AMERICAN BAR ASSOCIATION

CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS

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Preface

On August 14, 1964, at the request of President Lewis F. Powell, Jr., the House of Delegates of the American Bar Association created the Special Committee on Evaluation of Ethical Standards to examine the current Canons of Professional Ethics and to make recommendations for changes. Your Committee has been at work since that time with the extremely competent assistance of its Reporter, Professor John F. Sutton, Jr., of the University of Texas School of Law. Since August of 1967 we have been aided by Mrs. Sarah Ragle Weddington, a member of the Texas Bar, who has served as Assistant to Mr. Sutton. The supporting research work was conducted under the supervision of Mr. Sutton in his capacity as Director of a research project for the American Bar Foundation. We also acknowledge with thanks the effective help of Frederick R. Franklin of the American Bar Association Division of Professional Service Activities, who served as Staff Assistant in the crowded latter months of our work.

After substantial study and a number of meetings, we concluded that the present Canons needed revision in four principal particulars: (1) There are important areas involving the conduct of lawyers that are either only partially covered in or totally omitted from the Canons; (2) Many Canons that are sound in substance are in need of editorial revision; (3) Most of the Canons do not lend themselves to practical sanctions for violations; and (4) Changed and changing conditions in our legal system and urbanized society require new statements of professional principles.

The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908. They were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of *Professional Ethics*. Since then a limited number of amendments have been adopted on a piecemeal basis.

The thought of studying the Canons of Professional Ethics with a view of possible revision is not a new one,. In 1928, 1933 and 1937 special committees of the American Bar Association, appointed for the purpose of investigating the subject, made reports recommending overall revisions, but nothing came of these efforts. In 1954 a distinguished committee of the American Bar Foundation made extensive studies of the Canons and recommended further work in the field, but the subject lay fallow for ten more years until the creation of our Committee.

As far back as 1934 Mr. Justice (later Chief Justice) Harlan Fiske Stone, in his memorable address entitled *The Public Influence of the Bar,* made this observation:

Before the Bar can function at all as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era.

Our studies led us unanimously to the conclusion that the need for change in the statements of professional responsibility of lawyers could not be met by merely amending the present Canons. A new Code of Professional Responsibility could be the only answer.

While the opinions of the Committee on Professional Ethics of the American Bar Association have been published and given fairly wide distribution with resulting value to the bench and bar, they certainly are not conclusive as to the adequacy of the present Canons. Because the opinions are necessarily interpretations of the existing Canons, they tend to support the Canons and are critical of them only in the most unusual case. Since a large number of requests for opinions from the Committee on Professional Ethics deal with the etiquette of law practice, advertising, partnership names, announcements and the like, there has been a tendency for many lawyers to assume that this is the exclusive field of interest of the Committee and that it is not concerned with the more serious questions of professional standards and obligations.

The present Canons are not an effective teaching instrument and they fail to give guidance to young lawyers beyond the language of the Canons themselves. There is no organized interrelationship of the Canons and they often overlap. They are not cast in language designed for disciplinary enforcement and many abound with quaint expressions of the past. The present Canons, nevertheless, contain many provisions that are sound in substance, and all of these have been brought forward in the proposed Code.

In our studies and meetings we have relied heavily upon the monumental *Legal Ethics* (1953) of Henry S. Drinker, who served with great distinction for nine years as Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the American Bar Association.

We have had constant recourse to the opinions of the Committee on Professional Ethics. These opinions were collected and published in a single volume in 1967; since that time we have been favored with all opinions of the Committee in loose-leaf form.

Recent decisions of the Supreme Court of the United States have necessitated intensive studies of certain Canons. Among the landmark cases in this regard are *NAACP v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963), *Brotherhood of R. R. Trainmen v. Virginia,* 377 U.S. 1, 84 S. Ct. 1113, 12 L.Ed.2d 89 (1964), and *United Mine Workers v. Ill. State Bar Ass'n,* 389 U.S. 217, 88 S. Ct. 353, 19 L.Ed.2d 426 (1967). It is not here necessary to comment in detail on these far-reaching rulings since they are familiar to all lawyers.

Also, in recent years the Supreme Court of the United States has made important pronouncements in the areas of admission to the bar and discipline of lawyers. Without attempting an exhaustive catalogue in this regard, we refer to *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 96 (1957), *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L.Ed.2d 754 (1967), and *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L.Ed.2d 117 (1968).

Our Committee has held meetings with 37 major units of the profession and has corresponded with more than 100 additional groups. The entire Committee has met a total of 71 days and the editorial subcommittee of three members has met 28 additional days. Geoffrey C. Hazard, Jr., of Chicago, Illinois, Director of the American Bar Foundation, John G. Bonomi, of New York, New York, a member of the A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, and Paul Carrington, of Dallas, Texas, a member of the A.B.A. Special Committee on Availability of Legal Services, attended many of our meetings and each made invaluable suggestions in the course of our deliberations. Lawrence E. Walsh, of New York, New York, served as a member of our Committee in the first two years of its existence and rendered distinctive service in that period.

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CODE OF PROFESSIONAL RESPONSIBILITY

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CODE OF PROFESSIONAL RESPONSIBILITY

PREAMBLE AND PRELIMINARY STATEMENT

Preamble[1]

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government.[2] Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system.[3] A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen,[4] but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.[5]

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preliminary Statement

In furtherance of the principles stated in the Preamble, the American Bar Association has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules.[6] The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Consideration and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.[7]

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial,[8] the Disciplinary Rules should be uniformly applied to all lawyers,[9] regardless of the nature of their professional activities.[10] The Code makes no attempt to prescribe either disciplinary procedures or penalties[11] for violation of a Disciplinary Rule,[12] nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances.[13] An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

NOTES

1. The footnotes are intended merely to enable the reader to relate the provisions of this Code to the ABA Canons of Professional Ethics adopted in 1908, as amended, the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources; they are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards. Footnotes citing ABA Canons refer to the ABA Canons of Professional Ethics, adopted in 1908, as amended.

2. *Cf.* ABA CANONS, Preamble.

3. "[T]he lawyer stands today in special need of a clear understanding of his obligations and of the vital connection between those obligations and the role his profession plays in society." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958).

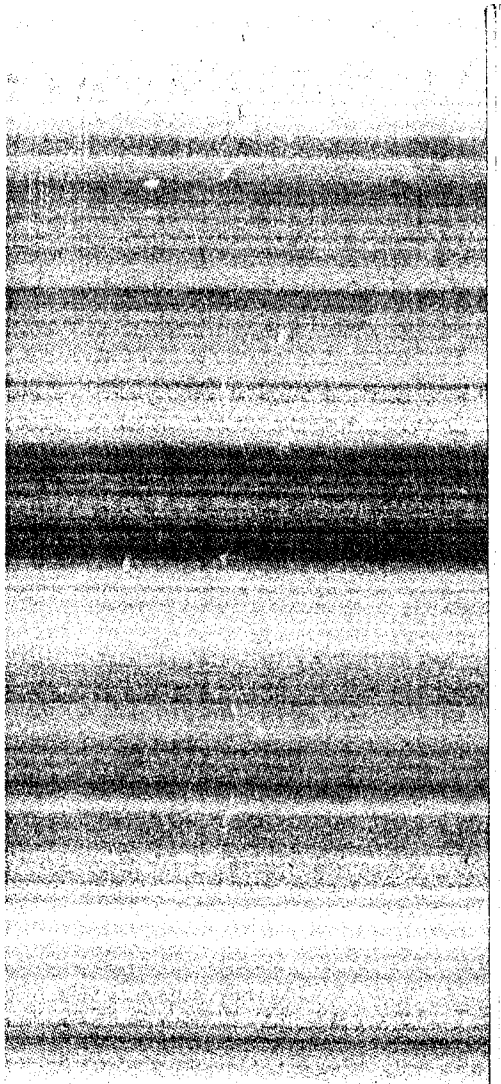
4. "No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958).

5. "The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purposes and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reasons for being." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar*, 12 U.C.L.A. L. REV. 438, 440 (1965).

6. The Supreme Court of Wisconsin adopted a Code of Judicial Ethics in 1967. "The code is divided into standards and rules, the standards being statements of what the general desirable level of conduct should be, the rules being particular canons, the violation of which shall subject an individual judge to sanctions." In re Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 253, 153 N. W. 2d 873, 874 (1967).

The portion of the Wisconsin Code of Judicial Ethics entitled "Standards" states that "[t]he following standards set forth the significant qualities of the ideal judge . . . ." *Id.*, 36 Wis. 2d at 256, 153 N. W. 2d at 875. The portion entitled "Rules" states that "[t]he court promulgates the following rules because the requirements of judicial conduct embodied therein are of sufficient gravity to warrant sanctions if they are not obeyed . . . ." *Id.*, 36 Wis. 2d at 259, 153 N. W. 2d at 876.

7. "Under the conditions of modern practice it is peculiarly necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards. Today the lawyer plays a changing and increasingly varied role. In many developing fields the precise contribution of the legal profession is as yet undefined." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).



"A true sense of professional responsibility must derive from an understanding of the reasons that lie back of specific restraints, such as those embodied in the Canons. The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective." *Id.*

8. "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. . . . He is accordingly entitled to procedural due process, which includes fair notice of the charge." In re Ruffalo, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 122, 88 S. Ct. 1222, 1226 (1968), *rehearing denied*, 391 U.S. 961, 20 L. Ed. 2d 874, 88 S. Ct. 1833 (1968).

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification . . . but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Bd. of Bar Examiners, 353 U.S. 232, 239, 1 L. Ed. 2d 796, 801-02, 77 S. Ct. 752, 756 (1957).

"[A]n accused lawyer may expect that he will not be condemned out of a capricious self-righteousness or denied the essentials of a fair hearing." Kingsland v. Dorsey, 338 U.S. 318, 320, 94 L. Ed. 123, 126, 70 S. Ct. 123, 124-25 (1949).

"The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." Ex parte Garland, 71 U.S. (4 Wall.) 333, 378-79, 18 L. Ed. 366, 370 (1866).

See generally Comment, *Procedural Due Process and Character Hearings for Bar Applicants*, 15 STAN. L. REV. 500 (1963).

9. "The canons of professional ethics must be enforced by the Courts and must be respected by members of the Bar if we are to maintain public confidence in the integrity and impartiality of the administration of justice." In re Meeker, 76 N. M. 354, 357, 414 P.2d 862, 864 (1966), *appeal dismissed*, 385 U.S. 449 (1967).

10. *See* ABA CANON 45.

"The Canons of this Association govern all its members, irrespective of the nature of their practice, and the application of the Canons is not affected by statutes or regulations governing certain activities of lawyers which may prescribe less stringent standards." ABA COMM. ON PROFESSIONAL ETHICS, *OPINIONS*, No. 203 (1940) [hereinafter each Opinion is cited as "*ABA Opinion*"].

Cf. ABA Opinion 152 (1936).

11. "There is generally no prescribed discipline for any particular type of improper conduct. The disciplinary measures taken are discretionary with the courts, which may disbar, suspend, or merely censure the attorney as the nature of the offense and past indicia of character may warrant." Note, 43 CORNELL L.Q. 489, 495 (1958).

12. The Code seeks only to specify conduct for which a lawyer should be disciplined. Recommendations as to the procedures to be used in disciplinary actions and the gravity of disciplinary measures appropriate for violations of the Code are within the jurisdiction of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement.

13. "The severity of the judgment of this court should be in proportion to the gravity of the offenses, the moral turpitude involved, and the extent that the defendant's acts and conduct affect his professional qualifications to practice law." Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 1092-93, 16 So. 2d 843, 850 (1944) (Higgins, J., concurring in decree).

"Certainly an erring lawyer who has been disciplined and who having paid the penalty has given satisfactory evidence of repentance and has been rehabilitated and restored to his place at the bar by the court which knows him best ought not to have what amounts to an order of permanent disbarment entered against him by a federal court solely on the basis of an earlier criminal record and without regard to his subsequent rehabilitation and present good character . . . . We think, therefore, that the district court should reconsider the appellant's application for admission and grant it unless the court finds it to be a fact that the appellant is not presently of good moral or professional character." In re Dreier, 258 F.2d 68, 69-70 (3d Cir. 1958).

CANON 1

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

ETHICAL CONSIDERATIONS

EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC 1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education[1] or moral standards[2] or of other relevant factors[3] but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar.[4] In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC 1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.[5]

EC 1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules.[6] A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.[7]

EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct.[8] Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice.[9] In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

DISCIPLINARY RULES

DR 1-101 Maintaining Integrity and Competence of the Legal Profession.

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.[10]

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.[11]

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.[12]

(3) Engage in illegal conduct involving moral turpitude.[13]

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.[14]

DR 1-103 Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.[15]

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.[16]

NOTES

1. "[W]e cannot conclude that all educational restrictions [on bar admission] are unlawful. We assume that few would deny that a grammar school education requirement, before taking the bar examination, was reasonable. Or that an applicant had to be able to read or write. Once we conclude that *some* restriction is proper, then it becomes a matter of degree—the problem of drawing the line.

. . . .

"We conclude the fundamental question here is whether Rule IV, Section 6 of the Rules Pertaining to Admission of Applicants to the State Bar of Arizona is 'arbitrary, capricious and unreasonable.' We conclude an educational requirement of graduation from an accredited law school is not." Hackin v. Lockwood, 361 F.2d 499, 503-4 (9th Cir. 1966), *cert. denied*, 385 U.S. 960, 17 L. Ed.2d 305, 87 S. Ct. 396 (1966).

2. "Every state in the United States, as a prerequisite for admission to the practice of law, requires that applicants possess 'good moral character.' Although the requirement is of judicial origin, it is now embodied in legislation in most states." Comment, *Procedural Due Process and Character Hearings for Bar Applicants*, 15 STAN. L. REV. 500 (1963).

"Good character in the members of the bar is essential to the preservation of the integrity of the courts. The duty and power of the court to guard its portals against intrusion by men and women who are mentally and morally dishonest, unfit because of bad character, evidenced by their course of conduct, to participate in the administrative law, would seem to be unquestioned in the matter of preservation of judicial dignity and integrity." In re Monaghan, 126 Vt. 53, 222 A.2d 663, 670 (1966).

"Fundamentally, the question involved in both situations [*i.e.* admission and disciplinary proceedings] is the same—is the applicant for admission or the attorney sought to be disciplined a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude. At the time of oral argument the attorney for respondent frankly conceded that the test for admission and for discipline is and should be the same. We agree with this concession." Hallinan v. Comm. of Bar Examiners, 65 Cal.2d 447, 453, 421 P.2d 76, 81, 55 Cal.Rptr. 228, 233 (1966).

3. "Proceedings to gain admission to the bar are for the purpose of protecting the public and the courts from the ministrations of persons unfit to practice the profession. Attorneys are officers of the court appointed to assist the court in the administration of justice. Into their hands are committed the property, the liberty and sometimes the lives of their clients. This commitment demands a high degree of intelligence, knowledge of the law, respect for its function in society, sound and faithful judgment and, above all else,

integrity of character in private and professional conduct." In re Monaghan, 126 Vt. 53, 222 A.2d 665, 676 (1966) (Holden, C.J., dissenting).

4. "A bar composed of lawyers of good moral character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an independent Bar." Konigsberg v. State Bar, 353 U.S. 252, 273, 1 L. Ed. 2d 810, 825, 77 S. Ct. 722, 733 (1957).

5. *See* ABA CANON 29.

6. ABA CANON 28 designates certain conduct as unprofessional and then states that: "A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred." ABA CANON 29 states a broader admonition: "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."

7. "It is the obligation of the organized Bar and the individual lawyer to give unstinted cooperation and assistance to the highest court of the state in discharging its function and duty with respect to discipline and in purging the profession of the unworthy." *Report of the Special Committee on Disciplinary Procedures*, 80 A.B.A. REP. 463, 470 (1955).

8. *Cf.* ABA CANON 32.

9. "We decline, on the present record, to disbar Mr. Sherman or to reprimand him—not because we condone his actions, but because, as heretofore indicated, we are concerned with whether he is mentally responsible for what he has done.

"The logic of the situation would seem to dictate the conclusion that, if he was mentally responsible for the conduct we have outlined, he should be disbarred; and, if he was not mentally responsible, he should not be permitted to practice law.

"However, the flaw in the logic is that he may have been mentally irresponsible [at the time of his offensive conduct] . . . , and, yet, have sufficiently improved in the almost two and one-half years intervening to be able to capably and competently represent his clients. . . .

. . .

"We would make clear that we are satisfied that a case has been made against Mr. Sherman, warranting a refusal to permit him to further practice law in this state unless he can establish his mental irresponsibility at the time of the offenses charged. The burden of proof is upon him.

"If he establishes such mental irresponsibility, the burden is then upon him to establish his present capability to practice law." In re Sherman, 58 Wash. 2d 1, 6-7, 354 P.2d 888, 890 (1960), *cert. denied*, 371 U.S. 951, 9 L. Ed. 2d 499, 83 S. Ct. 506 (1963).

10. "This Court has the inherent power to revoke a license to practice law in this State, where such license was issued by this Court, and its issuance was procured by the fraudulent concealment, or by the false and fraudulent representation by the applicant of a fact which was manifestly material to the issuance of the license." North Carolina ex rel. Attorney General v. Gorson, 209 N.C. 320, 326, 183 S.E. 392, 395 (1936), *cert. denied*, 298 U.S. 662, 80 L. Ed. 1387, 56 S. Ct. 752 (1936).

See also Application of Patterson, 318 P.2d 907, 913 (Or. 1957), *cert. denied*, 356 U.S. 947, 2 L. Ed. 2d 822, 78 S. Ct. 795 (1958).

11. *See* ABA CANON 29.

12. In *ABA Opinion* 95 (1933), which held that a municipal attorney could not permit police officers to interview persons with claims against the municipality when the attorney knew the claimants to be represented by counsel, the Committee on Professional Ethics said:

"The law officer is, of course, responsible for the acts of those in his department who are under his supervision and control. *Opinion 85. In re Robinson*, 136 N.Y.S. 548 (affirmed 209 N. Y. 354-1912) held that it was a matter of disbarment for an attorney to adopt a general course of approving the unethical conduct of employees of his client, even though he did not actively participate therein.

