MANUAL ON LEGAL ETHICS

By

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INTRODUCTION

This manual is designed primarily for the benefit of solo and small firm practitioners. It presents New Jersey lawyer ethics law under sequential headings, beginning with preparing to practice and moving on to attracting clients, forming the attorney-client relationship, providing the service and terminating the relationship. Other headings include discipline, fee arbitration, legal malpractice, disqualification and professionalism. The concise and rather basic nature of the manual text makes it suitable for use in seminars intended to satisfy the ethics/professionalism requirement of New Jersey's mandatory continuing legal education program. See. R.1:42-1.

The appendix at the end of this manual contains research materials on New Jersey ethics law. Items A through D are New Jersey's four ethics codes spanning the period from 1908 to the present. Item E presents New Jersey's 16 Principles of Professionalism, adopted in 1997. Item F contains three cross reference tables linking New Jersey's advisory committee opinions to each other and to New Jersey's ethics codes dating from 1964 to the present. Item G is an index to assist in locating advisory opinions by topic. Finally item H is an index of original sources cited in the text of this manual.

There is relatively little "black letter" material in the law of ethics. Most of the law of ethics consists of basic principles which require sensitive discretion in their application. In many instances a court opinion or an advisory committee opinion can be found which may resolve the discretionary issue. Otherwise, however, the lawyer is left with only basic principles. Moreover, in most instances the lawyer exercises this discretion in private, in what is fundamentally a self-administered system of ethical control.

Two ingredients are important for the self-administered aspects of this system to work. First lawyers must know the basic ethical principles. This manual will contribute to and reinforce that knowledge. Second, lawyers must conduct themselves as true professionals, being committed to serving the interest of the public before seeking to enhance their own positions. To that end lawyers should be striving to fulfill the spirit of the law of ethics rather than viewing the law as simply a collection of negative rules to be minimized and tolerated.

A. The 2004 New Jersey Ethics Rules- A Brief History

The 2004 Rules of Professional Conduct have their origin in the 1984 New Jersey RPCs. Those rules were based upon the Model Rules of Professional Conduct ("Model Rules") adopted by the American Bar Association in 1983. Unlike most states, New Jersey did not accept the 1983 Model Rules verbatim but made many substantive changes particularly to the rules on advertising and solicitation, confidentiality and conflicts of interest. In the years following, both the Model Rules and the New Jersey RPCs have been amended numerous times but mostly in minor or technical ways, until 2004.

In 1997 the ABA created "Ethics 2000", a commission devoted to making a comprehensive study of the Model Rules. Eventually, this commission concluded that it was not necessary to create another all-new ethics code. Rather, the commission concentrated on overhauling the existing Model Rules. As that effort was going on, a second ABA commission was formed in 2000 to deal specifically with the matter of the multijurisdictional practice of law. In February of 2002 the ABA House of Delegates adopted a large number of amendments to the Model Rules based upon the "Ethics 2000" commission's efforts. Later, in August of 2002 the delegates approved additional amendments to MRPCs 5.5 and 8.5 based upon the recommendations of the multijurisdictional practice commission.

While these efforts were being made at the ABA level, New Jersey initiated its own rule review process. In January of 2001 the New Jersey Supreme Court appointed a commission (which came to be known as the Pollock Commission, so named because the chair was former Supreme Court Associate Justice Stewart G. Pollock) to review the New Jersey RPCs in light of the report and recommendations which had just then been released by the ABA's Ethics 2000 commission. One month later the New Jersey Supreme Court appointed an ad-hoc committee to review issues related to admission to the New Jersey bar, including in particular multijurisdictional practice issues. The Pollock Commission and the ad hoc committee completed their work in late 2002 and the Supreme Court released reports from both on December 11, 2002. On September 10, 2003 the Supreme Court issued Administrative Determinations relating to each report, responding to the various recommendations in the reports and announcing revised RPCs and related rules of court to be effective January 1, 2004. These Administrative Determinations are posted on the New Jersey judiciary website. Since 2004 the Court has made minor revisions to RPC 1.6, 1.11, 3.5, 5.5, 7.1, 7.3 and 7.5.

There are 58 numbered rules in the 2002 Model Rules, but only 56 in the 2004 New Jersey version. The New Jersey Supreme Court chose not to adopt MRPC 5.7 and MRPC 7.6. Both versions deleted former Rule 2.2. Of the 56 rules in the 2004 New Jersey version, 29 are substantially different from the prior New Jersey version and four of those 29 are entirely new (1.0, 1.18, 2.4 and 6.5). Only 18 of New Jersey's 2004 rules are identical or essentially the same as their 2002 Model Rules counterparts.

As to substance, in the 2004 revisions the Court finally eliminated the unpopular "appearance of impropriety" standard from RPC 1.7. The Court also modified the "bona fide office" rule in R.1:21-1 by striking out the requirement that the office must be located in New Jersey. The Court refused to endorse admission to the bar by motion. However, the Court revised RPC 5.5 to grant considerably more extensive opportunities for out-of-state lawyers to represent their out-of-state clients in New Jersey matters. These revisions will be covered in detail later in this manual.

Further RPC revisions may be coming. The ABA has proposed changes to the Model Rules designed to keep pace with modern technology and the forces of a global law practice. Late in 2013 the New Jersey Supreme Court appointed a special committee, chaired by former Chief Justice James R. Zazzali, to study the ABA proposals and make recommendations for revision of the New Jersey rules.

B. Other Sources of Ethics Law

In addition to code-type law (the RPCs), the law of ethics for New Jersey lawyers also includes rules of court, case decisions, advisory opinions and commentary literature. Examples of court rules would be qualifications to practice law (R.1:21-1), requirements for financial record keeping (R.1:21-6), limits on contingent fees (R.1:21-7), prohibited client relationships (R.1:15), and duties pertaining to disciplinary proceedings (R.1:20). Court rules are equal to the RPCs in terms of the weight of their authority. State v. Rue, 175 N.J. 1, 14 (2003).

Although attorney discipline is essentially a state matter, on rare occasions the United States Supreme Court has become involved in ethics problems. The most notable example of that, of course, is the Supreme Court's concern with attorney advertising as it relates to freedom of speech.

The case decisions of greatest importance generally to the law of ethics in New Jersey are those issued by the New Jersey Supreme Court when passing review on advisory committee opinions or on lower court rulings relating to legal malpractice or lawyer disqualification issues or when imposing discipline upon attorneys.

In lawyer discipline matters, the New Jersey Disciplinary Review Board (DRB) has primary responsibility to adjudicate charges and impose appropriate discipline. In the past, decisions issued by the DRB were generally unavailable to the public. However, the DRB's disciplinary decisions from 1998 to the present are now archived at the Rutgers School of Law/Camden. Free and searchable, the database can be found at http://lawlibrary.rutgers.edu/drb/search.shtml.

Advisory opinions have been a significant part of the law of ethics for the lawyers of New Jersey for nearly 50 years. More than 700 formal opinions have been issued by the Advisory Committee on Professional Ethics (which I will cite as ACPE Opinion followed by the number and the date the opinion was published). Nearly 100 more have been issued by the Committee on Attorney Advertising (cited as CAA Opinion plus the number and date) and the Committee on the Unauthorized Practice of Law (cited as CUPL Opinion plus the number and date). The ACPE and CAA opinions are binding upon attorneys, R.1:19-6; 1:19A-3. The CUPL determinations are enforceable by means of disorderly persons prosecutions, or in the more extreme cases, fourth degree criminal prosecutions. See R.1:22-6 and N.J.S.A. 2C:21-22. The New Jersey advisory opinions are published as they are issued in the New Jersey Law Journal. However, the most convenient method of accessing these opinions is through the Rutgers University School of Law/Camden, http://lawlibrary.rutgers.edu/ethics/search.shtml.

Care must be taken when citing the ACPE opinions, since relatively few relate to the 2004 RPCs. The RPCs they do cite may vary from the new ones. Indeed, many opinions relate to the Disciplinary Rules of the ABA's Code of Professional Responsibility (effective in New Jersey between September 13, 1971 and September 10, 1984) or even to the earlier ABA Canons of Professional Ethics (effective prior to September 13, 1971 in New Jersey). These earlier opinions have continued validity only to the extent the RPCs, Disciplinary Rules or Canons they

cite or other principles they rely upon are not inconsistent with today's Rules of Professional Conduct. See ACPE Opinion 595 (1986).

Commentary literature abounds. In New Jersey we are most fortunate to have Kevin H. Michels' New Jersey Attorney Ethics (Gann Law Books, updated annually), as well as Robert Ramsey's New Jersey Attorney Discipline (Volume 46 of the New Jersey Practice Series, Thomson West, updated annually). Other works with a national orientation include Restatement of the Law Third, The Law Governing Lawyers, (American Law Institute, 2000) (hereafter cited simply as "Restatement of the Law Governing Lawyers"); Hazard, Hodes and Jarvis, The Law of Lawyering, Third Edition (Wolters Kluwer, updated annually); and Rotunda and Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (West, updated annually). The ABA's Model Rules as published by the Center for Professional Responsibility include extensive comments along with the text of each rule.

C. Researching Ethics Questions

The research process should begin with the RPCs, identifying all sections that may relate to the facts. Some RPCs are sufficiently clear and specific that the research process can stop right there. Most of the time, however, the rule sections contain operative words which call for interpretive application. When this is so, a search for precedent in case decisions and advisory opinions must be undertaken.

When researching advisory opinions or DRB decisions in the Rutgers Law School/Camden library archives, there is a "search dialog" system which can be very helpful. See http://lawlibrary.rutgers.edu/courts/help.shtml for instructions on how to use this system. For a more pedestrian approach to researching the advisory opinions, note that the appendix to this manual contains both an index to the opinions and a series of cross reference tables which list every instance in which advisory opinions cite particular DRs, RPCs or other advisory opinions.

For expert assistance in researching, there are several possibilities. For immediate help, consult Kevin H. Michels' New Jersey Attorney Ethics, or call the ethics hotline maintained by the Advisory Committee on Professional Ethics at 609-292-0694. If time permits, another option would be to submit an inquiry to the secretary of the appropriate advisory committee seeking an advisory opinion. (See R.1:19, 1:19A and 1:22).

I. PREPARING TO PRACTICE

This section deals with the basic ethical requirements involved in establishing a firm and opening an office and describes the expanded jurisdictional privileges available under revised RPC 5.5.

A. Law Firm

Lawyers may practice alone, in partnership with other lawyers, in professional corporations and even in professional corporations composed of partnerships or other professional corporations, R.1:21-1A. However, all persons having an ownership interest in the firm must be lawyers, RPC 5.4(d), and all persons practicing in the firm in New Jersey must be admitted to practice in New Jersey, R.1:21-1(a); RPC 5.5; In re Application of Jackman, 165 N.J. 580 (2000). Disbarred or suspended attorneys may not be employed by any firm engaged in the practice of law. R.1:20-20(a). As to "foreign legal consultants," see R.1:21-9 and In re Dalena, 157 N.J. 242 (1999). The "affiliation" of law firms has been disapproved. Joint opinion ACPE Opinion 694/ CAA Opinion 28 (2003); cf., ABA Formal Opinion 351 (1984). Wholly-owned subsidiary firms are permitted for practice in specialized areas of law. ACPE Opinion 704/CAA Opinion 37 (2006).

In recent years, lawyers have proposed creating teams of various professionals to provide comprehensive services to their clients. Known as "multidisciplinary plans" or MDPs, such plans are permitted in Europe, Canada and Australia, but not yet in the United States. In New Jersey, MDPs are prohibited by RPC 5.4(b) and (d). See also R.1:21-1(a) and R.1:21-1A(d) and (e).

Lawyers may engage in the practice of law as limited liability companies or as limited liability partnerships. R.1:21-1B and R.1:21-1C; N.J.S.A. 42:2B-1 through 70 and N.J.S.A. 42:1-1 through 49. Even solo practitioners are eligible. Lawyers practicing in companies or partnerships may limit their liability to their own malpractice and that of persons working under their direct supervision. However, they must carry malpractice insurance on themselves of at least $100,000.

The name of the firm must include the full or last names of one or more of the lawyers in the firm or the names of persons who have ceased to be associated with the firm through death or retirement, RPC 7.5(a). (Consult entire rule 7.5 for more detail.) See also CAA Opinions 1, 2, 5 and 10; Matter of Kasson, 141 N.J. 83, 87 (1995). As to the appropriate use of the "Of Counsel" designation, see CAA Opinion 21 (1997); ABA Formal Opinion 357 (1990).

Under present law New Jersey firms may not utilize trade names. However, that law is in the process of being changed. In March of 2013 the Supreme Court finally issued a ruling in a

repeatedly argued case involving the Alpha Center for Divorce Mediation. See Letter Decision of the Committee on Attorney Advertising, 213 N.J. 171 (2013). In this opinion the court announced that it was adopting a new version of RPC 7.5(e), reading as follows:

> (e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Use of a trade name shall be permissible so long as it describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results. Such trade names shall be accompanied by the name of the attorney who is responsible for the management of the organization. Any firm name containing additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

Taking note of the experiences other states have had when adopting trade name provisions, the court decided to appoint a special committee to assist it in addressing the details of implementation. Consequently, the revised 7.5(e) will not become effective until the committee completes its task and the Court has acted on the committee's recommendations. In December, 2013, the Court announced appointment of the 16 people who will comprise this committee, with retired assignment judge, Linda R. Feinberg, as chair.

With the new rule text the Court added the following official comment, illustrating what sort of trade names will be considered permissible:

> Official comment (2013); By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Millburn Personal Injury Group, John Smith, Esq." However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results.

Then, before closing its opinion, as a further illustration to the bar, the Court passed judgment on the Alpha Center name. During argument the Alpha Center had agreed to include the name of its managing attorney, leaving for review only the trade name itself. As to that, the Court found the "Alpha" part unacceptable under the new rule. "...[W]e conclude that the word adds no informative content other than serving the impermissible purpose of invoking the notion of primacy." 213 N.J. at 187.

Partners or supervisory lawyers must make "reasonable efforts" to ensure that their subordinate lawyers conform to the rules of ethics, RPC 5.1. Subordinate lawyers are bound by the RPCs even if a superior member of the firm gives them contrary direction, unless the issue is "arguable" and the superior's resolution is "reasonable", RPC 5.2. Supervisory lawyers must make "reasonable efforts" to ensure that the conduct of their non-lawyer assistants is compatible with the professional obligations of the lawyer, RPC 5.3. There are no separate ethical

obligations directed toward paralegals. The New Jersey Supreme Court has determined that the most appropriate form of paralegal regulation should be the oversight given them by their supervising attorneys. (Administrative Determination of May 18, 1999, posted in the New Jersey judiciary website archives.)

In interpreting RPC 5.3, supervisory lawyers would be well to observe the ten "Model Guidelines for the Utilization of Legal Assistant Services" adopted by the American Bar Association in 1991 available on the ABA website.

Paralegals may carry their own business cards if the firm name is shown, ACPE Opinion 647 (1990), may sign firm correspondence in their own names in certain circumstances, ACPE Opinion 611 (1988), modified by ACPE Opinion 720/CUPL Opinion 46 (2011), and may be identified by name and title in firm letterhead and advertising, CAA Opinion 16 (1993). If measures are taken to protect confidentiality, paralegals can change employer law firms to work for an adversary firm. See ACPE Opinion 665 (1992), modifying ACPE Opinion 546 (1984); Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10 (1992). Note that when paralegals do relocate to firms representing adverse parties, screening under RPC 1.10 is appropriate as would be true of lawyers who switch sides. ACPE Opinion 633 (1989). Under no circumstances, however, may a paralegal represent law office clients in court. Matter of Pomper, DRB 08-237 (2008).

Independent (or "freelance") paralegals may be retained by a law firm provided they are supervised to the same extent as employee paralegals. See In re Opinion 24 of the Comm. on the Unauthorized Practice of Law, 128 N.J. 114 (1992).

Employing freelance paralegals is, obviously, a form of outsourcing. In August, 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 08-451, giving broad approval to the outsourcing of legal and non-legal support services, including even the outsourcing of legal work to lawyers located in foreign countries. New Jersey ethics officials have not endorsed this ABA opinion, and appear to be approaching the outsourcing topic very cautiously. Outsourcing raises a number of critical ethics issues, all addressed in the ABA opinion, such as the need to assure that the outsourced services are competent (RPC 1.1), that the providers are sufficiently supervised (RPC 5.1, 5.3), that disclosure of confidential information to the providers is done with client consent (RPC 1.6), and that the outsourcing lawyer not assist in the unauthorized practice of law (RPC 5.5).

Law firm partnership or employment agreements may not restrict the rights of a lawyer to practice after termination of the relationship, RPC 5.6. Nor may agreements require forfeiture of a departing lawyer's equitable interest or compensation. See Jacob v. Norris, McLaughlin & Marcus, supra; Weiss v. Carpenter, Bennet & Morrissey, 143 N.J. 420 (1996); Heher v. Smith, Stratton, Wise, 143 N.J. 448 (1996); Apfel v. Budd, Larner, Gross, 423 N.J. Super. 133 (App. Div. 1999); Borteck v. Riker, Danzig, Scherer, Hyland & Peretti LLP, 362 N.J. Super. 284 (App. Div. 2003); Groen, Laveson, Goldberg & Rubenstone v. Kancher, 362 N.J. Super. 350 (App. Div. 2003). For an interpretation of the retirement benefits exception in RPC 5.6(a), see Borteck v. Riker, Danzig, Scherer, Hyland & Peretti LLP, 179 N.J. 246 (2004).

Law firms may buy or sell law practices under RPC 1.17, a provision adopted by the Supreme Court in 1992. RPC 1.17 supersedes ACPE Opinions 48 (1964) and 80 (1965) which prohibited such sales. This rule is quite detailed and should be studied carefully by any parties to such a transaction. Of particular note are provisions in the rule that good will may be part of the sales price, that the seller thereafter must cease practicing law in New Jersey and, unlike the Model Rule, that the entire practice must be sold, not just an area of practice, although the practice may be sold in segments to different purchasers.

Lawyers may sell their accounts receivable to a third party or retain the services of a collection agency. However, collection actions may not be initiated against current clients and before selling accounts receivable or referring them to a collections agency, lawyers must first provide the fee arbitration notice required by R.1:20A-6. Confidential information about clients and the legal representation must be protected to the extent reasonably possible. ACPE Opinion 723 (2012).

B. In-House Counsel

Corporate lawyers tend not to fit the typical lawyer profile for which the rules of ethics were designed. The rules focus primarily on the representation of individuals, whereas corporate lawyers mostly represent organizations. The rules also focus primarily on the role of lawyers as litigators, whereas corporate lawyers are involved mostly in transactional matters. The rules contemplate lawyers providing representation to a client population, whereas, at least as to in-house counsel, corporate lawyers are salaried employees of the organizations they represent. Lawyers in private practice need only comply with the ethics rules of the one or perhaps a few other jurisdictions where they practice, whereas corporate lawyers must comply with the often conflicting rules not only of many jurisdictions but of governmental agencies as well. Finally, lawyers representing individuals are free to focus upon the private concerns of their clients, whereas corporate lawyers also need to be sensitive about how their representation affects the public interest. (See Regan, "Professional Responsibility and the Corporate Lawyer," The Georgetown Journal of Legal Ethics, Vol. XIII, No. 2 (Winter, 2000).)

One of the RPCs is devoted specifically to the organizational client, RPC 1.13, although even this rule leaves many important issues unresolved. Aside from RPC 1.13, the "disjunction" (Professor Regan's term) between corporate practice and the rules of ethics leaves even the most conscientious corporate lawyer unsure of just how to satisfy such basic ethical duties as providing loyal representation, protecting client confidences, avoiding conflicts of interest and being candid in statements to adversaries, third parties and the public. Compounding the problem for in-house corporate lawyers in New Jersey is the fact, noted earlier, that there are so many unique features in New Jersey's version of the RPCs. New Jersey in-house counsel who obtain limited licenses under R.1:27-2 face a doubly-difficult chore. Even before tackling the disjunction problem they must first learn the unique New Jersey rules.

All full time New Jersey in-house counsel who perform legal services but do not hold a plenary New Jersey license must apply for a "limited" license to practice law. Under R.1:27-2 which became effective in January 2004, unlicensed in-house counsel who fail to obtain a license

are not eligible to practice on behalf of their employer and risk prosecution for engaging in the unauthorized practice of law. And lawyers who work with unlicensed in-house counsel risk being disciplined under RPC 5.5(a)(2) for facilitating the unauthorized practice of law.

Prior to adoption of R.1:27-2, Opinion 14 of the New Jersey Supreme Court's Committee on the Unauthorized Practice of Law, issued in 1975, spared in-house counsel of the need to be licensed in New Jersey, provided they were licensed in some other state or the District of Columbia, were employed exclusively by their employer, confined their legal services to their employer's business, and did not make appearances before a tribunal except by pro hac vice authorization. Although R.1:27-2 superseded Opinion 14, in its March 1, 2004 determinations the Court indicated that Opinion 14 will remain as the rule governing the functions in-house counsel are permitted to perform. R.1:27-2 simply adds a mandatory licensing requirement to the Opinion 14 pattern.

As to scope, licensing is only required if the lawyer-employee is performing legal services. Whether some particular activity constitutes the practice of law is not always clear. The line between lawyering activities and business activities or activities related to another profession is often indistinct. The courts have tended to decide what constitutes the practice of law primarily on a case-by-case basis. New Jersey State Bar Association v. Northern New Jersey Mortgage Associates, 32 N.J. 430, 437 (1960); In re Opinion 24 of the Committee on the Unauthorized Practice of Law, 128 N.J. 114, 122 (1992); In re Jackman, 165 N.J. 580, 586 (2000).

In-house counsel who function as paralegals under the supervision of a fully licensed New Jersey lawyer are exempt from the licensing requirement. See the March 1, 2004 determinations, citing In re Opinion 24 of the Committee on the Unauthorized Practice of Law, supra. Only lawyers employed on a full-time permanent basis are eligible for limited licensure. Unlicensed in-house lawyers currently working only part-time or in temporary positions must obtain a plenary license. Unlicensed lawyers whose in-house offices are located outside New Jersey are still required to obtain limited licenses if they do New Jersey related work. If their New Jersey work is only occasional and irregular, licensure is not required, although the multi-jurisdictional provisions of RPC 5.5 may apply instead. In-house counsel with limited licenses are exempt from New Jersey's mandatory pro bono program. They are not exempt, however, from the duty to pay an annual assessment to the New Jersey Lawyers' Fund for Client Protection. They must also satisfy the continuing legal education requirements of R.1:42. Although not obligated to maintain trust accounts, whenever their duties involve safeguarding client property, in-house counsel are subject to the same fiduciary duties as are lawyers in private practice.

C. Multijurisdictional Practice

One of the most controversial of the topics which the ABA considered in 2002 was the issue of multijurisdictional practice ("MJP") and modification of RPC 5.5. The prior ABA model RPC 5.5 had been identical to New Jersey's version. Most states, including New Jersey, permitted lawyers from other jurisdictions to practice in isolated instances by means of pro hac

vice admissions. Additional flexibility in marginal situations protects persons who are not licensed in this state. See, for example, In re Opinion 26 of the Comm. in the Unauthorized Practice of Law, 139 N.J. 323 (1995), (title clerks conducting residential real estate settlements); In re Opinion 33, 160 N.J. 63 (1999), (out-of-state lawyers serving as bond counsel); and CUPL Opinion 47 (2011), (accountants drafting corporate documents). These exceptions are insufficient, however, to deal with the multijurisdictional requirements of contemporary law practice, particularly in the realm of transactional representation.

In essence, New Jersey's 2004 version of RPC 5.5, as further refined in 2012, prohibits in part (a) the unauthorized practice of law and grants in part (b) the privilege of practicing law in New Jersey without a New Jersey license in seven specific situations:

(1) When admitted pro hac vice pursuant to R.1:21-2.

(2) When holding a limited license as in-house counsel pursuant to R.1:27-2.

(3) When negotiating a transaction for an existing client where the transaction originated in or is otherwise related to a jurisdiction in which the lawyer is admitted.

(4) When participating in arbitration or other alternate dispute resolution for an existing client where the dispute originated in or is otherwise related to a jurisdiction in which the lawyer is admitted and are not services requiring pro hac vice admission.

(5) When performing investigation or discovery related to proceedings pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted; or

(6) When the out-of-state lawyer practice in New Jersey is only occasional and the lawyer associated with a New Jersey lawyer in the matter, who shall be held responsible for the conduct of the out-of-state lawyer; or

(7) When handling a matter in circumstances other than (1) through (6) where the matter arises directly out of the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted, provided that such practice is
only occasional and disengagement would harm the client.

In all seven instances, the lawyer must be licensed and in good standing in all jurisdictions of admission, must submit to the New Jersey RPCs and the disciplinary authority of the New Jersey Supreme Court, must consent to the appointment of the Clerk of the Supreme Court as agent for service of process, must not portray himself or herself as being a New Jersey lawyer, and must pay the annual assessments required of lawyers who are admitted in New Jersey. See Boston University v. University of Medicine and Dentistry of New Jersey, 176 N.J. 141 (2003); CUPL Opinion 49 (2012).

Those who choose to practice in New Jersey under one or more of the seven "exceptions" in RPC 5.5(b) should make a concerted effort to study New Jersey's RPCs before doing so. For a detailed commentary on this rule see CUPL Opinion 49 (2102). As the Introduction to this

manual emphasizes, New Jersey's rules are unique. Knowledge of the Model Rules or the rules of another jurisdiction is not transferable. If disciplinary proceedings are ever instituted, the 5.5(b) lawyer respondent cannot claim ignorance of New Jersey rules. This is underscored by the fact that in adopting RPC 8.5, the New Jersey Supreme Court pointedly deleted from (b) ("Choice of Law") the following sentence contained in the ABA version: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

Although RPC 5.5 is devoted primarily to the actions of lawyers who are not licensed in New Jersey, RPC 5.5(a)(2) makes it unethical for a licensed New Jersey lawyer to assist an unlicensed person in activity which violates 5.5. Thus, a New Jersey lawyer working with an out-of-state lawyer in a matter must monitor the situation carefully to be sure that the restrictions contained in RPC 5.5 are not breached.

D. Office

Rule 1:21-1(a), which sets forth qualifications for the practice of law in New Jersey, includes requirements for the lawyer's office. Traditionally, the rule required a "bona fide" office, which had to be an actual, physical place with a staff person present during normal business hours. In 2004 the Supreme Court relaxed the rule somewhat, allowing the "bona fide" office to be located outside of New Jersey. For an analysis of this version of the rule see ACPE Opinion 718 (2010). However, the increasingly archaic fundamentals of the rule remained.

Effective February 1, 2013, we have a totally new office rule. The "bona fide" requirement has been deleted. As revised by the Court, R.1:21-1(a) now requires only that the practicing lawyer be reasonably and reliably accessible to clients, counsel and courts. Lawyers who choose to practice without a fixed, physical office location are required by the new rule to designate a place where their files and records may be inspected and papers may be delivered or served. Those lawyers must also designate the Clerk of the Supreme Court as their agent for service of process. Significantly, R.1:21-1(a) now includes references to RPC 1.4, making that, in effect, a standard by which the lawyer's accessibility to clients will be measured.

The office requirement portion of R.1:21-1(a) now reads as follows:

"(1) An attorney need not maintain a fixed physical location, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto.
(2) An attorney who does not maintain a fixed physical location for the practice of law in this State, but who meets all other qualifications for the practice of law set forth herein must

designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in subsection (a)(1) of this rule....
(3) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(1).
(4) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places."

Regardless of where their offices (if any) may be located, attorneys who practice law in New Jersey must maintain trust and business bank accounts in the firm name in approved New Jersey financial institutions. R.1:21-6 requires this information to be included in the attorney's annual registration form filed with an annual fee paid to the Disciplinary Oversight Committee and the New Jersey Lawyers' Fund for Client Protection (R.1:20-1(b) and R.1:28-2). For more detail, see the topic headed "Safekeeping Property" later in this manual.

II. ATTRACTING CLIENTS

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977) the United States Supreme Court ruled that attorney advertising is a protected form of commercial speech. Prior to that time virtually no forms of advertising or solicitation were permitted in New Jersey.

The New Jersey Supreme Court responded cautiously to Bates, at first giving authority only for print media advertising. See DR 2-101(D), adopted in 1979 (Appendix B of this manual), and carried over into RPC 7.2 in 1984. This rule was relaxed somewhat in 1987, following a challenge in Petition of Felmeister & Isaacs, 104 N.J. 515 (1986). The solicitation provisions of RPC 7.3 were modified in 1990 in response to Shapiro v. Kentucky Bar Assn., 486 U.S. 466 (1988), and the communication of fields of practice provisions of PRC 7.4 were modified in 1993 in response to Peel v. Illinois Registration and Grievance Comm'n., 496 U.S. 91 (1990).

The rules regarding "information about legal services" (the heading in the Model Rules) appear in the New Jersey rules as RPCs 7.1 through 7.5. The 2004 version of these rules is virtually identical to New Jersey's prior version. New Jersey did not adopt MRPC 7.6, dealing with political contributions tied to public employment, which became part of the Model Rules in 2000. Three of the five New Jersey rules deal with the content of a lawyer's communications: RPC 7.1 (content generally), RPC 7.4 (fields of practice) and RPC 7.5 (firm names and letterheads). The other two deal with the means of a lawyer's communications: RPC 7.2 (advertising) and RPC 7.3 (solicitation).

A. Content

It was widely expected that in 2009 the Court would overhaul 7.1. Unfortunately, that did not happen. The expectations for change were generated by the Court's rejection of Committee on Attorney Advertising Opinion 39 (2006), in which the committee had ruled that advertising describing attorneys as "Super Lawyers" or "Best Lawyers in America" violated RPCs 7.1(a)(2) and (3). See In re Opinion 39, 197 N.J. 66 (2008). Following review of 7.1 by three of the Court's committees and a public hearing, the Court decided to amend (a)(3) only to the extent necessary to permit advertising as to lawyer comparisons made by an organization. The amendment became effective in 2009.

RPC 7.1(a)(1) states that an advertising statement is false or misleading if it contains a material misrepresentation. The court found misrepresentations in Matter of Anis, 126 N.J. 448 (1992), cert. denied, 504 U.S. 956 (1992), where the attorney in a targeted solicitation letter to the father of an aircraft crash victim claimed that he and his partner were "experienced practitioners in the personal injury field" (but neither had ever tried a case to a judge or jury or handled a personal injury claim against an airline), and that they would "substantially reduce the customary one-third fee" (without defining "substantially" or disclosing the graduated fee limits of Rule 1:21-7.)

In CAA Opinion 9 (1991) the advertisement claimed that the firm's client had been awarded $10.6 million in damages, whereas in fact the real recovery was only $1.7 million in a structured settlement having a $10.6 million value over time. The committee concluded that disclosure of the deferred payment feature was essential for accuracy. In CAA Opinion 22 (1997), a lawyer proposed advertising the fact that he had previously been a municipal court judge. The committee found this to be potentially misleading without also stating where and when he had served. And in CAA Opinion 25 (1998) the committee found five misleading statements in a flyer designed to promote utilization of living trusts.

In 2004 the Committee on Attorney Advertising issued two opinions relating to lawyers who send targeted letters to individuals they have identified through court record searches under R.1:38. See CAA Opinion 29, concerning municipal court defendants, and CAA Opinion 30, concerning prospective bankruptcy petitioners. Both advisory opinions were issued in response to numerous complaints the committee received from recipients who found the solicitation letters offensive. In both opinions the committee quoted examples from actual letters illustrating their impersonal and formulaic character, combining scare tactics with exaggerated promises. Both opinions conclude with lists of requirements defense and bankruptcy lawyers must meet in future solicitation letters in order to comply with RPC 7.1(a). See also ACPE Opinion 698/ CAA Opinion 34 (2005).

RPC 7.1(a)(2) states that an advertising statement is misleading if it is likely to create an unjustified expectation about the results the lawyer can achieve. CAA Opinion 15 (1993), dealt with client testimonials in general solicitation letters. Somewhat surprisingly, the committee approved of the use of testimonials in print as well as audio and visual advertising, provided the following disclaimer is prominently displayed: "Results may vary depending on your particular facts and legal circumstances." In June, 2005 the committee issued CAA Opinion 33,

superseding Opinion 15 and limiting the content of testimonial advertisements to client statements of a factual nature, excluding client statements of subjective opinion. In September, 2005, however, without giving its reasons the New Jersey Supreme Court stayed Opinion 33 and remanded the matter to the committee for further analysis. The committee responded with proposed Guideline 4, which is currently under review by the Supreme Court. Whether Opinion 15 is good law is a matter of conjecture.

Opinion 15 is easily distinguished from CAA Opinion 8 (1991), where the committee disapproved of an advertisement which included the following statement: "[Respondent attorney] was introduced by a talk show host as `The best divorce lawyer in the country.'" Note also CAA Opinion 17 (1994) which catalogs the many ethical difficulties involved in offering to provide legal advice via a "900 telephone number."

RPC 7.1(a)(3) declares that a communication is false or misleading if it compares the lawyer's services with other lawyers' services. In CAA Opinion 7 (1991) the committee held that this rule was violated by an advertisement in which the lawyer claimed to have "expertise" in a particular field of law. The committee reversed itself in CAA Opinion 24 (1997), declaring that the claim to expertise if true would not be inherently misleading. However, Opinion 24 was vacated by the New Jersey Supreme Court in 2001.

In CAA Opinion 42 (2010), the committee addressed the Supreme Court's 2009 revision to RPC 7.1(a)(3). The lawyer's solicitation letter which prompted Opinion 42 stated:

> "Because of my dedication to our clients and success in the courtroom, I have been named as a Super Lawyer by New Jersey Monthly Magazine for five (5) consecutive years (2006 through 2010), and I am a Life Member of the Million Dollar Advocates Forum, which puts me in an elite group of less than one percent (1%) of all lawyers in the United States."

