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MAINE BAR RULES

Proposed Rule 3: Code of Professional Responsibility

This document has been prepared by the Select Commission on Professional Responsibility. The Supreme Judicial Court of Maine will hold a formal public hearing on Proposed Rule 3 in Augusta at the Kennebec County Courthouse on Monday, March 12, at 2:00 p.m.

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RULE 3: CODE OF PROFESSIONAL RESPONSIBILITY

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### Rule 3: Code of Professional Responsibility

#### 3.1 Scope and Effect

(a) This Code shall be binding upon attorneys as provided in Rule 1(a). Violation of these rules shall be deemed to constitute conduct "unworthy of an attorney" for purposes of 4 M.R.S.A. §851 and Rule 7(e)(6)(A). Nothing in this Code is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation; and the prohibition of certain conduct in this Code is not to be interpreted as an approval of conduct not specifically mentioned.

(b) This Code is prospective in application and shall not affect disciplinary proceedings relating to conduct occurring before its effective date.

#### Reporter's Notes

Rule 3 of the Maine Bar Rules is entitled Code of Professional Responsibility and it replaces the Maine version of the American Bar Association Code of Professional Responsibility as amended from time to time by the Maine State Bar Association. The adoption of Rule 3 by the Supreme Judicial Court removes all doubt of the legal status of the Code as the source of positive law governing the conduct of attorneys within this State.

The Code is the result of over a year of study by the Court-appointed Select Commission on Professional Responsibility. The Commission received substantial assistance from the general public, the Department of the Attorney General, the Maine State Bar Association and many individual attorneys. Its work was guided by two basic principles recognized at the inception:

(1) the existing code was undesireably complex in structure and prolix in statement, and (2) time and resources did not permit an entirely original exploration of this difficult area. The latter judgment was reinforced by the knowledge that such basic studies are in process elsewhere by groups with much more leisurely timetables. As a consequence, the Commission determined to rework existing materials to achieve greater clarity without sacrificing coverage. The first step in this process was a decision to follow the lead of the Supreme Court of California in eliminating both the Canons and the so-called Ethical Considerations from the new code. Although quaint and inspirational, the Canons themselves are too general and lofty to be of practical value as standards for professional conduct. The Ethical Considerations, while valuable to the aspirational aspects of a lawyer's moral development, are not properly a part of a set of mandatory standards designed to be the enforced minimal level of conduct for lawyers. This left the Code's Disciplinary Rules which the Commission completely reorganized into groupings which reflect the place of the various standards or constraints in terms of a particular aspect of professional life. It is important to note, however, that the placement of a particular rule in a group or category does not in itself limit the rule to situations existing or arising in that category. No rule is limited to a particular aspect of professional activity unless its terms contain such a limitation.

The nine categories into which the rules here have been divided are: .1 Scope and Effect; .2 Admission, Disclosure and Misconduct; .3 Fees; .4 Acceptance of Employment; .5 Withdrawal from Employment; .6 Conduct During Representation; .7 Conduct During Litigation; .8 Specialization; and .9 Publicity and Advertising.

Finally, the Commission has studied each Disciplinary Rule (and variations thereof) in terms of relevance, succinctness and completeness. The result has been varying degrees of restatement looking toward simplification. No change has been made without careful consideration.

Rule 3.1 is jurisdictional. It recites the place of the Code within the Bar Rules and affirms the exclusive jurisdiction of the Supreme Judicial Court by reference to Rule 1(a); and it recognizes the place of legislation in aid of that exclusive jurisdiction by reference to 4 M.R.S.A. §851.

### 3.2 Admission, Disclosure and Misconduct

#### (a) Unauthorized Practice

(1) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of law or court rule.

(2) A lawyer shall not form a partnership or a professional corporation with a person not licensed to practice law if any of the activities of the partnership or corporation consist of the practice of law.

(3) A lawyer shall not aid any person, association, or corporation in the unauthorized practice of law.

#### Reporter's Notes

Rule 3.2 collects in modified form material formerly located in ABA Disciplinary Rules 1-101, 1-102, 1-103, 3-101, 3-103, 8-101 and 8-102. As reorganized, the rule collects: (1) standards relative to unauthorized practice; (2) the duties to be candid and truthful in connection with applications for licensure and to avoid reckless or false statements about judges or judicial officials; (3) special constraints upon lawyers who serve as public officials; (4) general prohibition of stated misconduct; and (5) a qualified duty to provide information about the conduct of other lawyers. The prohibitions and mandates of Rule 3.2 have in common a focus upon activities that are neither directly client-oriented nor encountered in connection with the lawyer-client relationship.

Rule 3.2(a) merges ABA DR 3-101 (Aiding Unauthorized Practice of Law and DR3-103 (Forming a Partnership with a Non-Lawyer). As the essence of the latter prohibition is unauthorized practice, it was felt it should be placed directly under that rubric. The Commission was aware of the growing interest in interdisciplinary service organizations but believed the public interest would not be best served by their encouragement on a proprietary level, in the legal profession. Among the goals supported by this decision are : (1) minimal public confusion as to the nature and legitimacy of proffered services; (2) maintenance of clear and unrestricted authority in the Supreme Judicial Court over the practice of law; and (3) avoidance of the difficult problems that would be posed by the substantive law of partnerships under a contrary rule. Lawyers and law firms



are, of course, free to employ or otherwise retain in a non-proprietary capacity economists, physicians, psychologists or others so long as there is neither a delegation nor a representation of authority to practice law.

