

NEW YORK STATE BAR ASSOCIATION

# NYSBA

**The Lawyer's Code  
of Professional  
Responsibility**





**New York State Bar Association**

**THE LAWYER'S CODE  
OF PROFESSIONAL  
RESPONSIBILITY**

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New York State Bar Association  
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## **PREAMBLE**

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

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

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

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

## **PRELIMINARY STATEMENT**

The Code of Professional Responsibility consists of three separate but inter-related parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be both an inspirational guide to the members of the profession and a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

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

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

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They con-

stitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

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

No codification of principles can expressly cover all situations that may arise. Accordingly, conduct that does not appear to violate the express terms of any Disciplinary Rule nevertheless may be found by an enforcing agency to be the subject of discipline on the basis of a general principle illustrated by a Disciplinary Rule or on the basis of an accepted common law principle applicable to lawyers.

#### **DEFINITIONS\* [§1200.1]\*\***

1. "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.
2. "Law firm" includes, but is not limited to, a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization and a qualified legal assistance organization.
3. "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.
4. "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.
5. "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.
6. "Tribunal" includes all courts, arbitrators and other adjudicatory bodies.
7. (Repealed)
8. "Qualified legal assistance organization" means an office or organization of one of the four types listed in DR 2-103 [1200.8] (D)(1) through (4), inclusive, that meets all the requirements thereof.
9. "Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

10. "Domestic relations matters" means representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings.

\* "Confidence" and "Secret" are defined in DR 4-101 [1200.19] (A). "Sexual relations" is defined in DR 5-111 [1200.29] (A). "Copy" is defined in DR 9-102 [1200.46] (D)(10).

\*\* As used in this publication, all references in brackets [ ] are to the Disciplinary Rules of the Code of Professional Responsibility, promulgated as joint rules of the Appellate Division of the Supreme Court and set forth in Part 1200 of Title 22 of New York Codes, Rules and Regulations (NYCRR).

1 "Statement of Client's Rights," 22 NYCRR Part 1210.



# CANON 1

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

### ETHICAL CONSIDERATIONS

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

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

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

**EC 1-4** The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all knowledge, other than knowledge protected as a confidence or secret, of conduct of another lawyer which the lawyer believes clearly to be a violation of the Disciplinary Rules that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness in other respects as a lawyer. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

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

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

**EC 1-7** A lawyer should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees, and other persons involved in the legal process.

**EC 1-8** A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics.

### **Provision of Nonlegal Services**

**EC 1-9** For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany an attorney-client relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services, when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as an attorney-client relationship. Therefore, where the legal and nonlegal services are not distinct, DR 1-106(A)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of the Code of Professional Responsibility with respect to the nonlegal services. DR 1-106(A)(1) applies to the provision of nonlegal services by a law firm if the person for whom the nonlegal services are being performed is also receiving legal services from the firm that are not distinct from the nonlegal services.

**EC 1-10** Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(2) requires that the lawyer providing the nonlegal services adhere to the Disciplinary Rules, unless exempted. Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Disciplinary Rules with respect to the nonlegal services, unless exempted.

**EC 1-11** The Disciplinary Rules will be presumed to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services unless the lawyer complies with DR 1-106(A)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to communicate the desired understanding. For example, while the written disclaimer set forth in DR 1-106(A)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. The lawyer or law firm will not be required to comply with these requirements if its interest in the entity providing the nonlegal services is so small as to be *de minimis*.

**EC 1-12** Although a lawyer may be exempt from the application of Disciplinary Rules with respect to nonlegal services on the face of DR 1-106(A), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Disciplinary Rules that are dependent upon the existence of a representation or attorney-client relationship. Other rules, such as those prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (DR 1-102), requiring lawyers to report certain attorney misconduct (DR 1-103), and prohibiting lawyers from misusing the confidences or secrets of a former client (DR 4-101[B]), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer otherwise exempt under DR 1-106(A). A lawyer or law firm is always subject to these Disciplinary Rules with respect to the rendering of legal services.

### **Contractual Relationships Between Lawyers and Nonlegal Professionals**

**EC 1-13** DR 1-107 permits lawyers to enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services provided the non-legal professional or non-legal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. The non-legal professional or non-legal professional service firm may not play a role in, for example, the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, determining the manner in which lawyers are hired or trained, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of pro bono publico and other public-interest legal work, financial and budgetary decisions relating to the legal practice, and determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

**EC 1-14** The contractual relationship permitted by DR 1-107 may provide for the sharing of premises, general overhead, or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted subject to the requirements of DR 2-103(B)(1) and DR 1-107(D). Similarly, lawyers participating in such

arrangements remain subject to general ethical principles in addition to those set forth in DR 1-107 including, at a minimum, DR 2-102(B), DR 5-105(A), DR 5-105(B), DR 5-107(B), DR 5-107(C), and DR 5-108(A). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the non-legal professional service firm or any individual non-legal professional, or enter into formal partnerships with non-lawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a non-legal professional or non-legal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that non-legal professional or firm acts or is entitled to act in a manner inconsistent with DR 1-107(A)(2) or EC 1-13. More generally, although the existence of a contractual relationship permitted by DR 1-107 does not by itself create a conflict of interest violating DR 5-101(A) whenever a law firm represents a client in a matter in which the non-legal professional service firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with the non-legal professional service firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm, creating a conflict of interest.