The committee ruled that the lawyer misused the Super Lawyer designation making it appear that he was indeed superior rather than stating simply that he had been included in a Super Lawyer listing. The committee also found the balance of the lawyer's statement entirely improper being either misleading or not subject to substantiation. Opinion 42 concludes with a summary of its instructions to the bar, one of which appears to be more restrictive than the Supreme Court's official comment. Opinion 42 declares that the lawyer's communication must itself include a description of the standard or methodology on which the lawyer's honor or accolade is based. The Supreme Court's comment permits the lawyer to cover this requirement by reference to a convenient, publicly available source.

The Court's rejection of CAA Opinions 24 and then 33, and now the Court's limited revision of RPC 7.1(a)(3), leave unclear the extent to which New Jersey lawyers may ethically advertise either their particular capabilities or the degree of satisfaction their services have brought to their clients. Both areas are surely relevant to a client's selection of legal counsel. The ABA took a more lenient approach in its 2002 Model Rule revisions, removing the unjustified expectation and comparison provisions from MRPC 7.1 and relegating them to

"Comment" status. Hopefully, our Court will revisit 7.1(a)(2) and (3) and make the sort of overhaul the rules so desperately need.

RPC 7.1(a)(4) restricts what can be said about the lawyer's fees to the following six items:

> "(i) a statement of the fee for an initial consultation;
> (ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;
> (iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
> (iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;
> (v) the availability of credit arrangements; and
> (vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive."

As to fields of practice, RPC 7.4(a), a lawyer may communicate the fact that he or she practices in certain categories of law or does not practice in certain categories of law, but in doing this the lawyer may not claim to be a specialist or an expert in any field. RPC 7.4(b) permits communication that the lawyer is certified as a specialist but only if the communication also conveys whether the certifying organization has been approved or not approved by either the New Jersey Supreme Court or the ABA. CAA Opinion 27 (2000) further requires that the attorneys who are certified be specifically identified.

The restrictions concerning firm names and letterhead language, RPC 7.5, are too detailed for summary review in a meaningful way. They deserve careful study whenever a new firm name is being established or new letterhead is printed. One particular restriction is worthy of note: additional language in the firm name such as "& Associates" may be used only if it is "accurate and descriptive of the firm", meaning that there must be other lawyers truly associated in the firm, RPC 7.5(e). As to the use of trade names, see Section I Part A earlier in this manual.

Advertisements by lawyers are exempt from regulation under the Consumer Fraud Act. See Macedo v. Dello Russo, 178 N.J. 340 (2004).

B. Means

New Jersey's advertising rule, RPC 7.2, is much more detailed than its Model Rule counterpart. RPC 7.2(a) permits advertising through any avenue of public media, including

"internet or other electronic media" (added in the 2004 revision) as well as through mailed written communication. CAA Opinion 43 (2011). However, the rule goes on to require that advertising be "predominantly informational", dignified and relevant to the matter of selecting legal counsel. Drawings, animations, dramatizations, music or lyrics are all prohibited. In 2002 the Pollock Commission expressed concern as to the constitutionality of these restrictions, but the Supreme Court did not share that concern.

RPC 7.2(c) prohibits referral fees. This provision must be read in conjunction with RPC 1.5(e), which permits lawyers from different firms to share fees in proportion to services actually rendered by each, and with R.1:39-6(d), which permits certified trial attorneys to share fees with referring attorneys without regard to services actually rendered. Referral payments made to non-lawyers, or "runners", are strongly condemned. In re Frankel, 20 N.J. 588 (1956); In re Pajerowski, 156 N.J. 509 (1988), and In re Tomar, Simonoff, Jacoby & Graziano, P.C., 196 N.J. 352 (2008). See also ACPE Opinion 674 (1994), prohibiting membership in a business referral organization requiring its members to provide weekly leads or pay sanctions; CAA Opinion 36 (2006) concerning internet marketing services; ACPE Opinion 681 (1995), prohibiting the sharing of profits between firms; ACPE Opinion 716/CUPL Opinion 45 (2009), prohibiting payment of fees to loan modification companies for client referrals; and CAA Opinion 43 (2011), drawing a distinction between internet websites which constitute impermissible attorney referral services and those which constitute legitimate advertising.

The 2002 Model Rule 7.2 included a new provision at (b)(4) allowing referral arrangements to be established between lawyers and lawyers as well as between lawyers and non-lawyer professionals if the reciprocal arrangement is not exclusive and is explained to the clients involved. The Pollock Commission made no recommendation on this provision and it did not appear in the Supreme Court's 2004 revisions.

RPC 7.3 deals with solicitation - personal contact orally or in writing with prospective clients for the purpose of obtaining professional employment. Part (a) of the rule authorizes such contact, but part (b) imposes broad restrictions. Subpart (b)(1) prohibits solicitation where the potential client's physical, emotional or mental state is such that he or she is unable to exercise reasonable judgment about employing the lawyer. Such was the situation in Matter of Anis, 126 N.J. 448 (1992), quoted above for advertising content violations. The Anis solicitation was made in response to the crash of Pan Am flight 103 over Lockerbie, Scotland December 21, 1988. It took the form of a personal letter to the father of a university student who had been on the flight and was mailed the day after the young man's remains were identified. The letter began: "Initially, we would like to extend our deepest sympathy for the loss of your son . . ." It went on to solicit the firm's services in pursuing a claim against the airline. The Supreme Court was outraged. It branded the opening sentence of the letter as "hollow sentiments" and insisted that no First Amendment protection should be available for "conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims and their families." Id. at 453, 458.

The court based its ruling upon RPC 7.1(b)(1). The court rejected the idea that the standard here is subjective and should require proof concerning the lawyer's knowledge of the impact the letter would actually have on this particular family. Instead, the court declared the

standard to be an objective one, that of an "ordinarily prudent attorney," who would surely recognize the offensive impact of such an intrusive communication. Id. at 457.

The objective standard from Anis was applied by the court in Matter of Ravish, Koster, Tobin, 155 N.J. 359 (1998). This case arose out of the solicitation activities of several different lawyers immediately following the gas line explosion at the Durham Woods apartment complex in Edison, New Jersey in 1994. No one was killed in the explosion and relatively few people were injured, but hundreds lost their dwellings, their personal possessions and even their vehicles.

One of the lawyers, Kenneth Oleckna, and his firm rented a Winnebago type van the day after the explosion, equipped it as a mobile office, posted advertisements on it, and parked it next to an emergency shelter that housed displaced residents. From there Oleckna dispatched paralegals who interviewed people who called as a result of the advertisements and had them sign retainer agreements. Another lawyer, Raymond Eisdorfer, responded to a call from a former client who was a resident at Durham Woods, and went to the shelter the day after the explosion. There he gave an hour and a half speech to a group of fifteen people, after which they signed retainer agreements with him. A third lawyer, Charles Meaden, drove to Edison the day after the explosion and, at a local hotel, was able to make contact with several displaced Durham Woods people to whom he later sent solicitation letters.

The Supreme Court found RPC 7.3(b)(1) violations in all three cases. In the Meaden case, the violation was simple to establish because Meaden admitted that at least one of the displaced persons he met was clearly distressed at the time. In the other two cases, the court presumed, on the basis of the objective standard, that the potential clients, only a day after they had lost their homes, property and vehicles, would not have had the mental and emotional ability to make reasoned decisions about employing an attorney. 155 N.J. at 367, 368. Justices O'Hern and Stein concurred with the five member majority as to the solicitations being in violation of RPC 7.3 (b)(1), but they would not have disciplined Oleckna, his firm and Eisdorfer, contending that the law beyond Anis was not sufficiently clear in 1994. Oddly, the respondents were not charged with violations of RPC 7.3 (b)(4) (now (b)(5)) even though their conduct constituted direct contact after a "specific event."

Subpart (2) of RPC 7.3(b) prohibits solicitation where the potential client has made known a desire not to be contacted. Subpart (3) prohibits solicitation where the communication involves coercion, duress or harassment. Note that subparts (1), (2) and (3) apply to all solicitation efforts, whereas subparts (4) and (5) apply only to solicitation that is focused upon specific events.

Subpart (4) concerns solicitation of victims of a "specific mass-disaster event." Adopted in 1997, the rule fixes as a bright line standard a thirty day ban on targeted solicitation, patterned after the United States Supreme Court's opinion in Florida Bar v. Went For It, 515 U.S. 618 (1995). This rule was not in effect in 1994 at the time of the Durham Woods solicitations. The solicitation ban in airline crashes by federal law is 45 days, 49 U.S.C. 1136(g)(2).

Subpart (5), which had been numbered (4) prior to the 1997 revision, concerns solicitation of persons associated with any specific event not considered to be a mass disaster event under subpart (4) where pecuniary gain to the lawyer is a significant motive. Subpart (5) prohibits all forms of direct contact except for a letter by mail which must meet three requirements: The word "ADVERTISEMENT" must appear in bold capital letters at the top of the first page and on the outside envelope; at the end of the letter there must be the following text: "Before making your choice of an attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and a notice must also appear at the end of the letter to the effect that if the letter is inaccurate or misleading the recipient may report that to the Committee on Attorney Advertising in Trenton. These notice requirements also apply to email advertising (CAA Notice to the Bar, November 7, 2005). CAA Opinion 35 (2005) adds to RPC 7.3(b)(5) a requirement that the text also state "If you are already represented by counsel in this matter, please disregard this advertisement.". As to font sizes for these notices, see the detailed instructions contained in Attorney Advertising Guideline 2 (CAA, March 2, 2005), as amended effective October, 2013.

In view of the above restrictions under part (b) of RPC 7.3, what sorts of solicitation are permissible under part (a)? In terms of solicitation that is not related to a "specific event", the only restrictions are those in (b)(1), (2) and (3). There may be personal contact both orally and in writing so long as the potential client is capable of making a reasoned decision, the client has not expressed an unwillingness to be contacted, and the lawyer does not pressure the client. The fact that pecuniary gain to the lawyer may be a significant motive is irrelevant.

If, however, the solicitation concerns a "specific event" (other than a mass disaster) and pecuniary gain is a significant motive, the restrictions in (b)(5) also apply, limiting the solicitation to a written mailing which contains all of the "ADVERTISEMENT" notification items. What constitutes a "specific event"? The rule does not define this term, nor has the Supreme Court dealt with it in any opinion. The Committee on Attorney Advertising, however, has determined that the term should be interpreted broadly, to include "situations, conditions or occurrences which now, or in the future will, give rise to a cause of action." CAA Opinion 12 (1992).

III. FORMING THE ATTORNEY-CLIENT RELATION

A. Conflicts of Interest

Conflicts of interest abound in the practice of law. They may be present before representation begins or may arise during the representation. They may involve representation that is simultaneous or representation that is successive. They may extend from one lawyer to include by imputation an entire firm. They may be the subject of disciplinary charges or malpractice liability or motions to disqualify. Some are curable by client consent, some are avoidable by screening and some are neither curable nor avoidable.

Conflicts of interest law is complex and diverse. Although the relevant code rules (RPC 1.7 through 1.14) provide a helpful framework they are difficult to apply because they are loaded with terms requiring attorney judgment and discretion, such as "reasonably believes", "full disclosure", "reasonable opportunity", "substantial risk", "substantially related matter" and so forth. The law's diversity results from the court decisions and advisory committee opinions going back many years which are not always anchored in code rules and vary in their focus. Most of the court decisions are responses to disqualification motions and many conclude by prohibiting representation where the conflicts may not be actual at all but only potential in character, as in Hill v. N.J. Department of Corrections Commissioner, 342 N.J. Super. 273 (App. Div. 2001), cert. den. 171 N.J. 338 (2002). The advisory committee opinions raise problems for other reasons. First, many (particularly older ones) do not constitute carefully written expressions of what the code rules prohibit but instead are expressions of what, on a somewhat higher plane, a lawyer would be wise to refrain from doing. Second, many make reference in their holdings to the appearance of impropriety standard, which the Supreme Court discarded in its 2004 RPC revisions.

The 2004 New Jersey RPCs dealing with conflicts of interest introduced a substantial amount of new or extensively revised material. The most significant change, however, was a deletion- the elimination of RPC 1.7(c) and the appearance of impropriety rule, not just from RPC 1.7 but also from RPCs 1.8, 1.9 and 1.10 where the rule had been incorporated by reference. As a result, New Jersey's conflict of interest code law is considerably less vague. Not only that, but it can be said that the New Jersey code now prohibits only "actual" conflicts of interest. True, the code continues to prohibit imputed conflicts under RPC 1.10, but the conflicts which are imputed are actual ones as prohibited under other rules, chiefly RPCs 1.7 and 1.9.

Some confusion may arise from use of the word "risk" in RPC 1.7(a)(2)- "significant risk" and in RPC 1.8(k)- "substantial risk". Is a "risk" of conflict to be understood as being merely a potential for conflict? If so, how is a risk of conflict really any different from the discarded appearance standard?

Hazard, Hodes and Jarvis reject the notion that a "risk" of conflict is only a "potential" one:

> "... The conflict- the risk -... exists in the here and now; what is only 'potential' is the actual harm- the actual breakdown of the trusting client-lawyer relationship or actual harm to the quality of the representation."
>
> The Law of Lawyering, supra at Sec.10.4

The Restatement supports this view. See Restatement of the Law Governing Lawyers, Third (ALI, 2000), Sec. 121, Comment c(iii).

This interpretation of "risk" makes sense. It is also consistent with the New Jersey Supreme Court's decision to abolish RPC 1.7(c). Indeed, RPC 1.7(c)(2) even spoke of " ... situations creating an appearance of impropriety rather than an actual conflict...". The Court's

intention was clearly to narrow the conflicts rules to prohibit only actual conflicts, with "significant risk" or "substantial risk" having reference to a present situation, not a potential one. See, generally, In re ACPE Opinion 697, 188 N.J. 549 (2006).

Three categories of conflicts are proscribed- concurrent conflicts (RPC 1.7 and 1.8), conflicts involving former clients (RPC 1.9) and imputed conflicts (RPC 1.10). In each of these categories provision is made for curing most conflicts with client consent. Imputed conflicts may also be avoided in some situations by screening even without client consent.

1. RPC 1.7 - General Rule for Concurrent Conflicts

The text of the 2004 version of RPC 1.7(a) reads:

> "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."

a. Identifying Conflicts

RPC 1.7(a) refers to "concurrent" (i.e. contemporaneous) conflicts of two sorts, derived from former RPC 1.7(a) and (b), namely conflicts involving "directly adverse" client interests and conflicts involving representation that is "materially limited" by the lawyer's responsibilities to others or by the lawyer's own interests. Directly adverse situations are normally obvious. Opposing parties in litigation, a buyer and seller and an employer and employee are typical examples. However, some adverse situations are not obvious, such as where a lawyer represents one client against a party the lawyer simultaneously represents in another matter even though the two matters may be completely unrelated. Gray v. Commercial Union Ins. Co., 191 N.J. Super. 590 (App. Div. 1983); MRPC 1.7 comment (6). This perspective, although long-standing, is not beyond challenge. Bussel, "No Conflict", Georgetown Journal of Legal Ethics, vol. 25, p. 207 (2012). And some directly adverse situations develop later in the course of what may have been conflict-free representation, such as where a lawyer represents the maker and guarantor of a note when a loan is negotiated but later is asked to defend both in collection proceedings brought by the payee. ACPE Opinion 556 (1985).

Compared with "directly adverse" situations, "materially limited" situations tend to be much more difficult to identify, basically for three reasons. First, the terminology is less precise- "significant risk" and "materially limited" are terms requiring considerable sensitivity and discretion in their application. Second, the scope is broader- interests to be evaluated include not only other contemporaneous clients but also former clients, third persons and the lawyer's own

interests. Third, many if not most of the pre-2004 ACPE opinions dealing with "materially limited" situations are no longer valid because of their reliance upon the now discarded appearance of impropriety standard. In re ACPE Opinion 697, supra; ACPE Opinion 707 (2006); ACPE Opinion 709 (2006).

On the other hand, the elimination of the appearance of impropriety from the New Jersey code repositioned New Jersey's ethics law so that it is now consistent with the "materially limited" rule in both the Model Rules and RPCs of most other states. This opens up a major source of new precedent for the New Jersey lawyer.

The current New Jersey and ABA versions of the "materially limited" rule (1.7(a)(2)) are identical, as were the former versions of both. What separated the two former versions was the presence of 1.7(c) in the New Jersey version. Apart from that change, the 2004 versions speak of a "significant risk" that the representation "will be" materially limited, whereas the old versions spoke in broader language of "may be" materially limited. The two versions are not equal. Consequently, cases and advisory opinions under the pre-2002 Model Rules or the pre-2004 New Jersey code may not be relevant to decision making under the revised codes.

As we shall see later in this section, the 2004 New Jersey rules do not fully track the revised (or former) Model Rules as to client waivers, screening and per se disqualification. However, conflicts analysis begins with the identification of a conflict and, as to this, New Jersey may now draw upon resources formed at the national level. Such resources include Restatement of the Law Governing Lawyers, (ALI, 2000), sections 121 through 135; Hazard, Hodes and Jarvis, The Law of Lawyering, Third Edition (Wolters Kluwer, 2009), Sections 1.7:100 through 1.7:309; Rotunda and Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (West Group and ABA Center for Professional Responsibility, 2010-2011), Chapter 1.7; the official comments appended to the ABA Model Rules; and the ABA's Formal and Informal Advisory Opinions.

Examples noted in the above authorities as "materially limited" situations include representing co-plaintiffs or co-defendants in litigation, representing multiple parties to a negotiation (such as formation of a joint venture), representing several family members (or even simply a husband and wife) in estate planning, representing a lawyer in one matter while both lawyers also represent adverse parties in other litigation, and - the old standby illustration- representing both an insurance company and the insured. Note Matter of Simon, DRB 10-282, 206 N.J. 306 (2011), holding that a lawyer who sues a current client for payment of a fee violates RPC 1.7(a)(2)'s "personal interest of the lawyer provision. Identification of "materially limited" conflicts tends to be more difficult in non-litigation matters.

The conflict prohibitions in RPC 1.7(a) assume the existence of a "representation", i.e. a client-lawyer relationship. The Restatement states:

"A relationship of client and lawyer arises when:

> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services."
>
> Restatement of the Law Governing Lawyers, (ALI 2000), Section 14

Under this definition, a client-lawyer relationship requires both a reliance by the "client" upon the lawyer to provide legal services, and an awareness of the client's intent by the lawyer, who then expressly or tacitly agrees to assume that responsibility. This provision in the Restatement coincides with New Jersey case law. See, for example, In re Palmieri, 76 N.J. 51, 58-60 (1978); Procanik By Procanik v. Cillo, 226 N.J. Super. 132, 146 (App. Div. 1988), cert. den. 113 N.J. 357 (1988).

Note how similar the Restatement definition of an actual client is to RPC 1.18's definition of a prospective client:

> "(d) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client', ..."

Identification of conflicts requires that law firms maintain detailed records of conflict data, including the names of all clients and prospective clients, former clients and former prospective clients, organizations with which the lawyers in the firm are affiliated, other law firms with which firm lawyers were formerly associated, lawyers in other firms or organizations who have family ties to lawyers in the firm, and so forth. When prospective clients are first interviewed, forms should be completed containing the names of the prospective clients, adversaries and adverse law firms and that data should be compared with the firm's conflict data records before the firm agrees to any new representation. When the conflict search produces a match, a conflict determination must be made, preferably by a lawyer or lawyer committee in the firm having some expertise in ethics law. That determination process should include not only whether an actual conflict exists but also, if there is a conflict, whether and how to resolve it by client consent (or, in former client conflicts under RPC 1.9, by screening). Note that this same conflict checking process should be invoked again during the representation if a new party or adversary counsel becomes part of the case or transaction or if a new lawyer joins the firm.

b. Curing Conflicts

RPC 1.7(b) states:

> "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
>
> (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (3) the representation is not prohibited by law; and
>
> (4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."

Except as provided in subparagraphs (3) and (4), which will be discussed later, paragraph (b) allows for the curing of concurrent conflicts unless representation includes a public entity. The curing process involves two elements: (1) client consent to the conflict, and (2) the lawyer's belief that the representation will not be impaired by the conflict.

As to the consent element, each affected client must consent. This includes former clients as well as current ones but not third parties. The consents must be "informed", a term defined in RPC 1.0(e):

> "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The consents must be "confirmed in writing, after full disclosure and consultation" and if the conflict involves multiple clients in a single matter the consultation "shall include an explanation of the common representation and the advantages and risks involved". The rule does not specify what is to be included in each client's written confirmation. Presumably, as a minimum, the writing need only contain a simple statement of the facts constituting the conflict, a reference to there having been a consultation with the lawyer, and a confirmation of consent by the client. The written document should also be signed by the client. The rule does not state when the consent must be obtained, but again, presumably, the consent should be obtained before the conflicting representation commences.

In practice, counsel may wish to set forth in the consent document a much fuller statement as to what disclosures were made and what explanations were given in terms of the common representation, the advantages, risks and available alternatives. Counsel might also provide the client with the basis for the lawyer's belief that he or she will be able to provide "competent and diligent" representation to each affected client. If there is a possibility that

future events might render the lawyer unable to continue the multiple representations, counsel's disclosure should indicate that in such circumstances he or she would have to withdraw completely from the representation.

The Supreme Court in A. v. B., 158 N.J. 51 (1999) recommended a further step. When representing co-clients, counsel should obtain from the clients an agreement on the sharing of confidential information which may come to the lawyer's attention during the representation. 158 N.J. at 61-62. The Court left it to counsel and the clients to decide whether such information should be shared or kept confidential, but as a practical matter the lawyer's preference would probably be for such information to be shared.

RPC 1.7(b) does not state whether a consent once given may later be revoked. Comment 21 to the Model Rule opines that a client should be able to revoke the consent since all clients normally may terminate their lawyer's representation at any time for any reason. The difficult issue, however, is whether the lawyer may continue with the representation of the other client or clients. Here Comment 21 hedges, indicating that it would depend upon the circumstances. The Restatement declares that if a client who withdraws consent is justified in doing so because of changed facts, then the lawyer should withdraw entirely. On the other hand, the Restatement would permit the lawyer to continue the representation if termination will not cause harm to the other client(s) or to the lawyer. Restatement of the Law Governing Lawyers, supra. section 122f. A lawyer who continues the representation following one client's withdrawal should seek written consent to continue from the remaining client(s).

Turning now to the second curing element, the lawyer must hold the belief that he or she will be able to provide "competent and diligent" representation to each affected client. "Competence" and "diligence" are duties imposed by RPCs 1.1 and 1.3. Although the New Jersey and Model Rules versions of RPC 1.3 are identical, their versions of RPC 1.1 both current and former, are very different. The Model Rule speaks of competence as "... the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The New Jersey rule simply prohibits gross negligence or a pattern of negligence. Obviously, New Jersey's version of RPC 1.1 does not coincide with competence as that word is used in RPC 1.7 (b)(2). The Model Rule's four part standard is more likely what is intended.

Critical to this second element is that the lawyer's belief be reasonable, which has been held to be an objective issue subject to independent review by the court. Whitman v. Estate of Whitman, 259 N.J. Super. 256, 263 (App. Div. 1992). Logically, the lawyer's approach on the reasonableness issue would follow the same pattern as the lawyer's subsequent approach with respect to client disclosure and consultation, namely to assemble facts, identify all relevant persons in interest, and evaluate the risks in terms of undivided loyalty and preservation of confidences.

Whether the lawyer may reasonably proceed involves consideration of the type of conflict. Directly adverse conflicts pose the greatest risk. Indeed, in the litigation context, the rules treat them as incurable (RPC 1.7(b)(4)). Materially limited conflicts involving the same matter pose the next highest degree of risk. Probably the lowest level of risk exists when

materially limited conflicts involve unrelated matters. As a practical matter, lawyers would be prudent to limit their use of client conflict waivers to this third category.

A currently "hot" conflicts issue is whether a client may give prospective consent. This is an advance waiver of conflicts which may arise in the future but where the parties and issues are not yet known. Such a waiver has the advantage of eliminating the necessity that a lawyer withdraw later causing economic and other losses to the client and possibly the lawyer as well. There is little New Jersey law on advance waivers. However, national commentators seem to agree that advance waivers are valid if the client reasonably understands the risks and if the waiver is limited to matters unrelated to the present representation. Validity of such waivers would be strengthened, of course, if the client is an experienced user of legal services and seeks independent legal advice before signing. ABA Formal Opinion 05-436 (May 11, 2005); MRPC 1.7 comment 22; Restatement of the Law Governing Lawyers, supra, Section 122, comment d.; Hazard, Hodes and Jarvis, The Law of Lawyering, Third Edition, supra, Section 10.9.

c. Representation Prohibited by Law

Not all RPC 1.7 conflicts are curable. The most notable exception is in matters involving public entity clients who are specifically not permitted to give consent. RPC 1.7(b)(1). This exception has been part of New Jersey's RPCs since their adoption in 1984. No comparable exception has ever been included in the Model Rules. Both the Debevoise Committee, which reviewed the Model Rules for the New Jersey Supreme Court and reported in 1983, and the Pollock Commission, which performed the same function again and reported in 2002, urged adoption of the Model Rules versions which had no public entity exception. Both times, however, the New Jersey Supreme Court disagreed and inserted or retained the exception. One wonders why the exception is so important to the Court, since virtually all public entities at every level of government have ready access to separate legal counsel who could advise them in deciding whether to give consent. Nonetheless, this is the rule and the rule is clear.

A second exception written into RPC 1.7 (in both the Model Rules and the New Jersey version) prohibits simultaneous representation of clients having opposing claims in litigation. RPC 1.7(b)(4). Note that this per se rule excludes only clients in the same litigation with claims against each other. It does not cover cases involving representation of parties who are on the same side, such as co-plaintiffs or co-defendants, where the conflicts may be curable.

RPC 1.7(b)(3) excludes consent to cure in any other matters prohibited by law- obviously a reference to court rulings and advisory committee opinions in which the extreme nature of a particular conflict requires an unequivocal prohibition. Not surprisingly, most of the rulings in this area involve directly adverse conflicts, where the risk of harm is greatest. A commonly cited example is the New Jersey Supreme Court's opinion in Baldasarre v. Butler, 132 N.J. 278 (1993) where the court ruled that even with consents from the parties one attorney may not represent both the buyer and the seller in a complex commercial real estate transaction.

Another such ruling is found in In re Opinion 682 of the Advisory Committee on Professional Ethics, 147 N.J. 360 (1997). There the advisory committee had been asked whether attorneys could become full participants in a bar-related title insurance company owned and

managed by lawyers. The ACPE ruled against the plan, citing its earlier rulings in opinions 495 (1982) and 639 (1990), with heavy reliance upon the appearance of impropriety standard. In affirming, the Supreme Court acknowledged the applicability of RPC 1.7(c) but only in a marginal way. The heart of the Court's opposition to the plan was its conviction that a single attorney cannot possibly exercise truly independent professional judgment on behalf of both a real estate purchaser and a title insurance agency in the same transaction. Justice Garibaldi's factual analysis demonstrates why a per se prohibition was considered necessary:

> " A lawyer's duty in representing a client in the purchase of title insurance includes, inter alia, advocating on behalf of the client to obtain the most comprehensive coverage possible, compliance with all applicable principles of law, more favorable drafting of exceptions, minimal requirements for curing defects, and curing defects that have been implicitly insured. On the other hand, an attorney who acts as the agent for a title-insurance company owes the company a duty to minimize its losses; i.e., the attorney should write an insurance policy to minimize the title-insurance company's risk. One of the agent's duties to that company is to protect it from losses. The attorney should retain exceptions for any questionable items and should be cautious in authorizing insurance to deal with specific title related problems. Thus, attorneys who represent both purchaser and title-insurance companies in the same transactions place themselves in the position of servings two masters with incompatible interests."
>
> " Attorneys who undertake to represent both clients and title companies place themselves in a position of negotiating for both sides in the same transaction. In the most basic terms, the purchaser seeks maximum possible protection, as the success of any future claim depends on limiting exceptions and obtaining the most comprehensive coverage to protect against loss. The title company's interest is opposed to that of the purchaser; it strives to limit liability as much as possible in the event of a claim under the policy. In those instances in which exceptions are negotiable, consent, no matter how well informed, will not remedy the conflict of interest..."
>
> " Even if no clear conflict arises in negotiating title insurance, the pursuit of the client's best interests requires that a lawyer exercise independent professional judgment. When an attorney is both advocate for a buyer and agent for a title-insurance company, the independence of that lawyer's judgment inevitably is called into question. For example, the initial determination of whether title insurance is necessary is likely to be affected by the lawyer's financial interest. Given the decision to insure, financial interest in a title company has an incentive to refer a client to that company even if broader and less expensive coverage is available elsewhere..."
>
> " Because the attorney's representation of the client is limited by responsibilities to a third party (the title company) and to the attorney's own interests (to collect a share of the premium as a fee for securing the title policy), the NJATC proposal violates RPC 1.7. Although dual representation in some conflict-of-interest cases

> may be possible with full disclosure and consent, that consent is no remedy here because buyers and sellers are typically the least sophisticated players in real-estate transactions..."
>
> 147 N.J. at 368-369.

The Supreme Court might also have phrased its conclusion in terms of the reasonableness test in RPC 1.7(a)(1) and (b)(1)- or RPC 1.7(b)(2) in the current version. In reality the court was saying that no lawyer participating in the title insurance program could reasonably believe that he or she could represent both parties without adverse impact. The competing duties are such that a single attorney simply cannot perform both at the same time. For a similarly reasoned opinion in the case of private placement adoptions, see ABA Informal Opinion 1523 (1987).

In the matter of representing co-defendants in criminal proceedings, joint representation is presumed to be prejudicial, resulting in ineffective assistance of counsel under the Sixth Amendment. State v. Land, 73 N.J. 24 (1977); State v. Bellucci, 81 N.J. 531 (1980). The Bellucci court left room for valid joint representation with informed waivers in cases where there is no actual conflict, provided the waivers are put on the record and explored by questioning of each defendant. 81 N.J. at 545. Thereafter, pursuant to R. 3:8-2 the court determines whether the joint representation will be permitted. See also Restatement of the Law Governing Lawyers, (ALI 2000), Section 129, Comment c. Where, however, actual adverse conflicts exist, the conflict is not waivable. State ex rel. S.G., 175 N.J. 132 (2003).

In some rulings the courts have chosen to label more serious conflicts as "per se" conflicts. This label does not imply that the conflict is not waivable. Per se conflicts may be waived. The difference between per se and ordinary conflicts is that in per se conflicts prejudice to the client or clients is presumed, whereas in ordinary conflict situations, prejudice must be proven. See, for example, State v. Cottle, 194 N.J. 449 (2008) at 452, 467.

2. RPC 1.8 -Specific Rules for Concurrent Conflicts

RPC 1.8 contains a listing of specific conflict rules mostly having to do with transactions between lawyer and client. Virtually all the conflict situations listed would be questionable anyway under the "personal interest of the lawyer" portion of RPC 1.7(a)(2), but here they are spelled out for greater clarity. The text of RPC 1.8 is direct and specific and is, therefore, easier to apply than RPC 1.7. Note that the deletion of RPC 1.7(c) removed the appearance of impropriety from RPC 1.8 as well, invalidating prior ACPE opinions which relied upon the appearance of impropriety in making 1.8 determinations. However, the similarity of New Jersey's RPC 1.8 with its counterpart in the Model Rules means that New Jersey lawyers may now seek precedent in the ABA advisory opinions as well as in all other states where the Model Rules have been adopted.

RPC 1.8(a) concerns business transactions with a client or the acquisition of a financial interest adverse to a client. Such matters are prohibited unless three conditions are met: (1) the transaction must be fair and reasonable to the client and the terms fully disclosed in writing in such a manner that the client can understand the transaction; (2) the client must be advised in writing to seek the advice of independent legal counsel and be given a reasonable opportunity to

do so; and (3) the client must give informed written consent. The 2004 amendments to this rule specify that the consent document must recite the essential terms and the lawyer's role, including whether the lawyer is representing the client in the transaction. RPC 1.8(a)(3). Furthermore, "informed consent" per the definition in RPC 1.0(e) requires the lawyer to convey such information and explanation as will adequately educate the client as to the risks involved and available alternatives. To protect themselves in transactions with clients although not required by 1.8(a)(3) to do so, lawyers would do well to include this "informed consent" data in their written consent forms.

Increasingly, lawyers are being given (or are requesting) the opportunity to invest in their clients' businesses, sometimes acquiring ownership positions in payment of counsel fees. ABA Formal Opinion 418 (2000) gives approval to these practices, provided the lawyer complies with the detailed requirements of RPC 1.8(a) and if a counsel fee is paid by means of ownership acquisition, that "fee" must be reasonable under RPC 1.5.

Violation of RPC 1.8(a) can result in a court invalidating the transaction. In Petit-Clair v. Nelson, 344 N.J. Super. 538 (App. Div. 2001), the attorney obtained a mortgage from his clients on their personal residence to secure payment of his outstanding fee. When the clients later defaulted on the mortgage, he commenced foreclosure. The Chancery Court viewed this as a business transaction with a client, found that the attorney had not complied with the requirements of RPC 1.8(a), and invalidated the mortgage. The Appellate Division affirmed. Compare, however, Milo Fields Trust v. Britz, 378 N.J. Super. 137 (App. Div. 2005). There the lawyer had entered into a business venture with the client subject to RPC 1.8(a) but had failed to comply with the rule's disclosure and consent provisions. Nonetheless, the court refused to nullify the transaction, finding that the client was sophisticated and had himself initiated the lawyer's involvement. Note, however, that the court incorporated equitable principles (waiver, estoppel and ratification) into its holding based upon the client's long delay before objecting to the lawyer's participation.

The Advisory Committee has held that the provisions of RPC 1.8(a) apply to a lawyer who lists a client's real property with a broker who employs the lawyer's spouse, even if neither the lawyer nor the spouse receives a financial benefit from the transaction. APCE Opinion 696 (2005). In that opinion, the inquirer had asked whether an attorney who is either counsel to the executor of an estate or is himself the executor may list property of the estate with a broker who employs his wife. The committee ruled that this would be permissible provided the lawyer strictly followed the disclosure and consent requirements of the rule. As to who should provide consents, the committee held that where the lawyer represents the executor consent should be sought from the executor, but where the lawyer is himself the executor consents would be required from all beneficiaries.