Rule 3.2(a) contains several minor changes in language. These are not intended to effect substantive changes. Specifically, while 3.2(a)(2) makes it clear that a partnership interest in an unlicensed law school graduate is improper, the rule is not intended to preclude interstate law firms that are properly managed. Publicity limitations on such firms are set out in Rule 3.9(e).

Former DR3-102 (Dividing Legal Fees With a Non-Lawyer) now appears as Rule 3.3(e).

(b) Misstatements on Admission

(1) In connection with his application for admission to the bar, a lawyer shall not make any statement which he knows or should know is false or misleading nor shall he fail to disclose any fact or information which he knows or should know is material to such application.

(2) 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.

Reporter's Notes

Rule 3.2(b) is a restatement of DR1-101 (Maintaining Integrity and Competence of the Legal Profession.) Paragraph (1) contains several substantive changes designed to raise the standard relating to deception by one seeking a license to practice law. As to false statements, an objective standard is adopted by the elimination of the concept of materiality. In essence, all statements made by an applicant in connection with his application are deemed to be material; and no deliberate or reckless falsehood will be tolerated. The duty of disclosure is also broadened. Although materiality is retained in this part of the rule, the old requirement that the data withheld must have been specifically requested by the licensing authority has been deleted. If an applicant has information which he knows or should know is material to the question of his admission, he must

disclose it whether or not it has been requested. As stated, the new rule precludes the negligent as well as the deliberate nondisclosure of a material fact.

Paragraph (2) of Rule 3.2(b) is taken verbatim from DR 1-101(B). The prohibition of the furtherance of an unqualified candidacy is subjective, i.e., a violation will exist only when the lawyer actually knew of the disqualifying facts.

(c) Misstatements About Judges

(1) A lawyer shall not knowing or carelessly make false statements of fact concerning the qualification of a candidate for election or appointment to a judicial office.

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

Reporter's Notes

Rule 3.2(c) is former DR 8-102 with one change. The words "or carelessly" have been added to both paragraphs in order to proscribe negligent as well as deliberate false charges. This codification of case law is believed to be a correct statement of the public interest in a balance between the exposure of corruption or incompetence and the preservation of confidence in the courts as the cornerstone of governmental structure.

DR 8-103 (Lawyer Candidate for Judicial Office.) has been eliminated in the new code. To the limited extent that the matter is relevant in Maine, the Commission believes it is best dealt with elsewhere.

(d) Acts as a Public Official

A lawyer who holds public office shall not:

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

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

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

Reporter's Notes

Rule 3.2(d) formerly appeared as DR 8-101. It is unchanged.

(e) Disclosure of Misconduct by Other Lawyers

(1) A lawyer possessing unprivileged knowledge of a violation of the Maine Bar Rules shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(2) 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.

Reporter's Notes

Rule 3.2(e) formerly appeared as DR 1-103 (Disclosure of Information to Authorities.) It was changed only editorially in paragraph (1). The effect of the change is to make it clear that the duty of disclosure extends to knowledge of a violation of any of the Bar Rules. Both paragraphs treat knowledge subjectively and neither imposes any duty to investigate.

(f) Other Misconduct

A lawyer shall not:

(1) Directly or indirectly violate, circumvent or subvert any provision of the Maine Bar Rules.

(2) Engage in illegal conduct involving moral turpitude.

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

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

(5) Engage in any other conduct that adversely reflects upon the courts, the legal profession or his fitness to practice law.

#### Reporter's Notes

Rule 3.2(f) comes from DR1-102. Paragraph (1) combines former paragraphs (1) and (2) into an expanded prohibition of violation of any of the Maine Bar Rules. Although the rule stops short of imposing general vicarious responsibility, it is intended to be broad enough to interdict all active violations as well as passive behavior in the face of misdeeds by those over whom the lawyer has a measure of control. The paragraph is related to Rule 3.1 and 7(e)(6)(A). Paragraphs (2), (3), and (4) are old paragraphs (3), (4), and (5) respectively adopted here without change. Paragraph (5) is old paragraph (6) somewhat expanded to include a prohibition of conduct adversely reflecting upon the courts or the legal profession as well as the lawyer's fitness to practice law.

### 3.3 Fees; Fee Arbitration; Fee Division

#### (a) Excessive Fees.

A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive 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 of the lawyer.

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

(4) The responsibility assumed, 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 performing the services.

(8) Whether the fee is fixed or contingent.

(9) The informed written consent of the client as to the fee agreement.

#### Reporter's Notes

Rule 3.3(a) is a slight modification of DR 2-106 (A) and (B) (Fees for Legal Services). The first sentence of the rule has been changed by the deletion of the word "clearly" which preceded "excessive" in DR 2-106(A). The deletion is based upon the proposition that if, under the criteria established, it is suggested that "clearly excessive" somehow differs from "excessive" that difference should benefit the client. The balance of the opening paragraph and the first three subparagraphs are unchanged from DR 2-106(B). Subparagraph (4) was changed by the addition of "responsibility assumed" as a criterion of reasonableness. Subparagraphs (5), (6), (7), and (8) are unchanged. Subparagraph (9) is new. The Commission believes that the written agreement of a fully informed client should be a factor to be considered on the issue of reasonableness. Such an agreement does not in itself make an excessive fee reasonable.