**EC 1-15** Each lawyer and law firm having a contractual relationship under DR 1-107 has an ethical duty to observe these Disciplinary Rules with respect to its own conduct in the context of the contractual relationship. For example, the lawyer or law firm cannot permit its obligation to maintain client confidences as required by DR 4-101 to be compromised by the contractual relationship or by its implementation by or on behalf of non-lawyers involved in the relationship. In addition, the prohibition in DR 1-102(A)(2) against a lawyer or law firm circumventing a Disciplinary Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

**EC 1-16** The contractual relationship permitted under DR 1-107 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the non-legal professional or non-legal professional service firm. When in the context of such a contractual relationship a lawyer or law firm refers a client to the non-legal professional or non-legal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the non-legal professional or non-legal professional services firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise permitted by DR 1-107, a contractual relationship may not require referrals on an exclusive basis.

**EC 1-17** To assure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under DR 1-107 only if the non-legal party thereto is a professional or professional service firm meeting appropriate standards as regards ethics, education, training, and licensing. The Appellate Divisions maintain a public list of eligible professions. A member of a non-legal profession or professional service firm may apply for the inclusion of particular professions on the list, or professions may be added to the list by the Appellate Divisions sua sponte. A lawyer or law firm not wishing to affiliate with a non-lawyer on a systematic and continuing basis, but only to engage a non-lawyer on an ad hoc basis to assist in a specific matter, is not governed by DR

1-107 when so dealing with the non-lawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with DR 1-107. Likewise, the requirements of DR 1-107 need not be met when a lawyer retains an expert witness in a particular litigation.

**EC 1-18** Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the non-legal professional or non-legal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by DR 1-107 as a single law firm for purposes of these Disciplinary Rules, as would be the case if the non-legal professional or non-legal professional service firm were in an “of counsel” relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to DR 5-105(D), and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to DR 5-105(E). To the extent that the rules of ethics of the non-legal profession conflict with these Disciplinary Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with non-lawyer professionals who are themselves subject to regulation.

## **DISCIPLINARY RULES**

### **DR 1-101 [§1200.2] Maintaining Integrity and Competence of the Legal Profession.**

- A. A lawyer is subject to discipline if the lawyer has made a materially false statement in, or has deliberately failed to disclose a material fact requested in connection with, the lawyer’s application for admission to the bar.
- B. A lawyer shall not further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute.

### **DR 1-102 [§1200.3] Misconduct.**

- A. A lawyer or law firm 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 the lawyer’s honesty, trustworthiness or fitness as a lawyer.
  - 4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
  - 5. Engage in conduct that is prejudicial to the administration of justice.
  - 6. Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be

brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

7. Engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

**DR 1-103 [§1200.4] Disclosure of Information to Authorities.**

- A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 [1200.3] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, 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 1-104 [§1200.5] Responsibilities of a Partner or Supervisory Lawyer and Subordinate Lawyers.**

- A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.
- B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.
- C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.
- D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:
  1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or
  2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.
- E. A lawyer shall comply with these Disciplinary Rules notwithstanding that the lawyer acted at the direction of another person.

- F. A subordinate lawyer does not violate these Disciplinary Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

**DR 1-105 [§1200.5-a] Disciplinary Authority and Choice of Law.**

- A. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
- B. In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
  - 1. For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
  - 2. For any other conduct:
    - a. If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
    - b. If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

**DR 1-106 [1200.5-b] Responsibilities Regarding Non-legal Services**

- A. With respect to lawyers or law firms providing non-legal services to clients or other persons:
  - 1. A lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services.
  - 2. A lawyer or law firm that provides non-legal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
  - 3. A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to a person is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
  - 4. For purposes of DR 1-106 [1200.5-b](A)(2) and DR 1-106 [1200.5-b](A)(3), it will be presumed that the person receiving non-legal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an

attorney-client relationship does not exist with respect to the non-legal services, or if the interest of the lawyer or law firm in the entity providing non-legal services is de minimis.

- B. Notwithstanding the provisions of DR 1-106 [1200.5-b](A), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under DR 4-101 [1200.19](B) and (D) with respect to the confidences and secrets of a client receiving legal services.
- C. For purposes of DR 1-106 [1200.5-b], “non-legal services” shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.