RPC 1.8(c) prohibits a lawyer from preparing an instrument in which the client gives the lawyer a substantial gift, unless both persons are related. ACPE Opinion 683 (1996) has interpreted this rule as not precluding a lawyer from preparing a will in which the lawyer is designated as a fiduciary. The lawyer's fiduciary commission would not be a gift, but payment for services.

RPC 1.8(e)(1) concerns the practice of advancing court costs and litigation expenses in contingent fee cases. In ACPE Opinion 603 (1987) a law firm sought permission to borrow funds to cover litigation costs, charging the principal and interest against the ultimate recovery before computing the firm's contingent fee. The committee approved this practice, finding precedent in ACPE Opinions 446 (1980) and 582 (1986) and Notice to the Bar published in 101 N.J.L.J. 265 (1978).

RPC 1.8(g) concerns the problem of making aggregate settlement of the claims of multiple clients. See ACPE Opinion 616 (1988), which emphasizes that the problem in these situations rests with the lawyer who represents the multiple clients, not with the lawyer who submits the aggregate offer. Under RPC 1.8(g), the lawyer for the multiple clients must secure the consent of each client after a consultation in which the full story is told, including the terms of participation of all other clients. The consent requirement in RPC 1.8(g) may not be circumvented by having all clients agree in advance as part of the lawyer's retainer agreement to be bound by any settlement offer which a majority later vote to accept. The Tax Authority Inc. v. Jackson-Hewitt, Inc., 187 N.J. 4 (2006).

RPC 1.8(k), a new rule in 2004 with no Model Rule counterpart, states:

> "A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client."

Since a public entity in New Jersey cannot consent to cure conflicts, this provision has an absolute quality to it. The rule places upon public entity lawyers an obligation to "access" whether their representation of private clients would pose a "substantial risk" to the performance of their public entity responsibilities. The Supreme Court adopted RPC 1.8(k) as a replacement for RPC 1.7(c) in the public entity context. In re ACPE Opinion 697, supra. For an extensive discussion of public entity representation, see Section V Part D later in this manual.

3. RPC 1.9 - Former Clients

The text of the New Jersey rule, which largely mirrors the revised Model Rule, states:

> "(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client.
>
> (1) whose interests are materially adverse to that person; and

> (2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.
>
> Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter;
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."

The last sentence in (b) above, beginning with "Notwithstanding," creates an anomalous situation. Under RPC 1.9(a), if the lawyer was not a member of a firm while representing the former client, the lawyer may represent the new client if the former client gives consent. But under RPC 1.9(b), because of the "Notwithstanding" clause, if the lawyer was associated with a firm while representing the former client, the lawyer may not represent the new client under any circumstance. I cannot see any justification for the difference. Consent should be equally available in both situations. And the no-screening part of the sentence is already well covered by RPC 1.10(c).

As with RPC 1.7, here in RPC 1.9 we find more words and phrases calling for attorney discretion: "substantially related," "materially adverse," "disadvantage," "generally known "and so forth. Fortunately, however, we no longer have to deal with the appearance of impropriety in this context.

Oddly, prior to the RPCs there were no code rules relating to a continuing duty toward former clients. The duty did receive definition, however, as parties litigated motions to disqualify counsel. Indeed, the "substantially related" test, which is central to RPC 1.9, had its genesis over 50 years ago in the case of T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265 (D.C. S.D.N.Y. 1953).

New Jersey's primary pre-RPC disqualification case is Reardon v. Marlayne, Inc., 83 N.J. 460 (1980). That case established a three-part test for determining disqualification — a prior attorney-client relationship, a substantial relationship between the subject matter of the present suit and the former representation, and access to relevant confidences of the former client. 83 N.J. at 474. That three-part test remained as the standard in disqualification applications until the

Supreme Court, in Dewey v. R. J. Reynolds Tobacco Co., 109 N.J. 201, 212 (1988), ruled that the test had been superseded by RPC 1.9 and related rules.

Dewey has been a case of major importance in this matter of the "side-switching" attorney. The case involved protracted and highly publicized products liability litigation brought by the widow of a man who died allegedly as the result of cigarette smoking. After the case had been in litigation for three years or so, and before trial, a partner in one of the defense law firms left and became a partner in one of the plaintiff's firms. The former client moved to disqualify the second firm. The trial court granted the application. On appeal, after sending the case back to the trial court for factual findings, the Supreme Court affirmed as to the particular lawyer but reversed as to the firm, reluctantly but because of the "compelling circumstances" of the case.

In its opinion the court first discarded the three-part Reardon test, as noted above, in favor of the RPCs, particularly RPC 1.9. In applying that rule the court began by asking whether the attorney in Dewey had "represented" the defendant while a partner in the first firm. The court noted that prior to adoption of the RPCs in 1984 by established precedent in New Jersey, "representation" would have been shown merely on the basis of the attorney's affiliation with the former firm, regardless of his or her actual involvement with the former client's file. 109 N.J. at 214-215. The court decided, however, that because the appearance of impropriety had been incorporated into RPC 1.9 a per se disqualification was no longer appropriate. Instead, in determining whether "representation" existed during the former association, the court held that trial courts must examine the attorney's actual involvement. 109 N.J. at 215.

In Dewey, the Supreme Court's factual analysis led it to conclude that the attorney did have significant although limited contact with the litigation during his affiliation with the first firm, giving a reasonable basis for agreeing with the trial court that he was involved in the representation and should be disqualified under RPC 1.9(a). 109 N.J. at 216.

Normally, such a conclusion would have led inevitably to a finding under RPC 1.10(a) that the side-switching attorney's new firm should also be disqualified. That rule states: "when lawyers are associated in a firm, none of them shall knowingly represent a client when one of them practicing alone would be prohibited from doing so by . . . RPC 1.9 . . . ."

Indeed, the Supreme Court in Dewey did conclude that RPC 1.10(a) required disqualification of the attorney's second firm. However, because this issue arose in the context of a motion to disqualify rather than in the context of disciplinary proceedings, the court took the additional step of weighing the disqualification requirement against the interest of the plaintiff in being represented by counsel of her choosing, 109 N.J. at 218. Because the litigation below was on the eve of trial, the court balanced the interests in favor of plaintiff and denied defendant's disqualification application as to the second firm. At the same time, as a sort of prophylactic measure, the court directed that the second firm not bill for any further services, reasoning that they should have obtained consents from the defendant and plaintiff or, absent consents, could have deferred the lawyer's move until after the litigation had ended, 109 N.J. at 221.

In Dewey, the RPC 1.9 issue was whether the side-switching attorney should be viewed as having "represented" the former client while employed by the former firm. Using a fact

analysis the Court probed into the extent to which the lawyer had contact with the file and with the other members of the firm that were handling it. The Court also looked into the extent to which the lawyer benefited from fees the firm collected for the representation of that client- all of which related to whether a "reasonable basis" existed to invoke the appearance of impropriety prohibition. 109 N.J. at 216.

The RPC standard at issue in Dewey is no longer the law. It was superseded by RPC 1.9(b) and the elimination of RPC 1.7(c) in the 2004 revisions. City of Atlantic City v. Trupos, 201 N.J. 447, 464-465 (2010). The change is fundamental. Under the old rule as interpreted by Dewey, whether a lawyer "represented" a former client while associated with a firm depended upon whether it was reasonable under the facts for a member of the public to draw an inference of representation based upon appearances. RPC 1.9 did not require that the lawyer actually obtain material and confidential information during the time the lawyer was associated with the former firm. By comparison, the standard in the new rule is whether the lawyer, while at the former firm "personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter". As in concurrent conflict situations under RPC 1.7, in former client situations only actual conflicts are now prohibited.

In both RPC 1.9(a), where the lawyer is acting alone, and RPC 1.9(b) (except as modified by the "Notwithstanding" clause), where the lawyer is opposing his or her former firm, the conflict can be cured by the former client's giving "informed consent" in writing. "Informed consent" as defined in RPC 1.0(e), which was discussed earlier under RPC 1.7, includes the lawyer telling the client about available alternatives. In this context, one alternative may be screening under RPC 1.10, which can be implemented in appropriate 1.9 cases without the former client's consent (although notice to the client is required, as we will see later).

RPC 1.9(c) is taken from former 1.9(b) but is more comprehensive. The former rule prohibited only the using of information from the former representation to the disadvantage of the former client. The current rule also prohibits revealing such information generally, except as permitted or required by other rules.

In Dewey the court's focus was upon the word "represent" in RPC 1.9. Another interpretive problem is raised by the words "substantially related matter". In ACPE Opinion 686 (1998) the committee was called upon to interpret these words in the context of an attorney who proposed leaving his present firm, which represented medical care providers, and joining another firm, which represented insurance carriers against whom the medical care providers pursued PIP arbitration claims. Citing ACPE Opinion 654 (1991) and case decisions from several other jurisdictions, the committee, concluded that "a 'substantial relationship' exists where there is a factual nexus between the cases such that the attorney might have acquired confidential information in the first representation that could be used to the detriment of the former client in a subsequent action."

Using that definition, the committee ruled that neither the attorney nor his new defense firm could represent insurance carriers in any cases brought by medical care providers that he had formerly represented. The prohibition was not extended, however, to cases involving medical care providers that the attorney had not previously represented, so long as the attorney

could show that he did not acquire any protected information concerning such other clients while he was employed at the former firm.

In City of Atlantic City v. Trupos, 201 N.J. 447(2010) the city had sought to disqualify a law firm from representing property owners in real estate tax appeals where the firm, only two years prior, had represented the city in defending against similar appeals. The Court ruled against disqualification, using the case as a vehicle for announcing a new two-part standard for determining whether matters are substantially related. Under the new standard for RPC 1.9 purposes, matters are deemed to be substantially related if

> "(1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation…."
>
> Supra at 467

Trupos does not necessarily signal a trend away from disqualification. Twenty-First Century Rail Corporation v. New Jersey Transit Corp. involved a construction contact case in which a law firm represented one party prior to the onset of litigation and another party later in the litigation. Both representations involved the same construction project, the same parties, many of the same records and the same critical time delays. Because the firm's first representation was minimal, the Appellate Division chose to invoke RPC 1.9(a)'s "substantially related" test and found insufficient basis for disqualification. 419 N.J. Super. 343 (App. Div. 2011). However, the Supreme Court reversed, concluding, rather simply, that the rule's "same matter" test applied and disqualification was appropriate regardless of the extent of the first representation. 210 N.J. 264 (2012).

Note that in O Builders & Associates, Inc. v. Yuna Corporation of New Jersey, 206 N.J. 109 (2011) the Court applied its Trupos test to prospective client conflicts under RPC 1.18.

4. RPC 1.10 - Imputed Conflicts and Screening

This rule, dealing with imputed conflicts of interest, was revised extensively in 2004. RPC 1.10(a) continues the time-honored proposition that when lawyers are associated in a firm a conflict of interest arising under RPCs 1.7 or 1.9 affecting one of them is imputed to all of them. The new rule contains a minor exception if the conflict is based upon the personal interest of one of them and it does not present a significant risk.

RPC 1.10(b), formerly (c), deals with a firm's providing representation after the lawyer for an adverse client has left the firm. Such representation is permitted unless the current matter is the same or substantially related to the former lawyer's matter and any lawyer remaining in the firm has confidential information from the former lawyer's representation that is material.

RPC 1.10(c), deals with screening and represents a major departure from New Jersey's past tradition. Screening had long been permitted in only one context, namely that of former

government employment (see RPC 1.11). The New Jersey Supreme Court's Advisory Committee on Professional Ethics endorsed a more general utilization of screening, see ACPE Opinions 525 (1984), 654 (1991) and 665 (1992). Indeed, ACPE Opinion 679 (1995) even supports screening in RPC 1.7 situations. However, our State courts remained silent on this issue and, in the absence of a definitive State court ruling, the U.S. District Court for the District of New Jersey adopted the position that screening was not an option in New Jersey. Steel v. General Motors Corp., 912 F. Supp. 724 (D. N.J. 1995); Cardona v. General Motors Corp., 942 F. Supp. 968 (D. N.J. 1996).

RPC 1.10(c) contradicts these District Court rulings. Screening is now possible in situations beyond just the government employment context. However, the 2004 screening context remains rather limited. Note the text of RPC 1.10(c):

> "When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:
>
> > (1) the matter does not involve a proceeding in which the personally disqualified lawyer had a primary role;
> >
> > (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> >
> > (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule."

Although there are three enumerated conditions in the rule, a careful reading discloses six- (1) the conflict must be under RPC 1.9 - the former client rule (ACPE Opinion 679's extension to RPC 1.7 situations is disapproved by inference); (2) the screen must be "timely"- i.e. in place before or as the side-switching lawyer arrives, not at some later point in time; (3) the side-switching lawyer must not have had a primary role in the matter; (4) the side-switching lawyer must not receive any part of the fee from the second firm's representation; (5) written notice must be given to the former client; and (6) the screening must be based upon the firm's own established written procedures (this last factor being specified in RPC 1.10(f)).

The term "primary responsibility" in RPC 1.9(b) and RPC 1.10(c)(1) was of critical importance in Martin v. AtlantiCare Regional Medical Center, 2011 U.S. Dist. LEXIS 122987 (D.N.J. 2011). There, Magistrate Judge Schneider found primary responsibility sufficient to bar screening based upon the side-switching lawyer's active involvement in the litigation even though she was not the partner in charge of the file or the supervising attorney in the case while at her former firm.

The rule enumerates three objectives which written screening procedures should address, but it is not specific. Presumably, procedures will vary depending upon the size of the firm, whether the lawyers work at multiple sites, how the firm's files are maintained and so forth. The

first objective is that all employees must screen the personally disqualified lawyer. This implies that they must all be given notice. The written procedures should set forth how that notice will be provided, such as by attaching a screening notice to the case file and all internal memoranda (both physical files and electronic records). The second objective is that the personally disqualified lawyer must acknowledge being screened and take action to insure it. An appropriate step toward achieving this would be having the lawyer sign and date a written screening acknowledgment form to be retained in the case file.

The third objective is that the personally disqualified lawyer must not receive any part of the fee from the screened work. Comment 6. to MRPC 1.11 and Comment 7. to MRPC 1.18 interpreting language identical to that in New Jersey's RPC 1.10 state:

> "... These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified."

5. Appearance of Impropriety Rulings

The appearance of impropriety was a New Jersey standard for lawyer discipline for nearly 50 years. It was a product of caselaw rather than disciplinary code enactment. RPC 1.7(c) explicitly acknowledged that fact. This caselaw was a combination of court opinions (rulings on motions to disqualify as well as disciplinary actions) and advisory committee opinions. ACPE opinions, relying in whole or part upon the appearance standard, number in the hundreds.

Pre-2004 caselaw based solely upon the appearance standard is no longer valid. In re ACPE Opinion 697, 188 N.J. 549 (2006); ACPE Opinions 707 and 709 (2006). Pre-2004 caselaw based upon this standard may still be valid if the actual conflict standard is consistent with a relevant current conflict rule (RPC). However, this situation is unlikely since the standards incorporated into the 2004 RPCs are different from those of the 1984 version. Consider, for example, the comparable standards for concurrent conflicts which do not involve directly adverse interests. Aside from the appearance standard of RPC 1.7(c), the relevant pre-2004 standard- contained in RPC 1.7(b)- was whether the proposed representation "may be materially limited" by the lawyer's other responsibilities or interests. By comparison notice the narrower standard contained in the current rule, RPC 1.7(a)(2), namely whether there is a "significant risk" that the proposed representation "will be materially limited". The comparison in the context of public entity representation is somewhat less pronounced, but still distinct. The former RPC 1.7(b)'s "may be materially limited" is certainly broader than new RPC 1.8 (k)'s "substantial risk" that the lawyer's responsibilities to the public entity "would limit". The former refers to the possibility of harm, whereas the latter refers to actual harm. Thus, the code standards before 2004 and now ought not to be equated.

In deciding to discard the appearance of impropriety standard, the New Jersey Supreme Court finally conceded that the standard is too vague to support discipline. This was the central reason given by the organized bar in its long campaign of protest against the standard. Yet in

fairness it should be observed that the court did modify the standard over the years making it less abstract and more fact sensitive. As early as 1977, in Higgins v. ACPE, 73 N.J. 123 the court declared that the appearance of impropriety analysis requires a "reasonable basis" which is "something more than a fanciful possibility" of conflict. Again, two years later the court insisted that the analysis does not take place "in a vacuum" but is highly fact specific. In re Opinion 415, 81 N.J. 318, 325 (1979).

Subsequently, the court issued a series of opinions utilizing the appearance standard in a variety of factually specific situations, culminating with an observation that "the standard is indeed very workable". In re Opinion 662, 133 N.J. 22,25 (1993). For examples of these "fact-sensitive" rulings see In re Opinion 452, 87 N.J. 45, 50-51 (1981); In re Opinion 552, 102 N.J. 194, 204-205 (1986); In re Opinion 621, 128 N.J. 577, 597-602 (1992); and Matter of Opinion 653, 132 N.J. 124 (1993).

In their day, these fact-sensitive rulings served to give substance to the otherwise vague appearance standard. Nonetheless, despite this substance, the rulings remain grounded in a rule which prohibited representation not because of actual conflicts but merely because of the supposed observations of an imaginary informed citizen. With the demise of that appearance standard there is really no compelling reason to view these appearance rulings as valid precedent under today's revised conflict rules.

These fact-sensitive rulings do have significance, however, not because of their ultimate conclusions but simply because of their factual sensitivity. Conflicts of interest problems are extremely fact-sensitive, more so than in any other category of ethics law. These opinions demonstrate how the resolution of conflict questions ought to proceed- namely, with a careful factual listing of the lawyer's various duties and interests and giving weight to each item before applying whatever present ethics standards are relevant.

B. Retainer Agreements and Fees

All fees in all cases must be specified in writing, unless the client has been regularly represented, RPC 1.5(b). While written retainer agreements are preferable, the writing requirement can be satisfied by a simple letter to the client. The fee arrangement should be discussed at the initial client conference, with the letter sent immediately afterward repeating the fee terms. In family cases as well as in contingent fee tort cases, the fee arrangement must be in a written agreement signed by the client, R.5:3-5; R.1:21-7(g). Master retainer agreements, incorporated by reference into specific client retainer agreements, violate RPC 1.5(b) and are unenforceable unless the client is given a copy and its terms are fully explained. Albert Goldberg Butler Norton & West, P.C. v. Quinn, 410 N.J. Super. 510 (2009).

A failure to comply with RPC 1.5(b) is admissible against the lawyer if the client sues to recover a counsel fee. DeGraaff v. Fusco, 282 N.J. Super. 315 (App. Div. 1995). While a failure to comply with the writing requirement of RPC 1.5 or the signed retainer agreement requirements of R.1:27-7A and R.1:21-7(g) precludes recovery of a counsel fee under an alleged oral agreement, the attorney may be allowed recovery if quantum meruit requirements can be

met. Glick v. Barclays De Zoete Wedd, 300 N.J. Super. 299 (App.Div. 1997); Vaccaro v. Estate of Gorovoy, 303 N.J. Super. 201 (App. Div. 1997); Starkey v. Estate of Nicolaysen, 172 N.J. 60 (2002); Straubinger v. Schmitt, 348 N.J. Super. 494 (App. Div. 2002); Goldberger Seligsohn & Shinrod v. Baumgarten, 378 N.J. Super. 244 (App. Div. 2005).

The lawyer may advance money for expenses of the litigation, with reimbursement contingent upon the outcome of the case, RPC 1.8(e). The lawyer may even borrow the funds if necessary, ACPE Opinion 603 (1987). However, the retainer agreement must specify who pays for what expenses, how reimbursement is to be made and whether the fee percentage is computed on the gross or net recovery. RPC 1.5(c). This rule should be read in conjunction with R.1:21-7(d), which requires the fee in tort cases to be computed on the net recovery after deducting litigation expenses and prejudgment interest.

Contingent fee arrangements are not permitted in domestic relations and criminal defense matters, RPC 1.5(d). See ACPE Opinion 717 (2010), applying the rule to municipal court matters. But see ACPE Opinion 618 (1988), allowing a contingent fee on collection of post-judgment alimony arrears.

Upon conclusion of any contingent fee matter, the lawyer must provide the client with a written statement of the result, and if there was a recovery, a calculation of how the amount owed to the client was determined, RPC 1.5(c): R.1:21-7(g).

Forwarding fees, typically one-third of the total fee, are permitted only if the lawyer to whom the matter is referred holds a trial attorney certification under R.1:39-6(d). In contingent fee cases where the referral recipient is not certified, participation in the fee by the lawyer making the referral is on the basis of quantum meruit. In Bruno v. Gale, Wentworth & Dillon Realty, 371 N.J. Super. 69 (App. Div. 2004) the Appellate Division listed factors appropriate for quantum meruit consideration as including not only hours spent on the case by both counsel but also the quality of service, viability of the claim at the time of transfer, the amount of the recovery, the relationship between each lawyer and the client, and the "rainmaker" factor. (Id. at pages 74-76.)

Legal fees may not be shared with a non-lawyer, RPC 5.4(a), nor may a non-lawyer be compensated for referring a matter to a lawyer, RPC 7.3(d). See ACPE Opinion 716/CUPL Opinion 45 (2009). These prohibitions include fee sharing with a lawyer's own employees except if pursuant to a legitimate profit sharing plan. Matters of Fusco and Macaluso, DRB 07-386, 07-387 (2008); Matters of Kaplan et al., DRB 04-186 et al (2007); In re Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby & Graziano, P.C., 196 N.J. 352 (2008); In re Agrapidis, 188 N.J. 248 (2006).

"A lawyer's fee shall be reasonable," RPC 1.5(a). Courts passing review on lawyer fee agreements seek to ensure that the fee arrangements are both "fair" and "reasonable" to the client, with the burden of proving fairness and reasonableness being upon the lawyer. Cohen v. ROU, 146 N.J. 140, 156 (1996). RPC 1.5(a) contains a non-exhaustive list of eight factors to be considered in determining reasonableness. The rule was not changed in 2004. Indeed, the same eight factors first appeared in the Disciplinary Rules 40 years ago. DR 2-106(A). These factors

are useful as categories for analysis but they offer little substance, with the possible exception of item (3), which reads "the fee customarily charged in the locality for similar legal services." This item is not intended to revive the old minimum fee schedules, which were found to violate anti-trust laws in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Though dated, Professor Wolfram's treatise, Modern Legal Ethics (West Publishing Co., 1986), presents a helpful treatment of these and other factors at pages 518-522. Some guidance is available in cases where the court has had to make fee awards, as in In re Trust of Brown, 213 N.J. Super. 489 (Law Div. 1986) and in Argila v. Argila, 256 N.J. Super. 484 (App. Div. 1992). See also, Pressler & Verniero, N.J. Court Rules, Comments to N.J.R. 4:42-9 (Gann). However, these are not ethics opinions and are not squarely applicable.

ABA Formal Opinion 379 (1993) addresses three problematic billing issues in the context of what is a reasonable fee under RPC 1.5- (a) appearing in court for multiple clients in different matters and billing each client for the entire time; (b) traveling by plane on behalf of one client but using that time to work on another client's matter, and billing both for the overlapping time; and (c) billing for time spent in researching and writing for one client and charging the same amount later when recycling the product for the benefit of another client. The ABA committee found all three to be unreasonable fee charges:

> "...[I]t is helpful to consider these questions, not from a perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned. A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules. Model Rule 1.5."

Not only the fee but the entire retainer agreement must be fair and reasonable. Lengthy notice requirements prior to termination and non-refundable retainers are not acceptable as against public policy, regardless of the circumstances or the sophistication of the client. Cohen v. ROU, 146 N.J. 140 (1996); R.5:3-5(b). If discharged, the attorney may only recover the fair value of the services rendered, not necessarily the amount called for under the agreement. Ibid. See also Fischer v. Fischer, 375 N.J. Super. 278, 288 (App. Div. 2005), cert. den. 183 N.J. 590 (2005); Matter of Gourvitz, DRB 08-326 (2009).

In cases involving a court-awarded counsel fee (so-called "fee shifting" situations), that award is normally the exclusive property of the client- being in effect a reimbursement of the contractual counsel fee being paid by the client. Restatement of the Law Governing Lawyers (ALI 2000), Section 38(3)(b) and Section 35 comment d. Where the court-awarded fee exceeds

the amount of the contractual counsel fee, it is not unreasonable for the lawyer to receive the court-awarded fee amount instead of the contractual fee. Szczepanski v. Newcomb Med. Center, 141 N.J. 346, 358-359 (1995). However, a fee agreement giving the lawyer both the contractual fee and the court-awarded fee would be presumptively unreasonable. Restatement, Section 38 comment f. See also ACPE Opinion 714 (2008). Note, however, the contrary result in U.S. ex. rel. DePuce v. Cooper Health System, 08-cv-5626 (U.S. Dist. Ct., J.Irenas, 2013).

Traditionally, lawyers in New Jersey were entitled to utilize two kinds of liens in helping them collect outstanding fees: a common law lien on the client's files and a statutory lien on the client's cause of action. See Frenkel v. Frenkel, 252 N.J. Super. 214 (App. Div. 1991); ACPE Opinion 554 (1985); N.J.S.A. 2A:13-5. Over time, the common law lien came to be seen as an infringement upon the client's right to change lawyers at any time for any or no reason. Consequently, in April of 2013 the Supreme Court abolished the common law lien by adding the following simple sentence to RPC 1.16(d): "No lawyer shall assert a common law retaining lien." For a careful treatment of the statutory lien process, see Schepisi & McLaughlin, P.A. v. LoFaro, 430 N.J. Super. 347 (App. Div. 2013), cert denied, 215 N.J. 486 (2013); Kaplan, "Collecting Fees After the Demise of the Retaining Lien," 214 N.J.L.J. 262 (2013).

Should the client seek fee arbitration, court action to collect the fee is stayed, but the lawyer may still seek judicial relief preserving the status quo and the rest of the fee in dispute pending arbitration. Steiger v. Armellino, 315 N.J. Super. 176 (Ch. Div. Monmouth Cty. 1998). Moreover, such a petition may be filed and a temporary restraining order obtained prior to expiration of the 30 day pre-action notice requirement of R.1:20A-6. Shalit v. Shalit, 323 N.J. Super. 351 (Chan. Div. 1999). For a detailed review of procedural requirements and allocation of fee money among competing counsel, see Martin v. Martin, 335 N.J. Super. 212 (App. Div. 2000). See generally Musikoff v. Jay Parrino's The Mint, LLC, 172 N.J. 133 (2002).

IV. PERFORMING THE SERVICE

A. Scope of the Representation

As the attorney-client relationship is being formed in a new matter, the attorney must be concerned not only with possible conflicts and fee arrangements but also with the objectives of the representation and the means by which those objectives will be pursued. RPC 1.2(a) gives the client final authority in determining the scope and objectives of the representation and the lawyer final authority only in the choice of means. Even here, however, there may be situations in which the choice of means requires that the lawyer abide by the client's wishes, as for example when the particular representation will require the client to advance funds. Essentially, the lawyer has final authority over means only when necessary in order to comply with ethics requirements or other law or to fulfill a duty the lawyer may owe to third parties or to the justice system itself. See Hazard, Hodes and Jarvis, The Law of Lawyering, Third Edition, supra, Sections 5.4, 5.5; Restatement of the Law Governing Lawyers, supra, Sections 21-23.

The 2004 version of the rule added by way of clarification that the lawyer's role includes implied authorization to act on the client's behalf, without the lawyer having to consult with the client at every turn in the representation. As the representation proceeds, RPC 1.2(a) then gives the client final authority over whether to accept an offer of settlement or, in criminal cases, whether to enter a plea agreement or waive a jury or even testify. See Amatuzzo v. Kozmiuk, 305 N.J. Super. 469 (App. Div. 1997).

Because the client plays so substantial a role in determining the course of the representation, it is essential that the lawyer establish a good rapport with the client from the outset. Making this emphatic, the 2004 version of RPC 1.2(a) ties the duty to consult to RPC 1.4's duty to communicate. The lawyer should take time to elicit from the client exactly what the client hopes to achieve in the matter. Those expectations should be discussed and in the conversation should be modified into realistic objectives.

I cannot overstate the importance of helping clients to adopt realistic objectives. Deflating unrealistic client expectations is not pleasant and may mean that some clients take their business elsewhere. Nonetheless, representation based upon unrealistic objectives can only lead to serious problems down the road. The most effective objectives are probably those which underestimate the final results. Related to this is the obligation of the lawyer to help the client develop a sense of proportionality in terms of the cost of litigation compared to the issues or the amount in dispute. Chestone v. Chestone, 322 N.J. Super. 250 (App. Div. 1999) at 259.

RPC 1.2(c) permits the lawyer to limit the scope of the representation, provided the limitation is reasonable and the client gives informed consent (RPC 1.0(e)). Lerner v. Laufer, 359 N.J. Super 201 (App. Div. 2003) involved a malpractice claim by a matrimonial client against the attorney who had represented her in a divorce under a limited representation agreement. The Lerners had resolved their financial issues into a property settlement agreement through mediation without separate counsel. Thereafter, the wife hired Laufer to put through an uncontested divorce in which the property settlement agreement would be incorporated without evaluation on the merits. For his own protection, Laufer had his client sign a detailed written agreement in which she authorized Laufer to represent her without performing any discovery or appraisal work or otherwise going outside the four corners of the settlement agreement. Several months post-divorce the client made a discovery that raised questions concerning her husband's truthfulness during mediation. She then moved to set aside the PSA, sued the mediator, and later sued Laufer. Laufer escaped on summary judgment and the Appellate Division affirmed, citing RPC 1.2(c):

> "We hold it is not a breach of the standard of care for an attorney under a signed precisely drafted consent agreement to limit the scope of representation to not perform such services... that he or she might otherwise perform..."
>
> 359 N.J. Super. at 218 (emphasis added).

See, also, ACPE Opinion 713 (2008) dealing with limited representation on behalf of pro se litigants, a situation sometimes referred to as "ghostwriting."

"Collaborative law" involves an emerging form of alternate dispute resolution in which the lawyers are required to perform limited roles. Increasingly popular in matrimonial cases, the parties to a dispute agree in advance to make full and honest disclosure of all relevant information and then to negotiate toward a resolution, employing experts as needed. Lawyers for the parties must limit their representation to the collaborative methodology and withdraw from the representation if the negotiations fail and the dispute moves on into traditional litigation. In ACPE Opinion 699 (2005) the Advisory Committee gave its approval to this form of limited representation, provided the lawyers first determine that a collaborative law approach is suitable to their client's case and then they obtain their client's informed consent.

At all times, the scope and means of the lawyer's representation are constricted by the lawyer's other legal and ethical obligations. RPC 1.2(d) provides:

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

And RPC 1.4(d) - formerly RPC 1.2(e) - provides:

> "When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct."

B. Advocacy

> "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy and defense."

This quote from Canon 15 of the 1908 ABA Canons of Professional Ethics is a stirring depiction of advocacy in the best American tradition. Professor Wolfram considers the heart of this model to be zeal, which, in his translation, means: "...a lawyer is expected to devote energy, intelligence, skill and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client." Wolfram, Modern Legal Ethics, (West Publishing Co. 1986) p. 578.

The idea that the ethical advocate must be zealous is no longer an explicit part of our ethics codes. In the 1969 ABA Code of Professional Responsibility the word "zeal" or its variants was retained only as a title (in Canon 7 and in DR 7-101) and in one of the aspirational "Ethical Considerations" (EC 7-1). In the 1983 Model Rules of Professional Conduct the word appears merely in a comment to MRPC 1.3. Indeed, in terms of ethical code rules, for more than 40 years there have been precious few provisions truly supportive of advocacy in affirmative terms.

Hazard, Hodes and Jarvis see the duty of "reasonable diligence" in RPC 1.3 as a replacement for the duty of zeal. The Law of Lawyering, Third Edition, Section 6.2. That may be true. Note, however, that the two terms are hardly comparable and the difference certainly suggests an intent on the part of the framers of both codes to move away from "zealousness".

Wolfram, on the other hand, sees "zealousness" as remaining a part of the rules by inference, being "pivotal" in the definition of most of the lawyer's duties under the code. Modern Legal Ethics (West Publishing Co. 1986) p. 579.

Although the term "advocacy" may not appear, many of the RPCs relate to it, mostly in a negative way as we have already observed. In broad terms, the list includes:

RPC 1.2(d)- The lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent.

RPC 1.4(d)- The lawyer shall advise the client as to the legal and ethical limits on the lawyer's conduct while serving the client.

RPC 1.6- The lawyer must protect confidential information but shall reveal it when necessary to prevent harm to the person or property of others.

RPC 1.16- The lawyer shall not represent a client or must cease from serving the client if the representation will result in ethics violations.

RPC 2.1- The lawyer shall exercise independent professional judgment.

RPC 3.1- The lawyer shall not pursue frivolous claims or defenses.

RPC 3.2- The lawyer shall endeavor to expedite litigation.

RPC 3.3- The lawyer shall be candid with the court.

RPC 3.4- The lawyer shall deal fairly with evidence.

RPC 3.5- The lawyer shall not seek to influence illegally a judge, juror or other official.

RPC 3.6- The lawyer shall not make prejudicial statements to the news media.

RPC 3.7- The lawyer shall not act as advocate and witness in the same matter.

RPC 3.8- The lawyer acting as prosecutor shall observe certain duties which limit his or her advocacy role as a matter of public policy.

RPC 4.1- The lawyer shall be candid with his or her adversary.

RPC 4.2- The lawyer shall not communicate directly with a person represented by counsel.

RPC 4.3- The lawyer shall not deal with persons not represented by counsel except in certain conditions designed to benefit such persons.

RPC 4.4- The lawyer shall not use the legal process to harass third persons.

RPC 8.4(d)- The lawyer shall not engage in conduct prejudicial to the administration of justice; and

RPC 8.4(e)- The lawyer shall not state or imply an ability to influence improperly a public official.