DR 2-106(C) was omitted as inappropriate here. The substance of that provision now appears in Rule 8(c).

(b) Credit Cards. A lawyer may accept payment by credit card for legal services.

Reporter's Notes

Rule 3.3(b) is from DR 2-106(D). The rule has been changed by the deletion of the prohibition against increasing the fee to cover the cost of credit. That prohibition did not, and arguably should not, preclude the inclusion of such costs in office overhead; and the Commission believes the question of transferring those costs to all clients as opposed to confining them to those clients benefitted by the credit arrangement is a matter best left to the individual lawyer's discretion.

(c) Fee Arbitration. A lawyer admitted to practice in this State shall submit upon the request of his client, the resolution of any fee dispute to arbitration in accordance with Rule 9.

Reporter's Notes

Rule 3.3(c) is new. It is the operative section providing for compulsory fee arbitration in accordance with the procedures of Rule 9(e). The mandatory aspects of fee arbitration, of course, apply only to lawyers; not to clients.

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

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

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

(3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client. This provision does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

Reporter's Notes

Rule 3.3(d) was formerly DR 2-107. It is unchanged. The rule forbids fee-splitting unless the total fee is reasonable, the allocation is reasonable and the arrangement has received advance informed consent from the client.

(e) Dividing Fees with Non-Lawyers. A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

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

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

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part upon a profit-sharing arrangement.

Reporter's Notes

Rule 3.3(e) formerly appeared as DR 3-102 (Dividing Legal Fees with a Non-Lawyer). It is unchanged. It forbids dividing legal fees with non-lawyers except where certain payments are made to the administrator or the executor of a deceased lawyer. The rule supports Rule 3.2(a).

### 3.4 Acceptance of Employment

#### (a) Disclosure of Interest.

Before accepting any professional employment a lawyer shall disclose to the prospective client his relationship, if any, with the adverse party, his interest, if any, in the subject matter of the employment, and all the circumstances regarding his relationship to the parties and any interest or connection with the matter at hand that could influence the client in the selection of a lawyer.

#### Reporter's Notes

Rule 3.4(a) has no counterpart in the present code. Although DR 5-101(A) (Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment) is a disclosure provision and although DR 5-105(A) (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer) provides some control of conflict of interest situations, neither provision has the reach of the new rule. In drafting 3.4(a) the Commission sought to mandate complete disclosure. The duty extends to all facts that could possibly be relevant; and the test of relevance is shifted from the lawyer's judgment of his ability to act with unimpaired professional judgment to the client's judgment of the wisdom of retention. The rule is designed to insure that a client, in retaining an attorney, is completely informed about the existence of any fact which might influence the judgment of the attorney.

#### (b) Conflict of Interest.

A lawyer shall not accept 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 such employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under d below.



Reporter's Notes

Rule 3.4(b) is a modification of DR 5-105(A). Even when the disclosure required by Rule 3.4(a) has been made paragraph (b) contains several limitations on a lawyer's freedom to accept employment. The first is where such employment will adversely affect the lawyer's independent professional judgment in behalf of a client. The second is where such employment "is likely" to have such an effect. This dichotomization is intended to resolve doubts against undertaking representation. It does so by eliminating any requirement that the contemplated employment actually produce an adverse effect. It is enough if it is likely to do so. Both of these limitations operate in respect of any client, i.e., existing clients as well as those who are prospective. The third limitation of this paragraph is where the contemplated employment is likely to involve the lawyer in representing differing interests. The phrase "differing interests" comes from DR 5-105 and is undefined; but its context clearly indicates more than distinctness or dissimilarity. Indeed, it is the possibility of a potential relationship or interaction between or among the interests which may preclude absolute loyalty to each that is the heart of the prohibition.

The three limitations of Rule 3.4(b) are qualified by a reference to Rule 3.4(d). That paragraph permits a lawyer to represent multiple clients if the following three conditions are satisfied: (1) It is obvious that the lawyer can adequately represent the interests of each client; (2) The lawyer has fully disclosed the possible effect of the multiple representation on his professional judgment; and (3) Each client consents. Paragraph 3.4(d) applies only where the potential conflict is generated by the representation of multiple clients. It does not apply to conflicts lurking in the lawyer's own interests. The latter are dealt with in paragraph 3.4(f). The first condition of 3.4(d) requires more than a judgment by the lawyer that he can perform adequately. It must be obvious that he can do so; and if his capability requires substantial explanation the condition cannot be met. Rule 3.4(d) is the same as DR 5-105(C).

(c) Multiple Employment Forbidden. 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 repre-

sentation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under d below.

Reporter's Notes

Rule 3.4(c) is the same as DR 5-105(B). It brings the standards of paragraphs (b) and (c) to the question of a continuation of multiple employment.

(d) Multiple Employment Permitted.

A lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

See Rule 3.4(b).

(e) Interest of Former Client.

A lawyer shall not accept employment adverse to a former client without that client's informed written consent if such new employment may involve the use of confidential information obtained through such former employment.