"'. . . . The attorney should not advise or sanction acts by his client which he himself should not do.' *Opinion 75.*"

13. "The most obvious non-professional ground for disbarment is conviction for a felony. Most states make conviction for a felony grounds for automatic disbarment. Some of these states, including New York, make disbarment mandatory upon conviction for *any* felony, while others require disbarment only for those felonies which involve moral turpitude. There are strong arguments that some felonies, such as involuntary manslaughter, reflect neither on an attorney's fitness, trustworthiness, nor competence and, therefore, should not be grounds for disbarment, but most states tend to disregard these arguments and, following the common law rule, make disbarment mandatory on conviction for any felony." Note, 43 CORNELL L.Q. 489, 490 (1958).

"Some states treat conviction for misdemeanors as grounds for automatic disbarment . . . However, the vast majority, accepting the common law rule, require that the misdemeanor involve moral turpitude. While the definition of moral turpitude may prove difficult, it seems only proper that those minor offenses which do not affect the attorney's fitness to continue in the profession should not be grounds for disbarment. A good example is an assault and battery conviction which would not involve moral turpitude unless done with malice and deliberation." *Id.* at 491.

"The term 'moral turpitude' has been used in the law for centuries. It has been the subject of many decisions by the courts but has never been clearly defined because of the nature of the term. Perhaps the best general definition of the term 'moral turpitude' is that it imparts an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow. 58 C.J.S. at page 1201. Although offenses against revenue laws have been held to be crimes of moral turpitude, it has also been held that the attempt to evade the payment of taxes due to the government or any subdivision thereof, while wrong and unlawful, does not involve moral turpitude. 58 C.J.S. at page 1205." Comm. on Legal Ethics v. Scheer, 149 W. Va. 721, 726-27, 143 S. E. 2d 141, 145 (1965).

"The right and power to discipline an attorney, as one of its officers, is inherent in the court. . . . This power is not limited to those instances of misconduct wherein he has been employed, or has acted, in a professional capacity; but, on the contrary, this power may be exercised where his misconduct outside the scope of his professional relations shows him to be an unfit person to practice law." In re Wilson, 391 S.W.2d 914, 917-18 (Mo. 1965).

14. "It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with these responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'" Schware v. Bd. of Bar Examiners, 353 U.S. 232, 247 1 L. Ed. 2d 796, 806, 77 S. Ct. 752, 761 (1957) (Frankfurter, J., concurring).

"Particularly applicable here is Rule 4.47 providing that 'A lawyer should always maintain his integrity; and shall not willfully commit any act against the interest of the public; nor shall he violate his duty to the courts or his clients; *nor shall he, by any misconduct, commit any offense against the laws of Missouri or the United States of America, which amounts to a crime involving acts done by him contrary to justice, honesty, modesty or good morals;* nor shall he be guilty of any other misconduct whereby, for the protection of the public and those charged with the administration of justice, he should no longer be entrusted with the duties and responsibilities belonging to the office of an attorney.'" In re Wilson, 391 S.W.2d 914, 917 (Mo. 1965).

15. *See* ABA CANON 29; *cf.* ABA CANON 28.

16. *Cf.* ABA CANONS 28 and 29.

CANON 2

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

ETHICAL CONSIDERATIONS

EC 2-1 The need of members of the public for legal services[1] is met only if they recognize their legal problems, appreciate the importance of seeking assistance,[2] and are able to obtain the services of acceptable legal counsel.[3] Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.[4]

Recognition of Legal Problems

EC 2-2 The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed.[5] Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers.[6] Examples of permissible activities include preparation of institutional advertisements[7] and professional articles for lay publications[8] and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.[9]

EC 2-3 Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances.[10] The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems.[11] The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit,[12] secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result.[13] A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.[14]

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems,[15] since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein.[16]

Selection of a Lawyer: Generally

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices.[17] The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.[18]

EC 2-8 Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties —relatives, friends, acquaintances, business associates, or other lawyers. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment.[19] A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.[20]

Selection of a Lawyer: Professional Notices and Listings

EC 2-9 The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory[21] brashness in seeking business and thus could mislead the layman.[22] Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers.[23] Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions.[24] History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.

EC 2-10 Methods of advertising that are subject to the objections stated above[25] should be and are prohibited.[26] However, the Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone directory,[27] in the office building directory, and on his letterhead and professional card.[28] But at all times the permitted notices should be dignified and accurate.

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process.[29] The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder.[30] Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby.[31] However, the name of a partner who withdraws from a firm but continues to practice

law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name,[32] and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status.[33] He should not hold himself out as being a partner or associate of a law firm if he is not one in fact,[34] and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.[35]

EC 2-14 In some instances a lawyer confines his practice to a particular field of law.[36] In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist[37] or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.[38]

EC 2-15 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees[39] should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services,[40] and lawyers should support and participate in ethical activities designed to achieve that objective.[41]

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

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer.[42] A lawyer should not charge more than a reasonable fee,[43] for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.[44]

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances,[45] including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees.[46] It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC 2-19 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC 2-20 Contingent fee arrangements[47] in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.[48] Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.

EC 2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.[49]

EC 2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers[50] properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer[51] and if the total fee is reasonable.

EC 2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients[52] and should attempt to resolve amicably any differences on the subject.[53] He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.[54]

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

EC 2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.[55]

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need.[56] Thus it has been necessary for the profession to institute additional programs to provide legal services.[57] Accordingly, legal aid offices,[58] lawyer referral services,[59] and other related programs have been developed, and others will be developed, by the profession.[60] Every lawyer should support all proper efforts to meet this need for legal services.[61]

Acceptance and Retention of Employment

EC 2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective

of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.[62]

EC 2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.[63]

EC 2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers,[64] public officials, or influential members of the community does not justify his rejection of tendered employment.

EC 2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons.[65] Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity[66] or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty,[67] or the belief of the lawyer regarding the merits of the civil case.[68]

EC 2-30 Employment should not be accepted by a lawyer when he is unable to render competent service[69] or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another.[70] Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves[71] or withdraws, or the client terminates the prior employment.[72]

EC 2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC 2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances[73], and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client[74] as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal,[75] suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.[76]

DISCIPLINARY RULES

DR 2-101 Publicity in General.[77]

(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

(B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity,[78] nor shall he authorize or permit others to do so in his behalf[79] except as permitted under DR 2-103. This does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name[80]:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.[81]

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(C) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.[82]

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices,[83] except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification[84] but may not be published in periodicals, magazines, newspapers,[85] or other media.[86]

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives.[87] It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer.[88] It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.[89]

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates,[90] and names and dates relating to deceased and retired members.[91] A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client.[92] The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides[96] and in the city directory of the city in which his or the firm's office is located;[97] but the listing may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers.[98] The listing shall not be in distinctive form[99] or type.[97] A law firm may have a listing in the firm name separate from that of its members and associates.[100] The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers,"[101] except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.[102]

(6) A listing in a reputable law list[103] or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession.[104] A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses[105] and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates;[106] a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105 (A)(4);[107] date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references,[108] and, with their consent, names of clients regularly represented.[107]

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.[109] A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm,[110] and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.[110]

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.[111]

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions;[112] however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR 2-103 Recommendaton of Professional Employment.[113]

(A) A lawyer shall not recommend employment, as a private practitioner,[114] of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.[115]

(B) Except as permitted under DR 2-103 (C), a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment[116] by a client, or as a reward for having made a recommendation resulting in his employment[117] by a client.

(C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate,[118] except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.[119]

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(1) A legal aid office or public defender office:
  (a) Operated or sponsored by a duly accredited law school.
  (b) Operated or sponsored by a bona fide nonprofit community organization.
  (c) Operated or sponsored by a governmental agency.
  (d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.[120]

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.[121]

(4) A bar association representative of the general bar of the geographical area in which the association exists.[122]

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities,[123] and only if the following conditions, unless prohibited by such interpretation, are met:
  (a) The primary purposes of such organization do not include the rendition of legal services.
  (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
  (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
  (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR 2-104 Suggestion of Need of Legal Services.[124]

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice,[125] except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.[126]

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2-103(D)(1), (2), or (5) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics[127] so long as he does not emphasize his own professional experience or reputation and does not understand to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.[128]

DR 2-105 Limitation of Practice.[129]

(A) A lawyer shall not hold himself out publicly as a specialist[130] or as limiting his practice,[131] except as permitted under DR 2-102 (A) (6) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation Patent Attorney, Patent Lawyer, Trademark Attorney, or Trademark Lawyer, or any combination of those terms, on his letterhead and office sign, and a lawyer actively engaged in the admiralty practice may use the designation Admiralty or Admiralty Lawyer on his letterhead and office sign.[132]

(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability,[133] but the announcement shall not contain a representation of special competence or experience.[134] The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

(4) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.[135]

DR 2-106 Fees for Legal Services.[136]

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.[137]

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

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

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

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

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by 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.[138]

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.[139]

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.[140]

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.[141]

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.[142]

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law, but he may enter into an agreement not to accept any other representation arising out of a transaction or event embraced in the subject matter of the controversy or suit thus settled.

DR 2-109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.[143]

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR 2-110 Withdrawal from Employment.[144]

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer repre-

senting a client in other matters shall withdraw from employment, if:

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

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.[145]

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.[146]

If DR 2-110 (B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.[147]

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

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

NOTES

1. "Men have need for more than a system of law; they have need for a system of law which functions, and that means they have need for lawyers." Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405 (1953).

2. "Law is not self-applying; men must apply and utilize it in concrete cases. But the ordinary man is incapable. He cannot know the principles of law or the rules guiding the machinery of law administration; he does not know how to formulate his desires with precision and to put them into writing; he is ineffective in the presentation of his claims." *Id.*

3. "This need [to provide legal services] was recognized by . . . Mr. [Lewis F.] Powell [Jr., President, American Bar Association, 1963-64], who said: 'Looking at contemporary America realistically, we must admit that despite all our efforts to date [and these have not been insignificant], far too many persons are not able to obtain equal justice under law. This usually results because their poverty or their ignorance has prevented them from obtaining legal counsel.'" Address by E. Clinton Bumberger, Association of American Law Schools 1965 Annual Meeting, Dec. 28, 1965, in PROCEEDINGS, PART II, 1965, 61, 63-64 (1965).

"A wide gap separates the need for legal services and its satisfaction, as numerous studies reveal. Looked at from the side of the layman, one reason for the gap is poverty and the consequent inability to pay legal fees. Another set of reasons is ignorance of the need for and the value of legal services, and ignorance of where to find a dependable lawyer. There is fear of the mysterious processes and delays of the law, and there is fear of overreaching and overcharging by lawyers, a fear stimulated by the occasional exposure of shysters." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438 (1965).

4. "It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them; so long as this can be done ethically and with dignity." *ABA Opinion* 320 (1968).

"[T]here is a responsibility on the bar to make legal services available to those who need them. The maxim, 'privilege brings responsibilities,' can be expanded to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 443 (1965).

"The obligation to provide legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs and fearful of the ways of the law that such advice is often most needed. If it is not received in time, the most valiant and skillful representation in court may come too late." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

5. "Over a period of years institutional advertising of programs for the benefit of the public have been approved by this and other Ethics Committees as well as by the courts. . . .

"To the same effect are opinions of this Committee: *Opinion 179* dealing with radio programs presenting a situation in which legal advice is suggested in connection with a drafting of a will; *Opinions 205* and *227* permitting institutional advertising of lawyer referral plans; *Opinion 191* holding that advertising by lawyer members of a non-bar associated sponsored plan violated *Canon 27*. The Illinois Ethics Committee, in its *Opinion 201*, sustained bar association institutional advertising of a check-up plan . . . .

"This Committee has passed squarely on the question of the propriety of institutional advertising in connection with a legal check-up plan. Informal Decision C-171 quotes with express approval the Michigan Ethics Committee as follows:

As a public service, the bar has in the past addressed the public as to the importance of making wills, consulting counsel in connection with real estate transactions, etc. In the same way, the bar, as such, may recommend this program, provided always that it does it in such a way that there is not suggestion of solicitation on behalf of any individual lawyer."

ABA Opinion 307 (1962).

6. "We recognize a distinction between teaching the lay public the importance of securing legal services preventive in character and the solicitation of professional employment by or for a particular lawyer. The former tends to promote the public interest and enhance the public estimation of the profession. The latter is calculated to injure the public and degrade the profession.

. . . .

"Advertising which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public and enable the lawyer to render a more desirable and beneficial professional service. . . . *ABA Opinion* 179 (1938).

7. "[A bar association] may engage in a dignified institutional educational campaign so long as it does not involve the identification of a particular lawyer with the check-up program. Such educational material may point out the value of the annual check-up and may be printed in newspapers, magazines, pamphlets, and brochures, or produced by means of films, radio, television or other media. The printed materials may be distributed in a dignified way through the offices of persons having close dealings with lawyers as, for example, banks, real estate agents, insurance agents and others. They may be available in lawyers' offices. The bar association may prepare and distribute to lawyers materials and forms for use in the annual legal check-up." *ABA Opinion* 307 (1962).

8. "A lawyer may with propriety write articles for publications in which he gives information upon the law . . . ." ABA CANON 40.

"The newsletters, by means of which respondents are alleged to have advertised their wares, were sent to the officers of union clients represented by their firm. . . . They contain no reference to any cases handled by the respondents. Their contents are confined to rulings of boards, commissions and courts on problems of interest to labor union, together with proposed and completed legislation important to the Brotherhood, and other items which might affect unions and their members. The respondents cite Opinion 213 of the Committee on Professional Ethics and Grievances as permitting such practice. After studying this opinion, we agree that sending of newsletters of the above type to regular clients does not offend Canon 27." In re Ratner, 194 Kan. 362, 371, 399 P.2d 865, 872-73 (1965).

Cf. ABA Opinion 92 (1933).

9. *Cf. ABA Opinions* 307 (1962) and 179 (1938).

"There is no ethical or other valid reason why an attorney may not write articles on legal subjects for magazines and newspapers. The fact that the publication is a trade journal or magazine, makes no difference as to the ethical question involved. On the other hand, it would be unethical and contrary to the precepts of the Canons for the attorney to allow his name to be carried in the magazine or other publication . . . as a free legal adviser for the subscribers to the publication. Such would be contrary to *Canons 27* and *35* and Opinions heretofore announced by the Committee on Professional Ethics and Grievances. (See *Opinions 31, 41, 42,* and *56*)." *ABA Opinion* 162 (1936).

10. *See* ABA CANON 28.

11. "This question can assume constitutional dimensions: "We meet at the outset the contention that 'solicitation' is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . .

. . . .

"However valid may be Virginia's interest in regulating the traditionally illegal practice of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against governments in other countries, the exercise in our own, as in this case of First Amendment rights to enforce Constitutional rights through litigation, as a matter of law, cannot be deemed malicious." NAACP v. Button, 371 U.S. 415, 429, 439-40, 9 L. Ed. 2d 405, 415-16, 422, 83 S. Ct. 328, 336, 341 (1963).

12. *See* ABA CANON 27.

13. "The Canons of Professional Ethics of the American Bar Association and the decisions of the courts quite generally prohibit the direct solicitation of business for gain by an attorney either through advertisement or personal communication; and also condemn the procuring of business by indirection through touters of any kind. It is disreputable for an attorney to breed litigation by seeking out those who have claims for personal injuries or other grounds of action in order to secure them as clients, or to employ agents or runners, or to reward those who bring or influence the bringing of business to his office. . . . Moreover, it tends quite easily to the institution of baseless litigation and the manufacture of perjured testimony. From early times, this danger has been recognized in the law by the condemnation of the crime of common barratry, or the stirring up of suits or quarrels between individuals at law or otherwise." In re Ades, 6 F.Supp. 467, 474-75 (D. Mary. 1934).

14. "*Rule 2.*

"§a. . . .

"[A] member of the State Bar shall not solicit professional employment by

"(1) Volunteering counsel or advice except where ties of blood relationship or trust make it appropriate." CAL. BUSINESS AND PROFESSIONS CODE §6076 (West 1962).

15. "*Rule 18* . . . A member of the State Bar shall not advise inquirers or render opinions to them through or in connection with a newspaper, radio or other publicity medium of any kind in respect to their specific legal problems, whether or not such attorney shall be compensated for his services." CAL. BUSINESS AND PROFESSIONS CODE §6076 (West 1962).

16. "In any case where a member might well apply the advice given in the opinion to his individual affairs, the lawyer rendering the opinion [concerning problems common to members of an association and distributed to the members through a periodic bulletin] should specifically state that this opinion should not be relied on by any member as a basis for handling his individual affairs, but that in every case he should consult his counsel. In the publication of the opinion the association should make a similar statement." *ABA Opinion* 273 (1946).

17. "A group of recent interrelated changes bears directly on the availability of legal services. . . . [One] change is the constantly accelerating urbanization of the country and the decline of personal and neighborhood knowledge of whom to retain as a professional man." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 440 (1965).

18. *Cf.* Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973, 974 (1963).

19. *See* ABA CANON 27.

20. *See* ABA CANON 28.

21. "'Self-laudation' is a very flexible concept; Canon 27 does not define it, so what course of conduct would be said to constitute it under a given state of facts would no doubt vary as the opinions of men vary. As a famous English judge said, it would vary as the length of the chancellor's foot. It must be in words and tone that will 'offend the traditions and lower the tone of our profession.' When it does this, it is 'reprehensible.' This seems to be the test by which 'self-laudation' is measured." State v. Nichols, 151 So. 2d 257, 259 (Fla. 1963).

22. "Were it not for the prohibitions of . . . [Canon 27] lawyers could, and no doubt would be forced to, engage competitively in advertising of all kinds in which each would seek to explain to the public why he could serve better and accomplish more than his brothers at the Bar.

"Susceptible as we are to advertising the public would then be encouraged to choose an attorney on the basis of which had the better, more attractive advertising program rather than on his reputation for professional ability.

"This would certainly maim, if not destroy, the dignity and professional status of the Bar of this State." State v. Nichols, 151 So. 2d 257, 268 (Fla. 1963) (O'Connell, J., concurring in part and dissenting in part).

23. *Cf.* ABA CANON 8.

24. "The prohibition of advertising by lawyers deserves some examination. All agree that advertising by an individual lawyer, if permitted, will detract from the dignity of the profession, but the matter goes deeper than this. Perhaps the most understandable and acceptable additional reasons we have found are stated by one commentator as follows:

"'1. That advertisements, unless kept within narrow limits, like any other form of solicitation, tend to stir up litigation, and such tendency is against the public interest.

"'2. That if there were no restrictions on advertisements, the least capable and least honorable lawyers would be apt to publish the most extravagant and alluring material about themselves, and that the harm which would result would, in large measure, fall on the ignorant and on those least able to afford it.

"'3. That the temptation would be strong to hold out as inducements for employment, assurances of success or of satisfaction to the client, which assurances could not be realized, and that the giving of such assurances would materially increase the temptation to use ill means to secure the end desired by the client.