**DR 1-107 [1200.5-c] Contractual Relationships Between Lawyers and Nonlegal Professionals**

- A. The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it services. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed “independent professional judgment and undivided loyalty uncompromised by conflicts of interest.”<sup>1</sup> Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and non-lawyers is incompatible with the core values of the legal profession and, therefore, a strict division between services provided by lawyers and those provided by non-lawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a non-legal professional or non-legal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services, notwithstanding the provisions of DR 5-101 [1200.20](A), provided that:

1. The profession of the non-legal professional or non-legal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to section 1205.3 of the Joint Appellate Division Rules;
2. The lawyer or law firm neither grants to the non-legal professional or non-legal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm nor, as provided in DR 2-103 [1200.8](B)(1), shares legal fees with a non-lawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

3. The fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the non-legal professional service firm, or to any client of the non-legal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Division Rules.
- B.** For purposes of DR 1-107 [1200.5-c](A):
1. Each profession on the list maintained pursuant to a joint rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a non-legal profession or non-legal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:
    - a. have been awarded a Bachelor's Degree or its equivalent from an accredited college or university;
    - b. are licensed to practice the profession by an agency of the State of New York or the United States Government; and
    - c. are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.
  2. The term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.
- C.** DR 1-107 [1200.5-c](A) shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a non-legal professional or non-legal professional service firm.
- D.** Notwithstanding DR 3-102 [1200.17](A), a lawyer or law firm may allocate costs and expenses with a non-legal professional or non-legal professional service firm pursuant to a contractual relationship permitted by DR 1-107 [1200.5-c](A), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each.



# CANON 2

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

### ETHICAL CONSIDERATIONS

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

#### **Recognition of Legal Problems**

**EC 2-2** The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise.

**EC 2-3** Whether a lawyer acts properly in volunteering in-person advice to a non-lawyer to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist the public in recognizing legal problems.

**EC 2-4** (Repealed)

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

#### **Selection of a Lawyer**

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

**EC 2-7** Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable potential users of legal services to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many people have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for tran-

sients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about the availability of lawyers, the qualifications of particular lawyers, the areas of law in which lawyers accept representation and the cost of legal services impedes the intelligent selection of lawyers.

**EC 2-8** Selection of a lawyer should be made on an informed basis. Disclosure of truthful and relevant information about lawyers and their areas of practice should assist in the making of an informed selection. Disinterested and informed advice and recommendation of third parties —relatives, friends, acquaintances, business associates, or other lawyers — may also be helpful.

### **Lawyer Advertising**

**EC 2-9** The attorney client relationship is personal and unique and should not be established as a result of pressures and deceptions.

**EC 2-10** A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. Special care should be taken to avoid the use of any statement or claim which is false, misleading, deceptive or unfair, or which is violative of any statute or rule of court, in disclosing information, by advertisements or otherwise, relating to a lawyer's education, experience or professional qualifications, the nature or extent of any nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer, or the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by DR 1-107, and the nature and extent of services available through those contractual relationships. A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state.

**EC 2-11** The name under which a lawyer practices may be a factor in the selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

**EC 2-12** A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his or her name to remain in the name of the firm if the lawyer actively continues to practice law as a member thereof. If the lawyer does not have the right to prac-

tice law concurrently, the lawyer's name should be removed from the firm name, and the lawyer should not be identified as a past or present member of the firm; and the lawyer should not hold himself or herself out as being a practicing lawyer.

**EC 2-13** In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. A lawyer should not hold himself or herself out as being a partner or associate of a law firm if not one in fact, and thus should not hold himself or herself out as being a partner or associate if the lawyer only shares offices with another lawyer.

**EC 2-14** The following, if used in public communications or communications to a prospective client, are likely to be false, deceptive or misleading: (1) a communication that promises the outcome of any legal matter; (2) a communication that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official; (3) a letter or other written communication made to appear as a legal document; (4) the inclusion of names, addresses and telephone numbers as required by DR 2-101(K) in a manner that is too small or too fast for an average viewer to receive the information in a meaningful fashion; (5) the use of dollar signs, the terms "most cash" or "maximum dollars," or like terms that suggest the outcome of the legal matter; (6) the use of an actor to portray the lawyer or another representative of the lawyer's firm; or (7) any other use of an actor or use of a dramatization without meaningful disclosure thereof.

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

**EC 2-16** Persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in appropriate activities designed to achieve that objective.

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

**EC 2-17** The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter non-lawyers from using the legal system to protect their rights and to minimize and resolve disputes. Furthermore, an excessive charge abuses the professional relationship between lawyer and client.

**EC 2-18** The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, the lawyer's experience, ability, and reputation, the nature of the employment, the responsibility involved and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any

fee for services rendered another lawyer or a member of the lawyer's immediate family.

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

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

**EC 2-21** A lawyer should not accept compensation or anything of value incident to the lawyer's employment or services from one other than the client without the knowledge and consent of the client after full disclosure.