Reporter's Notes

Although this section is new it reflects reported opinions. It is similar to Rule 4-101 of the California Rules of Professional Conduct. As used in this paragraph the term "confidential information" means information which remains confidential at the time the new employment is under consideration.

(f) Interest of Lawyer.

Except with the informed written consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by any interest of the lawyer.

Reporter's Notes

This section together with 3.4(a) and 3.4(b) is directed toward the prevention of conflict of interest between lawyer and client. It applies to any form or nature of interest including those which might be termed financial, business, property, professional, political or personal. The rule stops short of absolute prohibition of potentially conflicting employment because the Commission was advised of the legitimate interest a fully informed client might have therein. As an added safeguard for the public, however, this section requires that the client's informed consent be in written form.

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

Reporter's Notes

Rule 3.4(g) is the same as DR 9-101(A). The term "judicial capacity" is to be construed broadly to include any consensual or official fact-finding or adjudicatory position.

(h) Prior Service as Public Official. A lawyer shall not accept private employment in a matter in which he held substantial and relevant responsibility while he was a public official or employee.

Reporter's Notes

Rule 3.4(h) comes from DR 9-101(b). It has been changed by the insertion of the words "and relevant" following "substantial" and "official or" preceding "employee".

(i) Non-payment of Prior Lawyer. A lawyer shall not refuse employment on the ground that the client's prior lawyer has not been paid.

Reporter's Notes

Rule 3.4(i) is new. Rule 3.5 (a)(3) is related.

(j) When Lawyer May be Called as Witness.

A lawyer shall not accept employment in contemplated or pending litigation if he knows or should know that he or a lawyer in his firm ought to be called as a witness. This rule does not apply where the predictable testimony will relate solely

to uncontested matters or to legal services furnished by the lawyer or where the distinctive value of the lawyer or his firm in the particular case would make denial a substantial hardship on the client.

#### Reporter's Notes

Rule 3.4(j) is a truncated version of DR 5-101(B). The changes in language are not intended to be substantive. The rule also appears in the Code of Trial Conduct promulgated by the American College of Trial Lawyers. A companion rule on withdrawal from employment appears in 3.5(a)(4).

#### (r) Partners and Associates Barred.

If, for reasons other than health, a lawyer is required to decline employment or to withdraw from employment under these Rules, no partner or associate, or any lawyer affiliated with him or his firm may accept or continue such employment.

#### Reporter's Notes

Except for the provision regarding health, this rule is identical to DR 5-105(D). As used in the rule the term "lawyer affiliated with him or his firm" does not include a space sharing arrangement and does not include a lawyer whose only affiliation is by marriage or other legal relationship.

#### (1) ~~Other~~ Violations.

A lawyer may not accept employment which he knows or reasonably should know would lead to a violation of other provisions of these rules.

### 3.5 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) 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) Withdrawal shall not be conditioned upon payment by the client for services to date; and a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

Reporter's Notes

Rule 3.5(a) is the same as DR 2-110(A) with the addition of the first part of paragraph (3). The Commission believes that a condition of payment may place both the client and the new attorney at an extreme disadvantage. See Rule 3.4(a).

(b) Mandatory withdrawal.

- (1) If a lawyer knows or should know that he or a lawyer in his firm ought to be called as a witness in litigation concerning the subject matter of his employment he and his firm shall withdraw from representation at the trial unless the court otherwise orders. This rule does not apply to situations in which the lawyer would not be precluded from accepting employment under Rule 3.4(j).
- (2) 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:

(i) He knows or should know 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.

(ii) He knows or should know that his continued employment will result in violation of this Code.

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

(iv) He is discharged by his client.

Reporter's Notes

Rule 3.5(b)(1) is a condensed version of DR 5-102 (Withdrawal as Counsel When the Lawyer Becomes a Witness). By expressly recognizing judicial discretion in the area, the new language eliminates the need for DR 5-102(b) which is related to the timing of the withdrawal. Rule 3.5(b)(2) is DR 2-110(B) with two minor changes in style.

(c) Permissive withdrawal.

Other than as provided in these rules a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless:

(1) His client 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;

- (2) His client personally seeks to pursue an illegal course of conduct;
- (3) His client insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under these rules;
- (4) His client by other conduct renders it unreasonably difficult for the lawyer to carry out his responsibilities;
- (5) His client 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 by these rules;
- (6) His client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
- (7) His continued employment is likely to result in a violation of these rules;
- (8) His inability to work with client or with co-counsel indicates that the best interests of the client likely will be served by withdrawal;
- (9) His mental or physical condition renders it difficult for him to carry out the employment effectively;
- (10) His client knowingly and freely assents to termination of his employment; or
- (11) 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.

Reporter's Notes

Rule 3.5(c) is the same as DR 2-110(C). Advising violations of law is dealt with in Rule 3.6(e) and bringing improper legal actions in Rule 3.7(a).



### 3.6 Conduct During Representation

(a) Standards of Care and Judgment. A lawyer must employ reasonable care and skill and apply his best judgment in the performance of his services. He shall be punctual in his professional commitments. He shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without first associating himself with a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.