Most of the above rules are fairly self-explanatory, even some of the longer ones such as RPC 3.6. In this part of the manual I will discuss in detail only RPCs 3.1, 3.2, 4.2, and conclude with some comments on responding ethically to client fraud.

1. RPC 3.1

The text reads:

> "A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

RPC 3.1 should be read in conjunction with R.1:4-8, amended in 1996, the "frivolous litigation" rule patterned after Federal Rule 11. This rule places upon the lawyer the burden of making sure that everything he or she signs, files or advocates has support in fact and law, as substantiated by "an inquiry reasonable under the circumstances." Violation of this rule may lead to financial sanctions (fines and/or counsel fees) as well as a striking of the offensive material. The rule does not apply to discovery violations covered by R.4:23. Note that under the rule the court may award counsel fees and reasonable expenses to the prevailing party. Summit Trust Co. v. Baxt, 333 N.J. Super. 439 (App. Div. 2000). Built into the rule is a 28 day notice

provision, giving the attorney opportunity to withdraw or revise the allegedly offensive material prior to court review and imposition of any sanction.

The focus in both RPC 3.1 and R.1:4-8 is upon the particular lawyer's knowledge or reasonable belief — a subjective standard for determining frivolousness. By contrast, Model Rule 3.1 creates an objective standard, without reference to the particular lawyer, stating simply that the lawyer may not assert a claim unless the claim has a basis which is not frivolous.

N.J.S.A. 2A:15-59.1 provides sanctions against frivolous litigation. This statute punishes only the litigants, however, not the attorneys who file the pleadings. Moreover, the word "frivolous" as used in the statute has been given a restrictive interpretation. See McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993); Debrango v. Summit Bancorp, 328 N.J. Super. 219 (App. Div. 2000); Port-o-san Corp v. Teamsters Local Union No. 863 Welfare & Pension Funds, 363 N.J. Super. 431 (App. Div. 2003).

RPC 3.1 makes allowances for the special role of the criminal defense lawyer. The rule permits, but does not require a defense which forces the prosecutor to prove every element of every charge. In this regard, note the corresponding special responsibilities of the prosecutor under RPC 3.8 — to refrain from prosecuting a charge that he or she knows is not supported by probable cause and to make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense. In post conviction relief applications by indigent defendants, under R.3:22-6(d) assigned counsel are obligated to advance any grounds insisted upon by the defendants even though counsel may deem the grounds to be without merit, and notwithstanding RPC 3.1. So called "Anders Briefs", permitted by the United States Supreme Court in Anders v. California, 386 U.S. 738 (1967), are not recognized in New Jersey. State v. Rue, 175 N.J. 1 (2002).

Marvelous debates have been waged over the age-long problem of the lawyer who vigorously and successfully defends his or her client, knowing all the while that the client is in fact guilty. A controversial but highly readable treatment is given by Professor Monroe H. Freedman in Lawyers' Ethics in an Adversary System (Bobbs-Merrill Company, Inc. 1975). See, also Trial Ethics, by Professors Underwood and Fortune (Little, Brown and Company, 1988).

2. RPC 3.2

The text reads:

> "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process."

In the first half of this rule the difficult issue is in determining whether the client who would rather slow down the litigation has a legitimate reason to do so. Although the rule speaks merely of the "interests" of the client, the Model Rule comment suggests that only "legitimate" interests are to be given deference.

The second half of this rule, which is not found in the Model Rule, dates back to the original Code of Responsibility, specifically DR 7-101(A)(1). The New Jersey Supreme Court chose to keep this provision, making it part of RPC 3.2 in 1984 and retaining it in the 2004 revision. This is highly significant. In New Jersey, "courtesy and consideration" are ethical duties, not just professional ideals.

3. RPC 4.2

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice."

The rule prohibiting a lawyer from communicating with a person who is represented by counsel has been part of our legal ethics codes for 100 years. See Canon 9 of the ABA Canons of Professional Ethics of 1908; DR 7-104(A)(1) of the ABA Code of Professional Responsibility of 1969 (adopted in New Jersey in 1971); and MRPC 4.2 of the Model Rules of Professional Conduct of 1983 (adopted in New Jersey in 1984). Over the years this rule has been evaluated, modified and interpreted, producing what is today not only an amended version of the codified rule but also a body of caselaw and scholarly commentary which surround the rule and explain its limits and proper application.

My analysis of RPC 4.2 relies to a large extent upon authorities which are keyed to the Model Rules version of 4.2. Since MRPC 4.2 and New Jersey's RPC 4.2 differ somewhat, the two versions should be compared at this point. MRPC 4.2 states:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

The major difference between the two versions is the inclusion in the New Jersey version of the "litigation control group" concept, which is developed more fully in New Jersey's RPC 1.13(a). The other differences are several short phrases added for clarity in the New Jersey version. For our purposes the differences are irrelevant. The New Jersey rule contains all the MRPC text and that text is the part which matters.

The authorities are unanimous that a lawyer does not violate RPC 4.2 when his or her client communicates directly with an adverse party or other person represented by counsel.

Moreover, a lawyer is not precluded from advising his or her client that the client has the right to engage in such direct communication. MRPC 4.2 Comment (4)(2006); ABA Formal Opinion 92-362 (1992); Rotunda and Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility, sec. 4.2-5, p. 848 (ABA / Thomson West, 2006-2007); Restatement of the Law Governing Lawyers, Third, Section 99, Comment k. (ALI, 2000); Hazard, Hodes and Jarvis, The Law of Lawyering, Third Edition, Section 38.4 (Wolters Kluwer, 2008).

New Jersey supports this interpretation of RPC 4.2. State v. P.Z., 152 N.J. 86 (1997) at 116 f.n.6; Michels, New Jersey Attorney Ethics, section 32:1-1 (Gann, 2008).

Some may object that if a lawyer counsels his or her client to communicate directly with the other (represented) party, the lawyer will have violated RPC 8.4(a), which makes it professional misconduct for a lawyer to violate the RPCs "through the acts of another". Hazard, Hodes and Jarvis reject that notion, citing the Restatement section 99(2) and ABA Formal Opinion 92-362 (1992):

> "... [A] lawyer should be able to advise a client to contact a third party- even a represented third party- directly, without running afoul of the prohibition in Rule 8.4(a) against violating a disciplinary rule through the acts of another. ..."
>
> The Law of Lawyering, Section 38.4.

Section 99 of the Restatement states the anti-contact rule in part (1), then adds in part (2):

> "Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient."

By way of illustration, the Restatement authors provide the following at Volume 2, p. 77:

> "Lawyer represents Owner, who has a worsening business relationship with Contractor. From earlier meetings, Lawyer knows that Contractor is represented by a lawyer in the matter. Owner drafts a letter to send to Contractor stating Owner's position in the dispute, showing a copy of the draft to Lawyer. Viewing the draft as inappropriate, Lawyer redrafts the letter, recommending that Client send out the letter as redrafted. Client does so, as Lawyer knew would occur. Lawyer has not violated the rule of this Section."

In their comments on the topic of clients communicating with represented third parties, Rotunda and Dzienkowski have noted a significant difference between Model Rule 4.2 and its Disciplinary Rule predecessor, DR 7-104(A)(1). The DR not only prohibited a lawyer from communicating with represented third parties, it also prohibited a lawyer from "causing another" to do so. This "causing another" provision was eliminated in the Model Rule. Rotunda and Dzienkowski find in that deletion authority for the proposition that RPC 8.4(a)'s "through the acts of another" clause does not apply to RPC 4.2 communications. Legal Ethics, Section 4.2-5. Accord, see ABA Formal Opinion 92-362 (1992) at p. 89.

ABA Formal Opinion 92-362 is particularly instructive. The facts before the committee were as follows:

> "... The inquiring lawyer represents the plaintiff in a civil litigation matter, in which the defendant is also represented by counsel. Two months ago, plaintiff's lawyer made a settlement offer to opposing counsel. Plaintiff's lawyer has had no response, and the case is scheduled to go to trial in two weeks. Plaintiff's lawyer suspects that opposing counsel has not informed the defendant of the offer."

The committee readily concluded that the lawyer for plaintiff would violate MRPC 4.2 if he or she contacted defendant directly to verify whether defendant knew about the settlement offer. The committee's more difficult issue was whether plaintiff's lawyer could ethically counsel the plaintiff concerning plaintiff's freedom to make the inquiry. (It was assumed by the committee that clients are always free to communicate with each other.)

The committee incorporated several ethical duties into its analysis, including MRPC 1.1 (the lawyer's duty to provide competent representation), MRPC 1.2(a) (the lawyer's duty to abide by the client's objectives and to consult with the client as to the means of the representation) and, of most importance, MRPC 1.4(b) (the lawyer's duty to inform the client sufficiently to enable the client to make wise decisions concerning the representation). Based upon these duties, the committee concluded that in the case presented the lawyer was obligated (not merely permitted) to advise the plaintiff that the lawyer believes the settlement offer had not been presented to the defendant, that MRPC 4.2 precludes him or her as the lawyer from contacting defendant directly, but that plaintiff was free to do so.

4. Client Fraud

The words "fraud" or "fraudulent" appear ten times in the New Jersey Rules of Professional Conduct (RPCs). In RPC 1.0(d) the terms are defined (up to a point) and in RPC 8.4(c) fraud is noted as a particular form of lawyer misconduct. In all other instances the words relate to fraudulent conduct on the part of the client, which the lawyer has a duty to address in some fashion.

Fraud is conduct which has a "purpose to deceive." RPC 1.0(d). Beyond that generality, the RPC definition simply incorporates by reference whatever the law of fraud may be in the applicable jurisdiction. In New Jersey it is clear that the law of fraud in the context of a lawyer's representation of clients is not the same as in traditional tort or criminal law situations where, for example, fraud presupposes reliance by a victim. In that sense, fraud in the lawyer-client context is construed broadly. Fellerman v. Bradley, 99 N.J. 493, 504 (1985); ACPE Opinion 586 (1986). At the same time, however, client fraud which necessitates disclosure by the lawyer is construed narrowly, in deference to the lawyer's fundamental duty to protect in strict confidence all information relating to the representation. ACPE Opinion 673 (1994).

The Supreme Court and advisory committee have issued few opinions dealing with fraud in the context of the RPCs (or their predecessors). There is a substantial body of New Jersey

caselaw, however, dealing with fraud as part of the "crime or fraud" exception to the lawyer-client privilege under NJRE 504 (or its predecessor). Although the latter construes fraud in the context of the rules of evidence rather than under the ethics code, that distinction is not significant. For our purposes we may assume that fraud has the same meaning in both situations and that opinions regarding fraud for evidence purposes are applicable in the area of lawyer discipline. A. v. B., 158 N.J. 51, 58 (1999).

RPC 1.2(d) prohibits a lawyer from counseling a client in conduct the lawyer knows is fraudulent (or illegal or criminal). The rule is not violated when a lawyer simply explains to his or her client why the client's conduct is fraudulent and urges the client to refrain from it or to rectify it. Suppose, however, the client is unpersuaded and, in weighing the options, asks the lawyer to assess the client's exposure in terms of damages should the client decide to pursue the fraudulent scheme. May the lawyer provide the damage assessment or would doing so place the lawyer "in" the client's fraud for RPC 1.2(d) purposes?

Ethics scholars differ somewhat on whether RPC 1.2(d) permits a lawyer to advise a client as to the consequences of the client's fraudulent plan. Professor Hazard and co-authors, Hodes and Jarvis, see legal advice as to consequences being proper only if given in conjunction with a concerted effort to dissuade the client from the contemplated conduct. The Law of Lawyering, supra, section 5.13. Other authorities are more lenient, permitting the lawyer to advise as to consequences so long as the lawyer refrains from making specific recommendations in support of the client's improper conduct. See, for example, MRPC 1.2, comment 9; Restatement of the Law Governing Lawyers, supra, section 94(2); Rotunda and Dzienkowski, Legal Ethics, supra, section 1.2-4

RPC 1.2(d) also prohibits assisting in client fraud. In ACPE Opinion 710 (2006) the advisory committee dealt with the duties of lawyers who represent the parties to a real estate sale where the buyer insists upon "seller's concessions," which artificially and deceptively inflate the purchase price enabling the buyer to obtain a higher mortgage. Citing RPC 1.2(d) as well as other rules, the committee declared:

> "... It is the lawyers' duty to see that the true terms of a real estate transaction are disclosed by their clients to the lender and to prevent false and misleading information from becoming available by their acts or omissions to those who, in due course, may purchase the loan. ..."

See also Matter of Soriano, DRB 10-369 (2011); Matter of Barrett, DRB 10-435 (2011); Matter of Malvone, DRB 12-139 (2012).

Where the lawyer acquires knowledge of client fraud, the lawyer may be obligated to disclose it under RPCs 1.6(b)(2), 3.3(a)(2) or 4.1(a)(2). These exceptions to the RPC 1.6(a) duty of confidentiality will be discussed in the next portion of this manual. It is evident from these various rules that fraud situations test the core values of the lawyering function. On the one hand, the lawyer must be utterly loyal to the client and fully protective of the client's confidences. On the other hand, the lawyer may not participate in deception, either to the court

or to adversaries and foreseeable third parties. As we will see in the next section, in New Jersey, the RPCs clearly tip the scales in favor of disclosure.

When confronted by a situation in which disclosure is required, the lawyer should first confront the client, urging the client to make disclosure voluntarily. The client should be advised that the lawyer has an obligation to be truthful, which cannot be compromised. If the client persists in following an untruthful course of action, the lawyer should resign. The lawyer has no other option. Continuing with the representation makes the lawyer a knowing participant in the client's fraud, which is clearly unethical. RPC 1.16(a)(1).

In most situations, withdrawing from the representation relieves the lawyer from having to disclose the client's fraud. Davin, LLC v. Daham, 329 N.J. Super. 54,78 (App. Div. 2000); Banco Popular North America v. Gandi, 184 N.J. 161, 185 (2005). However, in prevention situations covered by RPC 1.6(b), where disclosure is not as overtly connected to the lawyer's on-going representation as in RPC 3.3(a) and RPC 4.1(a), disclosure may be a requirement regardless of the lawyer's withdrawal. ACPE Opinion 677 (1994).

C. Confidentiality

1. RPC 1.6(a)

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

The breadth of this confidentiality standard, "information relating to representation," is the result of considerable evolution. The old Canons spoke only of client "confidences" (Canon 48). The Disciplinary Rules broadened that to "confidence or secret" (DR 4-101(B)). On the other hand, the lawyer-client privilege remains limited to "communications" between lawyer and client (NJRE 504, formerly NJER 26 and codified at N.J.S.A. 2A:84A-20).

The policy reflected in the basic confidentiality standard, as well as in the lawyer-client privilege, is that confidentiality promotes trust and encourages full and free communication on the part of the client. Such communication is, of course, necessary if the lawyer is to give appropriate counsel and provide effective representation. See In re Advisory Opinion No. 544, 103 N.J. 399, 405 (1986). In criminal defense situations, the standard also has support in the Fifth and Sixth Amendments to the U.S. Constitution. See In re Kozlov, 79 N.J. 232, 243 (1979); Matter of Mandell, 250 N.J. Super. 125, 130 (App. Div. 1991).

Note that similar confidentiality provisions appear elsewhere in the code in regard to client transactions (1.8), former clients (1.9), public entities (1.11), organizations (1.13), clients with disabilities (1.14) and prospective clients (1.18).

The duty to protect confidential information requires constant vigilance on the part of the lawyer. It is a duty that can be breached unintentionally, even without the lawyer's awareness, while telling stories during a casual social conversation, or when using illustrations during a conference with another client, or when negotiating a settlement with an adversary lawyer. Confidential information is not protected merely by deleting the client's name in such conversations. Confidential information remains protected after the representation has ended, State v. Bellucci, 81 N.J. 531 (1980), and, at least as to client communications, the confidentiality obligation continues even after the client's death, Swidler & Berlin v. United States, 524 U.S. 399 (1998).

Privacy is important to the protection of confidential information. In the lawyer's office, the client waiting area should be isolated so that the client does not have opportunity to overhear conversations by office staff. During client interviews there should be no interruptions, such as the lawyer taking telephone calls or speaking with office staff, which expose the client to confidential information. When third parties are present during client interviews, the lawyer-client privilege related to that interview may be lost unless the third parties are either office staff or persons necessary to facilitate the interview (such as a translator).

Although the duty to preserve confidential information is comprehensive, information that has become "generally known" is not included. That phrase appears in RPC 1.9(c)(1), not in RPC 1.6, but is a generally accepted 1.6(a) limitation. Restatement of the Law Governing Lawyers (ALI 2000), Section 59. Note, however, that the fact that the information may be in the public record available to anyone determined to search for it does not make the information "generally known". Steel v. General Motors Corp., 912 F. Supp. 724 (D.N.J. 1995).

Under the New Jersey RPCs, this broadly comprehensive duty of confidentiality is somewhat superficial, having to yield to paramount rules requiring disclosure, chief of which are 1.6(b), 3.3 and 4.1. Within 1.6(a)'s "information" greater protection is available to communications which fall within the lawyer-client privilege, a rule not of ethics but of evidence, NJRE 504.

New Jersey's major exceptions fall into two categories- those requiring disclosure to prevent harm to people or property, RPC 1.6(b), and those requiring disclosure to promote truthful advocacy, RPC 3.3(a) and RPC 4.1(a). In all instances these exceptions expressly override the confidentiality protections of RPC 1.6(a).

2. Exceptions to Prevent Harm

The New Jersey Supreme Court insists upon candor at the expense of confidentiality. This is clearly demonstrated by comparing the New Jersey RPCs with the ABA Model Rules (MRPCs). Consider first the requirements for disclosure to prevent harm to people and property (RPC 1.6(b)). Under the MRPC, disclosure is optional not mandatory and is limited to preventing death or substantial bodily harm. Under the New Jersey RPC, disclosure is mandatory in preventing not only death or substantial bodily harm but also substantial injury to the financial interests or property of others. (NJ RPC 1.6(b)(2) also requires disclosure to prevent fraud upon a tribunal. MRPC contains a similar requirement at MRPC 3.3(b).) Beyond

these mandatory items, NJ RPC 1.6(c) permits disclosure to likely victims, and (d) permits disclosure to prevent the client from harming himself or herself, or to rectify the consequences of a client's misconduct which involved the lawyer's services.

RPC 1.6(b) in the New Jersey version states:

> "A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
>
> (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial injury to the financial interest or property of another;
>
> (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal."

Note that this rule requires disclosure but only to "proper authorities" and only for the prevention of future harm. Past harm is not covered by these disclosure provisions. The disclosures are required or permitted only where the lawyer "reasonably believes" the disclosures to be necessary, an objective conclusion made by a "reasonable" lawyer based upon information having some foundation in fact and possessing the weight of prima facie evidence. RPC 1.6(e).

3. Exceptions to Promote Truthful Advocacy

As to the requirements for disclosure to promote truthful advocacy under RPC 3.3(a), both the MRPC (in 2002 form) and the NJRPC prohibit the lawyer from knowingly making false statements of material fact or law to a court and knowingly submitting false evidence, and both versions require the lawyer to disclose controlling legal precedent and expose a client who commits fraud upon the court. The primary difference between the two codes is 3.3(a)(5), which is unique to New Jersey.

RPC 3.3(a) reads:

> "A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
> (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law."

RPC 3.3(a)(5) requires the lawyer to disclose material facts known to the lawyer but not to the court if the omission is "reasonably certain to mislead" the court. This "reasonably certain" standard is itself a modification favoring confidentiality. The former rule's standard was more broadly phrased "may tend to be misled".

In 2004, the Supreme Court narrowed 3.3(a)(5) by adding the privilege exception. The lawyer-client privilege is, of course, subject to its own exceptions, chief of which is the "crime or fraud" exception. The rationale for this exception is that a client ought not to enjoy confidentiality when he or she intentionally uses a lawyer's services for some illegal purpose. Fellerman v. Bradley, 99 N.J. 493 (1985). For ethics purposes, the crime or fraud exception is construed broadly. ACPE Opinion 586 (1986); In re Callan, 66 N.J. 401 (1975). At the same time, the party seeking to enforce the exception carries the burden of proof and in doing so must resort to evidence outside the otherwise privileged communication. National Util. Serv. v. Sunshine Biscuits, 301 N.J. Super. 610 (App. Div. 1997).

Based upon the above principles, in representing a client a lawyer may rely upon the lawyer-client privilege and withhold facts, even material facts, and even if the lawyer is reasonably certain that the omission of those facts will mislead the court, but only if (a) the facts became known to the lawyer during communications with the client related to the representation (i.e. are privileged), and (b) the facts are not subject to the crime or fraud exception of the privilege. Disclosure is required, however, if the lawyer-client privilege does not apply even if the facts would otherwise enjoy confidentiality under the broader protection of RPC 1.6(a). See In re Seelig, 180 N.J. 234 (2004).

The Supreme Court helped define the outer limits of RPC 3.3(a)(5) in Brundage v. Estate of Carambio, 195 N.J. 575 (2008). There, the Appellate Division had ruled that a lawyer violated this rule by not disclosing to the appellate court in one case the fact that another appeal was pending before a different appellate panel dealing with the same issue. The Supreme Court reversed, concluding that the lawyer's non-disclosure was not "reasonably certain to mislead" as required for a 3.3(a)(5) violation. At the same time, the majority condemned the lawyer for his "sharp practices" and lack of professionalism.

4. Lawyer-Client Privilege

In the first full paragraph above I stated that a lawyer "may rely" upon the privilege. To be more accurate, I should have said a lawyer "must rely" upon the privilege. The lawyer has no choice but to claim and uphold the privilege if under the circumstances the client is entitled to its protection. NJRE 504(1). State v. Land, 73 N.J. 24 (1977).

These competing duties- the lawyer-client privilege requiring confidentiality and the RPC 3.3(a)(5) duty requiring disclosure- place the lawyer in a most difficult position. If the disclosure requirements apply, then the lawyer must disclose. If the privilege applies, then the lawyer must remain silent. An incorrect application of the disclosure requirements either way creates an ethical violation.

Fortunately, some leeway can be found in RPC 3.3(a)(5)'s somewhat flexible wording ("material fact", "knowingly" and "reasonably certain"). In addition, although the crime or fraud exception is construed broadly, the Advisory Committee has said in a comparable context that the exceptions in RPC 1.6(b) should be construed narrowly for the sake of the lawyer-client relationship. ACPE Opinion 673 (1994).

The dilemma described above is mild compared with the predicament of the lawyer who is ordered by a court to make disclosure or be held in contempt. In the following cases, lawyer-defendants had refused to disclose citing the privilege but were held in contempt by the trial court. Most succeeded in overturning their contempt convictions on appeal, but only after a great ordeal and at considerable risk.

In In re Kozlov, 79 N.J. 232 (1979), the attorney was held in contempt for refusing to disclose the identity of his client so the court could question him about his knowledge of possible bias on the part of a certain juror. The Supreme Court reversed the conviction, but cautiously, noting that the trial court had other "less intrusive" avenues it should have pursued before requiring disclosure of privileged information.

In Fellerman v. Bradley, 99 N.J. 493 (1985), the attorney was held in contempt for refusing to disclose his client's address, which was necessary for collection from the client of a court-ordered expert witness fee. This time the Supreme Court upheld the conviction, relying upon the "crime or fraud" exception to the attorney-client privilege, contained in then evidence rule 26 (now 504). See also Dry Branch Kaolin Co. v. Doe, 263 N.J. Super. 325 (App. Div. 1993), distinguishing Kozlov and following Fellerman. See also Horon Holding Corp. v. McKenzie, 341 N.J. Super. 117 (App. Div. 2001).

In Matter of Nackson, 114 N.J. 527 (1989), the attorney was held in contempt for refusing to disclose to a grand jury his fugitive client's whereabouts. The Supreme Court upheld the Appellate Division's reversal, taking care to distinguish the facts from those in Fellerman.

Finally, in Matter of Mandell, 250 N.J. Super. 125 (App. Div. 1991), the attorney was held in contempt for refusing to state at a criminal case pretrial conference whether her client (defendant) would be testifying at the trial. The Appellate Division reversed, citing the attorney-client privilege and the constitutional right of the accused not to be required to disclose his intentions concerning testifying.

Ordinarily, of course, the lawyer must comply with a trial court ruling even if it is erroneous, seeking to reverse the ruling later on appeal. Where, however, the erroneous ruling requires disclosure of possibly privileged information, once that information is disclosed an

appeal is of no benefit. For that reason, the United States Supreme Court in Maness v. Meyers, 419 U.S. 449 (1975), made provision for "precompliance review" (appeal prior to enforcement of contempt), at least where constitutional rights may be involved. In Mandell the Appellate Division ruled that the defense counsel should have been permitted such review. 250 N.J. Super. at 131. In Nackson, however, the Supreme Court refused to adopt a similar rule requiring prior court approval before an attorney is summoned before a grand jury. 114 N.J. at 539, 540. Compare, however, State v. Ray, 372 N.J. Super. 496 (App. Div. 2004).

The attorney-client privilege and its exceptions is a complex topic going beyond the scope of this manual. For a fuller discussion of the privilege in New Jersey see Biunno, N.J. Rules of Evidence, Comments to NJRE 504, (Gann Law Books); and Pressler & Verniero, N.J. Court Rules, Comments to N.J.R. 4:10-2, (Gann Law Books), both of which volumes are updated annually. (Pressler & Verniero comments also cover the related topic of the work-product doctrine). See also Dontzin v. Myer, 301 N.J. Super. 501 (App. Div. 1997).

5. Margin of Safety

Given the serious dilemma posed by the competing duties of confidentiality and candor, it is fortunate that the wording of the disclosure requirements allows for considerable discretion on the part of the lawyer. Where the circumstances create a "close call," as in Matter of Nackson, 114 N.J. 527, 533 (1989), the lawyer who has acted deliberately, with sincerity and good intention in exercising this discretion ought not be faulted. See ACPE Opinion 643 (1990).

Examples of this discretionary language are easily highlighted. RPC 1.6(b), (c) and (d) speak repeatedly of a lawyer's "reasonable belief," which RPC 1.6(e) defines as a belief or conclusion having "some foundation in fact" sufficient to constitute "prima facie evidence." RPC 3.3 speaks of a lawyer not "knowingly" making false statements of "material" fact, of taking "reasonable remedial measures," and of having concern lest an omission be "reasonably certain" to mislead the court. The words "knowingly" and "material" appear also in RPC 4.1. Each of these words and phrases gives a margin of safety to the lawyer who may find himself or herself having to take a position without being certain it is ethically correct.

Authority for this margin of safety idea is found in ACPE Opinion 643 (1990). There, during his representation of the husband in a divorce, the attorney received a call from the husband reporting that he had been involuntarily committed to the psychiatric ward of a New York hospital, but requesting that the attorney not tell this to anyone. Eventually, the husband was released from the hospital and took over pro se representation of his case. The attorney then inquired whether he should report the fact of the hospitalization to the court since that fact might bear upon the husband's fitness to engage in visitation with his four year old daughter. The advisory committee observed that the situation would require disclosure under RPC 3.3(a)(5) if the fact of the hospitalization was a "material" fact and if the court "may tend to be misled" by his silence. However, the committee chose not to make a determination on those issues. Rather, the committee stated:

> "Ultimately, . . . whether this fact is material, and whether failure to disclose may or may not be misleading, depends upon the totality of the other current

> information before the court. Such a decision is committed to the professional judgment of the lawyer by the Rules of Professional Conduct and the reasonable exercise of that judgment is all that is required . . . .
>
> [S]ome weighing is possible and necessary in the lawyer's exercise of professional judgment. A decision that a fact is really material, or that a tribunal will actually be misled in the absence of disclosure, is not to be made lightly or easily, especially where, as here, there are serious negative implications of disclosure, chilling essential communications to an attorney."

There are relatively few advisory committee opinions dealing with disclosure of confidential information. However, the few that have been issued do provide some guidance in dealing with this dilemma. It is clear, for example, that the lawyer who learns of past wrongdoing by the client has no duty to report it. ACPE Opinion 638 (1990); ACPE Opinion 664 (1992). Likewise, the lawyer who learns of perjury committed by the client after the client has discharged the lawyer has no duty to disclose. ACPE Opinion 673 (1994).

On the other hand if the client wrongdoing is continuing in its commission disclosure under 1.6(b) is required. Thus, in ACPE Opinion 586 (1986), disclosure was required where the lawyer learned from another client about a continuing fraudulent misrepresentation committed against the lawyer's former client. In ACPE Opinion 677 (1994) disclosure was required where the client misrepresented certain revenue facts of a continuing nature to a department of the New Jersey state government. And in ACPE Opinion 680 (1995) disclosure was required where the clients gained access without permission to confidential documents belonging to their adversaries in litigation.

When confronted by a situation in which disclosure may become required the lawyer should first confront the client and urge that the client make disclosure voluntarily. RPC 1.4(c), RPC 2.1. The client should be advised that the lawyer has an ethical obligation to be truthful, which cannot be compromised. RPC 1.2(d), RPC 1.4(d). If the client persists in following an untruthful course of action, the lawyer should resign. RPC 1:16(a)(1); Davin LLC v. Daham, 329 N.J. Super. 54 (App. Div. 2000); Banco Popular North America v. Gandi, 184 N.J. 161, 185 (2005).

Unique confidentiality and conflicts of interest problems can arise for the lawyer who is assigned by an insurer to defend an insured. In Montanex v. Irizarry, 273 N.J. Super. 276 (App. Div. 1994), during the jury trial of a motor vehicle accident case, defendant (the driver) was testifying against plaintiff (the passenger, who was also his wife). To the defense lawyer's surprise, defendant began testifying in an inculpatory manner, establishing liability in favor of his wife. Defense counsel was shocked and sought leave from the court and was allowed to impeach his client. The jury ruled in plaintiff's favor but the Appellate Division reversed, holding that defense counsel breached his duty of primary loyalty to the insured by impeaching him. Rather, the lawyer should have sought leave to withdraw from the representation.

The attorney for an organization can have a very difficult time if he or she discovers unlawful conduct on the part of an organizational employee. RPC 1.13(a) states clearly that the

attorney represents the entity, not its directors, officers, employees, members, shareholders, etc. (Note that the lawyer is deemed to represent the organization's "litigation control group," but that is only a fiction created to resolve problems generated by RPC 4.2 and 4.3.) If the illegality is committed by the organization's "highest authority," RPC 1.13(c) permits the lawyer to breach the confidentiality restriction of RPC 1.6 in responding to the crisis. However, if someone other than the "highest authority" is involved, the lawyer is to proceed in the "best interest of the organization" by keeping the information confined to higher management personnel.

Representation of co-clients such as a husband and wife can create difficult confidentiality problems, as illustrated by the case of A. v. B., 158 N.J. 51 (1999). There a law firm represented a husband and wife in preparing companion wills, where the parties left their estates to each other with their children as contingent beneficiaries. Unknown to the wife and the law firm was the fact that the husband had fathered an illegitimate child. When the firm found out about the child from another source, it notified the husband that it considered itself obligated to make disclosure to the wife. The husband moved before the court to block disclosure. His application was denied, the Appellate Division reversed, but the Supreme Court reversed again, authorizing disclosure.

The Supreme Court saw the case as presenting a conflict between the lawyer's duty of confidentiality under RPC 1.6(a) and the lawyer's duty to provide the client with all relevant facts so that the client can make informed decisions under RPC 1.4(c). (Id. at 56). In its opinion the court did not make a determination as to which duty must be given priority. It did, however, provide some guidelines. First, it rejected the law firm's claim that it was obligated to make disclosure under RPC 1.6(b), finding the possible inheritance of the wife's estate by the illegitimate child "too remote" to constitute a substantial financial injury under RPC 1.6(b). Second, however, the court found the husband's concealment of the child's existence to be a "fraudulent act" against the wife, within the meaning of RPC 1.6(c), thus giving the firm the right to disclose if it chose to do so. (Id. at 57, 58).

As guidance to the bar, the Supreme Court declared:

> "As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation." Id. at 61-62.

D. Quality of Service

The quality of a lawyer's representation on behalf of a client has ethical significance. Three rules deal most directly with this general topic — RPC 1.1 (competence), 1.3 (diligence) and 1.4 (communication).

New Jersey's version of RPC 1.1 differs significantly from the ABA Model Rule, which states:

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

The New Jersey version states:

> "A lawyer shall not:
>
> > (a)Handle or neglect a matter entrusted to the lawyer in such a manner that the lawyer's conduct constitutes gross negligence.
> >
> > (b)Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally."

This New Jersey provision comes directly from New Jersey's former DR 6-101 and deliberately preserves New Jersey precedent interpreting and applying such terms as "gross negligence" and "pattern of negligence." The rule was not changed in the 2004 revisions.

The original ABA Model Rule was rejected for several reasons which were discussed in detail by the Debevoise Committee in its July 28, 1983 report. Simply stated, the reasons are (1) the term "competence" is too vague even with the added language to serve as a guide in specific situations; (2) it would be unfair to treat a lawyer as being unethical for a single act of simple negligence; and (3) a simple negligence standard would surely open the gates to a flood of complaints from disgruntled clients, who might prefer disciplinary proceedings to malpractice litigation or a combination of both.

The quality of a lawyer's representation can be measured in terms of knowledge, skill and effort. "Competence" in the ABA version of RPC 1.1 embraces these three elements. The New Jersey version, on the surface, seems to deal only with the third — the "handling" of the client's matter. Negligence, in terms of neglect or a lack of effort is the major emphasis of the rule in the Supreme Court's disciplinary rulings. However, negligence in terms of inadequate knowledge or inexperience falls within 1.1 as well. See ACPE Opinion 671 (1993). The lawyer should not undertake any particular representation unless he or she has the requisite knowledge and skill or is willing to take steps to eliminate his or her deficiencies. Such steps might be as simple as reading or attending continuing legal education courses, (which are now mandatory in New Jersey), but in more extreme cases, the lawyer ought at least to retain co-counsel who has the requisite competence.