"'In other words, the reasons for the rule, and for the conclusion that it is desirable to prohibit advertising entirely, or to limit it within such narrow bounds that it will not admit of abuse, are based on the possibility and probability that this means of publicity, if permitted, will be abused.' Harrison Hewitt in a comment at 15 A.B.A.J. 116 (1929) reproduced in CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION (2d Ed., 1955), p. 525.

"Of course, competition is at the root of the abuses in advertising. If the individual lawyer were permitted to compete with his fellows in publicity through advertising, we have no doubt that Mr. Hewitt's three points, quoted above, would accurately forecast the result." Jacksonville Bar Ass'n v. Wilson, 102 So. 2d 292, 294-95 (Fla. 1958).

25. *See* ABA CANON 27.

26. *Cf. ABA Opinions* 309 (1963) and 284 (1951).

27. *Cf. ABA Opinions* 313 (1964) and 284 (1951).

28. *See* ABA CANON 27.

29. *Cf. ABA Opinion* 303 (1961).

30. *See* ABA CANON 33.

31. *Id.*

"The continued use of a firm name by one or more surviving partners after the death of a member of the firm whose name is in the firm title is expressly permitted by the Canons of Ethics. The reason for this is that all of the partners have by their joint and several efforts over a period of years contributed to the good will attached to the firm name. In the case of a firm having widespread connections, this good will is disturbed by a change in firm name every time a name partner dies, and that reflects a loss in some degree of the good will to the building up of which the surviving partners have contributed their time, skill and labor through a period of years. To avoid this loss the firm name is continued, and to meet the requirements of the Canon the individuals constituting the firm from time to time are listed." *ABA Opinion* 267 (1945).

"Accepted local custom in New York recognizes that the name of a law firm does not necessarily identify the individual members of the firm, and hence the continued use of a firm name after the death of one or more partners is not a deception and is permissible. . . . The continued use of a deceased partner's name in the firm title is not affected by the fact that another partner withdraws from the firm and his name is dropped, or the name of the new partner is added to the firm name." *Opinion* No. 45, Committee on Professional Ethics, New York State Bar Ass'n, 39 N.Y.St.B.J. 455 (1967).

Cf. ABA Opinion 258 (1943).

32. *Cf.* ABA CANON 33 and *ABA Opinion* 315 (1965).

33. *Cf. ABA Opinions* 283 (1950) and 81 (1932).

34. *See ABA Opinion* 316 (1967).

35. "The word 'associates' has a variety of meanings. Principally through custom the word when used on the letterheads of law firms has come to be regarded as describing those who are employees of the firm. Because the word has acquired this special significance in connection with the practice of the law the use of the word to describe lawyer relationships other than employer-employee is likely

to be misleading." In re Sussman and Tanner, 241 Ore. 246, 248, 405 P.2d 355, 356 (1965).

According to *ABA Opinion* 310 (1963), use of the term "associates" would be misleading in two situations: (1) where two lawyers are partners and they share both responsibility and liability for the partnership; and (2) where two lawyers practice separately, sharing no responsibility or liability, and only share a suite of offices and some costs.

36. "For a long time, many lawyers have, of necessity, limited their practice to certain branches of law. The increasing complexity of the law and the demand of the public for more expertness on the part of the lawyer has, in the past few years—particularly in the last ten years—brought about specialization on an increasing scale." *Report of the Special Committee on Specialization and Specialized Legal Services*, 79 A.B.A. Rep. 582, 584 (1954).

37. "In varying degrees specialization has become the *modus operandi* throughout the legal profession. . . . American society is specialization conscious. The present Canons, however, do not allow lawyers to make known to the lay public the fact that they engage in the practice of a specialty. . . ." Tucker, *The Large Law Firm: Considerations Concerning the Modernization of the Canons of Professional Ethics*, 1965 Wis. L. Rev. 344, 348-49 (1965).

38. *See* ABA Canon 27.

39. *See* ABA Canon 12.

40. *Cf.* ABA Canon 12.

41. "If there is any fundamental proposition of government on which all would agree, it is that one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless the legal profession is ready to provide adequate representation for those unable to pay the usual fees." *Professional Representation: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

42. *See* ABA Canon 12.

43. *Cf.* ABA Canon 12.

44. "When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient." *ABA Opinion* 302 (1961).

Cf. ABA Opinion 187 (1962).

45. *See* ABA Canon 12.

46. *Id.*

"[U]nder . . . [*Canon 12*], this Committee has consistently held that minimum fee schedules can only be suggested or recommended and cannot be made obligatory . . . ." *ABA Opinion* 302 (1961).

"[A] compulsory minimum fee schedule is contrary to *Canon 12* and repeated pronouncements of this committee." *ABA Opinion* 190 (1939).

Cf. ABA Opinions 171 (1937) and 28 (1930).

47. *See* ABA Canon 13; *see also* Mackinnon, Contingent Fees for Legal Services (1964) (A report of the American Bar Foundation).

"A contract for a reasonable contingent fee where sanctioned by law is permitted by *Canon 13*, but the client must remain responsible to the lawyer for expenses advanced by the latter. There is to be no barter of the privilege of prosecuting a cause for gain in exchange for the promise of the attorney to prosecute at his own expense." (Cardozo, C. J. in Matter of Gilman, 251 N.Y. 265, 270-271.)" *ABA Opinion* 246 (1942).

48. *See* Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution*, 26 U. Pitt. L. Rev. 811, 829 (1965).

49. *See* ABA Canon 38.

"Of course, as . . . [Informal Opinion 679] points out, there must be full disclosure of the arrangement [that an entity other than the client pays the attorney's fee] by the attorney to the client . . . ." *ABA Opinion* 320 (1968).

50. "Only lawyers may share in . . . a division of fees, but . . . it is not necessary that both lawyers be admitted to practice in the same state, so long as the division was based on the division of services or responsibility." *ABA Opinion* 316 (1967).

51. *See* ABA Canon 34.

"We adhere to our previous rulings that where a lawyer merely brings about the employment of another lawyer *but renders no service and assumes no responsibility in the matter*, a division of the latter's fee is improper. (*Opinions 18 and 153*).

"It is assumed that the bar, generally, understands what acts or conduct of a lawyer may constitute 'services' to a client within the intendment of *Canon 12*. Such acts or conduct involve, if not always, involve 'responsibility' on the part of the lawyer, whether the word 'responsibility' be construed to denote the possible resultant legal or moral liability on the part of the lawyer to the client or to others, or the onus of deciding what should or should not be done in behalf of the client. The word 'services' in *Canon 12* must be construed in this broad sense and may apply to the selection and retainer of associate counsel as well as to other acts or conduct in the client's behalf." *ABA Opinion* 204 (1940).

52. *See* ABA Canon 14.

53. *Cf. ABA Opinion* 320 (1968).

54. *See* ABA Canon 14.

"Ours is a learned profession, not a mere money-getting trade. . . . Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. And where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights." *ABA Opinion* 250 (1943).

But cf. ABA Opinion 320 (1968).

55. "As a society increases in size, sophistication and technology, the body of laws which is required to control that society also increases in size, scope and complexity. With this growth, the law directly affects more and more facets of individual behavior, creating an expanding need for legal services on the part of the individual members of the society. . . . As legal guidance in social and commercial behavior increasingly becomes necessary, there will come a concurrent demand from the layman that such guidance be made available to him. This demand will not come from those who are able to employ the best of legal talent, nor from those who can obtain legal assistance at little or no cost. It will come from the large 'forgotten middle income class,' who can neither afford to pay proportionately large fees nor qualify for ultra-low-cost services. The legal profession must recognize this inevitable demand and consider methods whereby it can be satisfied. If the profession fails to provide such methods, the laity will." Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution*, 26 U. Pitt. L. Rev. 811, 811-12 (1965).

"The issue is not whether we shall do something or do nothing. The demand for ordinary everyday legal justice is so great and the moral nature of the demand is so strong that the issue has become whether we devise, maintain, and support suitable agencies able to satisfy the demand or, by our own default, force the government to take over the job, supplant us, and ultimately dominate us." Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 Wis. L. Rev. 416, 418 (1949).

56. "Lawyers have peculiar responsibilities for the just administration of the law, and these responsibilities include providing advice and representation for needy persons. To a degree not always appreciated by the public at large, the bar has performed these obligations with zeal and devotion. The Committee is persuaded, however, that a system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate. . . . A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance. . . . We believe that fees for private appointed counsel should be set by the court within maximum limits established by the statute." Report of the Atty Gen's Comm. on Poverty and the Administration of Criminal Justice 41-43 (1963).

57. "At present this representation [of those unable to pay usual fees] is being supplied in some measure through the spontaneous generosity of individual lawyers, through legal aid societies, and—increasingly—through the organized efforts of the Bar. If those who stand in need of this service know of its availability and their need is in fact adequately met, the precise mechanism by which this service is provided becomes of secondary importance. It is of great importance, however, that both the impulse to render this service, and the plan for making that impulse effective, should arise within the legal profession itself." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

58. "Free legal clinics carried on by the organized bar are not ethically objectionable. On the contrary, they serve a very worthwhile purpose and should be encouraged." *ABA Opinion* 191 (1939).

59. "We are of the opinion that the [lawyer referral] plan here presented does not fall within the inhibition of the Canon. No solicitation for a particular lawyer is involved. The dominant purpose of the plan is to provide as an obligation of the profession competent legal services to persons in low-income groups at fees within their ability to pay. The plan is to be supervised and directed by the local Bar Association. There is to be no advertisement of the names of the lawyers constituting the panel. The general method and purpose of the plan only is to be advertised. Persons seeking the legal services will be directed to members of the panel by the Bar Association. Aside from the filing of the panel with the Bar Association, there is to be no advertisement of the names of the lawyers constituting the panel. If these limitations are observed, we think there is no solicitation of business by or for particular lawyers and no violation of the inhibition of *Canon 27*." *ABA Opinion* 205 (1940).

60. "Whereas the American Bar Association believes that it is a fundamental duty of the bar to see to it that all persons requiring legal advice be able to attain it, irrespective of their economic status . . . .

"Resolved, that the Association approves and sponsors the setting up by state and local bar associations of lawyer referral plans and low-cost legal service methods for the purpose of dealing with cases of persons who might not otherwise have the benefit of legal advice . . . ." *Proceedings of the House of Delegates of the American Bar Association*, Oct. 30, 1946, 71 A.B.A. Rep. 103, 109-10 (1946).

61. "The defense of indigent citizens, without compensation, is carried on throughout the country by lawyers representing legal aid societies, not only with the approval, but with the commendation of those acquainted with the work. Not infrequently services are rendered out of sympathy or for other philanthropic reasons, by individual lawyers who do not represent legal aid societies. There is nothing whatever in the Canons to prevent a lawyer from performing such an act, nor should there be." *ABA Opinion* 148 (1935).

62. *But cf.* ABA Canon 31.

63. "One of the highest services the lawyer can render to society is to appear pro court on behalf of clients whose causes are in disfavor with the general public." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

One author proposes the following proposition to be included in "A Proper Oath for Advocates": "I recognize that it is sometimes difficult for clients with unpopular causes to obtain proper legal representation. I will do all that I can to assure that the client with the unpopular cause is properly represented, and that the lawyer representing such a client receives credit from and support of the bar for handling such a matter." Thode, *The Ethical Standard for the Advocate*, 39 Texas L. Rev. 575, 592 (1961).

"§6068. . . . It is the duty of an attorney:

"(b) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed." Cal. Business and Professions Code §6068 (West 1962).

Ohio Rev. Stats. Ch. 9 §9.460(8).

See Rostow, *The Lawyer and His Client*, 48 A.B.A.J. 25 and 146 (1962).

64. *See* ABA Canons 7 and 29.

"We are of the opinion that it is not professionally improper for a lawyer to accept employment to compel another lawyer to honor the just claim of a layman. On the contrary, it is highly proper that he do so. Unfortunately, there appears to be a widespread feeling among laymen that it is difficult, if not impossible, to obtain justice when they have claims against members of the Bar because other lawyers will not accept employment to proceed against them. The honor of the profession, whose members proudly style themselves officers of the court, must surely be sullied if its members bind themselves by custom to refrain from enforcing just claims of laymen against lawyers." *ABA Opinion* 144 (1935).

65. ABA Canon 4 uses a slightly different test, saying, "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason . . . ."

66. *Cf.* ABA Canon 7.

67. *See* ABA Canon 5.

68. Dr. Johnson's reply to Boswell upon being asked what he thought of "supporting a cause which you know to be bad" was: "*Sir*, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts faithfully; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and it if does convince him, why, then, Sir, you are wrong, and he is right." 2 Boswell, The Life of Johnson 47-48 (Hill ed. 1887).

69. "The lawyer deciding whether to undertake a case must be able to judge objectively whether he is capable of handling it and whether he can assume its burdens without prejudice to previous commitments. . . ." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1158, 1218 (1958).

70. "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong." ABA Canon 30.

71. *See* ABA Canon 7.

72. *Id.*

"From the facts stated we assume that the client has discharged the first attorney and given notice of the discharge. Such being the case, the second attorney may properly accept employment. *Canon 7; Opinions 10, 130, 149*." *ABA Opinion* 209 (1941).

73. *See* ABA Canon 44.

"I will carefully consider, before taking a case, whether it appears that I can fully represent the client within the framework of law. If the decision is in the affirmative, then it will take extreme circumstances to cause me to decide later that I cannot so represent him." Thode, *The Ethical Standard for the Advocate*, 39 Texas L. Rev. 575, 592 (1961) (from "A Proper Oath for Advocates").

74. *ABA Opinion* 314 (1965) held that a lawyer should not disassociate himself from a cause when "it is obvious that the very act of disassociation would have the effect of violating *Canon 37*."

75. ABA Canon 44 enumerates instances in which ". . . the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer."

76. *See* ABA Canon 44.

77. *Cf.* ABA Canon 27; *see generally ABA Opinion* 293 (1957).

78. *Cf. ABA Opinions* 133 (1935), 116 (1934), 107 (1934), 73 (1932), 59 (1931), and 43 (1931).

79. "There can be no justification for the participation and acquiescence by an attorney in the development and publication of an article which, on its face, plainly amounts to a self-interest and unethical presentation of his achievements and capabilities." Matter of Connelly, 18 App. Div. 2d 466, 478, 240 N.Y.S.2d 126, 138 (1963).

"An announcement of the fact that the lawyer had resigned and the name of the person to succeed him, or take over his work, would not be objectionable, either as an official communication to those employed by or connected with the administrative agency or instrumentality [that had employed him], or as a news release.

"But to include therein a statement of the lawyer's experience in and acquaintance with the various departments and agencies of the government, and a laudation of his legal ability, either generally or in a special branch of the law, is not only bad taste but ethically improper.

"It can have but one primary purpose or object: to aid the lawyer in securing professional employment in private practice by advertising his professional experience, attainments and ability." *ABA Opinion* 184 (1938).

Cf. ABA Opinions 285 (1951) and 140 (1935).

80. "The question is always . . . whether under the circumstance the furtherance of the professional employment of the lawyer is the primary purpose of the advertisement, or is merely a necessary incident of a proper and legitimate objective of the client which does not have the effect of unduly advertising him." *ABA Opinion* 290 (1956).

See ABA Opinion 285 (1951).

81. *See ABA Opinions* 299 (1961), 290 (1956), 158 (1939), and 100 (1933); *cf. ABA Opinion* 80 (1932).

82. "*Rule 2.*

. . . .

"[A] member of the State Bar shall not solicit professional employment by . . . .

"(4) The making of gifts to representatives of the press, radio, television or any medium of communication in anticipation of or in return for publicity." Cal. Business and Professions Code §6076 (West 1962).

83. *Cf. ABA Opinions* 233 (1943) and 114 (1934).

84. *See ABA Opinion* 175 (1938).

85. *See ABA Opinions* 260 (1944) and 182 (1938).

86. *But cf. ABA Opinions* 276 (1947) and 256 (1943).

87. *See ABA Opinion* 301 (1961).

88. "[I]t has become commonplace for many lawyers to participate in government service; to deny them the right, upon their return to private practice, to refer to their prior employment in a brief and dignified manner, would place an undue limitation upon a large element of our profession. It is entirely proper for a member of the profession to explain his absence from private practice, where such is the primary purpose of the announcement, by a brief and dignified reference to the prior employment.

". . . [M]y such announcement should be limited to the immediate past connection of the lawyer with the government, made upon his leaving that position to enter private practice." *ABA Opinion* 301 (1961).

89. *See ABA Opinion* 251 (1943).

90. "Those lawyers who are working for an individual lawyer or a law firm may be designated on the letterhead and in other appropriate places as 'associates'." *ABA Opinion* 310 (1963).

91. *See* ABA Canon 33.

92. *But see ABA Opinion* 285 (1951).

93. *See ABA Opinion* 295 (1959).

94. *But see ABA Opinion* 313 (1964) which says the Committee "approves a listing in the classified section of the city directory for lawyers only when the listing includes all lawyers residing in the community and when no charge is made therefor."

95. "The listing should consist only of the lawyer's name, address and telephone number." *ABA Opinion* 313 (1964).

96. "[A]dding to the regular classified listing a 'second line' in which a lawyer states that he is engaged in a 'specialty' is an undue attempt to make his name distinctive." *ABA Opinion* 284 (1951).

97. "[Opinion 284] held that a lawyer could not with propriety have his name listed in distinctive type in a telephone directory or city directory. We affirm that opinion." *ABA Opinion* 313 (1964).

See ABA Opinions 123 (1934) and 53 (1931).

98. "[I]f a lawyer is a member of a law firm, both the firm, and the individual lawyer may be listed separately." *ABA Opinion* 313 (1964).

99. *See ABA Opinion* 284 (1951).

100. *See* Silverman v. State Bar of Texas, 405 F.2d 410, (5th Cir. 1968); *but see ABA Opinion* 286 (1952).

101. *Cf.* ABA Canon 43.

102. *Cf. ABA Opinion* 255 (1943).

103. "We are asked to define the word 'addresses' appearing in the second paragraph of Canon 27 . . . .

"It is our opinion that an address (other than a cable address) within the intendment of the canon is that of the lawyer's office or of his residence. Neither address should be misleading. If, for example, an office address is given, it

must be that of a bona fide office. The residence address, if given, should be identified as such if the city or other place of residence is not the same as that in which the law office is located." *ABA Opinion* 249 (1942).