#### Reporter's Notes

Rule 3.6 contains a number of provisions bearing upon the relationship between the attorney and his client during the period of employment, of whatever nature. Although these provisions are generally focused upon that relationship and the welfare of the client therein, that is not the sole concern. Other protected interests include those of adverse parties, the courts and the general public. The placement of a particular mandate or prohibition within Rule 3.6 rather than elsewhere in the Code is a matter of clarity of expression and not limitation of scope or function. For example, the attorney's duty to disclose fraud would clearly survive termination of employment. The same is true of such matters as the receipt of funds and the preservation of confidences. Other parts of Rule 3.6 reflect policies which underlie provisions placed elsewhere in the Code, again for clarity. Thus, the strong policy against conflicts in interest is the basis for much of Rule 3.4 (Acceptance of Employment) as well as Rule 3.5(a)(4) (Withdrawal From Employment) and Rule 3.6(i) (Avoiding Adverse Interest).

By number, the old Disciplinary Rules collected in Rule 3.6 are: 4-101, 5-1-6, 5-107, 6-101, 6-102, 7-102, 7-104, 7-105, 7-106 and 9-102.

The first two sentences of Rule 3.6(a) are new. The balance of the rule comes from DR 6-101 (Failing to Act Competently). The material added by the Commission is intended to reinforce the duty owed a client by stating the duty positively as well as negatively. The lawyer is always expected to do three things: (1) He must act with reasonable care and skill; (2) He must apply his best judgment; and (3) He must act promptly. The standard of reasonable care and skill is an objective one, to be determined by reference to some determinable community standard of professional performance. Best judgment, on the other hand, is a subjective individual matter. The requirements are discrete.

(b) Limiting Liability.

A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice or that of his partners or salaried employees. This rule shall not prevent a lawyer from settling or defending a malpractice claim.

Reporter's Notes

The first sentence of Rule 3.6(b) is DR 6-102. The second sentence is from the California Rules of Professional Conduct, Rule 6-102. The added language will clarify the lawyer's freedom to defend himself or to work out a settlement after a claim has arisen. It is not intended to weaken the principal rule which remains an absolute bar to any lawyer-client arrangement in this area. The rule does not, however, interdict insurance contracts or intra-office agreements as to ultimate responsibility. Such devices cannot limit the rights of an aggrieved client.

(c) Disclosure of Fraud.

A lawyer who receives information clearly establishing that 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, except when the information is protected as a privileged communication. If a person other than his client has perpetrated a fraud upon a tribunal, the lawyer shall promptly reveal the fraud to the tribunal.

Reporter's Notes

Rule 3.6(c) is the same as DR 7-102(B). The rule does not address the substantive law of privilege.

(d) Threatening Prosecution.

A lawyer shall not present, or threaten to present, criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

Reporter's Notes

Rule 3.6(d) is a shortened version of DR 7-105. The change is not intended to be substantive.

(e) Advising Violation of Law.

A lawyer shall not advise the violation of any law, rule or ruling of a tribunal; but a lawyer may take appropriate steps in good faith to test the validity of any law, rule or ruling.

Reporter's Notes

Rule 3.6(e) derives from, but is much broader than, DR 7-106(A). As restated the rule makes it clear that a lawyer is bound not to advise the violation of law in any context, not just rulings during trial. This rule involves an extremely difficult distinction. Generally steps to test a law's validity will be appropriate only when those steps are themselves within the law; but situations may exist in which an informed lawyer concludes in good faith that a law is fatally flawed. In that case he not only may but should advise non-compliance if he deems that to be in his client's interest.

Rule 3.5(c) and Rule 3.7(a) are related areas.

(f) Preserving Identity of Funds and Property.

(1) All funds of clients paid to a lawyer or law firm, other than retainers and advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (i) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (ii) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) A lawyer shall:

- (i) Promptly notify a client of the receipt of his funds, securities, or other properties.
- (ii) 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.

- (iii) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Reporter's Notes

Rule 3.6(f) is the same as DR 9-102 except for the insertion of the work "retainers" in the first paragraph. The change recognizes that advance payment of fees is not improper and that such funds need not be segregated. The duties imposed by this rule are unqualified and unyielding. As prophylactic law this section does not require a showing of loss or harm to constitute a violation.

- (g) Settling Similar Claims.

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.

Reporter's Notes

Rule 3.6(g) is identical to DR 5-106. Rules 3.4(b), 3.4(c) and 3.4(d) also deal with multiple employment.

- (h) Avoiding Influence by Others.

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.

Reporter's Notes

Rule 3.6(h) is the same as DR 5-107(B). DR 5-107(A) was dropped as unnecessary and a possible impediment to the development of legal service plans.

(i) Avoiding Adverse Interest.

(1) A lawyer shall not knowingly acquire a property or pecuniary interest adverse to a client unless:

(i) The transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted to the client in manner and terms which should have reasonably been understood by the client;

(ii) The client is advised and given a reasonable opportunity to seek independent professional advice or counsel of the client's choice on the transaction; and

(iii) The client consents in writing thereto.

(2) A lawyer shall not enter into any business transaction with a client unless he complies with subparagraph one above.

(3) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such lawyer or any partner or associate of such lawyer appears as attorney for a party or is acting as executor, trustee, administrator, guardian or conservator.