Because the legal system is so complex and constantly changing, most lawyers — even solo practitioners — tend to specialize. New Jersey has provisions for certification of attorneys in trial practice (civil and criminal), matrimonial law, workers' compensation law and municipal court practice. R.1:39.

In order to encourage the trial of cases by certified trial attorneys, R.1:39 permits certified attorneys other than in matrimonial law matters to share their counsel fee with a referring attorney without regard to the extent of services rendered by the referring attorney, R.1:39-6(d). This is an exception to the general rule of ethics that the division of fees must be in proportion to the services actually performed by each lawyer, RPC 1.5(e).

Gross negligence under RPC 1.1 (or its predecessor, DR 6-101(A)) tends to involve extreme failures. For example, in Matter of Borden, 121 N.J. 520 (1990), the lawyer failed to take action on a client's matter for five years, missing a contractual deadline for claims, resulting in a lower settlement for the client. In Matter of Yetman, 113 N.J. 556 (1989), the lawyer neglected an estate for four years, failing to inform the client that there were aspects of the estate he was not competent to handle and failing to refer the matter to competent counsel. In Matter of Humen, 123 N.J. 289 (1991), the lawyer failed to record a deed and mortgage for six years and failed to insist that the grantor's spouse sign the deed as well.

Some of the cases where gross negligence was found have not been so extreme, however, blurring the line separating gross from simple negligence. For example, in Matter of Smith, 101 N.J. 568 (1986), the lawyer in an estate matter failed to meet the deadline for filing an inheritance tax return and failed to answer the client's telephone calls for ten months. In Matter of Beck, 118 N.J. 561 (1990), the lawyer failed to notify the client of a settlement conference or prepare the client for her participation. In Matter of Segal, 130 N.J. 468 (1992), the lawyer, a municipal prosecutor, failed to interview or subpoena witnesses or do any other advance preparation despite evidence of possible witnesses, three of whom had given sworn statements to the police. (It did not help matters for the prosecutor that the defendant was a sitting Superior Court judge and the acquittal was widely publicized).

The line between gross and simple negligence in ethics prosecutions is further blurred by the presence of RPC 1.3 and 1.4 in the New Jersey rules, requiring the lawyer to represent a client with reasonable diligence and promptness and to maintain a reasonable level of communication with the client. In the Model Rules, these provisions fit together well with RPC 1.1 which sets forth what is essentially a simple negligence standard. In the New Jersey version, however, the changes in RPC 1.1 to gross negligence and a pattern of negligence appear to clash with the simple negligence elements of RPC 1.3 and 1.4.

In practical terms, this apparent clash may have only minor consequence. Typically, such violations result in public discipline only when coupled with one or more counts under RPC 1.1. See, for example, Matter of Segal, Matter of Beck and Matter of Yetman, all supra; In re Riva, 157 N.J. 34 (1999). Single count violations of RPC 1.3 or 1.4 tend to be resolved by way of agreements in lieu of discipline (i.e. diversion) under R.1:20-3(i)(2)(B)).

RPC 1.4, requiring the lawyer to maintain reasonable communication with the client, had no counterpart in the Disciplinary Rules or the Canons. It is probably a component of the duty of diligence (RPC 1.3) and its lack is surely a form of negligence (RPC 1.1). By giving the duty to communicate its own rule, the drafters of the Model Rules were simply emphasizing its fundamental importance.

Poor communication is a widespread problem in the profession. It is the most frequent complaint registered by grieving clients. All lawyers should resolve to improve in this area. Lawyers must be more systematic in promptly returning telephone calls and email messages from clients, or having other staff people in the office screen client communications and respond in matters that do not require professional judgment. Lawyers should also make a habit of sending clients periodic progress reports as well as copies of all correspondence.

At times a failure to communicate is because the lawyer knows the client expects to hear about progress on the client's matter and no progress has been made. In such situations counsel tend to avoid the client, refusing to take calls from the client and ignoring the client's letters. Though common, such behavior is unprofessional and totally unacceptable. See, for example, Matter of Trueger, 140 N.J. 103, 105, 111-12 (1995).

E. Safekeeping Property

Misappropriation of client funds or property is an extremely serious offence. Because of "the paramount need to preserve public confidence in the integrity of the bar" the New Jersey Supreme Court has ruled that the only appropriate discipline for a knowing misappropriation is disbarment. In re Wilson, 81 N.J. 451, 453, 461 (1979). The Court readily acknowledges that the "Wilson rule" is "harsh," but makes no apologies. Matter of Barlow, 140 N.J. 191, 195 (1995); Matter of Greenberg, 155 N.J. 138 (1998). The rule is made even more harsh because of the fact that disbarment in New Jersey is absolutely permanent.

Where there has been a knowing misappropriation, the court has disbarred lawyers despite evidence of drug dependency, compulsive gambling, family hardship, or severe mental depression. In re Steinhoff, 114 N.J. 268 (1989); In re Nitti, 110 N.J. 321 (1988); In re Skevin, 104 N.J. 476 (1986); Matter of Roth, 140 N.J. 430 (1995); Matter of Greenberg, supra; In re Tonzola, 162 N.J. 296 (2000).

The duty to safeguard client funds and property is found in RPC 1.15 and R.1:21-6, which is incorporated by reference into RPC 1.15. See Trust and Business Accounting for Attorneys by David E. Johnson, Jr. (NJICLE, 2008). Failure to observe these record keeping requirements is itself an ethics violation, apart from any misappropriation (RPC 1.15(d)). The Office of Attorney Ethics conducts random audits in order to monitor attorney compliance. OAE's random audit staff have authored a booklet which outlines the New Jersey record keeping requirements which is available without charge.

RPC 1.15 does not contain the word "misappropriation." Rather, speaking positively, the rule commands the lawyer to "hold" client property "separate" from the lawyer's own property.

The negative prohibition against misappropriation has been derived from the rule by inference, but is a well-established ethical precept. See In re Wilson, supra; In re Johnson, 105 N.J. 249 (1987). It includes a temporary use of the client's funds as well as outright theft. In re Wilson, supra, at 455 (footnote 1); Matter of Freimark, 152 N.J. 45 (1997). It also includes taking client funds that the lawyer may be holding in escrow. In re Hollendonner, 102 N.J. 21 (1985); Matter of Gifis, 156 N.J. 323 (1998). Dishonesty or an intent to steal or defraud are not required as proof of violation. In re Cavuto, 160 N.J. 185 (1999).

The cases distinguish misappropriations which are "knowing" from those which are "negligent." Mandatory disbarment under Wilson applies only where the misappropriation is knowing, whereas in negligent misappropriation cases the sanction may be no more than a brief suspension or even less, e.g. Matter of Bancroft, 163 N.J. 139 (2000). Therefore, the distinction becomes enormously important in disciplinary prosecutions.

When the evidence establishes that client funds in the trust account have been invaded, a common defense to the charge of knowing misappropriation is that the lawyer's trust account records were so poorly maintained the lawyer did not in fact know that client funds were being invaded. Such a defense places the lawyer in the position of having to admit to record keeping violations and negligent misappropriation but may possibly be sufficient to forestall a finding that the misappropriation was done knowingly.

There is New Jersey case law going both ways with respect to the effect of poorly maintained trust account records on a knowing misappropriation. In Matter of Librizzi, 117 N.J. 481 (1990), the lawyer's poor trust account records saved him from a knowing misappropriation, while in In re Davis, 127 N.J. 118 (1992), the lawyer was found guilty of knowing misappropriation in spite of his poor records. The factual differences in the two cases help explain the diverging results.

In the Librizzi case, the attorney had been practicing for over twenty years with an unblemished record, but with grossly inadequate trust account records. An OAE random audit revealed a $25,000 shortage in his trust account. Immediately, the attorney borrowed money from his parents and replenished the account. Under the circumstances, the court concluded that there was insufficient proof of a knowing misappropriation and limited his sanction to a six month suspension.

In the Davis case, the attorney has also been practicing for twenty years, but had received three private reprimands along the way. His trust records were "egregious," he was out of trust as much as $30,000 and his invasions of client funds totaled over $40,000. At the time his case was reviewed by the court there were claims from six of his former clients pending before the Client Protection Fund totaling $19,900. He claimed that his poor records kept him from knowingly invading client funds, but the court disagreed. Noting that knowledge can be proven by circumstantial evidence, the court found clear and convincing evidence of his knowledge in the fact that he received bank notices of his trust account checks being dishonored and the fact that he used his trust account actively to pay personal living expenses. Davis was disbarred.

In Matter of Moras, 131 N.J. 163 (1993), the attorney disbursed $17,900 from his trust account to accommodate a friend, who gave him two personal checks to deposit, which would have covered the disbursement except that one of those checks was drawn against insufficient funds. The court viewed this as an extremely careless act, but not a knowing misappropriation, giving him a six month suspension.

The record-keeping defense did not fair so well, however, in Matter of Barlow, 140 N.J. 191 (1995); Matter of Roth, 140 N.J. 430 (1995); and Matter of Irizarry, 141 N.J. 189 (1995). In all three cases, the record-keeping deficiencies were so blatant as to constitute a "willful blindness" functionally equivalent to a knowing misappropriation. All three lawyers in those cases were disbarred. See also Matter of Freimark, 152 N.J. 45 (1997); Matter of Pomerantz, 155 N.J. 122 (1998). In re Mininsohn, 162 N.J. 62 (1999).

An alternate defense is to argue that the funds were not stolen from the client but merely borrowed with client consent — a violation of RPC 1.8 perhaps, but not a misappropriation deserving disbarment under the Wilson rule. This defense succeeded in Matter of Shelly, 140 N.J. 492 (1995), but not in Matter of DiLieto, 142 N.J. 492 (1995). The facts in Shelly were highly unusual in terms of the long-standing, informal fee payment arrangement between the lawyer and his client, which made feasible the lawyer's claim that the funds he took were only borrowed. In the DiLieto case, however, the lawyer's good faith was highly questionable.

Customarily, when a lawyer's financial records indicate probable misappropriation, the New Jersey Supreme Court imposes an immediate temporary suspension under R.1:20-11 prior to the evidential hearing on the charges set forth in the formal ethics complaint. In order to protect the interests of the lawyer's clients, the court may also appoint an attorney-trustee under R.1:20-19 to take control of the suspended lawyer's practice and make arrangements to return active files and trust funds to the clients.

As to retention of client files beyond the seven year period specified in RPC 1.15(a), see ACPE Opinion 692 (2001) and ACPE Opinion 692 Supplement (2002). Files may be scanned into digital format and retained electronically unless their nature requires that they be retained as originals (e.g. wills or deeds). ACPE Opinion 701 (2006).

F. Personal Conduct

RPC 8.4 declares as unethical various items of personal misconduct when committed by a lawyer. Included are the commission of a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness," and engaging in discriminatory conduct while in a professional capacity. (RPC 8.4(b) and (g)). Paragraph (g),which was anticipated in In re Vincenti, 114 N.J. 275 (1989), is followed in the court rules text by a substantial explanatory comment authored by the court.

Paragraph (b) is not limited to cases in which the lawyer has been convicted, the rule speaking rather of a "criminal act." Nor does the fact of a conviction for one offense prevent an ethics prosecution for a more serious act based upon the facts. Matter of Spina, 121 N.J. 378, 389

(1990). However, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. Matter of Principato, 139 N.J. 456, 460 (1995); R.1:20-13(c)(1).

Paragraph (b) speaks of criminal acts which "reflect adversely" on the lawyer's fitness. Since virtually all criminal acts reflect adversely, this is not a significant limitation.

RPC 8.4(d) declares it to be professional misconduct for a lawyer to engage in conduct "prejudicial to the administration of justice." This rule was violated in Matter of Welch, DRB 11-117 (2011), when the respondent attempted to condition settlement of a contested divorce case upon dismissal of a grievance filed against him by the adverse party. See also ACPE Opinion 721 (2011).

Public discipline is not limited to conduct involving the practice of law or a client relationship but includes any conduct by a lawyer that reveals a lack of basic honor and integrity. Thus, for example, lawyers have been disciplined for their private possession and use of marijuana. In re Echevarria, 119 N.J. 272 (1990); Matter of Pepe, 140 N.J. 561 (1995). And in 1995 the court disciplined two lawyers for disorderly persons offenses of simple assault which constituted domestic violence. In those two cases the court announced that domestic violence in the future would ordinarily result in a suspension from practice. Matter of Magid, 139 N.J. 449 (1995); Matter of Principato, 139 N.J. 456 (1995). Thus, see Matter of Toronto, 150 N.J. 191 (1997); Matter of Margrabia, 150 N.J. 198 (1997).

Lawyers who fail to pay court-ordered child support may have their license to practice law suspended, pursuant to R.1:20-11A. See Matter of Moras, 146 N.J. 558 (1996); N.J.S.A. 2A:17-56.8 (as amended, 1996).

MRPC 1.8(k) in the 2002 Model Rules prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship existed between them before the legal representation began. The Pollock Commission endorsed the rule but in the 2004 revisions the New Jersey Supreme Court decided against including it, preferring to deal with the offense as a form of attorney misconduct under RPC 8.4. Comment 17 to the Model Rule states a rationale for making such conduct subject to discipline:

> "The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of

> harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client."

In In re Gallo, 178 N.J.115 (2003) the respondent attorney had been charged with violating RPC 8.4(b) based upon his admission during his criminal plea hearing that he had committed four acts of non-consensual criminal sexual contact involving three female clients and one pro se female party opponent. Procedurally, the case did not involve an evidentiary hearing. Rather, because of respondent's criminal conviction the Office of Attorney Ethics (OAE) went directly to the Disciplinary Review Board (DRB) on a motion for discipline under R.1:20-13(c)(2). Respondent objected to the DRB considering the written statements of the four victims, since he had not had opportunity to confront them and test their reliability through cross examination and submission of rebuttal evidence. The DRB concurred, and based its sanction (a three year suspension) only upon respondent's admissions at the plea hearing. DRB 04-094 (2004). In its review of the sanction the Supreme Court found the record inadequate for a proper assessment of the "full gravity" of respondent's alleged professional misconduct, and remanded the case to the DRB for a plenary hearing before a Special Ethics Master. At the close of its opinion, the Supreme Court made this significant observation at page 123:

> "We will not prejudge this case, but do feel a need to articulate certain principles. We have traveled a far way from tolerance of sexual misconduct in the workplace and in our profession. We recognize the psychological damage that can be inflicted on the victims of sexual abuse, who silently suffer and do not complain because they feel powerless to do so. The sexual abuse of a client is unacceptable in any profession and in any business setting, and cannot be tolerated in our profession, which holds as sacred the dignity of the individual.
>
> Clients place not just money in trust with their attorneys; they place in trust their most intimate secrets, fears, and yearnings. Our Court has disbarred attorneys who have violated the economic trust of their clients.... Attorneys who commit sexual crimes against their clients take from their victims something more profound than money or goods; they take from their victims their dignity and psychological well-being. Such conduct is grossly incompatible with the standards of professionalism expected of attorneys. Attorneys who sexually molest their clients will be subject to severe disciplinary sanctions."

G. Terminating the Representation

RPC 1.16 deals with mandatory termination, optional termination, prohibited termination and duties post-termination. Under (a) the lawyer must terminate to avoid violation of the RPCs or when discharged by the client. Clients have freedom of choice when selecting counsel and may terminate the representation at any time for any or no reason. Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 18-24 (1992); Nostrame v. Santiago, 213 N.J. 109 (2013).

Under RPC 1.16(a) the lawyer must also terminate if the lawyer's physical or mental condition "materially impairs" the lawyer's ability to represent the client. Two rules of court are relevant here. R.1:28B provides for the creation and operation of the New Jersey Lawyers Assistance Program (LAP), a confidential counseling service conducted by the New Jersey State Bar Association for the benefit of lawyers, judges, law students and law school faculty with alcohol, drug, gambling, emotional, behavioral or other personal problems that impact upon their professional performance. This program can be reached by phone at 800-246-5527 or online at www.NJLAP.org. The second court rule is R.1:20-12 dealing with the legal process of removing from active status lawyers who no longer have the requisite capacity to practice properly because of mental or physical infirmity or illness or because of addiction to drugs or intoxicants.

Under RPC 1.16(b) the lawyer may terminate (unless prevented by (c)) for various good cause reasons which are clearly expressed in the rule. Item (b)(4) in the former New Jersey version had permitted withdrawal if the lawyer considered the client's chosen objective to be "imprudent". With encouragement from the Pollock Commission, the Supreme Court substituted for "imprudent" the words "with which the lawyer has a fundamental disagreement."

RPC 1.16(c) prohibits termination where court rules may require prior judicial approval and such approval is denied. In such circumstances good cause for termination is immaterial. Upon termination, RPC 1.16(d) requires the lawyer to "take steps to the extent reasonably practicable to protect a client's interest...". Note the relevance here of RPC 1.15(a)'s requirement that client records be retained for seven years and ACPE Opinion 692 (2001) and ACPE Opinion 692 Supplement (2002) which identify records that must be retained beyond the seven year limit. Aside from these retention requirements, records requested by the client must be released to the client upon demand per RPC 1.15(b).

V. PARTICULAR CLIENTS

A. Prospective Clients

RPC 1.18 entitled "Prospective Client" was added to the New Jersey RPCs in 2004. Although the New Jersey and Model Rule versions differ slightly, both agree in their definition of a prospective client as "... a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter...". If no client-lawyer relationship results, New Jersey's rule further denominates such a person a "former prospective client".

RPC 1.18 provides both confidentiality and conflict of interest protections to prospective (and former prospective) clients, patterned after but not as complete as the protections for former clients under RPC 1.9. As to confidentiality, prospective clients are entitled to the same protections as former clients enjoy, see RPC 1.18(a) and RPC 1.9(c). Concerning conflicts of interest, however, the rules diverge somewhat with former clients having greater protection than former prospective clients.

The context under both RPC 1.9 and RPC 1.18 is the representation of a person with interests "materially adverse" to those of a former client or former prospective client in "the same or a substantially related matter". Under RPC 1.9(a), the lawyer is precluded across the board from representing the second person (absent consent from the former client). Under RPC 1.18(b), however, the lawyer is precluded only if the lawyer received information from the former prospective client that "could be significantly harmful" to that client. Where the disqualified lawyer is part of a firm, under RPC 1.9(b) and RPC 1.18(c), the firm may screen off that lawyer and proceed if the lawyer did not have a "primary role" in the former client's representation. Under RPC 1.18(c), however, the only limit on the firm's representation of the second person is if the disqualified lawyer has "significantly harmful" knowledge. Even then the firm can screen off that lawyer and proceed if both parties consent.

ACPE Opinion 695 (2004) dealt with conflict of interest and confidentiality issues where a law firm represents a corporation and an employee of that corporation contacts the firm seeking representation on a claim against the corporation. The ACPE easily concluded that the employee constituted a "prospective client" under RPC 1.18. The more difficult issues were whether the firm had a duty to notify the corporation of the employee contact and whether it could ethically continue to represent the corporation even though it had declined to represent the employee. The committee concluded that both RPC 1.6(a) and 1.18 preclude the firm from disclosing the employee contact to the corporation. However, the committee saw no ethical barrier to the firm's continuing representation of the corporation so long as the firm's personnel who received information from the inquiring corporate employee were screened under RPC 1.18.

Screening may not be a feasible protective device in small firms and would, of course, have no application in solo-practitioner situations. Comment 4. to MRPC 1.18 suggests:

> "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation."

B. Organizational Clients

RPC 1.13 deals with two distinct topics relating to organizations- identifying the "client" being represented and disclosing wrongdoing by individuals within the organization. RPC 1.13(a) states that when representing an organization the lawyer's client is the organizational entity, as distinct from its directors, officers, shareholders and the like. At the same time, for the purposes of RPCs 4.2 and 4.3, the lawyer is deemed to represent as well the individuals comprising what the rule refers to as the organization's "litigation control group", consisting of persons responsible for determining the organization's "legal position". RPCs 4.2 and 4.3

contain restrictions upon the lawyer's freedom to contact third parties who are or are not represented by counsel. Contact with persons within an organization's "litigation control group" is equivalent to contact with the organization for the purposes of 4.2 and 4.3. Incidentally, this title was not intended to limit application to matters in litigation; rather, the matter can be of any kind. See the Official Comment of the New Jersey Supreme Court appended to the 2004 version of RPC 4.2.

RPC 1.13's other topic is whistle-blowing, which the rule regulates by means of two progressive steps. RPC 1.13(b), which is the first step, is mandatory. When the organization's lawyer comes to know that someone within the organization is violating the law in relation to the representation, the lawyer must respond, proceeding as "reasonably necessary in the best interest of the organization". Although a response is mandatory, the manner of responding is discretionary so long as the lawyer endeavors to contain the information within the organization. The rule includes suggested measures, which essentially constitute a gradual extension of the information to others at increasingly higher levels in the organization until an appropriate resolution occurs. If the organization's highest level authority fails to resolve the problem, RPC 1.13(c) permits but does not require the lawyer to reveal information "otherwise protected by RPC 1.6(a)", which presumably means taking the information to appropriate public authorities. The ABA Model Rule now incorporates this approach.

A fuller discussion RPC 1.13 appears in the in-house counsel section of this manual.

C. Clients Under a Disability

RPC 1.14 (as revised in 2004) addresses two areas of special concern in the representation of clients under a disability- the need for the lawyer to assume a broader representational role and the need for the lawyer to have greater flexibility in disclosing confidential information. The rule speaks of a client under a disability for the purposes of RPC 1.14 as a person with "diminished" capacity to make "adequately informed decisions". RPC 1.14(a) requires the lawyer who represents a person with diminished capacity to maintain a normal client-lawyer relationship with the client "as far as reasonably possible". In this regard, recall that one of the lawyer's communication duties, as specified in RPC 1.4(c), is to "... explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation".

When the lawyer finds that the client "cannot adequately act in the client's own interest" (or is not making adequately informed decisions), RPC 1.14(b) permits (but does not require) the lawyer to take action to protect the client and the client's interests. In terms of protection, the rule suggests consulting with other individuals or entities who may have the ability to take action or, if appropriate, seeking judicial relief in terms of a guardianship. Such protective action may require the lawyer to disclose confidential information. RPC 1.14(c) authorizes such disclosures as an exception to RPC 1.6(a), but only to the extent "reasonably necessary to protect the client's interests".

Representation of persons with diminished capacity is challenging. The duty to pursue a "normal" client-lawyer relationship obviously requires higher than normal levels of patience and communication skills on the part of the lawyer. As the representation proceeds the lawyer must also be able to discern whether the client is adequately participating. If the lawyer finds that the client is not adequately participating, the lawyer may then proceed with protective steps, but is not obligated to do so. If the lawyer opts not to do so, however, the lawyer cannot ethically continue in the representation because of the provisions in RPC 1.2(a) requiring the lawyer to follow the client's direction in terms of the scope, objectives and ultimate resolution of the representation. Presumably, in such a situation the lawyer would have authority to withdraw from the representation under RPC 1.16(a)(1). However, in doing so the lawyer would be obligated to take reasonable steps to protect the client's interests under RPC 1.16(d). Protection then may well involve the same sort of consultation and guardianship steps contemplated initially by RPC 1.14(b).

In the end, the lawyer who agrees to represent a person of diminished capacity is required to make every reasonable effort to maintain a normal client-lawyer relationship with that person. Should that prove reasonably impossible, the lawyer more than likely will remain responsible for seeing that the client's interests are protected by others, with a guardian ad litem or even a full guardianship being the final step.

D. Public Entity Clients

The primary rule dealing with public entity representation is RPC 1.11. However, provisions dealing with public entity representation also appear elsewhere: RPC 1.8(k) limits simultaneous private employment; RPCs 1.7, 1.8 and 1.9 contain prohibitions against public entities giving consent to cure conflicts; RPC 1.13(f) includes public entities within the provisions regarding representation of organizations; and a great many court decisions and ACPE advisory opinions address conflicts of interest involving representation of public entities. RPC 1.11 is concerned primarily with the situation of the lawyer who leaves the government and enters private employment. I will discuss that first, briefly, and then turn to other public entity conflict issues.

1. Former Government Employment

RPC 1.11, which incorporates RPC 1.9 by reference, deals specifically with the situation of the former government lawyer in three ways: limiting private party representation in (a), protecting confidential information in (b) and allowing for screening in (c). As under the prior versions of RPC 1.11(a), the lawyer may not represent a private client in a matter in which the lawyer previously participated in a substantial way for a public entity. The 2004 revision also prohibits representation if the interest of the private party is materially adverse to the particular public agency in which the lawyer was previously employed. In either case, as before, the prohibition expires after six months from the date the lawyer leaves public employment.

The confidentiality protections in RPC 1.11(b) are limited in scope to information relating to private persons which was acquired by the lawyer while employed by a public entity.

The lawyer may neither reveal such information nor represent another private person with adverse interests where the information could be used against the original person.

The disqualifications represented by (a) and (b) can be neutralized by screening under (c) provided the disqualified lawyer receives no part of the fee and written notice is given to the appropriate government agency.

Somewhat similar restrictions (but not including screening) are contained in RPC 1.11(d) with respect to the reverse situation of the lawyer who leaves private practice and enters public employment.

2. Conflicts in Public Entity Representation

Representation of public entity clients is governed by both the general conflict of interest rules such as RPC 1.7 and by RPC 1.8(k), a special rule added in 2004 as a replacement for RPC 1.7(c) in public entity situations. Unlike the Model Rules, the New Jersey rules expressly prohibit public entities from giving consent to cure conflicts (1.7(b)(1), 1.8(l), 1.9(d)). Because of this limitation, in order to proceed with public entity representation the New Jersey lawyer must be very confident that no conflict exists.

The threshold issue in public entity representation is identifying the public "client". The general conflict rules (1.7, 1.8 and 1.9) refer simply to a "public entity". However, RPC 1.11, the former government employee rule, refers repeatedly to "the appropriate government agency", and RPC 1.13, the organizational client rule, defines organization in 1.13(f) to include "state or local government or political subdivision thereof". These provisions suggest that a public "client" is the specific department or agency for which the lawyer is providing representation.

That notion is inconsistent, however, at least at the county and local levels, with the "official family doctrine" which, historically, lumped all county or municipal agencies into a single county or municipal government client for conflicts purposes. (At the municipal level the principle was usually referred to as the "municipal family doctrine"). This doctrine had a long history in New Jersey, extending back to ACPE Opinion 4 (1963). See, for example, Perillo v. ACPE, 83 N.J. 366, 378-379 (1980); In re Opinion 452, 87 N.J. 45, 48 (1981); ACPE Opinions 104 (1967) and 423 (1979); and Matter of ACPE Opinion 621, 128 N.J. 577-594 (1992).

In 2006 the New Jersey Supreme Court overturned prior caselaw and eliminated the official family doctrine as traditionally expressed. See In re ACPE Opinion 697, 188 N.J.549 (2006). In that matter the committee had been asked whether an attorney whose partner represented a township zoning board or housing authority might simultaneously appear on behalf of private clients in that township's municipal court. The committee ruled against the inquirer, relying upon the municipal family doctrine and insisting that such private representation would create a directly adverse conflict under RPC 1.7(a).

The Supreme Court chose to review Opinion 697, combining in its review consideration of another situation which the committee had condemned based upon Opinion 697. In that second matter the inquiring firm had asked whether it would be precluded per se from serving as

bond counsel or as special litigation counsel for a municipal governing body while simultaneously representing private clients before boards, agencies or the municipal court in that municipality. The Supreme Court reversed the committee. In doing so, the Court provided much needed clarification of the law on several points:

(1) The Court acknowledged that the official family doctrine (designated the municipal family doctrine in the Court's opinion since that was the factual context) was rooted in the appearance of impropriety standard and, as traditionally formulated, the doctrine had been effectively nullified when the appearance standard was eliminated in 2004.

(2) Although the doctrine as traditionally formulated had been nullified, the Court chose to retain the title but give it a new meaning, one which fit into the "contours" of RPC 1.8(k). The new "municipal family doctrine" is in reality simply a per se rule created by caselaw opinion to the effect that if the lawyer represents a municipal governing body in a "plenary" role the lawyer is prohibited from concurrently representing private clients before any subsidiary boards or agencies of that municipality including courts.

(3) This new per se prohibition only applies where the lawyer represents the governing body itself in a "plenary" role. It does not apply if representation of the governing body is pursuant to a "limited scope engagement" (such as serving as bond counsel or special litigation counsel, for example). Nor does the per se prohibition apply if the representation only involves subsidiary boards, agencies or courts. Situations not covered by the per se rule are governed by RPC 1.7(a) and RPC 1.8(k), which state as follows:

> RPC 1.7. Conflict of Interest: General Rule
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> RPC 1.8. Conflict of Interest: Current Clients; Specific Rules
>
> . . .
>
> (k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(4) The Court emphasized the overriding importance of RPC 1.8(k) in non per se situations. The Court did not explain what role, if any, RPC 1.7(a) should play in the conflict analysis. The Court did, however, declare that if a lawyer represents an agency subordinate to the governing body, the lawyer is barred from representing private clients before that agency. (Supra at 569).

On the surface, RPC 1.8(k) is simply a specific implementation of RPC 1.7(a)(2). Both rules prohibit dual representation (in the context of a public entity and a private client) where there is a substantial or significant "risk" that the lawyer's representation of either or both will be compromised. A closer examination of the two rules, however, reveals that RPC 1.8(k) constitutes a somewhat broader prohibition. RPC 1.7(a)(2) speaks of a significant risk that the representation "will be materially limited". By comparison, RPC 1.8(k) says simply "would limit", without any quantifier.

Both rules employ the term "risk". It bears repeating that "risk" in these rules represents a form of actual rather than merely potential conflict. There is, of course, a potential element in a risk conflict but it is concerned with the effect or possible consequences of the actual conflict, i.e. the harm that may be caused to the lawyer-client relationship. Hazard, Hodes and Jarvis, The Law of Lawyering, supra, sec.10.4. Another way to express this would be to state that a risk of harm is more than merely a possibility. The risk is "significant and plausible, even if it is not certain or even probable". Restatement of the Law Governing Lawyers Third (ALI, 2000), Sec.121, Comment c(iii).

In October 2006 the Advisory Committee expressed the view that RPC 1.8(k) conflicts are not imputed to the conflicted lawyer's firm. ACPE Opinion 709. The committee reached this conclusion based upon a literal reading of RPC 1.10(a) and RPC 1.8(j). It should be noted, however, that these two rules are exact copies of their Model Rules counterparts. Since the Model Rules have no provision like New Jersey's 1.8(k), New Jersey's failure to add 1.8(k) to the Model Rule text was obviously an oversight. The Supreme Court corrected the error in December 2006, making it clear that RPC 1.8(k) is to be applied to both the attorney "and his or her firm". In re ACPE Opinion 697, 188 N.J. 549, 567, 569 (2006).

Advisory committee opinion law under RPC 1.8(k) is just beginning to emerge, notably Opinions 702, 706, 707 and 709, all issued in 2006, and 722, issued in 2011. Before we look at them, what about the hundreds of New Jersey advisory opinions dealing with municipal conflicts issued before 2004? In Opinion 707 (2006), which will be discussed more fully in a moment, the committee noted that its own prior rulings in Opinion 464 (1980) and Reconsideration of Opinion 464 (1992) would have prohibited the dual representation under consideration. However, the committee rejected that precedent, declaring:

> "Given that the appearance of impropriety is no longer a standard of conduct under the RPCs, the Committee is of the view that there is no longer a basis for a finding of a per se conflict in the dual office holding in the factual circumstances presented ..."

In Opinion 697, the Supreme Court noted eleven specific instances in which the committee had barred public entity representation based upon the appearance of impropriety in the context of the municipal family doctrine. 188 N.J. at 564-565. Yet, none of that precedent was incorporated by the Court into its on-going prescription for proper analysis of public entity conflict issues. As we have seen, that prescription calls for application of the new municipal family doctrine to determine whether there is a per se conflict, followed by application of the substantial risk test under RPC 1.8(k) or, in directly adverse situations, application of RPC 1.7(a)(1). Pre-2004 court and committee opinions, to the extent based upon the appearance of impropriety, are simply not part of the picture for the purpose of current decision-making.

Advisory committee Opinions 702, 706, 707, 709 and 722 were written on a clear slate. They constitute new law. Opinion 702 is concerned with the so-called "developer rule" as first enunciated in In re A + B, 44 N.J. 331 (1965), which held that municipal attorneys may not represent developers whose projects are located in the same municipality. The inquirer in Opinion 702 wondered whether that rule remains viable given the elimination of the appearance of impropriety standard. The committee was reluctant to offer a definitive ruling, observing that the basis for the Supreme Court's opinion in A+B was unclear. If the basis were in common law, the committee reasoned that it would be without authority to declare the opinion inapplicable. The committee did offer, however, that if the basis for A+B were only ethics law, then under present post-2004 rules there would be no per se conflict.

Opinion 706 is concerned with whether the elimination of the appearance of impropriety standard nullified ACPE Opinion 530 (1984), holding that an assistant county counsel may not serve as mayor of a municipality within that county. The committee's response to the inquirer's question was essentially yes, Opinion 530 was nullified and there is no longer a per se prohibition against such dual office holding. At the same time the committee cited extensively from the Supreme Court's ruling in In re Opinion 415, 81 N.J. 318 (1979),upon which it had based Opinion 530, where the Court enumerated many "intersecting points" where conflicts between the dual roles could arise. In Opinion 415 those "intersecting points" had been cited by the Court to give a factual basis to the appearance of impropriety in that case. On the other hand, in Opinion 706 the committee quoted from that part of Opinion 415 to illustrate the kind of factors the lawyer should consider when assessing substantial or significant risk under RPC 1.8(k) and RPC 1.7(a). The committee's clear departure in Opinion 706 from its per se rulings of the past is truly remarkable. The opinion even went so far as to permit counsel to utilize recusal in order to avoid conflicts as necessary on a case by case basis, if not done to excess. Opinion 706 has its limits, however. See ACPE Opinion 722 (2011), discussed below.