**EC 2-22** Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer's firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation and if the total fee is reasonable.

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

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

**EC 2-24** A person whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are otherwise provided. Even a person of means

may be unable to pay a reasonable fee, which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

**EC 2-25** A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by providing professional services at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or organizations, or by participation in programs and organizations specifically designed to increase the availability of legal services. In addition, lawyers or law firms are encouraged to supplement this responsibility through the financial and other support of organizations that provide legal services to persons of limited means.

### **Acceptance and Retention of Employment**

**EC 2-26** A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of a fair share of tendered employment which may be unattractive both to the lawyer and the bar generally.

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

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

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

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

**EC 2-31** Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work

involved. Trial counsel for a convicted defendant should continue to represent the client by advising whether to take an appeal and, if the appeal is prosecuted, by representing the client through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

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

**EC 2-33** As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent, professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in a particular, qualified legal assistance organization and, while so participating, should adhere to the highest professional standards of effort and competence.

### **Sale of Law Practice**

**EC 2-34** Lawyers and law firms, particularly sole practitioners, should have the ability to sell law practices, including good will, provided certain conditions, designed primarily to protect clients, are satisfied. Where a lawyer is deceased, disabled, or missing, the sale may be effected by the lawyer's personal representative. Although the sale of a law practice should ideally result in the entire practice being transferred to a single buyer, there is no single-buyer requirement.

**EC 2-35** Notice to clients of the sale of the practice should be timely provided, preferably as soon as possible after an agreement has been reached by the seller and the buyer, and in any event no later than as soon as practicable after the day of closing. The sale of litigated matters does not relieve the seller of his or her obli-

gations under DR 2-110 regarding withdrawal. To the extent that conflicts of interest preclude the buyer from undertaking the representation of any particular clients of the seller, the seller shall, to the extent reasonably practicable, assist such clients in securing successor counsel. If the client declines to engage successor counsel, and if the seller cannot properly withdraw from the representation under DR 2-110, the seller shall retain responsibility for the representation.

**EC 2-36** Information concerning client confidences and secrets should not be disclosed to prospective buyers except to the extent permitted by DR 2-111. To the extent disclosures are made, extreme care should be taken to ensure that client confidences and secrets are protected by all lawyers who become privy to such information in the course of examining the seller's practice for possible purchase. Sellers should consider requiring prospective buyers to execute written confidentiality agreements prior to affording them access to any information concerning client matters.

### **Improper Political Contributions**

**EC 2-37** Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

**EC 2-38** In determining whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement, the factors to be considered include (a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a "Request for Proposal" process, (b) the amount of the contribution or the contributions resulting from a solicitation, (c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate, (d) whether the contribution or solicitation was made because of an existing personal, family or non-client professional relationship with the government official or candidate, (e) whether prior to the contribution or solicitation in question, the contributor or solicitor had made comparable contributions or had engaged in comparable solici-

itations on behalf of governmental officials or candidates for public office for which the lawyer or any law firm with which the lawyer is associated did not perform or seek to perform legal work, (f) whether the contributor has made a contribution to the government official's or candidate's opponent(s) during the same campaign period and, if so, the amounts thereof and (g) whether the contributor is eligible to vote in the jurisdiction of the governmental official or candidate, and if not, whether other factors indicate that the contribution or solicitation was nonetheless made to further a genuinely held political, social or economic belief or interest rather than to obtain a legal engagement.

## **DISCIPLINARY RULES**

### **DR 2-101 [§1200.6] Publicity and Advertising.**

- A.** A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading.
- B.** (Repealed)
- C.** It is proper to include information, provided its dissemination does not violate the provisions of DR 2-101 [1200.6] (A), as to:
  - 1. legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;
  - 2. names of clients regularly represented, provided that the client has given prior written consent;
  - 3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates; nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by DR 1-107 [1200.5-c], and the nature and extent of services available through those contractual relationships; and
  - 4. fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by DR 2-101 [1200.6] (L); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.
- D.** Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in DR 2-101(C) [1200.6(c)] that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.
- E.** A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written

statement clearly describing the scope of each advertised service, which statement shall be delivered to the client at the time of retainer for any such service. Such legal services shall include all those services which are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

- F. If the advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than one year following such transmission. All advertisements of legal services that are mailed, or are distributed other than by radio, television, directory, newspaper, magazine or other periodical, by a lawyer or law firm that practices law in this state, shall also be subject to the following provisions:
  - 1. A copy of each advertisement shall at the time of its initial mailing or distribution be filed with the Departmental Disciplinary Committee of the appropriate judicial department.
  - 2. Such advertisement shall contain no reference to the fact of filing.
  - 3. If such advertisement is directed to a predetermined address, a list, containing the names and addresses of all persons to whom the advertisement is being or will thereafter be mailed or distributed, shall be retained by the lawyer or law firm for a period of not less than one year following the last date of mailing or distribution.
  - 4. The advertisements filed pursuant to this subdivision shall be open to public inspection.
  - 5. The requirements of this subdivision shall not apply to such professional cards or other announcements the distribution of which is authorized by DR 2-102 [1200.7] (A).
- G. If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm may not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm may not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.
- H. Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Disciplinary Rule in a publication which is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication which is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.
- I. Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