(4) Prior to conclusion of all aspects of the matter

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

Reporter's Notes

Paragraphs (1) and (2) of Rule 3.6(i) are identical to Rule 5-101 of the California Rules of Professional Conduct except that the Maine version clearly places an affirmative duty on the lawyer to advise a client to seek independent counsel in those situations where a transaction may be permissible. The ABA provision (DR 5-104(A)) was rejected by the Commission as too permissive. Paragraph (3) of Rule 3.6(i) is from Rule 5-103 of the California Rules. It has no counterpart in the ABA materials. Paragraph (4) of Rule 3.6(i) is identical to DR 5-104(B).

(j) Communicating with Adverse Party.

During the course of his representation of a client, a lawyer shall not 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.

Reporter's Notes

Rule 3.6(j) is the same as DR 7-104(A)(1).  
DR 7-104(A)(2) was eliminated as unnecessary.

(k) 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.

Reporter's Notes

Rule 3.6(k) is identical to DR 9-101(C). See Rule 3.7(e).

(1) Preserving Confidence and Secrets.

As used herein "confidence" refers to information protected

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

- (1) Except as permitted by these rules or as required by law or by court order, a lawyer shall not knowingly reveal a confidence or secret of his client; use such a confidence or secret to the disadvantage of his client; or, without the informed written consent of the client, use such confidence or secret to the advantage of himself or a third person.
- (2) This provision is not violated by the disclosure of confidences or secrets by a lawyer as necessary to the defense of himself, his employees or his associates in a judicial proceeding (including, but not limited to, a grievance proceeding) against an accusation of wrongful conduct.
- (3) This provision is not violated by the disclosure of a client's intention to commit a crime or the information necessary to prevent the crime or subjecting others to risk or harm.
- (4) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from improperly disclosing or using confidences or secrets of a client.



Reporter's Notes

Rule 3.6(1) is a modified version of DR 4-101. It differs from the latter in requiring a client's informed consent to disclosure to be in writing and in not authorizing an attorney to divulge a confidence in order to establish or collect a fee. The new wording also limits the right to disclose in defending against a charge of wrongful conduct to judicial proceedings. Wrongful conduct is intended to include charges of negligence. Paragraph (3) expands the preventive exception to include the risk of harm to others.

The duties imposed by this rule, of course, survive termination of employment. Rule 3.4(e) is related.

3.7 Conduct During Litigation

(a) Improper Legal Action. A lawyer shall not file a suit, assert a position, delay a trial, or take action on behalf of his client when he know, or it is obvious, that such action would merely serve to harass or maliciously injure another.

Reporter's Notes

In Rule 3.7 are collected a number of provisions designed to govern a lawyer's behavior while he is involved in any form or stage of litigation. As used in the rule the term "litigation" and the term "tribunal" are intended to encompass all methods of dispute resolution, fact finding or resolution of rights including arbitration, mediation, fact finding, hearings, administrative proceedings, and agency determinations as well as court appearances. ABA Disciplinary Rules which appear in some measure include 5-103, 7-102, 7-103, 7-106, 7-108, 7-109, and 7-110.

Rule 3.7(a) is a restatement of DR 7-102(a)(1). No substantive change in intended.

(b) Improper Concealment, Statement or Evidence. A lawyer shall not knowingly make a false statement, conceal information legally required to be revealed, or participate in the creation or preservation of false evidence.

Reporter's Notes

Rule 3.7(b) is an abbreviated version of DR 7-102 (3), (4), (5) and (6). No substantive change is intended.

(c) Interest in Litigation. 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) Assert a lien granted by law against the proceeds of such action or litigation to secure his fee or expenses. (This section does not authorize an attorney to assert a lien on a client's file in order to secure payment of his fee, the assertion of such a lien (if any exists) is herein declared to be improper.)
- (2) Contract with a client for a reasonable contingent fee as provided in Rule 8.

Reporter's Notes

Rule 3.7(c) is from DR 5-103(A) with one significant change. The last two sentences in subparagraph (1) are new. The Commission believes that the assertion of a possessory lien upon a client's papers and documents is unacceptable professional conduct.

(d) Financial Assistance. 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 a lawyer may advance or guarantee the expense of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence.

Reporter's Notes

Rule 3.7(d) is the same as DR 5-103(B) except in the omission of the final proviso in the old version. That clause provided that the designated advances for clients were permissible only if the client remained ultimately liable for such expenses. The Commission believes the proviso was unrealistic and unenforced and that it might often prove inimical to clients' interests. The rule was inconsistent with the modern assessment of the need to broaden access to courts. For this reason the Commission recommends

the amendment of Rule 8(e) by the elimination of item (6) therein and the first sentence of paragraph (5) of the contingent fee form appended to Rule 8.

(e) Adversary Conduct.

(1) In appearing in his professional capacity before a tribunal, an attorney shall:

- (i) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by any artifice or false statement or fact or law.
- (ii) Disclose, unless privileged or irrelevant, the identities of the clients he represents.

(2) In appearing in his professional capacity before a tribunal, an attorney shall not:

- (i) Intentionally misquote to a judge, jury, or judicial officer, the language of a book, statute or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute that has been repealed or declared unconstitutional.
- (ii) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
- (iii) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
- (iv) Assert his personal knowledge of the facts at issue, except when testifying as a witness.
- (v) 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.

- (vi) Engage in undignified or discourteous conduct that is degrading to a tribunal.