Opinion 707 concerns whether a lawyer may serve as municipal attorney and an elected member of the school board in the same township. The committee's prior opinions, based upon the appearance of impropriety, prohibited such dual office holding per se. Considering those prior rulings abrogated, the committee focused its attention on RPC 1.8(k) and RPC 1.7(a). One might have expected the committee to leave the assessment job under these rules to the inquirer. Surprisingly, the committee confidently did the assessing itself, finding no risk under the facts presented.

Opinion 709 concerns whether a lawyer may practice criminal law in a firm located in a municipality bordering the one in which the lawyer is employed as a police officer. In that opinion the committee dealt with a number of different criminal defense situations and reached a variety of different conclusions, including two per se prohibitions. Overall, however, the committee confirmed its general theme from the earlier 2006 opinions that the burden is upon the lawyer to assess each situation under the risk tests of RPC 1.8(k) and RPC 1.7(a).

Finally, in Opinion 722, the advisory committee considered whether a lawyer may simultaneously serve as county counsel and as mayor of a municipality located in the same county, where the mayor would have "strong-mayor" status under the Faulkner Act. The committee concluded that the county counsel- "strong-mayor" combination created a substantial risk of conflict under RPC 1.8(k), distinguishing Opinion 706 where the dual offices were less powerful.

To summarize, in public entity-private client situations, the Supreme Court's revised official family doctrine, working in combination with RPC 1.8(k) and 1.7(a), provides that if the lawyer's public entity role is plenary, representation of a private client anywhere in that public entity system is prohibited per se. If the lawyer's public entity role involves a subordinate entity, representation of a private client before the same subordinate entity is also prohibited per se. All other public entity-private client situations as well as all public-public situations, except for specific per se rulings such as in ACPE Opinion 722, are subject to the lawyer's own assessment of risk per RPC 1.8(k) and 1.7(a)(2). Note that these two rules speak generally of conflicts involving "another client." Although that other client was a private one in the Opinion 697 analysis, "another client" may also include another public entity, as in ACPE Opinions 706, 707 and 722. Note also that recusal is available as a temporary solution in appropriate situations. APCE Opinion 706.

ACPE Opinion 707 stands for the proposition that the committee's prior opinions based upon the appearance of impropriety standard are no longer binding on attorneys. This represents an enormous shift in the law with respect to public entity clients. Instead of having recourse to a vast collection of rulings addressed to dozens of different public entity client situations, New Jersey lawyers now have for their guidance only the RPCs (primarily 1.7(a) and 1.8(k)) and the precious few opinions that have been rendered by the Supreme Court and the committee since the abolition of the appearance standard in 2004. Until we have more case made law to work with, lawyers should take a conservative approach, consistent with a recognition that representation of a public entity is a position of public trust, requiring the lawyer to be especially circumspect. In re Opinion 415, 81 N.J. 318, 324 (1979).

Although the appearance of impropriety standard has been rescinded for lawyers, it remains for judges. See Code of Judicial Conduct, Canon 2. Moreover, the standard for judges has been extended by judicial opinion to apply to government officials other than judges while functioning in a quasi-judicial capacity. Randolph v. City of Brigantine Planning Board, 405 N.J. Super. 215, 226 (App. Div. 2009).

Recently, the Supreme Court approved an even further extension of the standard- to lawyers who are providing legal services to government officials while they are engaged in

quasi-judicial activities. See Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 220-221 (2013). This may seem as if the Supreme Court is bringing the appearance standard back again for lawyers, but I truly do not believe that to be the case. In Kane at page 220 the Court reaffirmed its rulings in Opinion 697 and Trupos to the effect that the standard has been eliminated for lawyers "generally." Kane should be viewed as merely a very limited exception, both because of its unusual facts and also because it does not involve application of the old standard in a disciplinary context.

Kane involved a local property owner in Hoboken who sought several use variances to make his property more marketable. He succeeded before the Zoning Board, but City Council reversed after a de novo review. The matter came into court by action in lieu of prerogative writs, challenging City Council's ruling. When the case finally reached the Supreme Court, the primary issues centered around a conflict of interest on the part of one of the litigating lawyers. This lawyer had initially represented the party who was the primary objector in the Zoning Board proceedings. That party lost before the Zoning Board and appealed to the Hoboken City Council. Before the appeal was heard the lawyer for the objector changed sides and became Hoboken's city solicitor. Being aware that this created a conflict of interest, the lawyer immediately recused himself and Council hired a replacement lawyer to provide representation on the appeal.

Unfortunately, the side-switching lawyer's recusal turned out to be only partial. He continued his involvement on Council's behalf in two respects. First, he prepared a generic memorandum concerning the processing of Zoning Board appeals, which his temporary replacement circulated to the litigating attorneys. Second, and of more concern to the Supreme Court, he appeared and assisted Council as they formulated and approved a written resolution documenting the decision they had reached on a prior occasion with the help of the replacement lawyer.

In the end, the Court viewed these two facts, and particularly the second, when coupled with the appearance of impropriety standard, as sufficiently tainting Council's decision as to require that it be vacated. Although resurrection of the appearance standard by the Kane Court is troubling, the opinion was driven primarily by the lawyer's leaky recusal. As the Court said, "Recusal, if it is to have any meaning at all, must neither be porous nor partial." (p.224).

VI. ETHICS LAW IN OTHER SETTINGS

The RPCs represent a composite picture of the ethical lawyer. Because the RPCs function as a penal code for discipline purposes one might think that the level of conduct contemplated by them is "bare minimum". Actually, that is not the case. The ethical profile mandated by the RPCs is a challenging, even demanding one. For that reason, it is not surprising that the courts have borrowed the RPCs for use in areas other than discipline. In this section we will consider briefly how the RPCs have impacted the law in two such areas- motions to disqualify and legal malpractice claims.

A. Disqualification

Disqualification of a lawyer in a litigation context is normally based upon some conflict of interest. Disqualification is accomplished by way of motion which, in the New Jersey Superior Court, would be filed pursuant to R.1:6-2. Evidence in support of the motion (as well as in opposition) would be provided by way of affidavits and documentary records incorporated by reference. R.1:6-6.

The case most often cited in disqualification situations is Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201 (1988), which we studied earlier at length in our review of RPC 1.9. The Dewey court concluded that the firm in question was guilty of a conflict of interest by reason of the side-switching of its new partner. Although the Supreme Court based its ruling upon the appearance of impropriety standard of RPC 1.7(c), incorporated by reference into RPC 1.9, the court only reached its conclusion after a "painstaking analysis of the facts". Id at 205.

The precise facts are enormously important in motions to disqualify. Where affidavits produce discrepancies, the court may have to take oral testimony in order to clarify the facts prior to ruling on the motion. In Dewey the Supreme Court even found it necessary to remand the case to the trial court for more extensive factual determinations before it could perform appellate review of the disqualification issues. Id. at 209.

In addition to a complete detailing of the facts, litigants in disqualification motions may find it helpful to engage expert witnesses, both as to the ethical standards involved and also as to the specific responsibilities the supposedly conflicted lawyer was or should have been performing. The written reports of such experts are admissible in disqualification proceedings.

The legal standards cited by courts in disqualification motions have been drawn from a number of areas of the law, including the law of agency, law dealing with the obligations of a fiduciary, law relating to effective representation under the Sixth Amendment, and, of course, the RPCs, which are the source most often cited. As examples of RPC based disqualification cases, see Comparato v. Schait, 180 N.J. 90 (2004); Kramer v. Ciba-Geigy Corp., 371 N.J. Super. 580 (App. Div. 2004); State v. Davis, 366 N.J. Super. 30 (App. Div. 2004); as well as City of Atlantic City v. Trupos, 201 N.J. 447 (2010); O Builders & Associates, Inc. v. Yuma Corporation of New Jersey, 206 N.J. 109 (2011); Twenty-First Century Rail Corporation v. New Jersey Transit, 210 N.J. 264 (2012); and Martin v. AtlantiCare Regional Medical Center, 2011 U.S. Dist. LEXIS 122987 (D.N.J. 2011), all cited in the discussion of RPC 1.9, earlier.

Although the appearance of impropriety standard was removed from the RPCs in 2004, a question remained whether the standard might continue to have relevance in lawyer disqualification proceedings. Support for this appeared in the Pollock Commission's report (2002) and the Supreme Court's Administrative Determinations which responded to that report (2003). See State v. Davis, supra at 43-44 (App. Div. 2004). The Supreme Court ended this small controversy by dicta statement in footnote 5 of its ruling in In re ACPE Opinion 697, 188 N.J.549 (2006):

> "Although the Pollock Commission urged the abandonment of the "appearance of impropriety" rule, it "acknowledge[d] that a court properly may consider the appearance of impropriety as a factor in determining that multiple representation poses an unwarranted risk of disservice either to the public interest or to the interest of the client." Ibid. In light of our ultimate holding in this matter and because it injects an unneeded element of confusion, we reject the appearance of impropriety as a factor to be considered in determining whether a prohibited conflict of interest exists under RPC 1.7, 1.8 or 1.9. ..."

Thus, the appearance standard has no validity either for discipline purposes or in deciding motions to disqualify.

ACPE Opinion 703 (2006) concerned the practice of some lawyers who advise clients to falsely contact other lawyers for representation solely for the purpose of disqualifying those other lawyers, a practice which apparently occurs with some frequency in the matrimonial area. The committee ruled that such conduct is prejudicial to the administration of justice in violation of RPC 8.4(d).

B. Malpractice

Legal malpractice claims require proof of four elements: a duty, breach of the duty, proximate causation and damages. Garcia v. Kozlov, Seaton, Romanini & Brooks, 179 N.J. 343, 357 (2004); Conklin v. Hannoch Weisman, 145 N.J. 395,416 (1996); Albright v. Burns, 206 N.J. Super. 625, 635 (App. Div. 1986). Proof of violation of the RPCs is not sufficient, in itself, to sustain a malpractice cause of action. Baxt v. Liloia, 155 N.J. 190 (1998); Sommers v. McKinney, 287 N.J. Super. 1 (App. Div. 1996); Giles v. Wiley, Malehorn & Sirota, 345 N.J. Super. 119, 125 (App. Div. 2001), cert. den. 171 N.J. 340 (2002). The RPCs may, however, "inform the scope of an attorney's duties". Banco Popular North America v. Gandi, 184 N.J. 161, 182 (2005).

An affidavit of merit must be filed in all legal malpractice cases. N.J.S.A. 2A:53A-27. Typically, the affidavit is provided by an expert either in the field of legal ethics or in the defendant lawyer's substantive area of practice. As to the necessary content of the expert's testimony, see NJRE 703; Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78-79 (App. Div. 2007). Expert witnesses are entitled to a litigation privilege which protects them from malpractice claims based upon their sworn testimony. Reilly, Supple & Wischusen, LLC v. Blum, 2011 WL 798637 (N.J. Super, App. Div. 2011, Unpublished Opinion).

A meaningful treatment of malpractice law would have to be extensive and is beyond the scope of this manual. However, I will briefly address several issues in this area. One of the most difficult malpractice issues is determining appropriate standards of care in matters involving a lawyer's judgment, such as in recommending a settlement. Consider the situation a lawyer faces when a client agrees to settlement of litigation but later changes his or her mind. If the lawyer has not already been discharged by the client, the lawyer must then consider whether to continue

representing the client in an effort to set aside the settlement. A variety of factors would impact upon the lawyer's decision, including whether the lawyer's fee for the prior work has been fully paid and the client's reasons for rejecting the settlement.

Frequently, the client's reasons for rejecting a settlement boil down to dissatisfaction with some aspect of the lawyer's representation. Inferior representation by the lawyer is not likely to result in nullification of the settlement. It is likely, however, to produce a malpractice claim against the lawyer. If the lawyer is aware that malpractice has occurred, the lawyer certainly ought not to try to represent the client any further. Indeed, the lawyer would have an affirmative obligation to disclose the malpractice to the client. RPC 1.4(b), 1.7(b)(2) and Circle Chevrolet v. Giordano, Halleran and Ciesla, 142 N.J. 280, 291-292 (1995).

When clients change their minds after settling and sue their lawyers for malpractice, a common defense is judicial estoppel (sometimes referred to as the doctrine of issue preclusion). This defense reasons that once a client goes on the record, expresses under oath an understanding of the terms of a settlement and acknowledges that he or she is freely and voluntarily agreeing to those terms and considers them fair, then the client may not later attack the adequacy of the lawyer's representation in achieving the settlement. As we will see from the case law in this area, the estoppel defense does not always succeed.

There are four principal New Jersey Supreme Court opinions in this area of law, Ziegelheim v. Apollo, 128 N.J. 250 (1992), Puder v. Buechel, 183 N.J. 428 (2005), Guido v. Duane Morris, LLP, 202 N.J. 79 (2010), and Gere v. Louis, 209 N.J. 486 (2012). All four cases involved malpractice claims arising from settlements where the clients later changed their minds. In Ziegelheim, the client's malpractice complaint alleged that her lawyer failed to make proper investigation, failed to discover her husband's hidden assets, delayed in finalizing the settlement causing delay in alimony payments, failed to memorialize the settlement terms correctly and failed to provide her with the settlement terms in writing so that she could assess the settlement's fairness before placing her consent on the record. The Supreme Court reasoned that the divorce litigation (the proceedings on the record in which the client consented to the settlement) did not determine these issues and that, therefore, the malpractice claims should not be estopped. (Note also, however, that the equitable distribution award to Mrs. Ziegelheim was evaluated at merely 14 percent of the marital assets, after a 28 year marriage!)

In Puder, the basis for invoking judicial estoppel was rather compelling. While the client's malpractice case was pending she retained new counsel and managed to reopen the settlement and negotiate a more favorable settlement. The Supreme Court reasoned that any alleged deficiencies in the first settlement were ameliorated by the second one.

In Guido, the client was the majority shareholder in an SEC registered corporation. He retained counsel to assist him in amending the corporate bylaws to better secure his control. Other shareholder-directors resisted and the matter went into litigation. After several extended negotiating sessions, including mediation by a retired Superior Court judge, the case settled and the terms were place orally upon the court record. Guido gave consent under oath. Almost two years later, having made no effort to vacate the settlement, Guido sued his lawyers for malpractice. They counterclaimed seeking $431,796.69 in past due counsel fees. The Supreme

Court agreed with the trial court and the Appellate Division that there was a genuine issue of material fact as to whether counsel adequately explained to Guido the long term implications of the settlement, some of which were not necessarily obvious. Since this issue was not addressed in the settlement of the litigation, the Guido court refused to estop his malpractice claim.

Finally, in Gere, yet another divorce case, the plaintiff (wife) negotiated her property settlement agreement with the able help of "sophisticated" counsel as well as an accountant and a financial adviser. The agreement contained a provision giving plaintiff a six-month window in which she could decide whether she wished to remain a half-owner of her former husband's business interests, which included a marina. At the close of the six-month period, plaintiff's counsel inquired as to plaintiff's wishes and then sent a letter to the former husband's counsel indicating that plaintiff wished to maintain a one-half interest in all properties except for the marina. Plaintiff did not preapprove this letter and, eventually, disaffirmed it, contending that her intent all along was to retain a half-interest in the marina's underlying real estate but give up her interest in the business operations, for fair value. Plaintiff's position produced litigation, in which she was represented by new counsel. Ultimately, that litigation settled, with plaintiff retaining her half interest in the underlying marina real estate but only a 40 percent interest in the marina business. When the settlement was placed upon the court record, plaintiff through counsel insisted upon a carve-out provision by which her settlement would not foreclose her from pursuing malpractice claims against her former attorneys (both the attorney who authored the disputed letter and the attorney who next succeeded him). Despite the carve-out, when plaintiff then filed a malpractice action against both attorneys, they argued on the basis of Puder that plaintiff's second settlement barred her malpractice claims. The trial court agreed and dismissed her case. The Appellate Division concurred, but the Supreme Court reversed, concluding that the equitable exception in Puder should not be applied because of important factual differences between Gere and Puder. In Puder, the client's second settlement cured the deficiencies she perceived in her first settlement. In Gere, however, the client's second settlement produced less than what she might have obtained under the original settlement. Moreover, as to her original attorney, the second settlement served only as a partial remedy for the problem he had created by the letter he sent subsequent to the original settlement.

There are some practical lessons to be learned here. First, "client remorse" is preventable in many instances if the lawyer thoroughly prepares both the case and the client. For example, in Newell v. Hudson, 376 N.J. Super. 29 (App. Div. 2005), the lawyer's client was hoping for permanent alimony in the context of a relatively short marriage. Before the mandatory settlement conference, the lawyer had the client read Crews v. Crews, 164 N.J. 11(2000) where the Supreme Court clearly explained the prerequisite for alternate forms of alimony. As an accountant, she was competent to understand what she read. The Newell court cited this as a reason to support estoppel of her malpractice claim.

Second, lawyers should be thorough in questioning their clients when settlements are placed upon the court record. As noted in Ziegelheim, if possible counsel should promptly reduce settlement terms to writing for their client to read, enabling the clients to better understand the terms before going before the judge. Then, under oath, the clients should not only be asked whether they understand the terms and agree to them, but whether they consider the terms to be fair (given the fact that the terms reflect somewhat of a compromise). Finally, in

addition to the usual "freely and voluntarily" questions, clients could be asked whether they have been represented by present counsel throughout the litigation and whether they are satisfied with that representation. (Such self-serving questions may not produce binding answers in cases of serious malpractice, but may help minimize claims in borderline cases.)

Another difficult malpractice issue concerns liability to third parties. In Petrillo v. Bachenberg, 139 N.J. 472 (1995), the court held that a lawyer for the seller of real property may be held liable to the potential buyer for not accurately representing the contents of an important percolation test report. In Davin, L.L.C. v. Daham, 329 N.J. Super. 54 (App. Div. 2000), the lawyer for certain commercial rental property knew that foreclosure by the mortgage lender was imminent, but negotiated a 10 year lease of the property without disclosing this fact to the tenant. The court held that the lawyer had a duty to advise his client to make disclosure prior to finalizing the lease and if the client refused, that the lawyer should withdraw from the representation. The case was remanded for trial on the issue of whether the lawyer's failure to so advise the client was a proximate cause of the tenant's damages. See also Banco Popular North America v. Gandi, supra. On the other hand, compare Lyons, Doughty & Veldhuis v. Powers, 331 N.J. Super. 193 (App. Div. 2000).

As noted earlier, a lawyer has a duty under RPC 1.4(b) and 1.7(b)(2) to advise his or her client whenever it appears that the client may have a claim against that attorney. Circle Chevrolet v. Giordano, Halleran & Ciesla, 142 N.J. 280, 291-292 (1995). In this opinion the Supreme Court also ruled that if the lawyer's supposed malpractice occurs in the course of the pending representation, the entire controversy doctrine requires notice to the trial judge and possible inclusion of a malpractice claim in the original action. Supra at 289. The entire controversy portion of the court's ruling was immediately criticized and rather promptly rescinded, although the duty of the lawyer to advise the client of a possible malpractice claim continues. See Olds v. Donnelly, 150 N.J. 424, 440-443 (1997); ACPE Opinion 684 (1998).

Malpractice liability may also attach where a lawyer fails to report another lawyer's ethics violation under RPC 8.3(a). See Estate of Spencer v. Gavin, 400 N.J. Super. 220, 251-252 (App. Div. 2008).

As to the element of causation, the leading New Jersey case is Conklin v. Hannock Weisman, 145 N.J. 395 (1996). That case involved the sale of 100 acres of farmland in Montville, New Jersey to a real estate developer for $12 million. The contract required the purchaser to pay $3 million in cash at the closing and give the sellers back a note and mortgage for $9 million, guaranteed personally by the developer's partners. The contract provided that the $9 million mortgage debt would be subordinated to any mortgages the purchaser needed to give to institutional lenders in order to consummate the purchase and proceed with construction of the condominium/townhouse project. In less than four years the project failed, the developer defaulted on all mortgages, the individual partners went bankrupt and the institutional lenders, whose claims exceeded the value of the property, foreclosed. The sellers lost the $9 million owed to them under the contract of sale as well as their land. The sellers then sued their lawyers, Hannock Weisman, contending that they were not properly advised about the risks involved in the subordination of their mortgage. At trial the jury found malpractice but determined that it did

not proximately cause the sellers' losses. On appeal the Supreme Court concluded that the trial court's charge on proximate cause was improper and remanded the case for a new trial.

Writing for a unanimous court, Justice O'Hern used the case as an opportunity to provide much-needed clarification of the causation factor in legal malpractice cases. He began by observing that causation is "an inscrutably vague notion," (p.416), adding at footnote 5:

> "We have been candid in New Jersey to view this doctrine not so much as an expression of the mechanics of causation, but as an expression of line-drawing by courts and juries, an instrument of 'overall fairness and sound public policy'... based on 'logic, common sense, justice, policy and precedent.'..." (p.417, citations omitted).

Justice O'Hern's opinion recognizes two categories of legal malpractice cases for causation purposes. In simple cases (such as allowing a statute of limitations to run), causation in fact (or "but-for" causation) would apply. In more complex cases, however, where the lawyer's negligence is not the sole cause of injury and there may be intervening causes outside the lawyer's control, the simple but-for test must yield to the "value driven aspects of proximate cause" (p.419). Where, as in Conklin, the client claims that the lawyer provided inadequate or inaccurate advice which was a concurrent cause of harm, causation would be best judged by a "substantial factor" test (p.420).

The matter of proving damages in legal malpractice cases can be complicated. When malpractice occurs in litigation, damages are normally proven using a "suit within a suit" format. Lieberman v. Employers Insurance of Wausau, 84 N.J. 325 (1980); Jerista v. Murray, 367 N.J. Super. 292 (App. Div. 2004). That approach, however, has limitations and does not always fit the circumstances. Proof of damages by means of expert testimony may be equally acceptable and, in appropriate circumstances, even preferable to the suit- within- a suit approach. Garcia v. Kozlov, Seaton, Romanini & Brooks, supra, at 360-361. See also Jerista v. Murray, 185 N.J. 175 (2005); Froom v. Perel, 377 N.J. Super. 298 (App. Div. 2005), cert. den. 185 N.J. 267 (2005).

VII. DISCIPLINE AND FEE ARBITRATION

A. Discipline

The New Jersey Constitution grants to the Supreme Court exclusive authority over the discipline of attorneys, Art. 6, sec. 2, para. 3. Pursuant to that authority the court has established through Rule 1:20 an elaborate multi-tiered disciplinary system, using lawyer and lay person volunteers at both the local "district" level and the intermediate review level, with professional centralized personnel to coordinate the process.

Rule 1:20 contains twenty-four sections and many more subparts as well as official explanatory comments following each section, all of which takes up over sixty pages of text in the rule book. I will present here only a brief summary of the rule.

1. Disciplinary System

At the first level of the system are seventeen District Ethics Committees (DEC). Each committee includes not less than eight members, all appointed by the Supreme Court, including at least four attorneys and at least two lay persons all of whom either reside or work in the district. R.1:20-3(a). Each committee is assisted by a secretary, a lawyer with an office in the district, who is appointed, supervised and paid by the Director of the Office of Attorney Ethics (OAE) R.1:20-3(c).

DECs investigate, prosecute and hold hearings in most ethics cases, although the OAE has concurrent authority to investigate and prosecute the more serious or complex cases (R.1:20-2(b)(1)(A)).

At the middle level, above the DECs, is the Disciplinary Review Board (DRB). Its nine members are appointed by the Supreme Court and include at least five attorneys and at least three lay persons. Convening in Trenton, the DRB has responsibility to review (on appeal) the dismissal of ethics cases after investigation or hearing, and to review all cases in which there is a recommendation for discipline. The DRB has authority to impose all discipline except for disbarment, which can be imposed only by the Supreme Court. R.1:20-15.

At the top level, of course, is the Supreme Court, which is assisted in its administration of the entire disciplinary process by the Director of the OAE. (R.1:20-2) and by the Disciplinary Oversight Committee, which is responsible largely for financial matters. (R.1:20B)

2. Disciplinary Proceedings

The number of grievances filed each year far exceeds the number of cases resulting in public discipline. This is because most cases are dismissed following investigation. That is no reason, however, for attorneys to take the grievance process lightly. Immediate and careful attention to any grievance is surely in an attorney's best interest. It is also mandatory. Failure to cooperate can result in an immediate temporary suspension, as well as an ethics charge based upon that failure. R.1:20-3(g); RPC 8.1; Matter of Skokos, 113 N.J. 389 (1988).

The disciplinary process normally begins with the secretary of the local ethics committee receiving a grievance, usually from a client but occasionally from another attorney or the OAE or a judge (in which case the grievance is designated a "referral"). The secretary screens out cases for which the DEC lacks jurisdiction or if the facts stated, if true, would not constitute misconduct. In the latter instance, there must be concurrence by a designated public member of the DEC. R.1:20-3(e)(2) and (3). Written notice of the declination is given to the grievant but there is no appeal of any dismissal occurring prior to docketing. R.1:20-3(e)(5) and (6); O'Boyle v. District I Ethics Committee, 421 N.J. Super. 457 (App. Div. 2011).

Cases which survive the screening process are docketed, reported to the OAE and assigned to an attorney member of the DEC for investigation. Notice is given to the "respondent" attorney in writing. If requested to supply information or records, the respondent must do so within ten days. Respondent's response must be sent to the grievant, who has fourteen days in which to reply. R.1:20-3(g). The time "goals" established for the investigative stage are six months for standard disciplinary matters and nine months for complex matters. R.1:20-8(a).

After the investigation is completed, a written report is submitted to the chair of the DEC, who determines whether the matter should proceed either as "minor unethical conduct" or a normal unethical conduct case or should be dismissed. Dismissal would occur if there is "no reasonable prospect" of proving misconduct by "clear and convincing evidence." In that instance, written notice is given to the grievant, the respondent and the Director of OAE. The grievant has a right to appeal the dismissal to the DRB within twenty-one days. R.1:20-3(h).

"Minor unethical conduct" is misconduct which if proven would not warrant a sanction greater than a public admonition. The rule specifies types of unethical conduct which do not qualify as "minor," but leaves to the Director of OAE to define what does qualify as "minor."

In cases of minor unethical conduct the rule provides for possible disposition of the matter by agreement in lieu of discipline, with the consent of the Director of OAE. Typically, such an agreement addresses the cause of the misconduct by setting forth certain conditions for respondent to fulfill, after which the matter will be dismissed. One of the likely conditions is participation in the NJSBA's "Ethics Diversionary Program." R.1:20-3(i)(2).

In all unethical conduct cases as well as in minor unethical conduct cases not disposed of by administrative agreement, the prosecution commences with the filing of a complaint. R.1:20-3(i)(3). In cases where the attorney "poses a substantial threat of serious harm," he or she may be subject to immediate suspension. R.1:20-11.

In the past lawyer disciplinary proceedings and related records did not become public unless and until the filing of a formal complaint. However, this confidentiality came under constitutional challenge, prompting the Supreme Court to reconsider and modify its own rule, R.1:20-9. See R.M. v. Supreme Court of New Jersey, 185 N.J. 208 (2005). The ruling in R.M. did not make past concluded matters public but did apply to all matters then in the disciplinary pipeline. Specifically, the ruling permits grievants to make public the fact of their grievances being filed, the contents of the grievances and any results achieved by the disciplinary process. If a grievance is diverted, the grievant may disclose the fact of diversion and that in agreeing to diversion the lawyer admitted to a violation of the disciplinary rules. No other pre-complaint information or records are made public. R.1:20-9 was later revised to confirm the ruling in R.M..

The respondent has twenty-one days to file a verified answer. In the answer the lawyer must set forth "a full, candid, and complete disclosure of all facts reasonably within the scope of the ..... complaint" as well as all affirmative defenses, any mitigating circumstances, a request for a hearing (if desired) and any constitutional challenges to the proceeding. R.1:20-4(e). Failure to

file an answer is deemed an admission of the truthfulness of the complaint and that its allegations provide a sufficient basis for the imposition of sanctions. No further proof hearing is required and the case proceeds directly to the DRB for discipline. R.1:20-4(f).

Discovery is permitted by both sides, but is limited to requests for production of records, reports and other written materials as well as the names, addresses and telephone numbers of persons known to have knowledge or information, designating those the party intends to call as a witness. R.1:20-5(a).

The discovery period is brief. Responses to discovery are to be made within twenty days. R.1:20-5(a)(5). This limitation is critical if the time "goals" for the completion of formal hearings are to be achieved. R.1:20-8(b). Note that disciplinary matters take priority over most other cases. R.1:20-8(g).

Hearings in cases are conducted before three-member DEC panels, consisting of one public member and two lawyer members. More lengthy or complex cases are heard by a Special Ethics Master. R.1:20-6(a) and (b). The standard of proof is "clear and convincing evidence." R.1:20-6(c)(2)(B); In re Breslin, 171 N.J. 235 (2002). Except for deliberations the hearings are open to the public as well as to the grievant and the grievant's attorney, if any. R.1:20-6(c)(2)(D) and (F); R.1:20-9(b). Upon conclusion of the hearings, the panel or Special Ethics Master submits a report to the DRB with findings of fact and conclusions of law and either a letter of dismissal or recommendations as to the form of discipline, depending upon their conclusions as to guilt or innocence. R.1:20-6(c)(2)(E).

Disciplinary proceedings are neither civil nor criminal in nature. R.1:20-7(a). The burden of proving a violation is upon the presenter but the respondent attorney has the burden of proving affirmative defenses and mitigation. R.1:20-6(c)(2)(C). Evidence rules are relaxed, which means hearsay evidence is admissible. However, the "residuum evidence rule" applies, which means that hearsay evidence is insufficient in itself to establish critical facts. R.1:20-7(b). Evidence of prior discipline is not admissible until after a finding of unethical conduct has been made, unless such evidence is "probative of issues pending before the trier of fact". R.1:20-8(n).

As noted earlier, the DRB reviews both dismissals and recommendations for discipline. The review is conducted in most instances de novo on the record below, with oral argument. R.1:20-15(e) and (f). Except for disbarment, which only the Supreme Court may impose, all other sanctions are imposed by direction of the DRB, implemented by an order of the Clerk of the Supreme Court. R.1:20-16(a) and (b). However, such orders may be stayed by the filing of a timely petition for review. DRB sanction alternatives are admonition, reprimand, censure, suspension for a stated term and indeterminate suspension. R.1:20-15A(a). Conditions may also be imposed either as part of a sanction or as requirements for reinstatement. R.1:20-15A(b). On rare occasions the Supreme Court has suspended a sanction and placed the respondent on probation. See In re Alum, 162 N.J. 313 (2000). In re Tomar, Simonoff, Jacoby & Graziano, P.C., 196 N.J. 352 (2008). Before imposing disbarment, the Supreme Court reviews the matter de novo on the record with briefs and oral argument. R.1:20-16(a). In addition, the DRB may impose a fine. R.1:20-15(j).

The "indeterminate suspension" sanction in R.1:20-15A(a) was created by the Supreme Court in 2002 as a response to ongoing protests from the organized bar that disbarred lawyers should be granted some opportunity to seek reinstatement. The Court denied that opportunity- disbarment remains absolutely final in New Jersey- but it fashioned this sanction as an alternative to be used in cases that lie "on the cusp" of disbarment. Supreme Court Administrative Determination dated July 30, 2002. An indeterminate suspension carries with it the qualification that the disciplined lawyer may not seek reinstatement for a minimum of five years.

As of this writing the Supreme Court has yet to approve an indeterminate suspension sanction. In the one instance where the DRB recommended it, the Supreme Court disagreed (although it did not help that the lawyer-respondent failed to appear before the court). In re Hall, 181 N.J. 339 (2004). In substance the Court did impose indeterminate suspensions in two reciprocal discipline cases. See In re Pavilonis, 98 N.J. 36 (1984) and In re Bruneio, 177 N.J. 603 (2003). Both cases involved disbarment in Pennsylvania, where reinstatement is possible after five years. The Court rejected reciprocal disbarment and imposed five years suspensions conditioned upon reinstatement in Pennsylvania.

The Supreme Court is reluctant to establish bright line rules regarding disciplinary sanctions. In Matter of Witherspoon, 203 N.J. 343 (2010), the respondent had attempted to exchange reduced legal fees for sexual favors from three different clients and the relative of a fourth client. The DEC panel proposed a censure and the DRB increased that to a three month suspension. Two members of the Supreme Court would have disbarred the respondent, but the majority opted for a one year suspension, rejecting the dissenters' contention that a harsh, bright line rule was needed:

> "Our system of discipline.... Includes few bright line rules, because few indeed are the acts for which one sanction will be invariably appropriate. ..."
>
> Supra at 358.

A few other sections of Rule 1:20 merit special note. An attorney who is charged with an indictable offense must report it promptly to the OAE Director. R.1:20-13(a)(1). Conviction of an attorney for a "serious" crime will result in an immediate suspension. R.1:20-13(b). Ordinarily, criminal convictions result in motions by the OAE to the DRB for discipline to be imposed without an evidentiary hearing, R.1:20-13(c)(2). On occasion, however, where the lawyer's misconduct is not fully disclosed by the criminal record, the Supreme Court requires an evidentiary hearing. In re Gallo, 178 N.J.115 (2003).

RPC 8.5 was extensively revised in 2004. It deals with both jurisdiction and choice of law as related to lawyer discipline. RPC 8.5(a) establishes that New Jersey has authority to discipline a lawyer regardless of where the misconduct occurs and even if another jurisdiction disciplines the lawyer for the same offense. New Jersey may also discipline a lawyer who is not admitted to the New Jersey bar who comes into New Jersey to practice on a limited basis under RPC 5.5.

As to choice of law, RPC 8.5 (b) provides that as to misconduct related to litigation, the law will be that of the jurisdiction where the tribunal is located. In other misconduct situations, the law will be that of the jurisdiction where the lawyer's misconduct occurred or had its predominant effect. The Model Rule adds to (b)(2): "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur". By not adopting this final sentence, in effect the New Jersey Supreme Court is warning lawyers everywhere that to practice here they must learn New Jersey's rules.