104. "[T]oday in various parts of the country Committees on Professional Ethics of local and state bar associations are authorizing lawyers to describe themselves in announcements to the Bar and in notices in legal periodicals and approved law lists as specialists in a great variety of things. Thus in the approved law lists or professional announcements there appear, in connection with the names of individual practitioners or firms, such designations as 'International Law, Public and Private'; 'Trial Preparation in Personal Injury and Negligence Actions'; 'Philippine War Damage Claims'; 'Anti-Trust'; 'Domestic Relations'; 'Tax Law'; 'Negligence Law'. It would seem that the ABA has given at least its tacit approval to this sort of announcement.

"It is important that this sort of description is not, in New York at least, permitted on letterheads or shingles or elsewhere in communications to laymen. This is subject to the single exception that such announcement to laymen is permitted in the four traditional specialties, Admiralty, Patent, Copyright and Trade-mark." *Report of the Special Committee on Specialization and Specialized Legal Education*, 79 A.B.A. Rep. 582, 586 (1954).

105. This provision is included to conform to action taken by the ABA House of Delegates at the Mid-Winter Meeting, January, 1969.

106. *See* ABA Canon 43 and *ABA Opinion* 119 (1934); *but see ABA Opinion* 236 (1941).

107. *See* ABA Canon 27.

108. *See* ABA Canon 33; *cf. ABA Opinions* 318 (1967), 267 (1945), 219 (1941), 208 (1940), 192 (1939), 97 (1933), and 6 (1925).

109. *ABA Opinion* 318 (1967) held, "anything to the contrary in Formal Opinion 315 or in the other opinions cited notwithstanding" that: "Where a partner whose name appears in the name of a law firm is elected or appointed to high local, state or federal office, which office he intends to occupy only temporarily, at the end of which time he intends to return to his position with the firm, and provided that he is not precluded by holding such office from engaging in the practice of law and does not in fact sever his relationship with the firm but only takes a leave of absence, and provided that there is no local law, statute or custom to the contrary, his name may be retained in the firm name during his term or terms of office, but only if proper precautions are taken not to mislead the public as to his degree of participation in the firm's affairs."

Cf. ABA Opinion 143 (1935), New York County Opinion 67, and New York City Opinions 36 and 798; *but cf. ABA Opinion* 192 (1939) and Michigan Opinion 164.

110. *Cf.* ABA Canon 33.

111. *See ABA Opinion* 277 (1948); *cf.* ABA Canon 33 and *ABA Opinions* 318 (1967), 126 (1935), 115 (1934), and 106 (1934).

112. *See ABA Opinions* 318 (1967) and 316 (1967); *cf.* ABA Canon 33.

113. *Cf.* ABA Canons 27 and 28.

114. "We think it clear that a lawyer's seeking employment in an ordinary law office, or appointment to a civil service position, is not prohibited by . . . [Canon 27]." *ABA Opinion* 197 (1939).

115. "[A] lawyer may not seek from persons not his clients the opportunity to perform . . . a [legal] check-up." *ABA Opinion* 307 (1962).

116. *Cf. ABA Opinion* 78 (1932).

117. "'No financial connection of any kind between the Brotherhood and any lawyer is permissible. No lawyer can properly pay any amount whatsoever to the Brotherhood or any of its departments, officers or members as compensation, reimbursement of expenses or gratuity in connection with the procurement of a case.'" In re Brotherhood of R. R. Trainmen, 13 Ill. 2d 391, 398, 150 N.E. 2d 163, 167 (1958), *quoted in* In re Ratner, 194 Kan. 362, 372, 399 P.2d 865, 873 (1965).

See ABA Opinion 147 (1935).

118. "This Court has condemned the practice of ambulance chasing through the media of runners and touters. In similar fashion we have with equal emphasis condemned the practice of direct solicitation by a lawyer. We have classified both offenses as serious breaches of the Canons of Ethics demanding severe treatment of the offending lawyer." State v. Dawson, 111 So. 2d 427, 431 (Fla. 1959).

119. "Registrants [of a lawyer referral plan] may be required to contribute to the expense of operating it by a reasonable registration charge or by a reasonable percentage of fees collected by them." *ABA Opinion* 291 (1956).

Cf. ABA Opinion 227 (1941).

120. *Cf. ABA Opinion* 148 (1935).

121. *Cf. ABA Opinion* 227 (1941).

122. "If a bar association has embarked on a program of institutional advertising for an annual legal check-up and provides brochures and reprints, it is not improper to have these available in the lawyer's office for persons to read and take." *ABA Opinion* 307 (1962).

Cf. ABA Opinion 121 (1934).

123. United Mine Workers v. Ill. State Bar Ass'n., 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967); Brotherhood of R.R. Trainmen v. Virginia, 371 U.S. 1, 12 L. Ed. 2d 89, 84 S. Ct. 1113 (1964); NAACP v. Button, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963).

124. ABA Canon 28.

125. *Cf. ABA Opinions* 229 (1941) and 173 (1937).

126. "It certainly is not improper for a lawyer to advise his regular clients of new statutes, court decisions, and administrative rulings, which may affect the client's interests, provided the communication is strictly limited to such information. . . .

"When such communications go to concerns or individuals other than regular clients of the lawyer, they are thinly disguised advertisements for professional employment, and are obviously improper." *ABA Opinion* 213 (1941).

"It is our opinion that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will.

"Periodic notices might be sent to the client for whom a lawyer has drawn a will, suggesting that it might be wise for the client to reexamine his will to determine whether or not there has been any change in his situation requiring a modification of his will." *ABA Opinion* 210 (1941).

Cf. ABA Canon 28.

127. *Cf. ABA Opinion* 168 (1937).

128. *But cf. ABA Opinion* 111 (1934).

129. *See* ABA Canon 45; cf. ABA Canons 27, 43, and 46.

130. *Cf. ABA Opinions* 228 (1941) and 194 (1939).

131. *See ABA Opinions* 251 (1943) and 175 (1938).

132. *See* ABA Canon 27; cf. *ABA Opinion* 286 (1952).

133. *Cf. ABA Opinion* 194 (1939).

134. *See* ABA Canon 46.

135. This provision is included to conform to action taken by the ABA House of Delegates at the Mid-Winter Meeting, January, 1969.

136. *See* ABA Canon 12.

137. The charging of a "clearly excessive fee" is a ground for discipline. State ex rel. Nebraska State Bar Ass'n. v. Richards, 165 Neb. 80, 90, 84 N. W. 2d 136, 143 (1957).

"An attorney has the right to contract for any fee he chooses so long as it is not excessive (see Opinion 190), and this Committee is not concerned with the amount of such fees unless so excessive as to constitute a misappropriation of the client's funds (see Opinion 27)." *ABA Opinion* 320 (1968).

Cf. ABA Opinions 209 (1940), 190 (1939), and 27 (1930) and State ex rel. Lee v. Buchanan, 191 So. 2d 33 (Fla. 1966).

138. *Cf.* ABA Canon 13; *see generally* MacKinnon, Contingent Fees for Legal Services (1964) (A Report of the American Bar Foundation).

139. "Contingent fees, whether in civil or criminal cases, are a special concern of the law. . . .

"In criminal cases, the rule is stricter because of the danger of corrupting justice. The second part of Section 542 of the Restatement [of Contracts] reads; 'A bargain to conduct a criminal case . . . in consideration of a promise of a fee contingent on success is illegal. . . .'" Peyton v. Margiotti, 398 Pa. 86, 156 A. 2d 865, 867 (1959).

"The third area of practice in which the use of the contingent fee is generally considered to be prohibited is the prosecution and defense of criminal cases. However, there are so few cases, and these are predominantly old, that it is doubtful that there can be said to be any current law on the subject. . . . In the absence of cases on the validity of contingent fees for defense attorneys, it is necessary to rely on the consensus among commentators that such a fee is void as against public policy. The nature of criminal practice itself makes unlikely the use of contingent fee contracts." MacKinnon, Contingent Fees for Legal Services 52 (1964) (A Report of the American Bar Foundation).

140. *See* ABA Canon 34 and *ABA Opinions* 316 (1967) and 294 (1958); *see generally ABA Opinions* 265 (1945), 204 (1940), 190 (1939), 171 (1937), 153 (1936), 97 (1933), 63 (1932), 28 (1930), 27 (1930), and 18 (1930).

141. "*Canon 12* contemplates that a lawyer's fee should not exceed *the value of the services* rendered. . . .

"*Canon 12* applies, whether joint or separate fees are charged [by associate attorneys] . . . ." *ABA Opinion* 204 (1940).

142. "[A] general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status. Accordingly, the Committee is of the opinion it would be improper for the employing lawyer to require the covenant and likewise for the employed lawyer to agree to it." *ABA Opinion* 300 (1961).

143. *See* ABA Canon 30.

"*Rule 13*. . . . A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another . . . ." Cal. Business and Professions Code §6067 (West 1962).

144. *Cf.* ABA Canon 44.

145. *See also* Code of Professional Responsibility, DR 5-102 and DR 5-105.

146. *Cf.* ABA Canon 4.

147. *Cf.* Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), *rehearing denied*, 388 U.S. 924, 18 L. Ed. 2d 1377, 87 S. Ct. 2094 (1967).

CANON 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

ETHICAL CONSIDERATIONS

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.[1] The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC 3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law.[2] Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product.[3] This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman.[4] This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs.[5] In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper.[6] These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states.[7] Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states.[8] In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.[9]

DISCIPLINARY RULES

DR 3-101 Aiding Unauthorized Practice of Law.[10]

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.[11]

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.[12]

DR 3-102 Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer,[13] 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.[14]

(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.[15]

DR 3-103 Forming a partnership with a Non-Lawyer.

(A) 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.[16]

NOTES

1. "The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law. The prohibition of lay intermediaries is intended to insure the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 439 (1965).

2. What constitutes unauthorized practice of the law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction." *ABA Opinion* 198 (1939).

"In the light of the historical development of the lawyer's functions, it is impossible to lay down an exhaustive definition of 'the practice of law' by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work.' State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz., 76, 87, 366 P.2d 1, 8-9 (1961), *modified*, 91 Ariz. 293, 371 P. 2d 1020 (1962).

3. "A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings a part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client." *ABA Opinion* 316 (1967).

ABA Opinion 316 (1967) also stated that if a lawyer practices law as part of a law firm which includes lawyers from several states, he may delegate tasks to firm members in other states so long as he "is the person who, on behalf of the firm, vouched for the work of all of the others and, with the client and in the courts, did the legal acts defined by that state as the practice of law."

"A lawyer cannot delegate his professional responsibility to a law student employed in his office. He may avail himself of the assistance of the student in many of the fields of the lawyer's work, such as examination of case law, finding and interviewing witnesses, making collections of claims, examining court records, delivering papers, conveying important messages, and other similar matters. But the student is not permitted, until he is admitted to the Bar, to perform the professional functions of a lawyer, such as conducting court trials, giving professional advice to clients or drawing legal documents for them. The student in all his work must act as agent for the lawyer employing him, who must supervise his work and be responsible for his good conduct." *ABA Opinion* 85 (1932).

4. "No division of fees for legal services is proper, except with another lawyer . . . ." ABA CANON 34. Otherwise, according to *ABA Opinion* 316 (1967), "[t]he Canons of Ethics do not examine into the method by which such persons are remunerated by the lawyer. . . . They may be paid a salary, a per diem charge, a flat fee, a contract price, etc."

See ABA CANONS 33 and 47.

5. "Many partnership agreements provide that the active partners, on the death of any one of them, are to make payments to the estate or to the nominee of a deceased partner on a pre-determined formula. It is only where the effect of such an arrangement is to make the estate or nominee a member of the partnership along with the surviving partners that it is prohibited by *Canon 34*. Where the payments are made in accordance with a pre-existing agreement entered into by the deceased partner during his lifetime and providing for a fixed method for determining their amount based upon the value of services rendered during the partner's lifetime and providing for a fixed period over which the payments are to be made, this is not the case. Under these circumstances, whether the payments are considered to be delayed payment of compensation earned but withheld during the partner's lifetime, or whether they are considered to be an approximation of his interest in matters pending at the time of his death, is immaterial. In either event, as Henry S. Drinker says in his book, LEGAL ETHICS, at page 189: 'It would seem, however, that a reasonable agreement to pay the estate a proportion of the receipts for a reasonable period is a proper practical settlement for the lawyer's services to his retirement or death.'" *ABA Opinion* 308 (1963).

6. *Cf. ABA Opinion* 311 (1964).

7. "That the States have broad power to regulate the practice of law is, of course, beyond question." United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967).

"It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules." *ABA Opinion* 316 (1967).

8. "Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of a single client may involve legal problems in several states." *ABA Opinion* 316 (1967).

9. "[W]e reaffirmed the general principle that legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but we pointed out that there may be multistate transactions where strict adherence to this thesis would not be in the public interest and that, under the circumstances, it would have been not only more costly to the client but also 'grossly impractical and inefficient' to have had the settlement negotiations conducted by separate lawyers from different states." In re Estate of Waring, 47 N.J. 367, 376, 221 A.2d 193, 197 (1966).

Cf. ABA Opinion 316 1967).

10. Conduct permitted by the Disciplinary Rules of Canons 2 and 5 does not violate DR 3-101.

11. *See* ABA CANON 47.

12. It should be noted, however, that a lawyer may engage in conduct, otherwise prohibited by this Disciplinary Rule, where such conduct is authorized by preemptive federal legislation. *See* Sperry v. Florida, 373 U.S. 379, 10 L. Ed. 2d 428, 83 S. Ct. 1322 (1963).

13. *See* ABA CANON 34 and *ABA Opinions* 316 (1967), 180 (1938), and 48 (1931).

"The receiving attorney shall not under any guise or form share his fee for legal services with a lay agency, personal or corporate, without prejudice, however, to the right of the lay forwarder to charge and collect from the creditor proper compensation for non-legal services rendered by the law [*sic*] forwarder which are separate and apart from the services performed by the receiving attorney." *ABA Opinion* 294 (1958).

14. *See ABA Opinions* 309 (1963) and 266 (1945).

15. *Cf. ABA Opinion* 311 (1964).

16. *See* ABA CANON 33; *cf. ABA Opinions* 239 (1942) and 201 (1940).

ABA Opinion 316 (1967) states that lawyers licensed in different jurisdictions may, under certain conditions, enter "into an arrangement for the practice of law" and that a lawyer licensed in State A is not, for such purpose, a layman in State B.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.[1] A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.[2] A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure,[3] when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to

non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.[4] Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.[6] Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates.[8] Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another,[7] and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.[4] Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.[5] A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.[10]

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:
(1) Reveal a confidence or secret of his client.[11]
(2) Use a confidence or secret of his client to the disadvantage of the client.
(3) Use a confidence or secret of his client for the advantage of himself[12] **or of a third person,**[13] **unless the client consents after full disclosure.**

(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.[14]
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.[15]
(3) The intention of his client to commit a crime[16] **and the information necessary to prevent the crime.**[17]
(4) Confidences or secrets necessary to establish or collect his fee[18] **or to defend himself or his employees or associates against an accusation of wrongful conduct.**[19]

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

NOTES

1. *See* ABA CANONS 6 and 37 and *ABA Opinion* 287 (1953).

"The reason underlying the rule with respect to confidential communications between attorney and client is well stated in MECHAM ON AGENCY, 2d Ed., Vol. 2, §2297, as follows: 'The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged;—that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him under such circumstances.'" *ABA Opinion* 250 (1943).

"While it is true that complete revelation of relevant facts should be encouraged for trial purposes, nevertheless an attorney's dealings with his client, if both are sincere, and if the dealings involve more than mere technical matters, should be immune to discovery proceedings. There must be freedom from fear of revealment of matters disclosed to an attorney because of the peculiarly intimate relationship existing." Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F.Supp. 917, 919 (D.N.J. 1958).

Cf. ABA Opinions 314 (1965), 274 (1946) and 268 (1945).

2. "While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer. Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960).

Cf. ABA Opinion 150 (1936).

3. "Where . . . [a client] knowingly and after full disclosure participates in a [legal fee] financing plan which requires the furnishing of certain information to the bank, clearly by his conduct he has waived any privilege as to that information." *ABA Opinion* 320 (1968).

4. "The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his client by exposing injurious evidence entrusted to him. . . . [D]oing something intrinsically regrettable, because the only alternative involves worse consequences, is a necessity in every profession." WILLISTON, LIFE AND LAW 271 (1940).

Cf. ABA Opinions 177 (1938) and 83 (1932).

5. *See* ABA CANON 11.

6. *See* ABA CANON 37.

7. *See* ABA CANONS 6 and 37.

"[A]n attorney must not accept professional employment against a client or a former client which will, or even *may* require him to use confidential information obtained by the

attorney in the course of his professional relations with such client regarding the subject matter of the employment . . . ." *ABA Opinion* 165 (1936).

8. *See* ABA CANON 37.

"Confidential communications between an attorney and his client, made because of the relationship and concerning the subject-matter of the attorney's employment, are generally privileged from disclosure without the consent of the client, and this privilege outlasts the attorney's employment. *Canon 37.*" *ABA Opinion* 154 (1936).

9. *Cf. ABA Opinion* 266 (1945).

10. *See* ABA CANON 37; *cf.* ABA Canon 6.

11. "§6068. . . It is the duty of an attorney:

"(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." CAL. BUSINESS AND PROFESSIONS CODE §6068 (West 1962). Virtually the same provision is found in the Oregon statutes. ORE. REV. STATS. ch. 9 §9.460(5).

"Communications between lawyer and client are privileged (WIGMORE ON EVIDENCE, 3d Ed., Vol. 8, §§2290-2329). The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal adviser (*ibid.*, §2290, p. 548). The privilege applies to communications made in seeking legal advice for any purpose (*ibid.*, §2294, p. 563). The mere circumstance that the advice is given without charge therefor does not nullify the privilege (*ibid.*, §2303)." ABA Opinion 216 (1941).

"It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client . . . ." *ABA Opinion* 155 (1936).

12. *See* ABA CANON 11.

"The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit (7 C.J.S., §125, p. 958; Healy v. Gray, 184 Iowa 111, 168 N.W. 222; Baumgardner v. Hudson, D.C. App., 277 F. 552; Goodrum v. Clement, D.C. App., 277 F. 586)." *ABA Opinion* 250 (1943).

13. *See ABA Opinion* 177 (1938).

14. "[A lawyer] may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client (People v. Gerold, 265 Ill. 448, 107 N.E. 165, 178; Murphy v. Riggs, 238 Mich. 151, 213 N.W. 110, 112; Opinion of this Committee, No. 91)." *ABA Opinion* 202 (1940).

Cf. ABA Opinion 91 (1933).