- J. A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.
- K. All advertisements of legal services shall include the name, office address and telephone number of the attorney or law firm whose services are being offered.
- L. A lawyer or law firm advertising any contingent fee rates shall, at the time of the fee publication, disclose:
  - 1. Whether percentages are computed before or after deduction of costs, disbursements and other expenses of litigation;
  - 2. That, in the event there is no recovery, the client shall remain liable for the expenses of litigation, including court costs and disbursements.

**DR 2-102 [§1200.7] Professional Notices, Letterheads, and Signs.**

- A. A lawyer or law firm may use professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with DR 2-101 [1200.6], including the following:
  - 1. A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under DR 2-101 [1200.6](C), DR 2-101 [1200.6](D) or DR 2-105 [1200.10]. A professional card of a law firm may also give the names of members and associates.
  - 2. A professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or of any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106 [1200.5-b]. It may state biographical data, the names of members of the firm and associates and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under DR 2-105 [1200.10].
  - 3. A sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106 [1200.5-b]. The sign may state the nature of the legal practice if permitted under DR 2-105 [1200.10].
  - 4. A letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under DR 2-101 [1200.6](C), DR 2-101 [1200.6](D) or DR 2-105 [1200.10]. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.
- B. A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under

such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "P.C." or such symbols permitted by law, the name of a limited liability company or partnership shall contain "L.L.C.," "L.L.P." or such symbols permitted by law, and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like, may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or professional service firm pursuant to DR 1-107 [1200.5-c] to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

- C. A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners.
- D. A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

**DR 2-103 [§1200.8] Solicitation and Recommendation of Professional Employment.**

- A. A lawyer shall not solicit professional employment from a prospective client:
  - 1. By in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client or current client;
  - 2. By written or recorded communication if:
    - a. The communication or contact violates DR 2-101 [1200.6](A);
    - b. The prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
    - c. The solicitation involves coercion, duress or harassment;
    - d. The lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient make it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney; or
    - e. The lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed

- primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.
- B. A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:
    - 1. A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by DR 1-107, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; or
    - 2. A lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.
  - C. No written solicitation shall be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail.
  - D. A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the 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; or
      - d. 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 or authorized by law or court rule;
    - 4. Any bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
      - a. Neither the lawyer, not the lawyer's partner, nor associate, nor any other affiliated lawyer nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
      - b. 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.
      - c. 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.

- d. The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief.
  - e. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations.
  - f. Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.
- E. A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks services does so as a result of conduct prohibited under this Disciplinary Rule.
  - F. Advertising not proscribed under DR 2-101 [1200.6] shall not be deemed in violation of any provision of this Disciplinary Rule.

**DR 2-104 [§1200.9] Suggestion of Need of Legal Services.**

- A. (Repealed)
- B. (Repealed)
- C. A lawyer may accept employment which results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.
- D. A lawyer who is recommended, furnished or paid by a qualified legal assistance organization may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
- E. Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.
- F. If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept employment from those contacted for the purpose of obtaining their joinder, provided such acceptance does not violate any statute or court rule in the judicial department in which the lawyer practices.

**DR 2-105 [§1200.10] Identification of Practice and Specialty.**

- A. A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in DR 2-105 [1200.10] (B) or (C).
- 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 may state that the lawyer has been recognized or certified as a specialist only as follows:

1. A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."
2. A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

**DR 2-106 [§1200.11] Fee for Legal Services.**

- A. A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee.
- B. 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 may 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 or made known 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 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.
- C. A lawyer shall not enter into an arrangement for, charge or collect:
  1. A contingent fee for representing a defendant in a criminal case.
  2. Any fee in a domestic relations matter:
    - a. The payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;
    - b. Unless a written retainer agreement is signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement. A lawyer shall not include in the written retainer agreement a nonrefundable fee clause; or
    - c. Based on a security interest, confession of judgment or other lien, without prior notice to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall

not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

3. A fee proscribed by law or rule of court.

- D. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating 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, if not prohibited by statute or court rule, 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.
- E. Where representation is in a civil matter, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the justices of the Appellate Divisions.
- F. In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

**DR 2-107 [§1200.12] Division of Fees Among Lawyers.**

- A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, 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 in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.
  - 3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.
- B. This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

**DR 2-108 [§1200.13] Agreements Restricting the Practice of a Lawyer.**

- A. A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.
- B. In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.