RPC 8.5 should be read in conjunction with R.1:20-14, New Jersey's reciprocal discipline rule. Taken together, the two rules provide that when misconduct occurs in another jurisdiction New Jersey's response is (or should be) to await the results of the disciplinary process in that other jurisdiction and then proceed on a reciprocal basis here. On the other hand, the jurisdiction under RPC 8.5 is sufficiently comprehensive that if no disciplinary action is taken by the other jurisdiction, probable cause action can still be taken here. Likewise, R.1:20-14 is sufficiently flexible that if OAE should consider the sanction imposed by the other jurisdiction to be inadequate it can seek a more severe sanction here. Note that reciprocal discipline cases are brought initially before the DRB, not local District Ethics Committees or Special Ethics Masters. R.1:20-1 4(a)(2).

An attorney against whom a grievance has been filed may submit to discipline, including disbarment, by written consent. R.1:20-10. However, an attorney cannot avoid discipline by resigning from the bar. R.1:20-22.

Discipline may involve restrictions or conditions upon the respondent's future activities, such as being required to practice under the supervision of another attorney and render periodic reports. R.1:20-18. Attorneys who are suspended or disbarred are required to provide notice of that to their clients and others and an attorney-trustee may be appointed to take control of the respondent's legal affairs in order to protect clients' interests. R.1:20-19; 1:20-20. An attorney seeking reinstatement following a suspension must file a detailed and candid petition with a list of required documentation, allowing intimate scrutiny of the respondent's personal life and financial affairs. R.1:20-21.

Rule 1:20-12 deals with the matter of attorneys who lack the capacity to practice law by reason of mental or physical infirmity or illness or because of addiction to drugs or intoxicants. The rule provides that the OAE Director may petition the DRB for an order requiring the attorney to submit to a medical examination to verify the attorney's incapacity. If warranted, the DRB may recommend that the Supreme Court transfer the attorney to "disability inactive status", making him or her ineligible to practice law while the disability continues. Attorneys who have alcohol, drug abuse or gambling problems should seek confidential help from the New Jersey Lawyers' Assistance Program, (800) 246-5527.

For a comprehensive study of specific ethics violations and corresponding disciplinary sanctions, see Ramsey, New Jersey Attorney Discipline, (New Jersey Practice Series Volume 46, Thomson West, updated annually).

B. Fee Arbitration

Fee arbitration is governed by R.1:20A. The system utilizes district fee arbitration committees, administered by the OAE Director, operating in much the same fashion as the ethics committee system. Although fee disputes are not necessarily disciplinary matters, ethical issues may arise in the fee arbitration process, including the reasonableness of the fee being charged (note the reference to RPC 1.5 in R.1:20A-3(b)(1)). See Saffer v. Willoughby, 143 N.J. 256 (1996)

The New Jersey fee arbitration system is simple, swift and inexpensive. It is an optional forum for the client but is mandatory for the lawyer if the client requests it. Once the client elects fee arbitration, any pending litigation to collect the fee is stayed, but the results of the arbitration are binding and can be converted simply into a civil judgment by summary proceedings. No lawsuit to collect a fee may be filed unless the lawyer has given the client the notice concerning the availability of fee arbitration prescribed by R.1:20A-6. Note that it is considered to be a violation of RPC 1.7(a)(2) for lawyer to sue a client to collect a fee while the lawyer is still representing the client. Matter of Simon, 206 N.J. 306 (2011).

1. Fee Arbitration System

Fee arbitration is conducted by fee arbitration committees in seventeen regional districts, corresponding to the seventeen district ethics committees. Members of each committee are appointed by the Supreme Court and include not less than eight members, of which at least four must be lawyers and two lay people. The Supreme Court appoints one of the committee members as the chairperson and the OAE Director appoints a part-time secretary.

Fee committees have jurisdiction to arbitrate fee disputes and to take initial action where overreaching has occurred. Committees have no jurisdiction to hear any dispute where the fee was established as of right pursuant to statute or court rule or where the last services for which the fee is being charged occurred more than six years prior to the arbitration claim being filed. Committees have discretion to hear or decline cases where third parties have a substantial interest, or cases containing substantial legal questions in addition to the fee issue, and cases in which the fee charged exceed $100,000.00. R.1:20A-2.

2. Fee Arbitration Proceedings

Only the client may request fee arbitration. Arbitration can be requested even where the fee has been fully paid or where the lawyer is no longer practicing law. There is an administrative filing fee of $50.

Proceedings are conducted by three members of the district arbitration committee, a majority of whom must be lawyers, or by a single lawyer member if the fee charged is below $3,000. The proceedings are private, no record is kept of the testimony, and formal rules of evidence are not strictly observed. At the same time, the proceedings are formal and testimony is given under oath. R.1:20A-3(b)(4).

The burden of proof is upon the lawyer to prove the reasonableness of the fee by a preponderance of the evidence. R.1:20A-3(b)(1). Proofs would normally include a copy of the retainer agreement or letter to the client setting forth the fee arrangement. See RPC 1.5(b), R.1:21-7(g), R.5:3-5, discussed at IV. B., above. If a written agreement or letter was not prepared in violation of these rules, that does not preclude collection of the fee but fee arbitrators may choose to penalize the lawyer by resolving doubts about the fee arrangement in favor of the client if the client's position is reasonable. Detailed contemporaneous time records are critically important to respondent's fee recovery. Fox v. Drozd, 2010 WL 98894 (App. Div. 2010, unpublished opinion).

Witnesses may be subpoenaed by the committee, upon request and for good cause, R.1:20A-3(b)(2). Testimony by persons other than the parties is not common, but the lawyer may wish to use outside witnesses to establish such reasonableness factors under RPC 1.5(a) as "(3) the fee customarily charged in the locality for similar legal services" or "(7) the experience, reputation, and ability of the lawyer . . . ."

The committee's determination is in writing. The parties must comply with the determination within thirty days (the client paying the fee or the lawyer making a refund). An appeal can be taken, to the DRB, but only on limited and technical grounds. R.1:20A-3(c). See, Linker v. Company Car Corp., 281 N.J. Super. 579 (App. Div. 1995); Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992).

If the award is in the form of a refund to be paid by the lawyer, the client can enforce the award through the OAE Director, who may seek a temporary suspension of the lawyer until the refund is paid. R.1:20-15(k). A lawyer in that situation who files for bankruptcy protection is denied the benefit of an automatic stay under the Bankruptcy Code. Matter of Saluti, 207 N.J. 509 (2011).

If the award is against the client, the lawyer can enforce the award by instituting a summary action under R.4:67. Interest does not accrue on a fee arbitration award until it is reduced to judgment, at which time the normal rule providing interest on judgments applies. R.4:42-11.

VIII. ESSAY ON PROFESSIONALISM

Until now our focus has been upon the lawyer's professional responsibilities at the most basic level, where the duties are code-oriented, mandatory, and carry punitive consequences. We will now shift our focus to the lawyer's professional responsibilities at a higher level, where the law is largely descriptive and aspirational, not mandatory except to the extent that the lawyer chooses to see such responsibilities as being essential to what he or she is as a "professional" person.

Over 50 years ago Dean Roscoe Pound composed a definition of a "profession" which has become classic:

> "There is much more in a profession than a traditional dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service- no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."
>
> The Lawyer From Antiquity to Modern Times (West Pub. Co. and the ABA, 1953), p. 5.

As I read Pound's definition it seems to me that he begins by describing a reality- lawyers as professionals are involved in a "traditional dignified calling" which is also, of course, "a means or livelihood." In the balance of the statement, however, he seems to be stating an ideal- pursuing a "learned art" in "common" with others, in a "spirit of public service" which is "the primary purpose."

Is Pound's definition appropriate for today? The practice of law has become heavily commercialized and competitive. Can we still claim that law is a "traditional dignified calling"? Lawyers today work under tremendous pressure to be financially productive, leaving them little time to attend continuing legal education courses or to perform pro bono services. Can we still claim that we are engaged in a "learned art" or that the primary motivation behind our lawyering is public service? There is growing concern within the profession over the lack of courtesy and respect for others, even a lack of integrity, exhibited by so many lawyers today. In view of such self-centeredness, can we claim that ours is a "common" calling?

I will return to these questions at the conclusion of this essay, when I will propose a restatement of Pound's definition. Meanwhile, in preparation for that, it is important that we consider in some detail and primarily from a New Jersey perspective three themes Pound touched upon in his definition: serving the public interest, performing with honor and maintaining competency.

A. Serving the Public Interest

Dean Pound used the phrase "pursuit of the learned art in the spirit of public service". I confess that I am not sure what he meant by these words. Evidently, he was referring to something other than basic lawyering, even basic lawyering at the highest levels of excellence. I suspect he was referring to a more "grand" lawyering role in which the lawyer not only performs basic lawyering with excellence but shares in common with other lawyers a concern for the overall system of justice, a concern which prompts the lawyer at personal sacrifice to take on public interest responsibilities beyond his or her "livelihood" functions.

With that perspective in mind, we will now consider possible public interest representation under four headings: providing pro bono service, representing unpopular clients or causes, offering holistic advice and reforming the law and improving the legal system.

1. Providing Pro Bono Service

The New Jersey version of RPC 6.1 reads:

> "Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means."

Note that the operative words are "has a responsibility to render" rather than "shall render". The rule purposely stops short of making pro bono service a punishable duty.

The Model Rule version is more elaborate. While also stopping short of prescribing an enforceable duty, the ABA rule quantifies the responsibility: "A lawyer should aspire to render at least 50 hours... per year".

Despite the merely aspirational nature of RPC 6.1, and to the consternation of many practitioners, virtually all New Jersey lawyers are required to perform free legal services when appointed to do so by the judiciary under its "pro bono assignment program". The program was designed to implement the Court's ruling in Madden v. Delran, 126 N.J. 591 (1992). Assignments vary, including both civil and criminal proceedings, but in all cases the clients must be indigent. The Supreme Court's rationale for placing this sort of obligation upon attorneys was well expressed long before the Madden program came into being:

> "The duty to defend the indigent without charge is not a personal duty in the conventional sense of an obligation owed by one man to another, for the breach or nonperformance of which the other is entitled to dollar or other relief. A lawyer does not owe free representation to any and every indigent who chooses to demand it from him. Rather the duty is owed to the Court, and it is the Court's call that he is obliged to answer. The duty is to assist the Court in the business before it. The duty thus is an incident of the license to practice law, and the power to deal with it must therefore repose in the branch of government charged with responsibility for the terms and conditions of the right to practice."
>
> State v. Rush, 46 N.J. 399, 410 (1966).

Although it may be hard to find fault with the Court's analysis in Rush, to label the assigned duties per Madden as "pro bono" is a bit of an oxymoron. Pro bono work requires a joyful spirit, which tends to drain out when pro bono is made mandatory. Note that the Court did not extend Madden to require free representation on behalf of indigent defendants facing incarceration for failure to pay child support. Pasqua v. Council, 186 N.J. 127 (2006).

2. Representing Unpopular Clients or Causes

> "On the cold moonlit evening of March 5, 1770, the streets of Boston were covered by nearly a foot of snow. On the icy, cobbled square where the Province House stood, a lone British sentry, posted in front of the nearby Custom House, was being taunted by a small band of men and boys. The time was shortly after nine. Somewhere a church bell began to toll, the alarm for fire, and almost at once crowds came pouring into the streets, many men, up from the waterfront, brandishing sticks and clubs. As a throng of several hundred converged at the Custom House, the lone guard was reinforced by eight British soldiers with loaded muskets and fixed bayonets, their captain with drawn sword. Shouting, cursing, the crowd pelted the despised redcoats with snowballs, chunks of ice, oyster shells and stones. In the melee the soldiers suddenly opened fire, killing five men. Samuel Adams was quick to call the killings a "bloody butchery" and to distribute a print published by Paul Revere vividly portraying the scene as a slaughter of the innocent, an image of British tyranny, the Boston Massacre, that would become fixed in the public mind."
>
> David McCullough, John Adams, (Simon & Schuster 2001) pp. 66-67.

The following day, lawyer-patriot John Adams, 34 years of age and already known for the "fierce integrity" of his character, agreed to assume the defense of the British captain and his eight soldiers. Ultimately Adams won acquittals for the captain and six of the eight soldiers, much to the great displeasure of the Bostonians.

> RPC 1.2 (b) states:
>
> "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Unlike most RPCs, this rule does not require anything of the lawyer. It does, however, tie directly into the requirement in RPC 1.2(a) that the lawyer "abide by the client's decisions concerning the scope and objectives of [the] representation". Short of having to support the client in action with which the lawyer has a "fundamental disagreement," RPC 1.16(b)(4), (and even there the lawyer's withdrawal is only optional) the lawyer should endeavor to provide "zealous" representation regardless of the lawyer's personal opinion.

Earlier in this manual we considered the representation of clients under a disability per RPC 1.14. I highlighted there the difficulties associated with such representation. The lawyer first must attempt to maintain a "normal" client-lawyer relationship with the client and, if that proves to be impossible, the lawyer then becomes responsible to take "reasonably necessary protective action." Even if fully paid, lawyers who choose to handle such matters surely do so, at least in part, because of a "public interest" motivation. Clients with diminished capacity need to be represented and the lawyers who choose to provide the service do so largely because they

care enough to assume the extra burdens associated with such representation. See also ACPE Opinion 625 (1989).

3. Offering Holistic Advice

Consider the fact that as legal counselors lawyers are granted intimate access to the innermost thoughts and feeling of people who, before becoming clients, may have been total strangers. In confidence, clients often pour out all their troubles to the lawyer, unable to differentiate between legal problems and other problems. The lawyer's task becomes one of separating out the legal problems and proceeding with appropriate focused legal representation.

RPC 2.1 provides:

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

The second sentence of this rule gives the lawyer the option of considering factors other than just law when providing advice to the client. This suggests that, in appropriate circumstances, the lawyer needs to be concerned not just with the client's legal problems but with the client's other needs as well. The lawyer's representation should in some measure become holistic.

Obviously, the lawyer has no business giving advice in matters beyond the lawyer's competence, which in most instances means matters other than law. An ABA Comment to MRPC 2.1 suggests that in matters other than law probably the lawyer's best service is simply in making timely referral of the client to an appropriate expert in another discipline. Regardless of the extent of the lawyer's service beyond law, however, the point I am making is that "serving the public interest" contemplates the possibility that representation of a given client may need to take on holistic proportions.

4. Reforming the Law and Improving the Legal System

RPC 3.1 enables lawyers without fear of being condemned as frivolous to make good faith arguments for the establishment of new law. EC 8-2, one of the "Ethical Considerations" associated with the Disciplinary Rules of the former Code of Professional Responsibility, declared:

> "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, substantial 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..."

Canon 8, one of the broad statements of ethics principles which gave structure to the CPR, urged: "A lawyer should assist in improving the legal system". And New Jersey's "voluntary public interest legal service" rule, RPC 6.1, encourages lawyers to offer "service in activities for improving the law, the legal system or the legal profession". Obviously, lawyers are expected to have a strong interest in doing whatever their talents enable them to do to encourage and improve the profession to which they belong.

B. Performing With Honor

This section responds to what I identified in the introduction to this essay as a growing concern over the lack of integrity, courtesy and respect for others exhibited by so many lawyers. Appendix E consists of a reprint of the 16 "Principles of Professionalism for Lawyers and Judges" adopted in 1997 by the New Jersey Commission on Professionalism in the Law. Notice that the 16 principles are divided into groups of four, with the first three groups directed to lawyers (in their relations with clients, other counsel and the court) and the fourth group directed to judges. As noted in the preamble, these principles are only aspirational, but they do provide a much needed description of how lawyers and judges should manage their professional relationships.

Fundamental to these principles is the conviction, well expressed in principle 4 of the first group, that "... professional courtesy, fair tactics, civility, and adherence to the rules and law are compatible with vigorous advocacy and zealous representation". Various provisions within the RPCs underscore this conviction, at times even by explicit directives. Note, for example, in RPC 3.2 dealing with expediting litigation, the New Jersey rule adds "...and shall treat with courtesy and consideration all persons involved in the legal process". RPC 3.4 contains a list of seven specific directives related to fairness to opposing parties and counsel. RPC 3.6 extensively circumscribes what the lawyer who is participating in a litigated matter may say to the news media. And RPC 4.4(a) requires the lawyer to acknowledge and respect the rights of third parties.

The obligation that the lawyer show integrity and be honest is emphasized particularly in terms of the lawyer's relations with the court (items 1 and 4). Honesty in the professionalism context is more comprehensive than in the candor context of RPC 3.3(a) where the focus is upon material evidential facts. For professionalism purposes honesty relates to every representation the lawyer makes to the court, including, for example, such a minor matter as the lawyer's availability for trial.

C. Maintaining Competence

Dean Pound referred to law practice as "a learned art". MRPC 1.1 speaks to that at the disciplinary level in this way:

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

As pointed up in the Model Rule comments to MRPC 1.1, this rule obligates the lawyer when considering whether to accept employment by a client to assess whether he or she has the requisite knowledge and skill to perform that particular representation properly. If the lawyer is not sufficiently competent, he or she may not accept responsibility for the representation without either enlisting the help of other more competent counsel or acquiring for himself or herself the requisite level of competence through study, training or other types of preparation. Following upon these observations, Comment 6 states:

> "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

In December, 2009, New Jersey finally joined the ranks of states mandating the continuing legal education of all licensed attorneys. New Jersey's program, authorized by R.1:42, requires all licensed lawyers, whether or not they practice in New Jersey, to acquire 24 credit hours of training every two years, with four of the credits being in the area of ethics and professionalism. Details of the program beyond those in R.1:42 appear in the Supreme Court's Administrative Determinations issued October 8, 2009, as amended December 18, 2009, and in the Regulations of the Board on Continuing Legal Education adopted January 26, 2010. Regular continuing legal education is a professional necessity. Competent representation can only be provided by lawyers who are continuing to learn and develop in their fields of practice.

The professional obligation to maintain competence should also be considered in the context of the lawyer's physical and emotional health. As noted earlier in connection with RPC 1.16, the lawyer must withdraw from representation of a client if the lawyer's "physical or mental condition materially impairs" his or her ability to represent the client. Lawyers have a professional obligation to take proper care of themselves. Lawyers with addictive problems or serious depression should get help (the New Jersey Lawyers Assistance Program is an excellent resource). Lawyers who are incapacitated in these ways should voluntarily withdraw from practicing law until they have recovered.

D. Restating "Professionalism"

Let us now return to the questions posed in the introduction to this professionalism topic. Recall that Dean Pound mixed facts and ideals into his definition of the "professional". Of his three factual elements- "traditional dignified calling", "group of men" and "means of livelihood"- only the third seems to belong in any contemporary definition of the legal profession. The "group" today, obviously, consists of women as well as men and in nearly equal numbers. As to "traditional dignified calling" the first two words are no longer appropriate and possibly the third as well. Commercialization now characterizes the practice of law.

The ideals in Pound's definition- "learned art", "common calling" and "spirit of public service"- are admirable, but are they appropriate for today's practice of law? I take a practical approach to professionalism. I believe that whatever ideals we choose to include in our definition should represent attainable goals, not unreachable platitudes. While being truly

aspirational, the ideals in our definition should also be realistic with respect to the realities of today's legal marketplace and lawyering system.

The contemporary practice of law is not like it was in Pound's day. Lawyers then did not practice in large multi-state and even multi-national law firms. Lawyers did not advertise; indeed advertising and soliciting were considered unethical. Lawyers did not compete for business with the intensity they do today. They did not have to meet billable time quotas and have their productivity measured in financial terms. And legal malpractice suits were virtually non-existent.

Pound spoke of a profession as involving a "learned art". Of the several ideals in his definition this one probably fits best into a contemporary definition. Surely it is an important and attainable professional objective that lawyers maintain competency in the areas of their legal practices. Though now mandatory in New Jersey, continuing legal education should be considered a necessary aspect of the lawyer's being a licensed professional.

Pound spoke of a profession as a "common calling". He may have used these words to mean simply the members of a particular vocation, which would be a factual statement rather then the expression of an ideal. However, without making too much out of this, I choose to view Pound's words as the statement of an ideal, with emphasis on the "common" aspect. He is speaking of people who interact with each other in respectful and supportive ways because they share the same vocational mission. The New Jersey "Principles of Professionalism" referred to earlier are entirely consistent with that ideal. They represent attainable goals in terms of how lawyers should be relating to clients, adversaries and judges. Indeed, I believe that most lawyers already practice these principles. For them, the principles stand as a useful reminder of how they are expected to conduct themselves.

Our common calling is being undermined, however, by a number of lawyers who carelessly or even deliberately disregard these principles. Merely reminding them of their responsibility to respect others may not be sufficient. If necessary, in extreme cases disciplinary charges should be brought against such lawyers to enforce the "courtesy and consideration" requirement in RPC 3.2 or the truthfulness requirements in RPCs 3.3 and 4.1.

In a substantial way our common calling is also being undermined by neutral forces unrelated to lawyer character. The practice of law is becoming increasingly impersonal. The profession is crowded. Lawyers shift back and forth between multi-state practices. Others are isolated as in-house practitioners. We no longer know each other well enough to trust each other, let alone possess a genuine concern for one another. The reality is that we are no longer a close-knit community.

One more ideal element remains to be considered- "in the spirit of a public service". I believe Pound intended this phrase to describe an attribute of the professional person's learned pursuit. To Pound, the entire range of the lawyer's lawyering activity should be motivated by a spirit of public service. Not only so, but this "purpose" should hold a primary position in the lawyer's life, ahead of his of her personal ambitions and business concerns.

This is a lofty ideal, possibly too lofty to be a practical standard. An alternative and more achievable approach would be to treat public service not as an attribute of lawyering generally but as a separate component in the lawyer's professional life. Here, the ideal would consist of the lawyer's commitment to performing public service work along with the lawyer's other "livelihood" activities. This is the form of the ideal which has found expression in RPC 6.1:

> "Every lawyer has a professional responsibility to render public interest legal service. ..."

The range of public interest opportunities is wide, including different possibilities such as those I discussed earlier- providing pro bono service, representing unpopular clients or causes, offering holistic advice and reforming the law and improving the legal system. The extent of the lawyer's commitment is difficult to incorporate into an ideal. The Model Rule proposes 50 service hours per year, but the New Jersey rule is silent as to quantity, in recognition of the fact that the circumstances permitting opportunity for public service work vary widely from lawyer to lawyer. Note that RPC 6.1 speaks of lawyers contributing money as well as time. One excellent opportunity in the financial area would be the annual "Campaign for Justice" sponsored by Legal Services of New Jersey.

I will conclude with an effort at restating Dean Pound's definition, narrowing it to the lawyer context and modifying it to account for today's realities:

> The legal profession is composed of people trained in the law who devote their legal art to the representation of others. Although basic lawyering may be their means of livelihood, to them law is more than a business; it is a calling that reaches beyond the ordinary bounds of daily practice in two ways. First, it raises within them concerns for the effectiveness of the legal system in which they practice, particularly as to those financially unable to obtain proper representation, prompting them to contribute freely of their time and resources toward the goal of equal justice. Second, their calling obligates them through personal discipline to treat all persons they may encounter in the course of their professional activities with integrity, courtesy and respect.

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APPENDIX A

CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION

The American Bar Association (ABA) adopted its first code of ethics rules in1908, consisting of 32 *"Canons". Thirteen more were added in* 1928, *another in* 1933 *and a final one in1937. Many were amended as the years past. What appear below are the* 47 *Canons in their final amended form prior to being superseded by the ABA Code of Professional Responsibility in*1969.

1. The duty of the lawyer to the courts.
2. The selection of judges.
3. Attempts to exert personal influence on the court.
4. When counsel for an indigent prisoner.
5. The defense or prosecution of those accused of crime.
6. Adverse influences and conflicting interests.
7. Professional colleagues and conflicts of opinion.
8. Advising upon the merits of a client's case.
9. Negotiations with opposite party.
10. Acquiring interest in litigation.
11. Dealing with trust property.
12. Fixing the amount of the fee.
13. Contingent fees.
14. Suing a client for a fee.
15. How far a lawyer may go in supporting a client's cause.
16. Restraining clients from improprieties.
17. Ill-feeling and personalities between advocates
18. Treatment of witnesses and litigants.
19. Appearance of lawyer as witness for his client
20. Newspaper discussion of pending litigation.
21. Punctuality and expedition.
22. Candor and fairness.
23. Attitude toward jury.
24. Right of lawyer to control the incidents of the trial.
25. Taking technical advantage of opposite counsel; agreements with him.
26. Professional advocacy other than before courts.
27. Advertising) direct or indirect.
28. Stirring up litigation, directly or through agents.
29. Upholding the honor of the profession.
30. Justifiable and unjustifiable litigations.
31. Responsibility for litigation.
32. The lawyer's duty in its last analysis.
33. Partnerships-names.
34. Division of fees.
35. Intermediaries.
36. Retirement from judicial position or public employment.
37. Confidences of a client.
38. Compensation, commissions and rebates.
39. Witnesses.
40. Newspapers.
41. Discovery of imposition and deception.
42. Expenses.
43. Approval of law lists.
44. Withdrawal from employment as attorney or counsel.
45. Specialists.
46. Notice of specialized legal service.
47. Aiding the unauthorized practice of law.

PREAMBLE

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. The Duty of the Lawyer to the Courts

It is the duty of the lawyer to maintain towards the Courts a respectful attitude) not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves,

are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. The Selection of Judges

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending case, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime

It is the right of the lawyer to undertake the defense of a person accused .of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the 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.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. Adverse Influences and Conflicting Interests

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. With 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 obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer, are unworthy of those who should be brethren at the bar, but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable .result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations With Opposite Party

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. Dealing With Trust Property

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

12. Fixing the Amount of the Fee

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable request of brother lawyers, and of their widows and orphans with ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount .involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a bar association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees.

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of compensation, but should always be subject to the supervision of a court, as to its reasonableness.

14. Suing a Client for a Fee

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self respect and with

his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer. May Go in Supporting a Client's Cause

Nothing operates more certainly to create or foster popular prejudice against lawyers as a class and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge. of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost leaning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fee of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. Ill Feeling and Personalities Between Advocates

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyer as Witness for His Client

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. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

20. Newspaper Discussion of Pending Litigation

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or an argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding petitions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the, statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the Jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case, and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyer to Control the Incidents of the Trial

As to incidental matters pending the trial not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Taking Technical Advantage of Opposite Counsel; Agreements With Him

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. As far as possible, important agreements, affecting the rights of clients should be reduced to writing, but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. Professional Advocacy Other Than Before Courts

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27. Advertising, Direct or Indirect

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, or disclosing the amount of a claim or settlement, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but

the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar, schools. attended with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Special Committee on Law lists may be treated as evidence that such list is reputable.

Note: As amended by the Supreme Court July 27, 1961 to be Effective September 11, 1961.

28. Stirring up Litigation, Directly or Through Agents

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate. policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. 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

29. Upholding the Honor of the Profession

Lawyers should expose without fear or favor before the proper tribunals corrupt or, dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owes it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. Justifiable and Unjustifiable Litigations

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. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. Responsibility for Litigation

No lawyer is obliged to act either as advisor or advocate for every, person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving

disloyalty to the law whose ministers we are, or disrespect to the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stem and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders services or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent~ But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

33. Partnerships; Names

Partnerships among lawyers for the practice of their profession are very common and are not to be condemned. In the formation of partnerships and use of partnership names, care should be taken not to violate any law, custom or rule of court locally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the state, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should 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. In the selection and use of a firm name, no false, misleading, assumed or trade name should be used. The continued use of the name of a deceased or former partner, when permissible by local custom is not unethical, but care should be taken that no imposition or deception is practiced through this use. When a member of the firm on becoming a judge is precluded from practicing law, his name would not be continued in the firm name.

Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership employment consists of the practice of law.

34. Division of Fees

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

35. Intermediaries

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment with any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

36. Retirement From Judicial Position or Public Employment

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial Capacity.

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

37. Confidences of a Client

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers

that his obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

38. Compensation, Commissions, and Rebates

A lawyer should accept no compensation, commissions, rebates, or other advantages from others without the knowledge and consent of his client after full disclosure.

39. Witnesses

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand.

40. Newspapers

A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.

41. Discovery of Imposition and Deception

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

42. Expenses

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

43. Approved Law Lists

It is improper for a lawyer to permit his name to be published in a law list the conduct, management or contents of which are calculated or likely to deceive or injure the public or the profession or to lower the dignity or standing of the profession.

44. Withdrawal From Employment as Attorney or Counsel

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or ~oral course in the conduct of his case, or if he persists over the attorneys remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

45. Specialists

The Canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

46. Notice to Lawyers

A lawyer available to act as an associate of other lawyers in a particular branch of the law or legal service may send to lawyers of this State only and publish in any legal journal published in this State a brief and dignified announcement of his availability to serve other lawyers in connection therewith. The announcement should be in a form which does not constitute a statement or representation of special experience of expertness.

47. Aiding the Unauthorized Practice of Law

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate

APPENDIX B

DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE AMERICAN BAR ASSOCIATION (AS AMENDED AND ADOPTED BY THE NEW JERSEY SUPREME COURT)

In 1969 the ABA replaced the old Canons with the Code of Professional Responsibility (CPR). The CPR was organized under nine headings (also designated Canons but not specific in content). Under each Canon were two corresponding groups of specific statements, one group designated Ethical Considerations and the other group designated Disciplinary Rules. The New Jersey Supreme Court, acting under its 1948 New Jersey Constitutional authority to regulate the practice of law, elected to adopt only the Disciplinary Rules, many of which it modified from the ABA version. What appear below are the Disciplinary Rules of New Jersey in their final amended form prior to being superseded by the Rules of Professional Conduct in 1984.

DR 1-101 Maintaining Integrity and Competence of the Legal Profession.
DR 1-102 Misconduct.
DR 1-103 Disclosure of Information to Authorities.
DR 2-101 Publicity in General
DR 2-102 Professional Notices, Letterheads; Offices, and Law Lists.
DR 2-103 Solicitation of Professional Employment.
DR 2-104 Suggestion of Need of Legal, Services.
DR 2-105 Limitation of Practice.
DR 2-106 Fees for Legal Services.
DR 2-107 Division of Fees Among Lawyers.
DR 2-108 Agreements Restricting the Practice of a Lawyer.
DR 2-109 Acceptance of Employment.
DR 2-110 Withdrawal from Employment
DR 3-101 Aiding Unauthorized Practice of Law.
DR 3-102 Dividing Legal Fees with a Non-Lawyer.
DR 3-103 Forming a Partnership with a Non-Lawyer.
DR 4-101 Preservation of Confidences and Secrets of a Client.
DR 5-101 Refusing Employment when the Interests of the Lawyer May Impair His Independent Professional Judgment
DR 5-l02 Withdrawal as Counsel when the Lawyer Becomes a Witness.
DR 5-103 Avoiding Acquisition of Interest in Litigation.
DR 5-104 Limiting Business Relations with a Client.
DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the lawyer.
DR 5-106 Settling Similar Claims of Clients.
DR 5-107 Avoiding Influence by Others Than the Client.
DR 6-101 ..Failing to Act Competently.
DR 6-102 . Limiting Liability to Client.
DR 7-101 Representing a Client Zealously. .
DR 7-102 Representing a Client Within the Bounds Of the Law.
DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
DR 7-104 Communicating with One of Adverse Interest.
DR 7-105 Threatening Criminal Prosecution
DR 7-106 Trial Conduct.
DR.7-107 Trial Publicity.
DR 7-108 Communication with or Investigation of Jurors.
DR 7-109 Contact with Witnesses.
DR 7-1-10 Contact with Officials.
DR 8-101 Action as a Public Official.
DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.
DR 9-101 Avoiding Even the Appearance of Impropriety.
DR 9-102 Preserving Identity of Funds and Property of' a Client.

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.

(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.

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

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

(3)Engage in illegal conduct that adversely reflects on his fitness to practice law.

(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.

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.

(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.

DR 2-101 Publicity and Advertising.

(A) A lawyer shall not knowingly make any representation about his ability, background, or experience, or that of the lawyer's partner, or associate, or about the fee or any other aspect of a proposed professional engagement, that is false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

(B) Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

(1) Contains a material misrepresentation of fact;

(2) Omits to state any material fact necessary, in the light of all circumstances, to make the statement not misleading;

(3) Is intended or is likely to create an unjustified expectation;

(4) Is intended or is likely to convey the impression that the lawyer is in position to influence improperly any court, tribunal, or other public body or official;

(5) Relates to legal fees other than:

(a) A statement of the fee for an initial consultation;

(b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(c) A statement of the range of fees for, specifically described legal services, provided there is reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(e) The availability of credit arrangements; and

(f) A statement of the fees charged by a qualified legal assistance organization in which he participates for specific legal services the description of which would not be misunderstood or be deceptive; or

(6) Contains a misrepresentation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable, warnings or disclaimers necessary to make a representation or implication not deceptive.

(C) A lawyer shall not, on his own behalf, or on behalf of a partner or associate, or any other lawyer affiliated with the firm, use or participate in the use of any form of public communication which:

(1) Contains statistical data or other information based on past performance or prediction of future success;

(2) Contains a testimonial about or endorsement of a lawyer,

(3) Contains a statement of opinion as to the quality of the services or contains representation or implication, regarding the quality of legal services which is not susceptible of reasonable verification by the public;

(4) Is intended or is likely to attract clients by use of showmanship or self-laudation.

(D) A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. A paid advertisement must be identified as such unless it is apparent from the

context that it is a paid advertisement, and shall be communicated to the public only in print media. A. copy of the paid advertisement shall be approved by the lawyer prior to its publication and shall be retained by him for 3 years after publication.
Note: Paragraph (B) amended July 17, 1975 to be effective September 8, 1975; former, paragraphs (A), (B) deleted and new paragraphs (A), (B), (C) and (D) adopted January 26, 1979 to be effective April 1, 1979.