15. "A defendant in a criminal case when admitted to bail is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner. Being in lawful custody, the defendant is guilty of an escape when he gains his liberty before he is delivered in due process of law, and is guilty of a separate offense for which he may be punished. In failing to disclose his client's whereabouts as a fugitive under these circumstances the attorney would not only be aiding his client to escape trial on the charge for which he was indicted, but would likewise be aiding him in evading prosecution for the additional offense of escape.

"It is the opinion of the committee that under such circumstances the attorney's knowledge of his client's whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities. . . ." *ABA Opinion* 155 (1936).

"We held in *Opinion* 155 that a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure. Public policy forbids that the relation of attorney and client should be used to conceal wrongdoing on the part of the client.

"...

"When an attorney representing a defendant in a criminal case applies on his behalf for probation or suspension of sentence, he represents to the court, by implication at least, that his client will abide by the terms and conditions of the court's order. When that attorney is later advised of a violation of that order, it is his duty to advise his client of the consequences of his act, and endeavor to prevent a continuance of the wrongdoing. If his client thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client's conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure. . . ." *ABA Opinion* 156 (1936).

16. *ABA Opinion* 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed."

See ABA Opinion 155 (1936).

17. *See* ABA CANON 37 and *ABA Opinion* 202 (1940).

18. *Cf. ABA Opinion* 250 (1943).

19. *See* ABA CANON 37 and *ABA Opinions* 202 (1940) and 19 (1930).

"[T]he adjudicated cases recognize an exception to the rule [that a lawyer shall not reveal the confidences of his client], where disclosure is necessary to protect the attorney's interests arising out of the relation of attorney and client in which disclosure was made.

"The exception is stated in MECHEM ON AGENCY, 2d Ed., Vol. 2, §2313, as follows: 'But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.'

"Mr. Jones, in his COMMENTARIES ON EVIDENCE, 2d Ed., Vol. 5, §2165, states the exception thus: 'It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of privileged communications becomes necessary to protect the attorney's rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.'" *ABA Opinion* 250 (1943).

CANON 5

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

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.[1] Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.[2] After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances.[3] Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.[4]

EC 5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.[5]

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation.[6] However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement[7] gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client.[8] Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action,[9] but the ultimate liability for such costs and expenses must be that of the client.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment.[10] Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue.[11] In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness.[12] In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment.[13] Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.[14]

EC 5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed.[15] In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC 5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.[16]

EC 5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client.[17] This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.[18]

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests;[19] and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing,

withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires.[20] Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.[21] If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.[22]

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer,[23] and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC 5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty.[24] Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC 5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment.[25] The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client;[26] and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.[27]

EC 5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law,[28] if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISCIPLINARY RULES

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

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.[29]

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.[30]

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.[31]

DR 5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client,[32] 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.[33]

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client,[34] except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment,[35] except to the extent permitted under DR 5-105(C).[36]

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).[37]

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

DR 5-106 Settling Similar Claims of Clients.[38]

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.[39]

(B) 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.[40]

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein,[41] 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;[42] or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.[43]

NOTES

1. *Cf.* ABA CANON 35.

"[A lawyer's] fiduciary duty is of the highest order and he must not represent interests adverse to those of the client. It is true that because of his professional responsibility and the confidence and trust which his client may legitimately repose in him, he must adhere to a high standard of honesty, integrity and good faith in dealing with his client. He is not permitted to take advantage of his position or superior knowledge to impose upon the client; nor to conceal facts or law, nor in any way deceive him without being held responsible therefor." Smoot v. Lund, 13 Utah 2d 168, 172, 369 P.2d 933, 936 (1962).

"When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money." Grievance Comm. v. Rattner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).

"One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability. In a criminal case the client is entitled to a fair trial, but not a perfect one. These are fundamental requirements of due process under the Fourteenth Amendment. . . . The same principles are applicable in Sixth Amendment cases (not pertinent herein) and suggest that an attorney should have no conflict of interest and that he must devote his full and faithful efforts toward the defense of his client." Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959), *modified*, United States ex rel. Wilkins v. Bannmiller, 205 F. Supp. 123, 128 n. 5 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847, 13 L. Ed. 2d 51, 85 S. Ct. 87 (1964).

2. "Attorneys must not allow their private interests to conflict with those of their clients. . . . They owe their entire devotion to the interests of their clients." United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963).

"[T]he court [below] concluded that a firm may not accept any action against a person whom they are presently representing even though there is no relationship between the two cases. In arriving at this conclusion, the court cited an opinion of the Committee on Professional Ethics of the New York County Lawyers' Association which stated in part: 'While under the circumstances * * * there may be no actual conflict of interest * * * "maintenance of public confidence in the Bar requires an attorney who has accepted representation of a client to decline, while representing such client, any employment from an adverse party in any matter even though wholly unrelated to the original retainer." See Question and Answer No. 350, N. Y. County L. Ass'n, Questions and Answer No. 450 (June 21, 1956).' " Grievance Comm. v. Rattner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).

3. "Courts of equity will scrutinize with jealous vigilance transactions between parties occupying fiduciary relations toward each other. . . . A deed will not be held invalid, however, if made by the grantor with full knowledge of its nature and effect, and because of the deliberate, voluntary and intelligent desire of the grantor. . . . Where a fiduciary

relation exists, the burden of proof is on the grantee or beneficiary of an instrument executed during the existence of such relationship to show the fairness of the transaction, that it was equitable and just and that it did not proceed from undue influence. . . . The same rule has application where an attorney engages in a transaction with a client during the existence of the relation and is benefited thereby. . . . Conversely, an attorney is not prohibited from dealing with his client or buying his property, and such contracts, if open, fair and honest, when deliberately made, are as valid as contracts between other parties. . . . [I]mportant factors in determining whether a transaction is fair include a showing by the fiduciary (1) that he made a full and frank disclosure of all the relevant information that he had; (2) that the consideration was adequate; and (3) that the principal had independent advice before completing the transaction." McFall v. Braden, 19 Ill. 2d 108, 117-18, 166 N. E. 2d 46, 52 (1960).

4. See State ex rel. Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 94-95, 84 N. W. 2d 136, 146 (1957).

5. *See* ABA CANON 9.

6. *See* ABA CANON 10.

7. *See* CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-20.

8. *See* ABA CANON 42.

9. "*Rule 3a.* . . . A member of the State Bar shall not directly or indirectly pay or agree to pay, or represent or sanction the representation that he will pay, medical, hospital or nursing bills or other personal expenses incurred by or for a client, prospective or existing; provided this rule shall not prohibit a member:

"(1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or

(2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or

(3) from advancing the costs of prosecuting or defending a claim or action. Such costs within the meaning of this subparagraph (3) include all taxable costs or disbursements, costs or investigation and costs of obtaining and presenting evidence." CAL. BUSINESS AND PROFESSIONS CODE §6076 (West Supp. 1967).

10. "When a lawyer knows, prior to trial, that he will be a necessary witness, except as to merely formal matters such as identification or custody of a document or the like, neither he nor his firm or associates should conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, the lawyer should not argue the credibility of his own testimony." *A Code of Trial Conduct: Promulgated by the American College of Trial Lawyers*, 43 A.B.A.J. 223, 224-25 (1957).

11. *Cf.* CANON 19: "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel."

12. "It is the general rule that a lawyer may not testify in litigation in which he is an advocate unless circumstances arise which could not be anticipated and it is necessary to prevent a miscarriage of justice. In those rare cases where the testimony of an attorney is needed to protect his client's interests, it is not only proper but mandatory that it be forthcoming." Schwartz v. Wenger, 267 Minn. 40, 43-44, 124 N. W. 2d 489, 492 (1963).

13. "The great weight of authority in this country holds that the attorney who acts as counsel and witness, in behalf of his client, in the same cause on a material matter, not of a merely formal character, and not in an emergency, but having knowledge that he would be required to be a witness in ample time to have secured other counsel and given up his service in the case, violates a highly important provision of the Code of Ethics and a rule of professional conduct, but does not commit a legal error in so testifying, as a result of which a new trial will be granted." Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141A. 866, 869 (1928).

14. "[C]ases may arise, and in practice often do arise, in which there would be a failure of justice should the attorney withhold his testimony. In such a case it would be a vicious professional sentiment which would deprive the client of the benefit of his attorney's testimony." Connolly v. Straw, 53 Wis. 645, 649, 11 N. W. 17, 19 (1881).

But see CANON 19: "Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

15. *Cf.* ABA CANON 7.

16. *See* ABA CANON 7.

17. *See* ABA CANON 6; *cf. ABA Opinions* 261 (1944), 242 (1942), 142 (1935), and 30 (1931).

18. The ABA Canons speak of "conflicting interests" rather than "differing interests" but make no attempt to define such other than the statement in Canon 6: "Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

19. "Canon 6 of the Canons of Professional Ethics, adopted by the American Bar Association on September 30, 1937, and by the Pennsylvania Bar Association on January 7, 1938, provides in part that 'It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.' The full disclosure required by this canon contemplates that the possibly adverse effect of the conflict be fully explained by the attorney to the client to be affected and by him thoroughly understood. . . .

"The foregoing canon applies to cases where the circumstances are such that possibly conflicting interests may permissibly be represented by the same attorney. But manifestly, there are instances where the conflicts of interest are so critically adverse as not to admit of one attorney's representing both sides. Such is the situation which this record presents. No one could conscionably contend that the same attorney may represent both the plaintiff and defendant in an adversary action. Yet, that is what is being done in this case." Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 235, 135 A. 2d 252, 254 (1957), *cert. denied*, 355 U.S. 966, 2 L. Ed. 2d 541, 78 S. Ct. 557 (1958).

20. "Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 75-76, 86 L. Ed. 680, 702 S. Ct. 457, 467 (1942).

21. *See* ABA CANON 6.

22. *Id.*

23. *Cf. ABA Opinion* 282 (1950).

"When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client. . . .

". . . The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by an insurance carrier." American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 1075, 131 N. Y. S. 2d 393, 401 (1954), *motion to withdraw appeal granted*, 1 App. Div. 2d 1008, 154 N. Y. S. 2d 835 (1956).

"[C]ounsel, selected by State Farm to defend Dorothy Walker's suit for $50,000 damages, was appraised by Walker that his earlier version of the accident was untrue and that actually the accident occurred because he lost control of his car in passing a Cadillac just ahead. At that point, Walker's counsel should have refused to participate further in view of the conflict of interest between Walker and State Farm. . . . Instead he participated in the ensuing deposition of the Walkers, even took an *ex parte* sworn statement from Mr. Walker in order to advise State Farm what action it should take, and later used the statement against Walker in the District Court. This action appears to contravene an Indiana attorney's duty 'at every peril to himself, to preserve the secrets of his client' . . . ." State Farm Mut. Auto Ins. Co. v. Walker, 382 F.2d 548, 552 (1967), *cert. denied*, 389 U.S. 1045, 19 L. Ed. 2d 837, 88 S. Ct. 789 (1968).

24. *See* ABA CANON 6.

25. *See* ABA CANON 35.

"Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, . . . derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several States have sustained regulations aimed at these activities. We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." NAACP v. Button, 371 U.S. 415, 441-42, 9 L. Ed. 2d 405, 423-24, 83 S. Ct. 328, 342-43 (1963).

26. *Cf.* ABA CANON 38.

27. "Certainly it is true that 'the professional relationship between an attorney and his client is highly personal, involving an intimate appreciation of each individual client's particular problem.' And this Committee does not condone practices which interfere with that relationship. However, the mere fact the lawyer is actually paid by some entity other than the client does not affect that relationship, so long as the lawyer is selected by and is directly responsible to the client. See Informal Opinions 469 and 679. Of course, as the latter decision points out, there must be full disclosure of the arrangement by the attorney to the client. . . ." *ABA Opinion* 320 (1968).

"[A] third party may pay the cost of legal services as long as control remains in the client and the responsibility of the lawyer is solely to the client. Informal Opinions 469 ad [*sic*] 679. *See also Opinion* 237." *Id.*

28. *ABA Opinion* 303 (1961) recognized that "[s]tatutory provisions now exist in several states which are designed to make [the practice of law in a form that will be classified as a corporation for federal income tax purposes] legally possible, either as a result of lawyers incorporating or forming associations with various corporate characteristics."

29. *Cf.* ABA CANON 6 and *ABA Opinions* 181 (1938), 104 (1934), 103 (1933), 72 (1932), 50 (1931), 49 (1931), and 33 (1931)

"New York County [Opinion] 203. . . . [A lawyer] should not advise a client to employ an investment company in which he is interested, without informing him of this." DRINKER, LEGAL ETHICS 956 (1953).

"In *Opinions* 72 and 49 this Committee held: The relations of partners in a law firm are such that neither the firm nor any member or associate thereof, may accept any professional employment which any member of the firm cannot properly accept.

"In *Opinion* 16 this Committee held that a member of a law firm could not represent a defendant in a criminal case which was being prosecuted by another member of the firm who was public prosecuting attorney. The Opinion stated that it was clearly unethical for one member of the firm to oppose the interest of the state while another member represented those interests . . . . Since the prosecutor himself could not represent both the public and the defendant, no member of his law firm could either." *ABA Opinion* 296 (1959).

30. *Cf.* ABA CANON 19 and *ABA Opinions* 220 (1941), 185 (1938), 50 (1931), and 33 (1931); *but cf.* Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 498-99, 141 A. 866, 868 (1928).

31. This *Canon* [19] *of Ethics* needs no elaboration to be applied to the facts here. Apparently, the object of this precept is to avoid putting a lawyer in the obviously embarrassing predicament of testifying and then having to argue the credibility and effect of his own testimony. It was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." Galarowicz v. Ward, 119 Utah 611, 620, 230 P.2d 576, 580 (1951).

32. ABA CANON 10 and *ABA Opinions* 279 (1949), 246 (1942), and 176 (1938).

33. *See* CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(C).

34. *See* ABA CANON 42; *cf. ABA Opinion* 288 (1954).

35. *See* ABA CANON 6; *cf. ABA Opinions* 167 (1937), 60 (1931), and 40 (1931).

36. *ABA Opinion* 247 (1942) held that an attorney could not investigate a night club shooting on behalf of one of the owner's liability insurers, obtaining the cooperation of the owner, and later represent the injured patron in an action against the owner and a different insurance company unless the attorney obtain the "express consent of all concerned given after a full disclosure of the facts," since to do so would be to represent conflicting interests.

See ABA Opinions 247 (1942), 224 (1941), 222 (1941), 218 (1941), 112 (1934), 83 (1932), and 86 (1932).

37. *Cf. ABA Opinions* 231 (1941) and 160 (1936).

38. *Cf. ABA Opinions* 243 (1942) and 235 (1941).

39. *See* ABA CANON 38.

"A lawyer who receives a commission (whether delayed or not) from a title insurance company or guaranty fund for recommending or selling the insurance to his client, or for work done for the client or the company, without either fully disclosing to the client his financial interest in the transaction, or crediting the client's bill with the amount thus received, is guilty of unethical conduct." *ABA Opinion* 304 (1962).

40. *See* ABA CANON 35; *cf. ABA Opinion* 237 (1941).

"When the lay forwarder, as agent for the creditor, forwards a claim to an attorney, the direct relationship of attorney and client shall then exist between the attorney and the creditor, and the forwarder shall not interpose itself as an intermediary to control the activities of the attorney." *ABA Opinion* 294 (1958).

41. "Permanent beneficial and voting rights in the organization set up to practice law, whatever its form, must be restricted to lawyers while the organization is engaged in the practice of law." *ABA Opinion* 303 (1961).

42. "*Canon 33* . . . promulgates underlying principles that must be observed no matter in what form of organization lawyers practice law. Its requirement that no person shall be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline, makes it clear that any centralized management must be in law- to avoid a violation of this Canon." *ABA Opinion* 303 (1961).

43. "There is no intervention of any lay agency between lawyer and client when centralized management provided only by lawyers may give guidance or direction to the services being rendered by a lawyer-member of the organization to a client. The language in *Canon 33* that a lawyer should avoid all relations which direct the performance of his duties by or in the interest of an intermediary refers to lay intermediaries and not lawyer intermediaries with whom he is associated in the practice of law." *ABA Opinion* 303 (1961).

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice[1] and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs,[2] concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified.[3] However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.[4]

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his

client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.[5]

DISCIPLINARY RULES

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.[6]

DR 6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

NOTES

1. "[W]hen a citizen is faced with the need for a lawyer, he wants, and is entitled to, the best informed counsel he can obtain. Changing times produce changes in our laws and legal procedures. The natural complexities of law require continuing intensive study by a lawyer if he is to render his clients a maximum of efficient service. And, in so doing, he maintains the high standards of the legal profession; and he also increases respect and confidence by the general public." Rochelle & Payne, *The Struggle for Public Understanding*, 25 TEXAS B.J. 109, 160 (1962).

"We have undergone enormous changes in the last fifty years within the lives of most of the adults living today who may be seeking advice. Most of these changes have been accompanied by changes and developments in the law. . . . Every practicing lawyer encounters these problems and is often perplexed with his own inability to keep up, not only with changes in the law, but also with changes in the lives of his clients and their legal problems.

"To be sure, no client has a right to expect that his lawyer will have all of the answers at the end of his tongue or even in the back of his head at all times. But the client does have the right to expect that the lawyer will have devoted his time and energies to maintaining and improving his competence to know where to look for the answers, to know how to deal with the problems, and to know how to advise to the best of his legal talents and abilities." Levy & Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 A.B.A.J. 1110, 1112 (1966).

2. "The whole purpose of continuing legal education, so enthusiastically supported by the ABA, is to make it possible for lawyers to make themselves better lawyers. But there are no nostrums for proficiency in the law; it must come through the hard work of the lawyer himself. To the extent that that work, whether it be in attending institutes or lecture courses, in studying after hours or in the actual day in and day out practice of his profession, can be concentrated within a limited field, the greater the proficiency and expertness that can be developed." *Report of the Special Committee on Specialization and Specialized Legal Education*, 79 A.B.A. REP. 582, 588 (1954).

3. "If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service." Degen v. Steinbrink, 202 App. Div. 477, 481, 195 N. Y. S. 810, 814 (1922), *aff'd mem.*, 236 N. Y. 669 142 N. E. 328 (1923).

4. *Cf. ABA Opinion* 232 (1941).

5. *See ABA Opinion* 303 (1961); *cf.* CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-11.

