subject of a disciplinary inquiry shall fully and truthfully respond to a lawful demand for information from a disciplinary authority.
C. INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

The revision amends (a) and (b) by inserting “serious and” before “substantial” and substitutes “should” for “shall.” The revision also adds “honesty and trustworthiness” to (b) to parallel language in (a).
INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

PROPOSED REVISION OF RULE 8.3 (a) AND (b)

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a serious and substantial question as to the other lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a serious and substantial question as to the judge’s honesty, trustworthiness or fitness for office shall inform the appropriate authority.

[(c) as appears].

(Revised) Rules 8.3 (C) & (D)
RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct shall inform the appropriate professional authority if such violation raises a substantial question as to that lawyer’s honesty, or trustworthiness or and should inform such authority if such violation raises a substantial question as to that lawyer’s fitness to practice as a lawyer in other respects. shall inform the appropriate professional authority.

* * *
RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.
RULE 8.4 MISCONDUCT

Model Rule Text:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) state or imply an ability to influence improperly a government agency or official;

(d) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(e) assist a person who is not a member of the bar in the performance of activity that constitutes the practice of law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
Proposed Amendments:

A. CUYAHOGA COUNTY BAR ASSOCIATION

The amendment would modify Rule 8.4 in two respects. First, it would delete from paragraph (a) the prohibition on “knowingly assisting or inducing another” to violate the Rules of Professional Conduct.

Second, it would delete from paragraph (c) the prohibition on “implying” an ability to improperly influence a tribunal.

B. IOWA STATE BAR ASSOCIATION

The amendment would modify Rule 8.4 in four respects. First, it would strike the term “fraudulent” from paragraph (b).

Second, it would then add a new paragraph (c) identifying as professional misconduct “conduct involving fraud, dishonesty, deceit or misrepresentation.”

Third, it would add a new paragraph (d) identifying as professional misconduct “conduct prejudicial to the administration of justice.”

Fourth, it would add a new paragraph (i) identifying as professional misconduct “conduct that adversely reflects on the lawyer’s fitness to practice law.”

Comments of the Sponsor

The proposed amendment seeks to preserve standards of discipline which presently exist in DR 1-102(A) by four changes. The second change would add a new paragraph identical to the present DR-102(A)(4). The third change would add a new paragraph substantially identical to DR1-102(A)(6). As contrasted with the language of the proposed Model Rule, this latter change would eliminate the use of this general standard to “criminal or fraudulent act” only.
C. THE FLORIDA STATE BAR

This amendment is substantially the same as that proposed by the Iowa State Bar Association.

Comments of the Sponsor
The standard in the fourth change is a much broader standard than the proposed Rule which specifically limits the definition of professional misconduct to the commission of a criminal or fraudulent act. In addition, eliminating “fraudulent” from 8.4(b) and adding new paragraph (8) more clearly and explicitly defines the scope of the “fraudulent act” that would be covered, consistent with the existing comparable Rule.

D. STATE BAR OF ARIZONA

This amendment is substantially the same as that proposed by the Iowa State Bar Association, except that it would strike from paragraph (b) reference to conduct that adversely reflects on the lawyer’s “fitness as a lawyer” without substituting a new provision of similar substantive effect.

E. STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

The amendment would add in paragraph (e) the term “unauthorized” preceding the term “practice of law,” and would move paragraphs (d) and (e) to a new Rule.

F. BEVERLY HILLS BAR ASSOCIATION

Supports the amendment offered by the Standing Committee on Unauthorized Practice of Law.
RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) state or imply an ability to influence improperly a government agency or official;

(d) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(e) assist a person who is not a member of the bar in the performance of activity that constitutes the practice of law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
IOWA STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO RULE 8.4

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) (No change)

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) (e) state or imply an ability to influence improperly a government agency or official;

(f) (f) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(g) (g) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;

(h) (h) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(i) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.
RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) state or imply an ability to influence improperly a government agency or official;

(d) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(e) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(h) engage in conduct that is prejudicial to the administration of justice;

(i) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law whether occurring within or without the state of Florida.
RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(g) assist a person who is not a member of the bar in the performance of activity that constitutes the practice of law;

(h) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

PROPOSED AMENDMENT TO RULE 8.4

RULE 8.4  MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) state or imply an ability to influence improperly a government agency or official;

(d) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(e) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

PROPOSED AMENDMENT TO RULE 8.4

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) state or imply an ability to influence improperly a government agency or official;

(d) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(e) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW PROPOSED RULE

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
RULE 8.5  JURISDICTION

Model Rule Text:

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.
Proposed Amendment:

A. NEW YORK STATE BAR SPECIAL COMMITTEE

The amendment adds language which provides that a lawyer admitted to practice in two jurisdictions who performs actions in one jurisdiction that are proper in that jurisdiction but not in the other will not be subject to discipline in the other.

Comments of the Sponsor

The amendment is intended to invoke basic conflict of law principles in the resolution of possible conflicting ethical standards created by different jurisdictions.
NEW YORK STATE BAR ASSOCIATION

PROPOSED AMENDMENT TO MODEL RULE 8.5

RULE 8.5  JURISDICTION

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere; provided, however that a lawyer shall not be disciplined for conduct performed in another jurisdiction having more substantial contacts with the matter in question if the lawyer is admitted to practice in such jurisdiction and such conduct conforms to the Rules of Professional Conduct of such jurisdiction.
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