**DR 2-109 [§1200.14] Obligation to Decline Employment.**

- A. A lawyer shall not accept employment on behalf of a person if the lawyer knows or it is obvious that such person wishes to:
  - 1. Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person.

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

**DR 2-110 [§1200.15] 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. Even when withdrawal is otherwise permitted or required under section DR 2-110 [1200.15] (A)(1), (B) or (C), a lawyer shall not withdraw from employment until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the 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. The lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.
2. The lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule.
3. The lawyer's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.
4. The lawyer is discharged by his or her client.

**C. Permissive withdrawal.**

Except as stated in DR 2-110 [1200.15] (A), 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:
  - 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. Persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.
  - c. Insists that the lawyer pursue a course of conduct which is illegal or prohibited under the Disciplinary Rules.
  - d. By other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.
  - e. Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which 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.

- g. Has used the lawyer's services to perpetrate a crime or fraud.
2. The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.
3. The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
4. The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.
5. The lawyer's client knowingly and freely assents to termination of the employment.
6. The lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

**DR 2-111 [§1200.15-a] Sale of Law Practice.**

- A. A lawyer retiring from a private practice of law, a law firm one or more members of which are retiring from the private practice of law with the firm, or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including good will, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of this Code. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.
- B. Confidences and Secrets.
  1. With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as a confidence or secret under DR 4-101 [1200.19].
  2. Notwithstanding DR 4-101 [1200.19], the seller may provide the prospective buyer with information as to individual clients:
    - a. concerning the identity of the client, except as provided in DR 2-111 [1200.15-a] (B)(6);
    - b. concerning the status and general nature of the matter;
    - c. available in public court files; and
    - d. concerning the financial terms of the attorney-client relationship and the payment status of the client's account.
  3. Prior to making any disclosure of confidences or secrets that may be permitted under DR 2-111 [1200.15-a](B)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidences or secrets, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to DR 2-111 [1200.15-a] (B)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless seller shall have obtained the consent of the client in accordance with DR 4-101 [1200.19] (C)(1).

4. Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.
  5. Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.
  6. If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes a confidence or secret in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.
- C. Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:
1. The client's right to retain other counsel or to take possession of the file;
  2. The fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;
  3. The fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;
  4. Proposed fee increases, if any, permitted under DR 2-111 [1200.15-a] (E); and
  5. The identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in the state, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to re-sell the practice.
- D. When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.
- E. The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

# CANON 3

## *A Lawyer Should Assist in Preventing The Unauthorized Practice of Law*

### ETHICAL CONSIDERATIONS

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

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

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

**EC 3-4** A person who seeks legal services often is not in a position to judge whether he or she will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer without being subject to the regulations of the legal profession.

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

But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

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

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

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

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

## **DISCIPLINARY RULES**

### **DR 3-101 [§1200.16] 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 [§1200.17] 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 or her 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 which fairly represents the services rendered by the deceased lawyer.
3. A lawyer or law firm may compensate a non-lawyer employee, or include a non-lawyer employee in a retirement plan, based in whole or in part on a profit-sharing arrangement.

**DR 3-103 [§1200.18] 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.



# CANON 4

## *A Lawyer Should Preserve the Confidences and Secrets of a Client*

### ETHICAL CONSIDERATIONS

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

**EC 4-2** The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client consents after full disclosure, when necessary to perform the lawyer's professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of his or her firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in the professional relationship. Thus, in the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter, nor should the lawyer, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or the client's confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

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

**EC 4-4** The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of the client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of

information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of person to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

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

**EC 4-6** The obligation to protect confidences and secrets of a client continues after the termination of employment. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration. DR 2-111 sets forth the procedures for protecting confidences and secrets of clients in connection with the sale of a law practice.

**EC 4-7** The lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination. A lawyer is afforded the professional discretion to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and cannot be subjected to discipline either for revealing or not revealing such intention or information. In exercising this discretion, however, the lawyer should consider such factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any other possibly aggravating or extenuating circumstances. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

## **DISCIPLINARY RULES**

### **DR 4-101 [§1200.19] Preservation of Confidences and Secrets of 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 be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- B.** Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.
  2. Use a confidence or secret of a client to the disadvantage of the client.
  3. Use a confidence or secret of a client for the advantage of the lawyer 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 a client to commit a crime and the information necessary to prevent the crime.
  4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
  5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.
- D. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 [1200.19] (C) through an employee.



# CANON 5

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

### **ETHICAL CONSIDERATIONS**

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

#### **Interests of a Lawyer That May Affect the Lawyer's Judgment**

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

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

**EC 5-4** As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. A lawyer may, however, enter into standard commercial transactions with a client for products and services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client and restrictions are unnecessary and impracticable.

If, in the course of the representation of a client, a lawyer is permitted to receive from the client a beneficial ownership in literary or media rights relating to the subject matter of the employment, the lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though the employment has previously ended. Likewise, arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of the matter.