6. The annual report for 1967-1968 of the Committee on Grievances of the Association of the Bar of the City of New York showed a receipt of 2,232 complaints; of the 828 offenses against clients, 76 involved conversion, 49 involved "overreaching," and 452, or more than half of all such offenses, involved neglect. *Annual Report of the Committee on Grievances of the Association of the Bar of the City of New York*, N.Y.L.J., Sept. 12, 1968, at 4, col. 5.

CANON 7

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

ETHICAL CONSIDERATIONS

EC 7-1 The duty of a lawyer, both to his client[1] and to the legal system, is to represent his client zealously[2] within the bounds of the law,[3] which includes Disciplinary Rules and enforceable professional regulations.[4] The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law;[5] to seek any lawful objective[6] through legally permissible means;[7] and to present for adjudication any lawful claim, issue, or defense.

EC 7-2 The bounds of the law in a given case are often difficult to ascertain.[8] The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different.[9] In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.[10] In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.[11] His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.[12]

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.[13] He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.[14]

EC 7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC 7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.[15]

EC 7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations.[16] A lawyer should advise his client of the possible effect of each legal alternative.[17] A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint.[18] In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.[19] He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.[20]

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter,[21] a lawyer should always act in a manner consistent with the best interests of his client.[22] However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.[23]

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

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

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

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.[24] This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC 7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be *ex parte* in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency,[25] regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law.[26] Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged,[27] and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC 7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not

privileged, and should comply with applicable laws and legislative rules.[38]

EC 7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client.[39] While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.[40] If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself,[41] except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known;[42] the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.[43] The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.[44]

EC 7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently[45] according to procedures that command public confidence and respect.[46] Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC 7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process;[47] further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.[48]

EC 7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client.[49] Wng jurisdiction knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.[50]

EC 7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact.[51] It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC 7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them.[52] As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence.[53] A lawyer who knowingly[54] participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.[55]

EC 7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.[56]

EC 7-28 Witnesses should always testify truthfully[57] and should be free from any financial inducements that might tempt them to do otherwise.[58] A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.[59]

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences.[60] When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a veniremen or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror[61] or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.[62] When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

EC 7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury.[63] Such news or comments may prevent prospective jurors from being impartial at the outset of the trial[64] and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial.[65] The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal.[66] For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC 7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer,[67] therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.[68]

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.[69] For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings.[70] While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears.[71] He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers.[72] A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client.[73] He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so.[74] A lawyer should be punctual in fulfilling all professional commitments.[75]

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:[76]

(1) Fail to seek the lawful objectives of his client through reasonably available means[77] permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship,[78] except as required under DR 7-102 (B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

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

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.[79]

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.[70]

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.[71]

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.[72]

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.[73]

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if

he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating With One of Adverse Interest.[74]

(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party[75] or is authorized by law to do so.
(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel,[76] if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.[77]

DR 7-105 Threatening Criminal Prosecution.

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

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.
(B) In presenting a matter to a tribunal, a lawyer shall disclose:[78]
(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.[79]
(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.[80]
(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.[81]
(2) Ask any question that he has no reasonable basis to believe is revelant to the case and that is intended to degrade a witness or other person.[82]
(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused;[83] but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
(5) 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.[84]
(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107 Trial Publicity.[85]

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
(1) Information contained in a public record.
(2) That the investigation is in progress.
(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
(5) A warning to the public of any dangers.
(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
(5) The identity, testimony, or credibility of a prospective witness.
(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:
(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(3) A request for assistance in obtaining evidence.
(4) The identity of the victim of the crime.
(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
(8) The nature, substance, or text of the charge.
(9) Quotations from or references to public records of the court in the case.
(10) The scheduling or result of any step in the judicial proceedings.
(11) That the accused denies the charges made against him.
(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.
(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.
(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair hearing.
(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.
(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

DR 7-108 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.
(B) During the trial of a case:
(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.[86]
(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.
(C) DR 7-108 (A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.
(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[87]
(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.
(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.
(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR 7-109 Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.[88]
(B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.[89]
(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.[90] But a lawyer may advance, guarantee, or acquiesce in the payment of:
(1) Expenses reasonably incurred by a witness in attending or testifying.
(2) Reasonable compensation to a witness for his loss of time in attending or testifying.
(3) A reasonable fee for the professional services of an expert witness.

DR 7-110 Contact with Officials.[91]

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal.
(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
(1) In the course of official proceedings in the cause.
(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
(4) As otherwise authorized by law.[92]

NOTES

1. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." Powell v. Alabama, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64 (1932).

2. *Cf.* ABA CANON 4.

"At times . . . [the tax lawyer] will be wise to discard some arguments and he should exercise discretion to emphasize the arguments which in his judgment are most likely to be persuasive. But this process involves legal judgment rather than moral attitudes. The tax lawyer should put aside private disagreements with Congressional and Treasury policies. His own notions of policy, and his personal view of what the law should be, are irrelevant. The job entrusted to him by his client is to use all his learning and ability to protect his client's rights, not to help in the process of promoting a better tax system. The tax lawyer need not accept his client's economic and social opinions, but the client is paying for technical attention and undivided concentration upon his affairs. He is equally entitled to performance unfettered by his attorney's economic and social predictions." Paul, *The Lawyer as a Tax Adviser*, 25 ROCKY MT. L. REV. 412, 418 (1953).

3. *See* ABA CANONS 15 and 32.

ABA Canon 5, although only speaking of one accused of crime, imposes a similar obligation on the lawyer: "[T]he lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

"Any persuasion or pressure on the advocate which deters him from planning and carrying out the litigation on the basis of 'what, within the framework of the law, is best for my client's interest?' interferes with the obligation to represent the client fully within the law.

"This obligation, in its fullest sense, is the heart of the adversary process. Each attorney, as an advocate, acts for and seeks that which in his judgment is best for his client, within the bounds authoritatively established. The advocate does not *decide* what is just in this case—he would be usurping the function of the judge and jury—he acts for and seeks for his client that which he is entitled to under the law. He can do no less and properly represent the client." Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 584 (1961).

"The [Texas public opinion] survey indicates that distrust of the lawyer can be traced directly to certain factors. Foremost of these is a basic misunderstanding of the function of the lawyer as an advocate in an adversary system.

"Lawyers are accused of taking advantage of 'loopholes' and 'technicalities' to win. Persons who make this charge are unaware, or do not understand, that the lawyer is hired to win, and if he does not exercise every legitimate effort in his client's behalf, then he is betraying a sacred trust." Rochelle & Payne, *The Struggle for Public Understanding*, 25 TEXAS B.J. 109, 159 (1962).

"The importance of the attorney's undivided allegiance and faithful service to one accused of crime, irrespective of the attorney's personal opinion as to the guilt of his client, lies in Canon 5 of the American Bar Association Canon of Ethics.

"The difficulty lies, of course, in ascertaining whether the attorney has been guilty of an error of judgment, such as an election with respect to trial tactics, or has otherwise been actuated by his conscience or belief that his client should be convicted in any event. All too frequently courts are called upon to review actions of defense counsel which are, at the most, errors of judgment, not properly reviewable on habeas corpus unless the trial is a farce and a mockery of justice which requires the court to intervene. . . . But when defense counsel, in a truly adverse proceeding, admits that his conscience would not permit him to adopt certain customary trial procedures, this extends beyond the realm of judgment and strongly suggests an invasion of constitutional rights." Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959), *modified*, United States ex rel. Wilkins v. Bannister, 205 F. Supp. 123, 128, n. 5 (E.D. Pa. 1962), *aff'd*, 325 F. 2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847, 13 L. Ed. 2d 51, 85 S. Ct. 87 (1964).

"The adversary system in law administration bears a striking resemblance to the competitive economic system. In each we assume that the individual through partisanship or through self-interest will strive mightily for his side, and that kind of striving we must have. But neither system would be tolerable without restraints and modifications, and at times without outright departures from the system itself. Since the legal profession is entrusted with the system of law administration, a part of its task is to develop in its members appropriate restraints without impairing the values of partisan striving. An accompanying task is to aid in the modification of the adversary system or departure from it in areas to which the system is unsuited." Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405, 410 (1953).

4. "Rule 4.15 prohibits, in the pursuit of a client's cause, 'any manner of fraud or chicane'. Rule 4.22 requires 'candor and fairness' in the conduct of the lawyer, and forbids the making of knowing misquotations; Rule 4.47 provides that a lawyer 'should always maintain his integrity,' and generally forbids all misconduct injurious to the interests of the public, the courts, or his clients, and acts contrary to 'justice, honesty, modesty or good morals.' Our Commissioner has accurately paraphrased these rules as follows: 'An attorney does not have the duty to do all and whatever he can that may enable him to win his client's cause or to further his client's interest. His duty and efforts in these respects, although they should be prompted by his "entire devotion" to the interest of his client, must be within and not without the bounds of the law.'" In re Wines, 370 S. W. 2d 328, 333 (Mo. 1963).

See Note, 38 TEXAS L. REV. 107, 110 (1959).

5. "Under our system of government the process of adjudication is surrounded by safeguards evolved from centuries of experience. These safeguards are not designed merely to lend formality and decorum to the trial of causes. They are predicated on the assumption that to secure for any controversy a truly informed and dispassionate decision is a difficult thing, requiring for its achievement a special ammoning and organization of human effort and the adoption of measures to exclude the biases and prejudgments that have free play outside the courtroom. All of this goes for naught if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him. His chance to have his day in court loses much of its meaning if his case is handicapped from the outset by the very kind of prejudgment our rules of evidence and procedure are intended to prevent." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

6. "[I]t is . . . . [the tax lawyer's] positive duty to show the client how to avail himself to the full of what the law permits. He is not the keeper of the Congressional conscience." Paul, *The Lawyer as a Tax Adviser*, 25 ROCKY MT. L. REV. 412, 418 (1953).

7. *See* ABA CANONS 15 and 30.

8. "The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it . . . . It is a matter of proximity and degree as to which minds will differ . . . ." Justice Holmes, in Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96, 74 L. Ed 504, 508, 50 S. Ct. 169, 170 (1930).

9. "Today's lawyers perform two distinct types of functions, and our ethical standards should, but in the main do not, recognize these two functions. Judge Philbrick McCoy recently reported to the American Bar Association the need for a reappraisal of the Canons in light of the new and distinct function of counselor, as distinguished from advocate, which today predominates in the legal profession. . . .

". . . In the first place, any revision of the canons must take into account and speak to this new and now predominant function of the lawyer. . . . It is beyond the scope of this paper to discuss the ethical standards to be applied to the counselor except to state that in my opinion such standards should require a greater recognition and protection for the interest of the public generally than is presently expressed in the canons. Also, the counselor's obligation should extend to requiring him to inform and to impress upon the client a just solution of the problem, considering all interests involved." Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 578-79 (1961).

"The man who has been called into court to answer for his own actions is entitled to fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal advisor in a line of conduct that is immoral, unfair, or of doubtful legality. In saving himself from this unworthy involvement, the lawyer cannot be guided solely by an unreflective inner sense of good faith; he must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958).

10. "[A] lawyer who is asked to advise his client . . . may freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for those positions." *ABA Opinion* 314 (1965).

11. "The lawyer . . . . is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. . . . His personal belief in the soundness of his cause or of the authorities supporting it, is irrelevant." *ABA Opinion* 280 (1949).

"Counsel apparently misconceived his role. It was his duty to honorably present his client's contentions in the light most favorable to his client. Instead he presumed to advise the court as to the validity and sufficiency of prisoner's motion, by letter. We therefore conclude that prisoner had no effective assistance of counsel and remand this case to the District Court with instructions to set aside the Judgment, appoint new counsel to represent the prisoner if he makes no objection thereto, and proceed anew." McCartney v. United States, 343 F. 2d 471, 472 (9th Cir. 1965).

12. "Here the court-appointed counsel had the transcript but refused to proceed with the appeal because he found no merit in it. . . . We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae* which was condemned in *Ellis, supra*. Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity. . . .

"The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." Anders v. California, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 498, 87 S. Ct. 1396, 1399-1400 (1967), *rehearing denied*, 388 U.S. 924, 18 L. Ed. 2d 1377, 87 S. Ct. 2094 (1967).

See Paul, *The Lawyer As a Tax Adviser*, 25 ROCKY MT. L. REV. 412, 432 (1953).

13. *See* ABA CANON 32.

14. "For a lawyer to represent a syndicate notoriously engaged in the violation of the law for the purpose of advising the members how to break the law and at the same time escape it, is manifestly improper. While a lawyer may see to it that anyone accused of crime, no matter how serious and flagrant, has a fair trial, and present all available defenses, he may not co-operate in planning violations of the law. There is a sharp distinction, of course, between advising what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction. Where a lawyer accepts a retainer from an organization, known to be unlawful, and agrees in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities, this is equally improper."

"See also *Opinion* 155." *ABA Opinion* 281 (1952).

15. *See* ABA Special Committee on Minimum Standards for the Administration of Criminal Justice, *Standards Relating to Pleas of Guilty* pp. 69-70 (1968).

16. "First of all, a truly great lawyer is a wise counselor to all manner of men in the varied crises of their lives when they most need disinterested advice. Effective counseling necessarily involves a thoroughgoing knowledge of the principles of the law not merely as they appear in the books but as they actually operate in action." Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31 (1954).

17. "A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon. . . ." ABA CANON 8.

18. "[I]n devising charters of collaborative effort the lawyer often acts where all of the affected parties are present as participants. But the lawyer also performs a similar function in situations where this is not so, as, for example, in planning estates and drafting wills. Here the instrument defining the terms of collaboration may affect persons not present and often not born. Yet here, too, the good lawyer does not serve merely as a legal conduit for his client's desires, but as a wise counselor, experienced in the art of devising arrangements that will put in workable order the entangled affairs and interests of human beings." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1162 (1958).

19. *See* ABA CANON 8.

"Vital as is the lawyer's role in adjudication, it should not be thought that it is only as an advocate pleading in open court that he contributes to the administration of the law. The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958).

20. "My summation of Judge Sharswood's view of the advocate's duty to the client is that he owes to the client the duty to use all legal means in support of the client's case. However, at the same time Judge Sharswood recognized that many advocates would find this obligation unbearable if applicable without exception. Therefore, the individual lawyer is given the choice of representing his client fully within the bounds of the law *or of telling his client that he cannot do so*, so that the client may obtain another attorney if he wishes." Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 582 (1961).

Cf. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110 (C).

21. *See* ABA CANON 24.

22. Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 592 (1961).

23. *Cf. ABA Opinions* 253 (1946) and 178 (1938).

24. *See* ABA CANON 5 and Berger v. United States, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).

"The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere widely granted to a partisan advocate must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958).

"The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done." *ABA Opinion* 150 (1936).

25. As to appearances before a department of government, Canon 26 provides: "A lawyer openly . . . may render professional services . . . in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts . . . ."

26. "But as an advocate before a service which itself represents the adversary point of view, where his client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother lawyer. The limitations within which he must operate are best expressed in Canon 22 . . . ." *ABA Opinion* 314 (1965).

27. See Baird v. Koerner, 279 F. 2d 623 (9th Cir. 1960).

28. *See* ABA CANON 26.

29. "Law should be so practiced that the lawyer remains free to make up his own mind how he will vote, what causes he will support, what economic and political philosophy he will espouse. It is one of the glories of the profession that it admits of this freedom. Distinguished examples can be cited of lawyers whose views were at variance from those of their clients, lawyers whose skill and wisdom make them valued advisers to those who had little sympathy with their views as citizens." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1217 (1958).

"No doubt some tax lawyers feel constrained to abstain from activities on behalf of a better tax system because they think that their clients may object. Clients have no right to object if the tax adviser handles their affairs competently and faithfully and independently of his private views as to tax policy. They buy his expert services, not his private opinions or his silence on issues that gravely affect the public interest." Paul, *The Lawyer as a Tax Adviser*, 25 ROCKY MT. L. REV. 412, 434 (1953).

30. *See* ABA CANON 9.

31. *Id.*

32. *See Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958).

33. "Without the participation of someone who can act responsibly for each of the parties, this essential narrowing of the issues [by exchange of written pleadings or stipulations of counsel] becomes impossible. But here again the true significance of partisan advocacy lies deeper, touching once more the integrity of the adjudicative process itself. It is only through the advocate's participation that the hearing may remain in fact what it purports to be in theory: a public trial of the facts and issues. Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proof may be rejected as inadequate. . . . The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160-61 (1958).

34. *Cf.* ABA CANONS 15 and 32.

35. *Cf.* ABA CANON 21.

36. See *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

37. "We are of the opinion that the letter in question was improper, and that in writing and sending it respondent was guilty of unprofessional conduct. This court has heretofore expressed its disapproval of using threats of criminal prosecution as a means of forcing settlement of civil claims. . . .

"Respondent has been guilty of a violation of a principle which condemns any confusion of threats of criminal prosecution with the enforcement of civil claims. For this misconduct he should be severely censured." Matter of Gelman, 230 App. Div. 524, 527, N. Y. S. 416, 419 (1930).

38. "An attorney has the duty to protect the interests of his client. He has a right to prest legitimate argument and to protest an erroneous ruling." Gallagher v. Municipal Court, 31 Cal. 2d 784, 796, 192 P. 2d 905, 913 (1948).

"There must be protection, however, in the far more frequent case of the attorney who stands on his rights and combats the order in good faith and without disrespect believing with good cause that it is void, for it is here that the independence of the bar becomes valuable." Note, 39 COLUM. L. REV. 433, 438 (1939).

39. "Too many do not understand that accomplishment of the layman's abstract ideas of justice is the function of the judge and jury, and that it is the lawyer's sworn duty to portray his client's case in its most favorable light." Rochelle and Payne, *The Struggle for Public Understanding*, 25 TEXAS B.J. 109, 159 (1962).

40. "We are of the opinion that this Canon requires the lawyer to disclose such decisions [that are adverse to his client's contentions] to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case." *ABA Opinion* 146 (1935).

Cf. ABA Opinion 280 (1949) and Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 585-86 (1961).

41. *See* ABA CANON 15.

"The traditional duty of an advocate is that he honorably uphold the contentions of his client. He should not voluntarily undermine them." Harders v. State of California, 373 F. 2d 839, 842 (9th Cir. 1967).

42. *See* ABA CANON 22.

43. Id.; *cf.* ABA CANON 41.

44. *See generally ABA Opinion* 287 (1953) as to a lawyer's duty when he unknowingly participates in introducing perjured testimony.

45. "Under any standard of proper ethical conduct an attorney should not sit by silently and permit his client to commit what may have been perjury, and which certainly would mislead the court and the opposing party on a matter vital to the issue under consideration. . . .

. . . .