DR 2-102 Professional Notices, Letterheads, Offices; and Law Lists.
(A) A lawyer or law firm shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing, or a similar professional notice or device, if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C).
(B) A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B), or is contrary to law. The corporate name of a professional corporation shall conform to the provisions R.l:21-1A(c). The name of a lawyer who assumes a judicial or other office or position and is thereby prohibited from practicing law or who ceases for reasons other than death or retirement to be associated with a law firm shall not be used in the firm name or in professional notices of or public communications by the firm.
(C) A lawyer shall not hold himself out as having a partnership with one or more lawyers unless they are in fact partners. 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; provided, however, a firm name may not be used in New Jersey unless all those named are or were members of the bar in New Jersey.
(D) 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.
(E) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.
(F) Nothing contained herein shall prohibit a lawyer from permitting the inclusion in law lists and law directories intended primarily for the use of the legal profession, of such information as has been heretofore included in these publications.
Note: Paragraphs (A),'(B), (C) amended and (E), (F) adopted January 26, 1979 to be effective April 1,1979.

DR 2-103 Solicitation of Professional Employment.
(A) A lawyer shall not seek, by in-person contact, his employment (or employment of a partner or associate) by a non-lawyer who has not sought his advice regarding employment of a lawyer.
(B) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner, or associate, or any other lawyer affl1iated with him or his firm, as a private practitioner, if

(1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C); or

(2) The promotional activity involves use of coercion, duress, compulsion, intimidation, threats, unwarranted· promises of benefits, overreaching, or vexatious or harassing conduct.

(C) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client except that he may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.
(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101. However, this does not prohibit a lawyer or his partner or associate or any other lawyer

(5) and to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103{D)(1) through (4) may represent a member of 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 so long as he does not emphasize his own professional experience or reputation and does not undertake 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.

Note: Paragraph (3) amended July 17, 1975 to be effective September 8, 1975.

DR 2-105 Limitation or Practice.

(A) A lawyer shall not hold himself out publicly as or imply that he is a recognized or certified specialist except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of these terms on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

(2) A designation signifying certification as a specialist may be used in accordance with these rules by a member of the bar of this State who has been so certified by the Board appointed by the Supreme Court to administer the certification of the specialty. The legend "practice limited to" may be used only by attorneys who actually so limit their professional undertakings. No other use may be made of the above designations or other words or combinations of words which communicate that an attorney possesses special expertise whether certified by the Board or not.

(B) A statement, announcement, or holding out as limiting practice to a particular area or field of law is permitted by paragraph (A) of this rule if the statement, announcement, or holding out does not include a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR2-101(B) or that violates the regulations contained in DR 2-101(C).

Note: Paragraphs (A)(I)(2) amended and paragraphs (3) and (4) deleted; paragraph (B) adopted January 26, 1979 to be effective April 1, 1979.

DR 2-106 Fees for Legal Services.

(A) A lawyer should charge no more than a reasonable fee. A fee is 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.

(B) At the request of either the client or the lawyer with the client's consent, a fee dispute between them may be submitted to the appropriate Fee Arbitration Committee for resolution pursuant to R.1:20A.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a fee for representing a defendant in a criminal case which is substantially contingent upon the result.

(D) A lawyer shall be disciplined if he shall enter into an agreement for, charge, or collect a fee so excessive as to evidence an intent to overreach his client.

Note: Paragraph (B) amended November 27, 1974 to be effective April 1, 1975. Paragraph (B) amended February 23, 1978 to be effective April 1, 1978.

affiliated with him or his firm from being recommended, employed or paid by or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(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* non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated or sponsored by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any *bona fide* organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer nor any non-lawyer affiliated with him or his firm directly or indirectly which have initiated or promoted such organization which initiation or promotion shall result in financial or other benefit to such lawyer, partner, associate, affiliated lawyer, or non-lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal service furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal services plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, roles of court and other legal requirements that govern its legal service operations.

(g) Such organization has first filed with the Supreme Court and at least annually thereafter on a form prescribed by the Court a report with respect to its legal service plan, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities which plan shall be subject to approval by the Court, and to such rules pertaining to the operation thereof as the Court may from time to time adopt. Such organization shall furnish any additional information requested by the Supreme Court.

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

Note: Paragraphs (B), (C), (D) amended July 17, 1975 to be effective September 8, 1975; paragraph (A) amended and paragraph (B) adopted; former paragraph (B) redesignated (C); former paragraph (D) deleted; paragraphs (D) and (F) amended January 26, 1979 to be effective April, 1979.

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain Counselor take legal action shall not accept employment resulting from that advice, 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 believes to be a client.

(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 DR2-103(D)(1) through

DR 2-107 Division of Fees Among Lawyers.

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

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

(2) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client; and

(3) either the division is made in proportion to the services performed and responsibility assumed by each or the lawyer to whom the matter has been referred has been pursuant to R. 1:39, certified as a specialist, and the total fee charged the client relates only to the matter referred and does not exceed reasonable compensation for the legal services rendered therein.

(B) A lawyer who divides a fee pursuant to this role shall comply with the provisions of R.l:21-6 and R. 4:88-4 (relating to the sharing of fees) of the Rules Governing the Courts of the State of New Jersey.

(1) Whenever the division of fee is between a lawyer who is a certified specialist and a referring lawyer, they shall sign and file with the Administrative Director of the Courts a report as to each matter within 30 days after the final payment by the client pursuant to a fee division arrangement, or 6 months after termination of the litigation, whichever is earlier. The report shall set forth the nature of the matter, the stage at which it was referred; the extent, if any, to which the referring lawyer participated in the conduct of the matter, and the terms of the fee division arrangement.

(C) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to separation or retirement agreement, or professional corporation stock valuation agreement.

Note: Paragraph (A)(l) amended and former paragraphs (2) and (4) deleted; paragraph (3) amended and redesignated (2) and new paragraph (3) adopted; former paragraph (B) redesignated (C) and new paragraph (D) adopted January 26, 1979 to be effective April 1, 1979.

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 may be provided in a *bona fide* retirement plan and then only to the extent reasonably necessary to protect the plan.

(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.

DR 2·109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or believes 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.

(2) Present a claim or defense of 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.

(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 representing a client in other matters shall withdraw from employment if:

(1) He knows or believes 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 believes that his continued employment will result in violation of a Disciplinary Rule.

(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.

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.

(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.

DR 3-101 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a Non-lawyer in the unauthorized practice of law.

(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.

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, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that 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.

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.

DR 4-101 Preservation of Confidences and Secrets to a Client.

(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 to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except as permitted by DR 4-101(C), a lawyer shall not knowingly:

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

(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 or of a third person, 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.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(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.

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.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or believes 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.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes 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 in 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 believes 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 this client.

DR 5-103 Avoiding Acquisition or 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 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.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that the 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.

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 this 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, except to the extent permitted under DR 5-105(C).

(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).
(C) In situations covered by DR 5-105(A) and (B) except as prohibited by rule, opinion, directive or statute, a lawyer may represent multiple clients if he believes that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the facts and 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.
(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 and provided the public interest is not adversely affected, 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 anything of value related to his representation of or his employment by his client.
(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.
(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit except as provided by R. 1:21-1A (Professional Corporations) of the Rules Governing the Courts of the State of New Jersey.

DR 6-101 Failing to Act Competently.
(A) A lawyer shall not:
(1) Handle or neglect a legal matter entrusted to him in such manner that his conduct constitutes gross negligence.
(2) Exhibit a pattern of negligence or neglect in his handling of legal matters generally.
Note: Adopted Feb. 23, 1978, to be effective April 1, 1978.

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.

DR 7-101 Representing a Client Zealously.
(A) A lawyer shall not knowingly:
(1) Fail to seek the lawful objectives of his client through reasonably available means 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, 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 believes that such action would serve merely to harass or maliciously injure another.

(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.

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

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

(7) Counselor assists 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.

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

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

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he believes 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 to the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating with One of Adverse Interest.

(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 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, if, the interests of such person are or have a reasonable possibility of being in conflict with the interests of Ins client.

DR 7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an improper 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:

(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 .

(2) If relevant and unless privileged, the identities of the clients he represents and of the persons who employed him.

(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 basis to believe is relevant to the case or that will not be supported by admissible evidence.

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

(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; 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 or courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

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

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

DR 7-107 Trial Publicity.

(A) Prior to the filing of a complaint, information or indictment, a lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that he expects to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record relating to the matter.

(2) That the investigation is in progress.

(3) That 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 make or participate in making an extrajudicial statement that he expects 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 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 extrajudicial statement that he expects 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 he expects 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 delinquency 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 of litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that he expects 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 examination 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 he expects 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 of 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 not permit his employees and associates to make 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 a member of the jury

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) Except by leave of court no attorney shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to any matter relating to the case.

(D) All restrictions imposed by DR 7-108 upon a lawyer shall also apply to communications with or investigation of members of a family of a venireman or a juror.

(E) 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 disclose any evidence that he or his client has a legal obligation to reveal or produce.

(B) A lawyer shall not advise or cause a person to secrete himself or leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(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.

(D) 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.

(A) A lawyer shall not give or lend anything 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 counselor to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counselor to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

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 an advantage for himself or for a client under circumstances where he believes 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 a client.

(3) Accept anything of value from any person when the lawyer believes 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.

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

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

DR 9-101 Avoiding Even the Appearance of Impropriety.

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

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, and all escrow funds, shall be deposited in one or more identifiable bank accounts maintained in this State, and no funds belonging to the lawyer or 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, a portion of which the lawyer or law firm will be entitled to receive for his own use 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 the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) A lawyer shall comply with the provisions of R. 1:21-6 (Record Keeping) of the Rules Governing the courts of the State of New Jersey.

APPENDIX C

1984 RULES OF PROFESSIONAL CONDUCT AS ADOPTED BY THE NEW JERSEY SUPREME COURT

In 1983, *the ABA retired the Code of Professional Responsibility with its broad Canons and aspirational Ethical Considerations. In its place, the ABA adopted a more straight forward set of disciplinary declarations which it denominated the Model Rules of Professional Conduct (MRPC). In 1984, the New Jersey Supreme Court adopted its own modified version of the MRPC. Over the years, this version was subjected to a fair amount of amendment. What appear below are the New Jersey RPCs in their final amended form (2003) prior to being extensively revised for 2004.*

INTRODUCTION

The Supreme Court has adopted the ABA Model Rules of Professional Conduct, as recommended by the Supreme Court Committee on the Model Rules of Professional Conduct (the "Debevoise Committee") and as revised by the Court. Among the several other recommendations taken into account by the Court in adopting these rules were those by the New Jersey State Bar Association (NJSBA), the New Jersey Prosecutors Association, the United States Securities arid Exchange Commission, the United States Department of Justice, and private practitioners.

The explanatory comments that follow each rule have not been adopted by the Court nor should they be considered as a formal part of the rules. For assistance in interpreting these rules, reference should be made to the official ABA Comments and the commentary by the Debevoise Committee in its June 24, 1983 report, which appeared as a supplement to the July 28, 1983 issue of the *New Jersey Law Journal.*
SPECIAL NOTE: RPC 7.1 through RPC 7.5 are DR 2-101 through DR 2-105 as amended January 16, 1984, with minor editorial changes. They have been renumbered consistent with the ABA Model Rule numbering scheme. The explanatory comments that accompanied the adoption of these amended roles (as published in the January 26, 1984 issue of the *New Jersey Law Journal,* 113 N.J.L.J. 91-93) are again included here for ease of reference (also with minor editorial changes). It should be further noted that the Court is in the process of preparing an additional revision to RPC 7.3 as it relates to prepaid legal services plans, to be soon published for comments in the *New Jersey Law Journal.*

NOTE

These rules shall be referred to as the Rules of Professional Conduct and shall be abbreviated as "RPC"

RPC 1.1 Competence

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

RPC 1.2 Scope of Representation

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

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

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

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

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

RPC 1.3 Diligence

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

RPC 1.4 Communication

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

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

RPC 1.5 Fees

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

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

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

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

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the natures 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.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

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

(2) the client consents to the participation of all the lawyers involved; and
(3) the total fee is reasonable.

RPC 1.6 Confidentiality of Information

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

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client

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

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetuate a fraud upon a tribunal.

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

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

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

(3) to comply with other law.

(d) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsection (b) or (c).

RPC 1.7 Conflict of Interest: General Rule

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

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

(2) each client consent after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation.

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

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

(2) the client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) This rule shall not alter the effect of case law or ethics opinions to the effect that:

(1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial, and

(2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

RPC 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction

and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms that should have reasonably been understood by the client, (2) the client is advised of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

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

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

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

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

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

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

(3) A non-profit organization authorized under R. 1:21-1 (e) may provide financial assistance to indigent clients whom it is representing without a fee.

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

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless (1) the client fails to act in accordance with the lawyer's advice or refuses to permit the lawyer to act in accordance with the lawyer's advice and (2) the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions the lawyer shall not make an agreement unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

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

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

(k) The provisions of RPC 1.7(c) are applicable as well to situations covered by this rule.

RPC 1.9 Conflict of Interest: Former Client

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

(1) represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation with the former client; or

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

(b) The provisions of RPC 1.7(c) are applicable as well to situations covered by this rule.

RPC 1.10 Imputed Disqualification: General Rule

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

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer
had acquired information protected by RPC 1.6 and RPC 1.9(a)(2) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the film has information protected by RPC 1.6 and RPC 1.9(b) that is material to the matter.

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

(e) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in RPC 1.7 except where prohibited by law or regulation, such as the prohibition against a public entity waiving an attorney conflict of interest.

Ed. Note: The last line of paragraph (b) was corrected in Dewey v. R.J. Tobacco Co., 109 N.J. 201, 217-218 (1988) by changing the final cross reference from RPC 1.9(b) to RPC 1.9(a)(2).

RPC 1.11 Successive Government and Private Employment

(a) Except as the law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter (1) in which the lawyer participated personally and substantially as a public officer or employee, (2) about which the lawyer acquired knowledge of confidential information as a public officer or employee, or (3) for which the lawyer had substantial responsibility as a public officer or employee.

(b) An appearance of impropriety may arise from a lawyer representing a private client in connection with a matter that relates to the lawyer's former employment as a public officer or employee even if the lawyer did not personally and substantially participate in it, have actual knowledge of it, or substantial responsibility for it. In such an event, the lawyer may not represent a private client, but a firm with which that lawyer is associated may undertake or continue representation if: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in

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

(d) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and this is not otherwise available to the public.

RPC 1.12 Former Judge or Arbitrator or Law Clerk

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

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

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

RPC 1.13 Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

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

(1) asking reconsideration of the matter;

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

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

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

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

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

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

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

(f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Note: Adopted September 10, 1984 to be effective immediately; amended June 28, 1996 to be effective September 1, 1996.

RPC 1.14 Client under a Disability

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

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

RPC 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

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

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

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

RPC 1.16 Declining or Terminating Representation

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

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

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

(3) the lawyer is discharged.

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

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

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

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

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

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

(6) other good cause for withdrawal exists.

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

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

RPC 1.17 Sale of Law Practice

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in this jurisdiction.

(b) The practice is sold as an entirety, except in cases in which a conflict is present or may arise, to another lawyer or law firm.

(c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.

(1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.

(2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

(3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the New Jersey Law Journal and the New Jersey Lawyer at least thirty days in advance of the effective date of the transfer.

(d) The fees charged to clients shall not be increased by reason of the sale of the practice.

(e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.

(f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this rule.

Note: Adopted October 16, 1992, to be effective immediately; paragraph (t) amended July 10, 1998, to be effective immediately.

RPC 2.1 Advisor

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

RPC 2.2 Intermediary

Subject to the provisions of RPC 1.7:

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

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

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

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

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

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

RPC 2.3 Evaluation for Use by Third Persons

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

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

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

(3) the client consents after consultation.

(b) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.

RPC 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

RPC 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

RPC 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counselor assist another person to do any such act;

(b) falsify evidence, counselor assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligations exists;

(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990.

RPC 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

RPC 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph

(a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto:

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(l) amended October 1, 1992, to be effective immediately.

RPC 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

RPC 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important postindictment pretrial rights; and

(d) make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

RPC 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a) through (c), RPC 3.4(a) through (c), RPC 3.5(a), and RPC 3.5(c).

RPC 4.1 Truthfulness in Statements to Others

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

RPC 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer or is authorized by law to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but is not limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counselling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Note: Adopted Septen1her 10, 1984 to be effective immediately; amended June 28, 1996 to be effective September 1, 1996.

RPC 4.3 Dealing with Unrepresented Person; Employee of Organization

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1. 13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

Note: Adopted September 10, 1984 to be effective immediately; amended June 28, 1996 to be effective September 1, 1996.

RPC 4.4 Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

RPC 5.1 Responsibilities of a Partner or Supervisory Lawyer

(a) Every law firm and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional
Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

(2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RPC 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RPC 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) every lawyer or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

RPC 5.4, Professional Independence of a Lawyer

Except as otherwise provided by the Court Rules:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases a practice from the estate of a deceased lawyer, or from any person acting in a representative capacity for a disabled or disappeared lawyer, may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed upon price; and

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a) (2) amended and paragraph (a)(3) adopted October 16, 1992, to be effective immediately; paragraph (d) amended July 10, 1998, to be effective September 1, 1998.

RPC 5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

RPC 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's rights to practice is part of the settlement of a controversy between private parties.

RPC 6.1 Public Interest Legal Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

RPC 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment
by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

RPC 6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if:

(a) the organization complies with RPC 5.4 concerning the professional independence of its legal staff; and

(b) when the interests of a client of the lawyer could be affected, participation is consistent with the lawyer's obligations under RPC 1.7 and the lawyer takes no part in any decision by the organization that could have a material adverse effect on the interest of a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.

RPC 6.4 Law Reform Activities, Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client, except that when the organization is also a legal services organization, RPC 6.3 shall apply.

RPC 7.1 Communications Concerning a Lawyer's Service

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's service with other lawyers' services; or

(4) relates to legal fees other than:

(i) a statement of the fee for an initial consultation;

(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive.

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee, on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:193(d).

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (b) added June 26, 1987, to be effective July 1, 1987; paragraph (a) amended June 29, 1990, to be effective September 4, 1990.

RPC 7.2 Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or though mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-far-profit lawyer referral service or other legal service organization.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a) amended December 10, 1986, to be effective December 10, 1986; paragraph (c) amended October 16, 1992, to be effective immediately.

RPC 7.3 Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided that the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text; and

(ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, CN 037, Trenton, New Jersey 08625.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with· the lawyer or the lawyer's firm, as a private practitioner, if:

(1) the promotional activity involves use of a statement or claims that is false or misleading within the meaning of RPC 7.1; or

(2) the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by RPC 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's client:

(1) a legal aid office or public defender office;

(i) operated or sponsored by a duly accredited law school.

(ii) operated or sponsored by a bona fide nonprofit community organization.

(iii) operated or sponsored by a governmental agency.

(iv) operated, sponsored, or approved by a bar association.

(2) a military legal assistance office.

(3) a lawyer referral service operated, sponsored, or approved by a bar association.

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with. matters when such organization bears ultimate liability of its member or beneficiary.

(ii) neither the lawyer, nor the lawyer's partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have received any financial or other benefits from such initiation or promotion.

(iii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(iv) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(v) any member of beneficiary who is entitled to have legal services furnished or paid for the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.

(vi) the lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of a court and other legal requirements that govern its legal service operations.

(vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

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

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(4) amended June 29, 1990, to be effective September 4, 1990; new paragraph (b)(4) adopted and former paragraph (b)(4) redesignated and amended as paragraph (b)(5) April 28, 1997, to be effective May 5, 1997.

RPC 7.4 Communication of Fields of Practice and Certification

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraph (b) of this Rule.

(b) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; former rule amended and designated paragraph (a) and new paragraph (b) adopted July 15, 1993, to be effective September 1, 1993.

RPC 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. Except for organizations referred to in R. 1:21-1(d), the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a firm name, any advertisement, letterhead or other communication containing the firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

(c) A firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

(d) Lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public; quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

(f) In any case in which an organization practices under a trade name as permitted by paragraph (a) above, the names or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraphs (a) and (d) amended, paragraph (e) amended and redesignated as paragraph (t) and new paragraph (e) added June 29, 1990, to be effective September 4, 1990.

RPC 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure or information otherwise protected by RPC 1.6.

RPC 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

RPC 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.

(d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and

attorney volunteers' have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (d) adopted October 5, 1993, to be effective immediately.

RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994.

COMMENT BY SUPREME COURT

This rule amendment (the additional paragraph (g)) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as

treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. In re Vincenti, 114 N.J. 275 (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., In re Vincenti, 114 N.J. 275 (1989).

RPC 8.5 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

ATTORNEY ADVERTISING GUIDELINES

As approved by the Supreme Court of New Jersey

Attorney Advertising Guideline 1

In any advertisement by an attorney or law firm, the advertisement shall include the bona fide street address of the attorney or law firm.

Note: Adopted June 29, 1990, to be effective September 4, 1990.

APPENDIX D

(2004) RULES OF PROFESSIONAL CONDUCT OF NEW JERSEY

In 2002, the ABA adopted a large collection of amendments to the MRPC based upon the work of its "Ethics 2000" commission and its multijurisdictional practice commission. New Jersey's "Pollock Commission" and another "Ad Hoc" committee studied the ABA's commission reports and made recommendations to the New Jersey Supreme Court. Based upon that work, the New Jersey Supreme Court adopted a revised version of New Jersey's RPCs, quite unlike the new ABA version, effective January 1, 2004. That new version appears below as amended through September 4, 2013.

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NOTE: These rules shall be referred to as the Rules of Professional Conduct and shall be abbreviated as "RPC".

RPC 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent."

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened denotes the isolation of a lawyer from any participation in a matter through the timely adoption and enforcement by a law firm of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RPC 1.1 Competence

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

RPC 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.

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

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

RPC 1.3. Diligence

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

RPC 1.4. Communication

(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

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

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

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

RPC 1.5. Fees

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

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(2) a contingent fee for representing a defendant in a criminal case.

(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
(2) the client is notified of the fee division; and
(3) the client consents to the participation of all the lawyers involved; and
(4) the total fee is reasonable.

RPC 1.6. Confidentiality of Information

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

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

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

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved;
(3) to prevent the client from causing death or substantial bodily harm to himself or herself; or
(4) to comply with other law.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

RPC 1.7. Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(3) the representation is not prohibited by law; and
(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

RPC 1.8. Conflict of Interest: Current Clients; Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

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

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

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
(3) a non-profit organization authorized under R. 1:21-1(e) may provide financial assistance to indigent clients whom it is representing without fee.

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

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advise of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

RPC 1.9 Duties to Former Clients

(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

RPC 1.10. Imputation of Conflicts of Interest: General Rule

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

(1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;
(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in RPC 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by RPC 1.11.

(f) Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that:

(1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter,
(2) the screened attorney acknowledges the obligation to remain screened and takes action to insure the same, and
(3) the screened attorney is apportioned no part of the fee therefrom.

RPC 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

(1) in which the lawyer participated personally and substantially as a public officer or employee, or
(2) for which the lawyer had substantial responsibility as a public officer or employee; or
(3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and
(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

(c) In the event a lawyer is disqualified under (a) or (b), the lawyer may not represent a private client, but absent contrary law a firm with which that lawyer is associated may undertake or continue representation if:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and
(2) written notice is given promptly to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment,
(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and
(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c).

(e) As used in this Rule, the term:

(1) "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency;

(2) "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

RPC 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk

(a) Except as stated in paragraph (c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding have given consent, confirmed in writing.

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

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral. A lawyer serving as law clerk to such a person may negotiate for employment with a party or attorney involved in a matter in which the law clerk is participating personally and substantially, but only after the lawyer has notified the person to whom the lawyer is serving as law clerk.

(d) An arbitrator selected by a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

RPC 1.13. Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control

group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

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

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

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

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and
(2) revealing the information is necessary in the best interest of the organization.

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

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

(f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

RPC 1.14. Client Under a Disability

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

RPC 1.15. Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

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

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

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

RPC 1.16. Declining or Terminating Representation

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

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

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

(3) the lawyer is discharged.

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

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. No lawyer shall assert a common law retaining lien.

RPC 1.17. Sale of Law Practice

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in this jurisdiction.

(b) The entire practice is sold to one or more lawyers or law firms.

(c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.

(1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.

(2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

(3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the New Jersey Law Journal and the New Jersey Lawyer at least thirty days in advance of the effective date of the transfer.

(d) The fees charged to clients shall not be increased by reason of the sale of the practice.

(e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.

(f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

RPC 1.18. Prospective Client

(a) A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.

(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).

(c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.

(d) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," and if no client-lawyer relationship is formed, is a "former prospective client."

RPC 2.1. Advisor

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

RPC 2.2. (Reserved)

Note: RPC 2.2 ("Intermediary") adopted July 12, 1984 to be effective September 10, 1984; caption and rule deleted November 17, 2003 effective January 1, 2004.

RPC 2.3. Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless:

(1) the lawyer describes the conditions of the evaluation to the client, in writing, including disclosure of information otherwise protected by RPC 1.6;
(2) the lawyer consults with the client; and
(3) the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.

(d) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

RPC 2.4. Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform the parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

RPC 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

RPC 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

RPC 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

RPC 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

(d) contact or have discussions with a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral (hereinafter "judge") about the judge's post-retirement employment while the lawyer (or a law firm with or for whom the lawyer is a partner, associate, counsel, or contractor) is involved in a pending matter in which the judge is participating personally and substantially.

RPC 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Official Comment by Supreme Court (November 17, 2003)

A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

RPC 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

RPC 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

RPC 3.9. Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a) through (d), RPC 3.4(a) through (g), and RPC 3.5(a) through (c).

RPC 4.1. Truthfulness in Statements to Others

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

RPC 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Official Comment by Supreme Court (November 17, 2003)

Concerning organizations, RPC 4.2 addresses the issue of who is represented under the rule by precluding a lawyer from communicating with members of the organization's litigation control group. The term "litigation control group" is not intended to limit application of the rule to matters in litigation. As the Report of the Special Committee on RPC 4.2 states, "... the ''matter'' has been defined as a 'matter whether or not in litigation.'" The primary determinant of membership in the litigation control group is the person's role in determining the organization's legal position. See Michaels v. Woodland, 988 F.Supp. 468, 472 (D.N.J. 1997).

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. See State v. Bisaccia, 319 N.J. Super. 1, 22-23 (App. Div. 1999).

Concerning communication with governmental officials, the New Jersey Supreme Court Commission on the Rules of Professional Conduct agrees with the American Bar Association's Commission comments, which state:

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

RPC 4.3. Dealing with Unrepresented Person; Employee of Organization

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall

make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

RPC 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

RPC 5.1. Responsibilities of Partners, Supervisory Lawyers, and Law Firms

(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

(2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate or holds some other comparable status with the firm.

RPC 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RPC 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

RPC 5.4. Professional Independence of a Lawyer

Except as otherwise provided by the Rules of Court:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) lawyers or law firms who purchase a practice from the estate of a deceased lawyer, or from any person acting in a representative capacity for a disabled or disappeared lawyer, may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed upon price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R.1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;
(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;
(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;
(4) not hold himself or herself out as being admitted to practice in this jurisdiction.
(5) comply with R.1:21-1(a)(1); and
(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R.1:20-1(b) and (c), R.1:28-2, and R.1:28B-1(e) during the period of practice.

RPC 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

RPC 6.1. Voluntary Public Interest Legal Service

Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

RPC 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

RPC 6.3. Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if:

(a) the organization complies with RPC 5.4 concerning the professional independence of its legal staff; and

(b) when the interests of a client of the lawyer could be affected, participation is consistent with the lawyer's obligations under RPC 1.7 and the lawyer takes no part in any decision by the organization that could have a material adverse effect on the interest of a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.

RPC 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client, except that when the organization is also a legal services organization, RPC 6.3 shall apply.

RPC 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

> (1) is subject to RPC 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
> (2) is subject to RPC 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by RPC 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), RPC 1.10 is inapplicable to a representation governed by this RPC.

RPC 7.1. Communications Concerning a Lawyer's Service

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or

(4) relates to legal fees other than:

(i) a statement of the fee for an initial consultation;

(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

Official Comment by Supreme Court (November 2, 2009)

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

RPC 7.2. Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

RPC 7.3. Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient; and

(ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if:

(1) the promotional activity involves use of a statement or claim that is false or misleading within the meaning of RPC 7.1; or

(2) the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by RPC 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school.

(ii) operated or sponsored by a bona fide nonprofit community organization.

(iii) operated or sponsored by a governmental agency.

(iv) operated, sponsored, or approved by a bar association.

(2) a military legal assistance office.

(3) a lawyer referral service operated, sponsored, or approved by a bar association.

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal

services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters when such organization bears ultimate liability of its member or beneficiary.

(ii) neither the lawyer, nor the lawyer's partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have received any financial or other benefit from such initiation or promotion.

(iii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(iv) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(v) any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own expense except where the organization's plan provides for assuming such expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.

(vi) the lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

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

RPC 7.4. Communication of Fields of Practice and Certification

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.

(d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

RPC 7.5. Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. Except for organizations referred to in R. 1:21-1(e), the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a firm name, any advertisement, letterhead or other communication containing the firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

(c) A firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

(d) Lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

(f) In any case in which an organization practices under a trade name as permitted by paragraph (a) above, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

RPC 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

RPC 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

RPC 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.

(d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

> (1) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and
>
> (2) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Comment by Supreme Court (May 3, 1994)

This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities

in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989).

RPC 8.5. Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be:

> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

APPENDIX E

Principles of Professionalism for Lawyers and Judges
NEW JERSEY COMMISSION ON PROFESSIONALISM IN THE LAW

Preamble

Adherence to standards of professional responsibility, along with a broad respect for the law, is a hallmark of an enlightened and effective system of justice. The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Both are indispensable ingredients in the practice of law, and in the orderly administration of justice by our courts.

The following Principles, which focus on the goals of professionalism and civility, are aspirational in nature and are designed to assist and encourage judges and lawyers to meet their professional obligations. We encourage all judges and lawyers to make a commitment to these Principles, and to conduct themselves in a manner that preserves the dignity and honor of the judiciary and the legal profession.

Principles

Lawyers' Relations With Clients

1. To a client, a lawyer owes diligence, competence, faithfulness and good judgment, in the pursuit of client objectives.

2. Clients must be treated with respect. A lawyer should provide objective advice and strive to represent the client's interests as expeditiously and efficiently as possible. Lines of communication must be kept open and explanations provided for actions taken in the course of representation. Billing practices should be fully explained to a client at the time representation is undertaken.

3. Clients should be advised against pursuing a course of action that is without merit, and should avoid tactics that are intended to harass, or drain the financial resources of the opposing party.

4. Clients should be advised that professional courtesy, fair tactics, civility, and adherence to the rules and law are compatible with vigorous advocacy and zealous representation.

Lawyers' Relations With Other Counsel

1. To opposing counsel, a lawyer owes a duty of respect, courtesy and fair dealing, candor in the pursuit of the truth, cooperation in all respects not inconsistent with the client's interests, and scrupulous observance of all agreements and mutual understandings.

2. A lawyer should respect a colleague's schedule. Agreement should be sought on dates for meetings, conferences, depositions, hearings, trials and other events. A reasonable request for a

scheduling accommodation, extension of time, or waiver of procedural formalities should not be refused if the interests of a client will not be adversely affected.

3. Forms of pleading, discovery, motions, or other papers, should not be used as a means of harassment, or for gaining an unfair advantage. The filing or service of motions, pleadings or other papers should not be timed so as to unfairly limit another party's opportunity to respond, or harass counsel.

4. In the conduct of negotiations, or litigation, a lawyer should conduct himself for herself with dignity and fairness and refrain from conduct meant to harass the opposing party. A lawyer should not advance groundless claims, defenses and objections.

Lawyers' Relations With the Court

1. To the court, a lawyer owes honesty, respect, diligence, candor and punctuality. A lawyer has a duty to act in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.

2. A lawyer must avoid frivolous litigation and non-essential pleading in litigation. Settlement possibilities should be explored at the earliest reasonable date, and agreement should be sought on procedural and discovery matters. Delays not dictated by a competent and justified presentation of a client's claims or defenses should be avoided.

3. As an officer of the court, a lawyer should act with complete honesty; show respect for the court by proper demeanor; and act and speak civilly to the judge, court staff and adversaries, with an awareness that all involved are integral parts of the justice system.

4. A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack.

Judges' Relations With Lawyers and Others

1. To lawyers, parties, and all participants in the legal process, a judge owes courtesy, patience, respect, diligence, punctuality and fairness.

2. A judge must maintain control of proceedings, and has an obligation to ensure that proceedings are conducted in a civil manner. Judges should establish a climate of professionalism that upholds the dignity of the bench and bar. A judge should show respect for the bar by treating lawyers with civility and personal courtesy.

3. A judge should ensure that disputes are resolved in a prompt and efficient manner. However, hearings, meetings, conferences and trials should be scheduled with appropriate consideration to the schedules of lawyers, parties and witnesses.

4. A judge should remain knowledgeable of the law, rules and procedure, and apply them in a fair and consistent manner that enables all parties an adequate opportunity to present their cases.

Adopted 1997

APPENDIX F

CROSS REFERENCE TABLES FOR ETHICS RULES AND ADVISORY OPINIONS *

* Number alone represents an ACPE opinion, number plus A represents a CAA opinion and number plus U represents a CUPL opinion.

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1.3- 625, 681, 692S
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447- affirmed	86 N.J. 473 (1981)
452- affirmed	87 N.J. 45 (1981)
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662- reversed	133 N.J. 22 (1993)
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Committee on Attorney Advertising

39- vacated	197 N.J. 66 (2008)

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24- modified	128 N.J. 114 (1992)
26- affirmed in part, reversed in part	139 N.J. 323 (1995)
33- modified	160 N.J. 63 (1999)

APPENDIX G

INDEX TO THE OPINIONS OF ADVISORY COMMITTEE ON PROFESSIONAL ETHICS, COMMITTEE OF ATTORNEY ADVERTISING AND COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

NOTE: All references are opinion numbers. Numbers without a prefix are opinions of the Advisory Committee on Professional Ethics. Numbers with and "A" prefix refer to Committee on Attorney Advertising opinions, numbers with a "U" prefix refer to Committee on the Unauthorized Practice of Law opinions, and numbers with an "S" suffix denote a supplemental opinion. Two numbers separated by "/" indicate a joint ACPE and CAA opinion.

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