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

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

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

**EC 5-8** A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to the client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce a cause of action, but the ultimate liability for such costs and expenses must be that of the client except, where not prohibited by law or court rule, in the case of an indigent client represented on a pro bono basis.

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

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

**EC 5-11** A lawyer should not permit personal interests to influence the lawyer's advice relative to a suggestion by the client that additional counsel be employed. In like manner, the lawyer's personal interests should not deter the lawyer from suggesting that additional counsel be employed; on the contrary, the lawyer should be alert to the desirability of recommending additional counsel when, in his or her judgment, the proper representation of the client requires it.

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

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

## Interests of Multiple Clients

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

**EC 5-15** If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that the lawyer's judgment may be impaired or loyalty divided if the lawyer accepts or continues the employment. The lawyer should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that the lawyer refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that the lawyer can retain his or her independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of the clients. Simultaneous representation in unrelated matters of clients whose interests are only generally diverse, such as competing economic enterprises, does not by itself require consent of the respective clients. Likewise, a lawyer may generally represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts.

**EC 5-16** In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free of any potential conflict and to obtain other counsel if the client so desires. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict, and should accept or continue employment only if each client consents, preferably in writing. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, the lawyer should also advise all of the clients of those circumstances.

If a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent. In addition, there may be circumstances in which it is impossible to make the disclosure necessary to obtain consent, such as when the lawyer rep-

resents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision. In all cases in which the fact, validity or propriety of client consent is called into question, the lawyer must bear the burden of establishing that consent was properly obtained and relied upon by the lawyer.

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

**EC 5-18** A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested to represent a shareholder, director, officer, employee, representative, or other person connected with the entity in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present. Representation of a corporation or similar entity does not necessarily constitute representation of all of its affiliates. A number of factors should be considered before undertaking a representation adverse to the affiliate of a client including, without limitation, the nature and extent of the relationship between the entities, the nature and extent of the relationship between the matters, and the reasonable understanding of the organizational client as to whether its affiliates fall within the scope of the representation.

Occasionally, the lawyer may learn that an officer, employee or other person associated with the entity is engaged in action, refuses to act, or intends to act or to refrain from acting in a matter related to the representation that is a violation of a legal obligation to the entity, or a violation of law which reasonably might be imputed to the entity, and is likely to result in substantial injury to the entity. In such event, the lawyer must proceed as is reasonably necessary in the best interest of the entity. In determining how to proceed, the lawyer should 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 entity and the apparent motivation of the person involved, the policies of the entity concerning such matters and any other relevant considerations. Any measures taken should be designed to minimize disruption of the entity and the risk of revealing confidences and secrets of the entity. Such measures may include among others: asking reconsideration of the matter, advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the entity, and referring the matter to higher authority in the entity not involved in the wrongdoing, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the entity as determined by applicable law.

A lawyer for a corporation or other organization who is asked to become a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is a material risk that the dual role will compromise the lawyer's independent professional judgment on behalf of the corporation, the lawyer should not serve as a director.

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

**EC 5-20** A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity after disclosing such present or former relationships. A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.

### **Desires of Third Persons**

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

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

**EC 5-23** A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to an individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to

their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of professional freedom.

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

## **DISCIPLINARY RULES**

### **DR 5-101 [§1200.20] Conflicts of Interest - Lawyer's Own Interests**

- A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

### **DR 5-102 [§1200.21] Lawyers as Witnesses.**

- A. A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:
1. If the testimony will relate solely to an uncontested issue.
  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 the lawyer's firm to the client.
4. As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.
- B. Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.
  - C. If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal, except that the lawyer may continue as an advocate on issues of fact and may testify in the circumstances enumerated in DR 5-102 [1200.21] (B)(1) through (4).
  - D. If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

**DR 5-103 [§1200.22] Avoiding Acquisition of Interest in Litigation.**

- A. **A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she 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. Except as provided in DR 2-106 [1200.11] (C) (2) or (3), 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 the client, except that:
  1. A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.
  2. Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.

**DR 5-104 [§1200.23] Transactions Between Lawyer and 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 professional judgment therein for the protection of the client, unless:
  1. The transaction and terms on 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 reasonably understood by the client;
  2. The lawyer advises the client to seek the advice of independent counsel in the transaction; and

3. The client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.
- B.** Prior to conclusion of all aspects of the matter giving rise to employment, a lawyer shall not negotiate or enter into any arrangement or understanding:
1. With a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the employment or proposed employment.
  2. With any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of employment by a client or prospective client.

**DR 5-105 [§1200.24] Conflict of Interest; Simultaneous Representation**

- A.** A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C).
- B.** A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C).
- C.** In the situations covered by DR 5-105 [1200.24](A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.
- D.** While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101 [1200.20](A), DR 5-105 [1200.24] (A) or (B), DR 5-108 [1200.27] (A) or (B), or DR 9-101 [1200.45] (B) except as otherwise provided therein.
- E.** A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105 [1200.24] (D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105 [1200.24] (D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105 [1200.24] (D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105 [1200.24] (D).