"Respondent next urges that it was his duty to observe the utmost good faith toward his client, and therefore he could not divulge any confidential information. This duty to the client of course does not extend to the point of authorizing collaboration with him in the commission of fraud." In re Carroll, 244 S. W. 2d 474, 474-75 (Ky. 1951).

46. *See* ABA CANON 5; *cf. ABA Opinion* 131 (1935).

47. *Cf.* ABA CANON 39.

48. "The prevalence of perjury is a serious menace to the administration of justice, to prevent which no means have as yet been satisfactorily devised. But there certainly can be no greater incentive to perjury than to allow a party to make payments to its opponents witnesses under any guise or on any excuse, and at least attorneys who are officers of the court to aid it in the administration of justice, must keep themselves clear of any connection which in the slightest degree tends to induce witnesses to testify in favor of their clients." In re Robinson, 151 App. Div. 589, 600, 136 N. Y. S. 548, 556-57 (1912), *aff'd*, 209 N. Y. 354, 103 N. E. 160 (1913).

49. "It will not do for an attorney who seeks to justify himself against charges of this kind to show that he has escaped criminal responsibility under the Penal Law, nor can he blindly shut his eyes to a system which tends to suborn witnesses, to produce perjured testimony, and to suppress the truth. He has an active affirmative duty to protect the administration of justice from perjury and fraud, and that duty is not performed by allowing his subordinates and assistants to attempt to subvert justice and procure

results for his clients based upon false testimony and perjured witnesses." *Id.*, 151 App. Div. at 592, 136 N. Y. S. at 551.

50. *See* ABA CANON 23.

51. "[I]t is unfair to jurors to permit a disappointed litigant to pick over their private associations in search of something to discredit them and their verdict. And it would be unfair to the public too if jurors should understand that they cannot convict a man of means without risking an inquiry of that kind by paid investigators, with, to boot, the distortions an inquiry of that kind can produce." State v. LaFera, 42 N. J. 97, 107, 199 A. 2d 630, 636 (1964).

52. *ABA Opinion* 319 (1968) points out that "[m]any courts today, and the trend is in this direction, allow the testimony of jurors as to all irregularities in and out of the courtroom except those irregularities whose existence can be determined only by exploring the consciousness of a single particular juror. New Jersey v. Kociolek, 20 N. J. 92, 118 A.2d 812 (1955). Model Code of Evidence Rule 301. Certainly as to states in which the testimony and affidavits of jurors may be received in support of or against a motion for new trial, a lawyer, in his obligation to protect his client, must have the tools for ascertaining whether or not grounds for a new trial exist and it is not unethical for him to talk to and question jurors."

53. *Generally see* ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 1966).

"[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters . . . . See State v. Van Dwyne, 43 N. J. 369, 389, 204 A.2d 841, 852 1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. . . . In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements." Sheppard v. Maxwell, 384 U.S. 333, 361-62, 16 L. Ed. 2d 600, 619-20, 86 S. Ct. 1507, 1521-22 (1966).

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." Estes v. State of Texas, 381 U.S. 532, 540, 14 L. Ed. 2d 543, 549, 85 S. Ct. 1628, 1631-32 (1965), *rehearing denied*, 382 U.S. 875, 15 L. Ed. 2d 118, 86 S. Ct. 18 (1965).

54. "Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. . . . The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they themselves were televised live and their pictures rebroadcast on the evening show." *Id.*, 381 U.S. at 536-37, 14 L. Ed. 2d at 546-47, 85 S. Ct. at 1629-30.

55. "The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in Patterson v. Colorado, 205 U.S. 454, 462 (1907):

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Sheppard v. Maxwell, 384 U.S. 333, 351, 16 L. Ed. 2d 600, 614, 86 S. Ct. 1507, 1516 (1966).

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. . . . Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. . . . It may indeed be greater for it is then not tempered by protective procedures." Marshall v. United States, 360 U.S. 310, 312-13, 3 L. Ed. 2d 1250, 1252, 79 S. Ct. 1171, 1173 (1959).

"The experienced trial lawyer knows that an adverse public opinion is a tremendous disadvantage to the defense of his client. Although grand jurors conduct their deliberations in secret, they are selected from the body of the public. They are likely to know what the general public knows and to reflect the public attitude. Trials are open to the public, and aroused public opinion respecting the merits of a legal controversy creates a court room atmosphere which, without any vocal expression in the presence of the petit jury, makes itself felt and has its effect upon the action of the petit jury. Our fundamental concepts of justice and our American sense of fair play require that the petit jury shall be composed of persons with fair and impartial minds and without preconceived views as to the merits of the controversy, and that it shall determine the issues presented to it solely upon the evidence adduced at the trial and according to the law given in the instructions of the trial judge.

"While we may doubt that the effect of public opinion would sway or bias the judgment of the trial judge in an equity proceeding, the defendant should not be called upon to run that risk and the trial court should not have his work made more difficult by any dissemination of statements to the public that would be calculated to create a public demand for a particular judgment in a prospective or pending case." *ABA Opinion* 199 (1940).

Cf. Estes v. State of Texas, 381 U.S. 532, 544-45, 144 L. Ed. 2d 543, 551, 85 S. Ct. 1628, 1634 (1965), *rehearing denied*, 381 U.S. 875, 15 L. Ed. 2d 118, 86 S. Ct. 18 (1965).

56. *See* ABA CANON 20.

57. Canon 3 observes that a lawyer "deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor."

See ABA CANON 32.

58. "*Judicial Canon 32* provides:

> A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

The language of this Canon is perhaps broad enough to prohibit campaign contributions by lawyers, practicing before the court upon which the candidate hopes to sit. However, we do not think it was intended to prohibit such contributions when the candidate is obligated, by force of circumstances over which he has no control, to conduct a campaign, the expense of which exceeds that which he should reasonably be expected to personally bear!" *ABA Opinion* 226 (1941).

59. *See* ABA CANONS 3 and 32.

60. *Cf.* ABA CANON 18.

61. *See* ABA CANONS 1 and 3.

62. *See* ABA CANON 17.

63. *See* ABA CANON 24.

64. *See* ABA CANON 25.

65. *See* ABA CANON 21.

66. *See* ABA CANON 15.

67. *See* ABA CANONS 5 and 15; *cf.* ABA CANONS 4 and 32.

68. *Cf.* ABA CANON 24.

69. *See* ABA CANON 30.

70. *Cf.* ABA CANONS 22 and 29.

71. *See* ABA CANON 41; *cf.* Hinds v. State Bar, 19 Cal. 2d 87, 92-93, 119 P.2d 134, 137 (1941); *but see ABA Opinion* 287 (1953) and TEXAS CANON 38. *Also see* CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(C)(2).

72. *See* Precision Inst. Mfg. Co. v. Automotive M.M. Co., 324 U.S. 806, 89 L. Ed. 1381, 65 S. Ct. 993 (1945).

73. *Cf.* ABA CANON 5.

74. "*Rule 12*. . . . A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body." CAL. BUSINESS AND PROFESSIONS CODE §6076 (West 1962).

75. *See* ABA CANON 9; *cf. ABA Opinions* 124 (1934), 108 (1934), 95 (1933), and 75 (1932); *also see* In re Schwabe, 242 Or. 169, 174-75, 408 P.2d 922, 924 (1965).

"It is clear from the earlier opinions of this committee that *Canon 9* is to be construed literally and does not allow a communication with an opposing party, without the consent of his counsel, though the purpose merely be to investigate the facts. *Opinions 117, 95, 66*," *ABA Opinion* 187 (1938).

76. *Cf. ABA Opinion* 102 (1933).

77. *Cf.* ABA CANON 9 and *ABA Opinion* 58 (1931).

78. *Cf.* Note, 38 TEXAS L. REV. 107, 108-09 (1959).

79. "In the brief summary in the 1947 edition of the Committee's decisions (p. 17), *Opinion 146* was thus summarized: *Opinion 146*—A lawyer should disclose to the court a decision directly adverse to his client's case that is unknown to his adversary.

. . . .

"We would not confine the Opinion to 'controlling authorities'—i.e., those decisive of the pending case—but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

. . . .

". . . The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?" *ABA Opinion* 280 (1949).

80. "The authorities are substantially uniform against any privilege as applied to the fact of retainer or identity of the client. The privilege is limited to confidential communications, and a retainer is not a confidential communication, although it cannot come into existence without some communication between the attorney and the—at that stage prospective—client." United States v. Pape, 144 F.2d 778, 782 (2d Cir. 1944), *cert. denied*, 323 U.S. 752, 89 L. Ed. 2d 602, 65 S. Ct. 86 (1944).

"To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source." Colton v. United States, 306 F. 2d 633, 637 (2d Cir. 1962).

81. *See* ABA CANON 22; *cf.* ABA CANON 17.

"The rule allowing counsel when addressing the jury the widest latitude in discussing the evidence and presenting the client's theories falls far short of authorizing the statement by counsel of matter not in evidence, or indulging in argument founded on no proof, or demanding verdicts for purposes other than the just settlement of the matters at issue between the litigants, or appealing to prejudice or passion. The rule confining counsel to legitimate argument is not based on etiquette, but on justice. Its violation is not merely an overstepping of the bounds of propriety, but a violation of a party's rights. The jurors must determine the issues upon the evidence. Counsel's address should help them do this, not tend to lead them astray." Cherry Creek Nat. Bank v. Fidelity & Cas. Co., 207 App. Div. 787, 790-91, 202 N. Y. S. 611, 614 (1924).

82. *Cf.* ABA CANON 18.

"§6068. . . . It is the duty of an attorney:

. . . .

"(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged." CAL. BUSINESS AND PROFESSIONS CODE §6068 (West 1962).

83. "The record in the case at bar was silent concerning the qualities and character of the deceased. It is especially improper, in addressing the jury in a murder case, for the prosecuting attorney to make reference to his knowledge of the good qualities of the deceased where there is no evidence in the record bearing upon his character. . . . A prosecutor should never inject into his argument evidence not introduced at the trial." People v. Dukes, 12 Ill. 2d 334, 341, 146 N. E. 2d 14, 17-18 (1957).

84. "A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel." ABA CANON 25.

85. The provisions of Sections (A), (B), (C), and (D) of this Disciplinary Rule incorporate the fair trial-free press standards which apply to lawyers as adopted by the ABA House of Delegates, Feb. 19, 1968, upon the recommendation of the Fair Trial and Free Press Advisory Committee of the ABA Special Committee on Minimum Standards for the Administration of Criminal Justice.

Cf. ABA CANON 20; *see generally* ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1966).

"From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that prescribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Sheppard v. Maxwell, 384 U.S. 333, 362-63, 16 L. Ed. 2d 600, 620, 86 S. Ct. 1507, 1522 (1966).

86. *See* ABA CANON 23.

87. "[I]t would be unethical for a lawyer to harass, entice, induce or exert influence on a juror to obtain his testimony." *ABA Opinion* 319 (1968).

88. *See* ABA CANON 5.

89. *Cf.* ABA CANON 5.

"*Rule 15*. . . . A member of the State Bar shall not advise a person, whose testimony could establish or tend to establish a material fact, to avoid service of process, or secrete himself, or otherwise to make his testimony unavailable." CAL. BUSINESS AND PROFESSIONS CODE §6076 (West 1962).

90. *See* In re O'Keefe, 49 Mont. 369, 142 P. 638 (1914).

91. *Cf.* ABA CANON 3.

92. "*Rule 16*. . . . A member of the State Bar shall not, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer except in open court upon the merits of a contested matter pending before such judge or judicial officer; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. This rule shall not apply to ex parte matters." CAL. BUSINESS AND PROFESSIONS CODE §6076 (West 1962).

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system.[1] This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system,[2] without regard to the general interests or desires of clients or former clients.[3]

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded.[4] Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public.[5] A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5 Fraudulent, deceptive, or otherwise illegal con-

duct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified.[6] It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected[7] or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism.[8] While a lawyer as a citizen has a right to criticize such officials publicly,[9] he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.[10] Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.[11]

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR 8-101 Action as a Public Official.

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

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

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

DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.[12]

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

NOTES

1. ". . . [Another] task of the great lawyer is to do his part individually and as a member of the organized bar to improve his profession, the courts, and the law. As President Theodore Roosevelt aptly put it, 'Every man owes some of his time to the upbuilding of the profession to which he belongs.' Indeed, this obligation is one of the great things which distinguishes a profession from a business. The soundness and the necessity of President Roosevelt's admonition insofar as it relates to the legal profession cannot be doubted. The advances in natural science and technology are so startling and the velocity of change in business and in social life is so great that the law along with the other social sciences, and even human life itself, is in grave danger of being extinguished by new gods of its own invention if it does not awake from its lethargy. Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31, 31-32 (1954).

2. *See* ABA CANON 29; *Cf.* Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405, 406-07 (1953).

"The lawyer tempted by repose should recall the heavy costs paid by his profession when needed legal reform has to be accomplished through the initiative of public-spirited laymen. Where change must be thrust from without upon an unwilling Bar, the public's least flattering picture of the lawyer seems confirmed. The lawyer concerned for the standing of his profession will, therefore, interest himself actively in the improvement of the law. In doing so he will not only help to maintain confidence in the Bar, but will have the satisfaction of meeting a responsibility inhering in the nature of his calling." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1217 (1958).

3. *See* Slayton, *Cum Honore Officium*, 19 TEX. B.J. 765, 766 (1956); *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1162 (1958); and Paul, *The Lawyer as a Tax Adviser*, 25 ROCKY MT. L. REV. 412, 433-34 (1953).

4. "There are few great figures in the history of the Bar who have not concerned themselves with the reform and improvement of the law. The special obligation of the profession with respect to legal reform rests on considerations too obvious to require enumeration. Certainly it is the lawyer who has both the best chance to know when the law is working badly and the special competence to put it in order." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1217 (1958).

5. "*Rule 14*. . . . A member of the State Bar shall not communicate with, or appear before, a public officer, board, committee or body, in his professional capacity, without first disclosing that he is an attorney representing interests that may be affected by action of such officer, board, committee or body." CAL. BUSINESS AND PROFESSIONS CODE §6076 (West 1962).

6. *See* ABA CANON 2.

"Lawyers are better able than laymen to appraise accurately the qualifications of candidates for judicial office. It is proper that they should make that appraisal known to the voters in a proper and dignified manner. A lawyer may with propriety endorse a candidate for judicial office and seek like endorsement from other lawyers. But the lawyer who endorses a judicial candidate or seeks that endorsement from other lawyers should be actuated by a sincere belief in the superior qualifications of the candidate for judicial service and not by personal or selfish motives; and a lawyer should not use or attempt to use the power or prestige of the judicial office to secure such endorsement. On the other hand, the lawyer whose endorsement is sought, if he believes the candidate lacks the essential qualifications for the office or believes the opposing candidate is better qualified, should have the courage and moral stamina to refuse the request for endorsement." *ABA Opinion* 189 (1938).

7. "[W]e are of the opinion that, whenever a candidate for judicial office merits the endorsement and support of lawyers, the lawyers may make financial contributions toward the campaign if its cost, when reasonably conducted, exceeds that which the candidate would be expected to bear personally." *ABA Opinion* 226 (1941).

8. *See* ABA CANON 1.

9. "Citizens have a right under our constitutional system to criticize governmental officials and agencies. Courts are not, and should not be, immune to such criticism." Konigsberg v. State Bar of California, 353 U.S. 252, 269 (1957).

10. "[E]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure, and will refrain from unjustified attack on the character of the judges, while recognizing the duty to denounce and expose a corrupt or dishonest judge." Kentucky State Bar Ass'n v. Lewis, 282 S. W. 2d 321, 326 (Ky. 1955).

"We should be the last to deny that Mr. Meeker has the right to uphold the honor of the profession and to expose without fear or favor corrupt or dishonest conduct in the profession, whether the conduct be that of a judge or not. . . . However, this Canon [9] does not permit one to make charges which are false and untrue and unfounded in fact. When one's fancy leads him to make false charges, attacking the character and integrity of others, he does so at his peril. He should not do so without adequate proof of his charges and he is certainly not authorized to make careless, untruthful and vile charges against his professional brethren." In re Meeker, 76 N. M. 334, 364-65, 414 P.2d 862, 869 (1966), *appeal dismissed*, 385 U.S. 449, 17 L. Ed. 2d 510, 87 S. Ct. 613 (1967).

11. "*Opinions 16, 30, 34, 77, 118* and *134* relate to *Canon 6*, and pass on questions concerning the propriety of the conduct of an attorney who is a public officer, in representing private interests adverse to those of the public body which he represents. The principle applied in those opinions is that an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." *ABA Opinion* 192 (1939).

"The next question is whether a lawyer-member of a legislative body may appear as counsel or co-counsel at hearings before a zoning board of appeals, or similar tribunal, created by the legislative group of which he is a member. We are of the opinion that he may practice before fact-finding officers, hearing bodies and commissioners, since under our views he may appear as counsel in the courts where his municipality is a party. Decisions made at such hearings are usually subject to administrative review by the courts upon the record there made. It would be inconsistent to say that a lawyer-member of a legislative body could not participate in a hearing at which the record is made, but could appear thereafter when the cause is heard by the courts on administrative review. This is subject to an important exception. He should not appear as counsel where the matter is subject to review by the legislative body of which he is a member. . . . We are of the opinion that where a lawyer does so appear there would be conflict of interests between his duty as an advocate for his client on the one hand and the obligation to his governmental unit on the other." In re Becker, 16 Ill. 2d 488, 494-95, 158 N. E. 2d 753, 756-57 (1959).

Cf. ABA Opinions 186 (1938), 136 (1935), 118 (1934), and 77 (1932).

12. *Cf.* ABA CANONS 1 and 2.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system.[1] A lawyer should promote public confidence in our system and in the legal profession.[2]

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.[3]

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.[4]

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.[5]

DISCIPLINARY RULES

DR 9-101 Avoiding Even the Appearance of Impropriety.[6]

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.[7]

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.[8]

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

DR 9-102 Preserving Identity of Funds and Property of a Client.[10]

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

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

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

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

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

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

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

NOTES

1. "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity." Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141 A. 866, 868 (1928).

2. "A lawyer should never be reluctant or too proud to answer unjustified criticism of his profession, of himself, or of his brother lawyer. He should guard the reputation of his profession and of his brothers as zealously as he guards his own." Rochelle and Payne, *The Struggle for Public Understanding*, 25 Texas B. J. 109, 162 (1962).

3. *See* ABA Canon 29.

4. *See* ABA Canon 36.

5. "As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134: 'An attorney should not only avoid impropriety but should avoid the appearance of impropriety.'" State ex rel. Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 93, 84 N. W. 2d 136, 145 (1957).