Reporter's Notes

Rule 3.7(e) sets forth minimal standards of professional behavior before a court or other tribunal. Paragraph (1) states positive mandates and paragraph (2) contains prohibitions. The first subparagraph of paragraph (1) is taken from Rule 7-105(1) of the California Rules of Professional Conduct. It has no direct counterpart in the ABA Code. Rule 3.6(k) is related. The second subparagraph of paragraph (1) is similar to DR 7-106(B)(2) but it does not require disclosure of employing persons. As stated, the rule is identical to California Rule 7-105(2).

Rule 3.7(e)(2)(i) has no direct counterpart in the ABA Code. It is taken from California Rule 7-105(1) but differs in including the jury among those specifically protected against misquotation and non-disclosure. Subparagraphs (ii), (iii), (iv), (v), and (vi) of paragraph (2) are identical to DR 7-106(C)(1), (2), (3), (4), and (6) respectively.

Other parts of DR 7-106 are covered elsewhere in the new Code or were deemed to be unnecessary or undesirable. Perhaps the most significant change is the omission of DR 7-106(b)(2) which required a lawyer to disclose known but adverse legal authority overlooked by opposing counsel.

(f) Communication with Jurors

(1) At no time shall a lawyer connected with the trial of a case communicate extrajudicially, directly or indirectly, with a juror or anyone he knows to be a member of the venire from which the jury will be selected or with any member of such person's family.

(2) After discharge of a juror from further jury service, a lawyer may ask or answer questions or make comments to the former juror provided they are not intended to harass or embarrass him or influence his action in future jury service.

(3) A lawyer shall reveal promptly to the Court knowledge of improper conduct by a juror or venireman, or by another toward a juror or venireman, or a member of his family.

Reporter's Notes

Rule 3.7(f) is a restatement of DR 7-108. No substantive change is intended.

(g) Contact with Witnesses

A lawyer shall not:

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

(2) Advise or directly or indirectly cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(3) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of his case; but unless prohibited by law, an attorney may advance, guarantee or acquiesce in payment of:

- (i) Expenses reasonably incurred by a witness in attending or testifying.
- (ii) Reasonable compensation to a witness for his loss of time in attending or testifying.
- (iii) A reasonable fee for the professional services of an expert witness.

Reporter's Notes

Rule 3.7(g) is a restatement of DR 7-109. No substantive change if intended.

(h) Contact with Officials

(1) An attorney shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the

member and the judge, official or employee is such that gifts are customarily given and exchanged. This section shall not be construed to preclude contributions to election campaigns of public officers.

(2) An attorney shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. This rule shall not apply to communications permitted by rule of court.

Reporter's Notes

Rule 3.7(h) is a restatement of DR 7-110. No substantive change is intended.

(i) Duty of Public Prosecutor

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

(2) 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 that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

(3) A public prosecutor or other government lawyer shall not conduct a civil or criminal case against any person whom he represents or has represented as a client pursuant to a private employment.

(4) A public prosecutor or other government lawyer shall not conduct a civil or criminal case against any person relative to a matter in which he represents or has represented the complaining witness pursuant to private employment.

Reporter's Notes

Paragraphs (1) and (2) of Rule 3.7(i) are based upon DR 7-103. The wording of paragraph (1) has been broadened to include all lawyers. Paragraphs (3) and (4) of Rule 3.7(i) are based upon Maine case law.

(j) Trial Publicity

A lawyer participating in the defense or prosecution of a criminal matter or the trial of a civil cause shall not make or participate in making any extrajudicial statement which poses a substantial threat of interference with the administration of justice.

Reporter's Notes

Rule 3.7(j) replaces the elaborate and complex provisions of DR 7-107.

3.8 Designation of Specialties.

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

(a) ~~Patent, Trademark and Admiralty.~~

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 those terms on his letterhead and office signs. 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 letter head and office signs, 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 signs.

(b) Lawyer Referral Services.

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

(c) Consultants to Lawyers.

A lawyer available to act as a consultant to or as an associate of other lawyers may distribute to other lawyers and publish in legal journals circulated or distributed primarily to lawyers an announcement of such availability, but the announcement shall not contain a representation of special competence.

(d) Other Specialization.

In compliance with requirements established or approved by the Supreme Judicial Court.

Reporter's Notes

Rule 3.8 is based upon DR 2-105 (Limitation of Practice). There are two changes. Old paragraph (3) contained a once-a-year limitation on circularization. That has been deleted. 3.8(d) has been restated to reflect the Commission's judgment that there is a present public interest that must be addressed. Although the Commission reached no conclusion of the desirability of any plan of specialization or certification, (d) is in essence a recommendation that the question be resolved. It must be read with Rule 3.9(b)(4).

3.9 Publicity, Advertising and Solicitation.

(a) False Advertising Forbidden.

A lawyer shall not, on behalf of himself or any lawyer affiliated with him, knowingly use, or assist or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim. (A public communication is any communication, through mass media, direct mail, or other means, directed at a person or persons with whom the lawyer has no past or present attorney-client, adversary or personal relationship and includes professional cards, announcements, letterheads, office signs and similar accoutrements of a law practice).

Reporter's Notes

Rule 3.9 is a new approach to the issue of advertising by lawyers. Rather than replace the now discredited prohibition of professional advertising with a limited list of acceptable communications, the new rule recognizes the right to advertise in general and forbids only those practices that would be regarded as unsavory in virtually any context.



The latter include fraud (Rule 3.9(b), harassment or hucksterism. (Rule 3.9(c), commercial bribery (Rule 3.9(d) and 3.9(f)(2) and overreaching personal solicitation (Rules 3.9(f) and 3.9(g)).

Rule 3.9(a) has no counterpart in the ABA Code. It forbids the use of false, deceptive and misleading public communications. "Public Communications" are mass media uses including direct mail as well as the more traditional devices such as professional cards and letterheads. Telephone or other classified advertising would be a public communication but a direct mailing to past and present clients would not.

(b) False Advertising Defined.

Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim that:

- (1) Contains a material misrepresentation of fact or law.
- (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
- (3) Is intended or is likely to create an unjustified expectation;
- (4) States or implies that a lawyer is a specialist other than as permitted by Rule 3.8;
- (5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
- (6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

Reporter's Notes

Rule 3.9(b) also has no predecessor and is designed to implement the basic prohibition of 3.9(a). The section sets forth six categories of statements, based upon content or intent, which are deemed to be a violation of 3.9 if a public communication is involved. The six categories are not intended to be exclusive of other conduct involving de-

ception. The fourth of these categories refers to Rule 3.8 and will preclude advertisements asserting or implying specialists' qualifications unless made in conformity with a Court approved program.

(c) Other Improper Public Communication

A lawyer shall not, on behalf of himself or any lawyer affiliated with him, knowingly use, or assist or participate in the use of, any form of public communication that:

(1) Is intended or is likely to result in a legal action being taken or a legal position being asserted merely to harass or maliciously injure another; or

(2) Appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion.

Reporter's Notes

Rule 3.9(c) is intended to prohibit public communications which, although not a violation of Rule 3.9(a), are maliciously motivated or designed to appeal to the baser human emotions.

(d) Paid Advertisements

A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation or of 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 paid advertisement. If a paid advertisement is communicated to the public by use of radio or television, it shall be prerecorded, approved for broadcast by the lawyer and a recording of the actual transmission shall be retained by the lawyer for two years following transmission. If a public communication is transmitted through the mails a copy of such communication shall be retained by the lawyer for two years following the mailing.

Reporter's Notes

Rule 3.9(d) has two functions. It prevents surreptitious advertising and it requires the creation of a probative base for the operation of Rule 3.9(a). It should also help limit corruption in the media.

(e) Multi-Jurisdiction Disclosure

A multi-jurisdictional partnership shall disclose, in all public communications containing the names of lawyers affiliated with it, jurisdictional limitations of those lawyers not licensed to practice in the jurisdiction in which the communication is published.

Reporter's Notes

Rule 3.9(e) is a restatement of DR 2-102(D). It is related to Rule 3.2(a).

(f) Recommendation or Solicitation of Professional Employment

(1) A lawyer shall not solicit employment on behalf of himself or any lawyer affiliated with him through any form of personal contact:

- (i) By using any statement, claim or device that would violate this rule if part of a public communication; or
- (ii) By using any form of duress or intimidation, unwarranted suggestions or promises of benefits, or deceptive, vexatious, or harassing conduct; or
- (iii) When the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited. Without limitation, such circumstances will be deemed to exist when the individual solicited is in the custody of a law enforcement agency or under treatment in a hospital, convalescent facility or nursing home, or is a person whose mental faculties are impaired in any way or for any reason. Notwithstanding the foregoing, such circumstances will not be deemed to exist when a lawyer is discussing employment with any person who has, without solicitation by the

lawyer or anyone acting for him, sought the lawyer's advice regarding employment of a lawyer.

(2) 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 communication permitted by these rules and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(3) A lawyer shall not knowingly assist or authorize any other person or organization to engage in conduct that would violate this rule if engaged in by the lawyer personally, nor shall a lawyer accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this rule.

#### Reporter's Notes

Rule 3.9(f) regulates personal solicitation by lawyers. It prohibits fraud, intimidation and undue influence. It also forbids surreptitious private client recruitment.

#### (g) Suggestion of Need of Legal Services

(1) A lawyer who has given unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice if:

- (i) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of 3.9(b); or that violates the regulations contained in 3.9(c);
- (ii) The advice involves the use by the lawyer of any form of duress or intimidation, unwarranted suggestions or promises of benefits, or deceptive, vexatious, or harassing conduct; or

- (iii) The advice is given under circumstances that create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being advised within the meaning of 3.9(f)(1)(iii).

Reporter's Notes

Rule 3.9(g) is a complete revision of DR 2-104. Its purpose is the reinforcement of the solicitation regulations of Rule 3.9(f). Under the new rule lawyers may accept employment flowing from unsolicited advice to seek counsel, providing the advice involves no fraud, deception, duress or undue influence.

(h) As used in Rule 3.9 "Lawyer affiliated" shall mean any kind of affiliation for the practice of law and shall include, without limitation, partners and associates of a lawyer, lawyers employing a lawyer, lawyers "of counsel" to a lawyer or law firm, lawyers or law firms toward whom a lawyer is "of counsel" and lawyers with whom a lawyer shares offices or any expense of facility of a law practice, whether or not a partnership or any other affiliation exists.

Reporter's Notes

The term "lawyer(s) affiliated" appears in Rule 3.9(a), (c), (e), and (f).