"It would also be preferable that such contribution [to the campaign of a candidate for judicial office] be made to a campaign committee rather than to the candidate personally. In so doing, possible appearances of impropriety would be reduced to a minimum." *ABA Opinion* 226 (1941).

"The lawyer assumes high duties, and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession." People ex rel. Cutler v. Ford, 54 Ill. 520, 522 (1870), and also quoted in State Board of Law Examiners v. Sheldon, 43 Wyo. 522, 526, 7 P.2d 226, 227 (1932).

See ABA Opinion 150 (1936).

6. *Cf.* Code of Professional Responsibility, EC 5-6.

7. *See* ABA Canon 36.

"It is the duty of the judge to rule on questions of law and evidence in misdemeanor cases and examinations in felony cases. That duty calls for impartial and uninfluenced judgment, regardless of the effect on those immediately involved or others who may, directly or indirectly, be affected. Discharge of that duty might be greatly interfered with if the judge, in another capacity, were permitted to hold himself out to employment by those who are to be, or who may be, brought to trial in felony cases, even though he did not conduct the examination. His private interests as a lawyer in building up his clientele, his duty as such zealously to espouse the cause of his private clients and to defend against charges of crime brought by law-enforcement agencies of which he is a part, might prevent, or even destroy, that unbiased judicial judgment which is so essential in the administration of justice.

"In our opinion, acceptance of a judgeship with the duties of conducting misdemeanor trials, and examinations in felony cases to determine whether those accused should be bound over for trial in a higher court, ethically bars the judge from acting as attorney for the defendants upon such trial, whether they were examined by him or by some other judge. Such a practice would not only diminish public confidence in the administration of justice in both courts, but would produce serious conflict between the private interests of the judge as a lawyer, and of his clients, and his duties as a judge in adjudicating important phases of criminal processes in other cases. The public and private duties would be incompatible. The prestige of the judicial office would be diverted to private benefit, and the judicial office would be demeaned thereby." *ABA Opinion* 242 (1942).

"A lawyer, who has previously occupied a judicial position or acted in a judicial capacity, should refrain from accepting employment in any matter involving the same facts as were involved in any specific question which he acted upon in a judicial capacity and, for the same reasons, should also refrain from accepting any employment which might reasonably appear to involve the same facts." *ABA Opinion* 49 (1931).

See ABA Opinion 110 (1934).

8. *See ABA Opinions* 135 (1935) and 134 (1935); *cf.* ABA Canon 36 and *ABA Opinions* 39 (1931) and 26 (1930). *But see ABA Opinion* 37 (1931).

9. "[A statement by a governmental department or agency with regard to a lawyer resigning from its staff that includes a laudation of his legal ability] carries implications, probably not founded in fact, that the lawyer's acquaintance and previous relations with the personnel of the administrative agencies of the government place him in an advantageous position in practicing before such agencies. So to imply would not only represent what probably is untrue, but would be highly reprehensible." *ABA Opinion* 184 (1938).

10. *See* ABA Canon 11.

"*Rule 9*. . . . A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company . . . in a bank account separate from his own account and clearly designated as 'Clients' Funds Account' or 'Trust Funds Account' or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank or trust company, . . . which safe deposit box shall be clearly designated as 'Clients' Account' or 'Trust Account' or words of similar import, and be separate from the attorney's own safe deposit box." Cal. Business and Professions Code §6076 (West 1962).

"[C]ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors. . . . The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." Black v. State Bar, 57 Cal. 2d 219, 225-26, 368 P.2d 118, 122, 18 Cal. Rptr. 518, 522 (1962).

DEFINITIONS*

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

(1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

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

(3) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(4) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(5) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

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

* "Confidence" and "secret" are defined in DR 4-101 (A).

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THE CANONS

OF

JUDICIAL ETHICS

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"Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere, in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the Bench and of the Bar."

—EDWARD G. RYAN

CANONS OF JUDICIAL ETHICS*

Ancient Precedents.

"And I charged you judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I will hear it."—*Deuteronomy*, I, 16-17.

"Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous."—*Deuteronomy*, XVI, 19.

"We will not make any justiciaries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it."—*Magna Charta*, XLV.

"Judges ought to remember that their office is *jus dicere* not *jus dare;* to interpret law, and not to make law, or give law." . . .

"Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue." . . .

"Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions though pertinent."

"The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purprise thereof ought to be preserved without scandal and corruption." . . . —*Bacon's Essay "Of Judicature."*

Preamble.

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

1. Relations of the Judiciary.

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

2. The Public Interest.

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

3. Constitutional Obligations.

It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

4. Avoidance of Impropriety.

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.

5. Essential Conduct.

A judge should be temperate, attentative, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

6. Industry.

A judge should exhibit an industry and application commensurate with the duties imposed upon him.

7. Promptness.

A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

8. Court Organization.

A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

9. Consideration for Jurors and Others.

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

10. Courtesy and Civility.

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

11. Unprofessional Conduct of Attorneys and Counsel.

A judge should utilize his opportunities to criticise and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the

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* These Canons, to and including Canon 34, were adopted by the American Bar Association at its Forty-Seventh Annual Meeting, at Philadelphia, Pennsylvania, on July 9, 1924. The Committee of the Association which prepared the Canons was appointed in 1922, and composed of the following: William H. Taft, District of Columbia, Chairman; Leslie C. Cornish, Maine; Robert von Moschzisker, Pennsylvania; Charles A. Boston, New York; and Garret W. McEnerney, California. George Sutherland, of Utah, originally a member of the Committee, retired and was succeeded by Mr. McEnerney. In 1923, Frank M. Angellotti, of California, took the place of Mr. McEnerney.

Canons 28 and 30 were amended at the Fifty-Sixth Annual meeting, Grand Rapids, Michigan, August 30-September 1, 1933. Canon 28 was further amended at the Seventy-Third Annual Meeting, Washington, D. C., September 20, 1950. Canons 35 and 36 were adopted at the Sixtieth Annual Meeting, at Kansas City, Missouri, September 30, 1937. Canon 35 was amended at San Francisco, Calif., Sept. 1952.

matter at once to the proper investigating and disciplinary authorities.

12. Appointees of the Judiciary and Their Compensation.

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

13. Kinship or Influence.

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

14. Independence.

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor by apprehensive of unjust criticism.

15. Interference in Conduct of Trial.

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examining of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

16. Ex parte Applications.

A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

17. Ex parte Communications.

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such brief presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

18. Continuances.

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of businesss before the court.

19. Judicial Opinions.

In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeals in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusions and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

20. Influence of Decisions Upon the Development of the Law.

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

21. Idiosyncrasies and Inconsistencies.

Justice should not be moulded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

22. Review.

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly

worthy of condemnation because the wrong done may be irremediable.

23. Legislation

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

24. Inconsistent Obligations.

A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

25. Business Promotions and Solicitations for Charity.

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

26. Personal Investments and Relations.

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information coming to him in a judicial capacity for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

27. Executorships and Trusteeships.

While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

28. Partisan Politics.*

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or reelection.

* Amended August 31, 1933 and September 20, 1950.

29. Self-Interest.

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

30. Candidacy for Office.*

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to became a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

31. Private Law Practice.

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practises law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practise in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

If forbidden to practise law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

32. Gifts and Favors.

A judge should not accept any presents or favors from litigants, or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgment.

33. Social Relations.

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

34. A Summary of Judicial Obligation.

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere

* As amended August 31, 1933.

with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

35. Improper Publicizing of Court Proceedings.*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

* Adopted September 30, 1937; amended September 15, 1952 and February 5, 1963.

36. Conduct of Court Proceedings.*

Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the bar or the court, and the clerks should be required to make a formal record of the administration of the oath, including the name of the witness.

* Adopted September 30, 1937.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereupon to stir up strife and put money in his pocket? A moral tone ought to be enforced in the profession which would drive such men out of it."

—ABRAHAM LINCOLN

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

COMPOSITION AND JURISDICTION *

"Ethics and Professional Responsibility

This Committee, which shall consist of eight members, shall:

(1) Express its opinion, on its own initiative or when requested to do so by any member of the bar or by any officer or committee of a state or local bar association, concerning proper professional or judicial conduct, provided that an opinion shall not be issued on questions pending before courts. An opinion shall be rendered only upon the concurrence of a majority of the members of the Committee.

(2) Make its issued opinions known to the legal profession by periodic publication in summary or complete form and by providing copies of opinions upon request, to any member of the bar.

(3) Upon request, advise or assist state and local bar associations in their activities with respect to the interpretation of the Code of Professional Responsibility and the Canons of Judicial Ethics.

(4) Make recommendations for amendment to or clarification of the Code of Professional Responsibility or the Canons of Judicial Ethics when they appear to be advisable.

(5) Adopt and amend such rules as it may from time to time deem desirable concerning the methods and procedures to be used in expressing opinions. Such rules and amendments shall be effective when approved by the Board of Governors. The rules may be altered or abrogated by the Board of Governors or the House of Delegates."

* As defined by the By-Laws of the American Bar Association, Article X, Section 7(1), adopted August, 1969. Formerly called the Standing Committee on Professional Ethics.

RULES OF PROCEDURE **

1. The name of the Committee is the Standing Committee on Ethics and Professional Responsibility of the American Bar Association.

2. The purpose of the Committee is to advise members of the bar upon the ethical propriety of their contemplated professional or judicial conduct, to advise officers and appropriate committees of bar associations as to the ethical propriety of past, as well as contemplated, professional or judicial conduct of members of such associations and others under their jurisdiction, and to recommend appropriate amendments to the Code of Professional Responsibility and the Canons of Judicial Ethics.

3. The Committee will issue opinions of two kinds: Formal Opinions and Informal Opinions. Formal Opinions are opinions upon subjects which the Committee determines to be of widespread interest and will be published in full in the American Bar Association Journal and subsequently in bound volumes. Informal Opinions will be issued to the inquirers, in letter form, will be summarized in the American Bar Association Journal, and subsequently will, with identification removed, be made available in full upon request.

4. A later Formal Opinion overrules earlier Formal Opinions or Informal Opinions with which it is necessarily in conflict. A later Informal Opinion overrules earlier Informal Opinions with which it is necessarily in conflict, but does not overrule an earlier Formal Opinion.

5. Upon written request, the Committee will issue an Informal Opinion to any member of the bar who is a member of the American Bar Association on the propriety of professional or judicial conduct in which he proposes to engage when the proposed conduct is specifically described in the inquiry. The Committee will not issue an opinion for the benefit of a non-member of the American Bar Association except on request of his state or local bar association.

6. The Code of Professional Responsibility, as amended from time to time, will provide the standard to be applied by the Committee in formulating opinions pertaining to professional conduct. Where the standard of conduct under that Code differs from that established by the preexisting Canons of Professional Ethics of the American Bar Association, this will be stated in the opinion.*** Opinions on judicial conduct will be issued under existing Canons of Judicial Ethics of the American Bar Association as amended from time to time.

7. Opinions of the Committee issued prior to the effective date of the Code of Professional Responsibility shall continue in effect to the extent that they are not inconsistent with a specific provision of that Code and may be used as an appropriate guide in interpreting the Code of Professional Responsibility.

8. All opinions shall be adopted at a called meeting by majority vote of the members of the Committee except that between meetings, the Committee may adopt Formal Opinions by a vote of six members and Informal Opinions by a vote of five members, unless a member specifically requests that the opinion be held for action at a called meeting of the Committee.

9. The Committee will not issue opinions on questions of law, or pertaining to conduct which is the subject of pending litigation.

10. The Committee will not issue opinions involving past conduct, or the conduct of someone other than the inquirer, unless the request is from an ethics, grievance or similar committee, or chief officer, of a bar association. In determining whether such conduct is involved, the Committee may look to outside sources.

** Effective January 1, 1970.

*** This sentence of Rule 6 shall be in effect only until January 1, 1972.

STANDING COMMITTEE ON PROFESSIONAL GRIEVANCES

COMPOSITION AND JURISDICTION *

"Professional Grievances

This Committee shall consist of seven members chosen at large from the members of the Association.

The Committee shall:

(1) Formulate and recommend methods for the effective enforcement of ethics and high standards of conduct in the practice of law as a profession; develop and recommend improved disciplinary methods and procedures; cooperate with the disciplinary tribunals or committees established by bar associations, courts or other public authorities.

(2) (a) upon their request advise or assist state and local bar associations in their activities in respect to the professional conduct of lawyers;

(b) make such investigations of professional conduct and abuses in connection with the practice of law as it may deem advisable or as may be directed by the House of Delegates or the Board of Governors;

(c) furnish information and make recommendations on the foregoing subjects to the House of Delegates, the Board of Governors or the appropriate Committees and Sections of the Association;

provided however, that this Committee may refer any complaint for investigation, hearing and report to the appropriate tribunal or committee within a state, or to the appropriate state or local bar association.

(3) Be authorized to consider all information as to the professional conduct and the judicial conduct of any member of the Association (excepting matters of judicial decision or judicial discretion), and to proceed in accordance with rules adopted and approved, as provided in subparagraph (4) of this section, upon its own motion or upon complaint. After a hearing thereon, conducted by this Committee at which the accused member shall have been given reasonable opportunity to be present and be heard in his own defense, this Committee only shall recommend to the Board of Governors the censure, public or private, or the suspension or expulsion of the member; and the censure, suspension or expulsion shall become effective on approval of these recommendations by the Board of Governors.

(4) Be authorized to adopt such rules as it may deem desirable concerning the methods and procedures to be used in making investigations, in the hearing of complaints and the taking of testimony; such rules not to become effective until approval by the Board of Governors. The rules may be altered or abrogated by the House of Delegates."

* An defined by the By-Laws of the American Bar Association, Article X, Section 7(w). Amended August 1961 and August 1969.

ADMINISTRATION AND RULES OF PROCEDURE

The Rules of Procedure for the Standing Committee on Professional Grievances are in the process of being revised in accordance with the By-Law Amendments adopted August, 1969.

It is anticipated that new Rules of Procedure will be adopted by the Board of Governors of the American Bar Association in February, 1970.

STANDING COMMITTEE ON LAW LISTS

COMPOSITION AND JURISDICTION *

"Law Lists

(1) This Committee shall consist of five members, each of whom shall serve until the adjournment of the third annual meeting following his appointment, and until his successor is appointed, and from whom the President shall designate a chairman annually; *provided*, that in the original appointment of this Committee the President shall designate one member to serve until the adjournment of the first annual meeting following his appointment, two to serve until the adjournment of the second annual meeting following their appointment, and two to serve until the adjournment of the third annual meeting following their appointment, but thereafter successors shall be appointed for three-year terms.

(2) This Committee shall

(a) procure information regarding law lists, and advise members of the Association thereof;

(b) recommend to the House of Delegates for adoption such standards or rules, and amendments thereof, for law lists as may seem in the interest of the public and the members of the profession;

(c) adopt such reasonable rules and regulations for the conduct of its authorized activities as it may find desirable;

(d) endeavor to protect the public and members of the profession from dishonest, fraudulent or unworthy conduct of persons who represent, or claim to represent, law lists;

(e) cooperate with law enforcement officers and others interested in the censure or punishment of such dishonest, fradulent or unworthy conduct;

(f) investigate annually at the expense of the publishers of law lists which shall request the committee to do so, whether such publishers respectively are complying with the provisions of the Rules and Standards as to law lists;

(g) issue an annual certificate of compliance to the publisher of any law list which the committee, upon such investigation, finds has complied with the Rules and Standards as to law lists of the Association, and the regulations of the committee; and revoke, conditionally or otherwise, the certificate issued to the publisher of any such law list if the committee finds that the publisher thereof, after receiving such certificate, has violated any of such rules, standards, or regulations."

RULES AND STANDARDS AS TO LAW LISTS ‡

That the following Rules and Standards, and each of them, be adopted as and for Law Lists which request a certificate of compliance:

1. Every list of attorneys at law, legal directory or other instrumentality maintained or published primarily for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available for professional employment, shall be deemed a Law List.

2. The purchase or use of a Law List the publisher of which has a certificate of compliance may be recommended to attorneys at law, or laymen, by its issuer, only on the basis of the circulation, physical makeup and accuracy thereof, and the extent to which lawyers listed therein have been investigated. Efforts by the issuer of a Law List to otherwise secure employment for any attorney listed therein, or presented thereby, shall be deemed ground for not issuing a certificate of compliance, or for the revocation of the certificate if it has already been issued.

3. No certificate of compliance shall be issued to the publisher of any Law List or continue unrevoked

(a) if, in connection with the preparation, publication, distribution or presentation thereof, the issuer does, causes, permits to be done, encourages or participates in the doing of, any act or thing which, directly or indirectly, violates the Canons of Ethics of this Association, or which constitutes the unlawful practice of the law;

(b) which shall be conducted upon a basis which does not tend to promote the public interest, or which employs a practice not in accord with a high standard of business conduct;

(c) or if the price for representation, or listing therein, or for a copy of the list, is not uniform within reasonably prescribed areas;

(d) or if any obligation is assumed by either user or attorney, to employ, exclusively or preferentially, in the forwarding, receiving or exchange of legal business, the attorneys listed therein;

(e) or if in the physical makeup thereof, preferential prominence shall be given to the name of any attorney or attorneys listed therein, by different size or character of type, underscoring or other methods employed by printers for emphasis or to attract attention; but the foregoing shall not prohibit the publication in the geographical section of a Law List of such professional card as the Canons permit or of a reference there to such card in another section of the book;

(f) or if the issuer thereof shall endeavor to direct, or control, the professional activities of any attorney listed therein or presented thereby;

(g) or if such Law List shall be published or issued as a part of any professional, commercial, trade or business publication or journal;

(h) or if the issuer thereof neglect or refuse to promptly and fully (a) notify the Association through the committee, in writing, of any payment or payments made by such issuer, or by an indemnitor, upon claims against a listed attorney, or (b) cooperate, at the request of the Association, through the committee, in the investigation, ascertainment and proof of the facts of such claims.

4. The publisher of a Law List which has received a certificate of compliance from the committee may rate its listees in a manner not disapproved of by the committee.

5. The committee shall make and promulgate such regulations as may be necessary to administer and interpret these Rules and Standards.

* An defined by the By-Laws of the American Bar Association, Article X, Section 7(p).

‡ Adopted by the House of Delegates, September 30, 1937, with amendments made October, 1941, August, 1942, February, 1944 and August 1969.

OATH OF ADMISSION

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of Lawyers as defined by statutory enactments in that and many other States of the Union—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of .....

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

The American Bar Association commends this form of oath for adoption by the proper authorities in all the States and Territories.