**DR 5-106 [§1200.25] 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 the clients, unless each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and risks involved, including the

existence and nature of all the claims involved and the participation of each person in the settlement.

**DR 5-107 [§1200.26] Avoiding Influence by Others than the Client.**

- A. Except with the consent of the client after full disclosure a lawyer shall not:
  - 1. Accept compensation for legal services from one other than the client.
  - 2. Accept from one other than the client anything of value related to his or her representation of or employment by the client.
- B. Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client under DR 4-101 [1200.19] (B).
- C. A lawyer shall not practice with or in the form of a limited liability company, limited liability partnership or professional corporation authorized to practice law for a profit, if:
  - 1. A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  - 2. A non-lawyer is a member, corporate director or officer thereof; or
  - 3. A non-lawyer has the right to direct or control the professional judgment of a lawyer.

**DR 5-108 [§1200.27] Conflict of Interest - Former Client.**

- A. Except as provided in DR 9-101 [1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
  - 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
  - 2. Use any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19](C) or when the confidence or secret has become generally known.
- B. Except with the consent of the affected client after full disclosure, 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 had acquired information protected by section DR 4-101 [1200.19](B) that is material to the matter.
- C. Notwithstanding the provisions of DR 5-105 [1200.24](D), when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm only if the law firm or any lawyer remaining in the firm has information protected by DR 4-101 [1200.19](B) that is material to the matter, unless the affected client consents after full disclosure.

**DR 5-109 [§1200.28] Organization as Client.**

- A. When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.
- B. If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that 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. If, despite the lawyer's efforts in accordance with DR 5-109 [1200.28](B), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in a substantial injury to the organization, the lawyer may resign in accordance with DR 2-110 [1200.15].

**DR 5-110 [§1200.29] Membership in Legal Service Organization.**

- A. A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization:
  - 1. If participating in the decision or action would be incompatible with the lawyer's duty of loyalty to a client under DR 5-101 through DR 5-111 [1200.20 through 1200.29]; or
  - 2. Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

**DR 5-111 [§1200.29-a] Sexual Relations with Clients.**

- A. "Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse.
- B. A lawyer shall not:
  - 1. Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation.
  - 2. Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.
  - 3. In domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.
- C. DR 5-111 [1200.29-a] (B) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the lawyer-client relationship.
- D. Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

# CANON 6

## *A Lawyer Should Represent a Client Competently*

### ETHICAL CONSIDERATIONS

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

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

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

**EC 6-4** Having undertaken representation, a lawyer should use proper care to safeguard the interests of the client. If a lawyer has accepted employment in a matter beyond the lawyer's competence but in which the lawyer expected to become competent, the lawyer should diligently undertake the work and study necessary to be qualified. In addition to being qualified to handle a particular matter, the lawyer's obligation to the client requires adequate preparation for and appropriate attention to the legal work, as well as promptly responding to inquiries from the client.

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

**EC 6-6** A lawyer should not seek, by contract or other means, to limit prospectively the lawyer's individual liability to the client for malpractice nor shall a lawyer settle a claim for malpractice with an otherwise unrepresented client with-

out first advising the client that independent representation is appropriate. A lawyer who handles the affairs of the client properly has no need to attempt to limit liability for professional activities and one who does not handle the affairs of the client properly should not be permitted to do so. A lawyer who is a shareholder in or is associated with a professional legal corporation, a member of a limited liability company or a partner in a limited liability partnership engaged in the practice of law may, however, limit the lawyer's liability for malpractice to the extent permitted by law.

## **DISCIPLINARY RULES**

### **DR 6-101 [§1200.30] Failing to Act Competently.**

- A.** A lawyer shall not:
  1. Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating 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 the lawyer.

### **DR 6-102 [§1200.31] Limiting Liability to Client.**

- A.** A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice, or, without first advising that person that independent representation is appropriate in connection therewith, to settle a claim for such liability with an unrepresented client or former client.

# CANON 7

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

### ETHICAL CONSIDERATIONS

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

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

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

#### **Duty of the Lawyer to a Client**

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

**EC 7-5** A lawyer as adviser furthers the interest of the client by giving a professional opinion as to what he or she believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the practical effect of such decision. The lawyer may continue in the representation of the client even though the client has elected to pursue a course of conduct contrary to

the advice of the lawyer so long as the lawyer does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid the client to commit criminal acts or counsel the client on how to violate the law and avoid punishment therefor.

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

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

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

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

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

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

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

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

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

respect to the compulsion of testimony and other information are generally the same as those of public prosecutors.

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

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

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

**EC 7-18** The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of the client with a person the lawyer knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless the lawyer has the consent of the lawyer for that person. However, a lawyer may properly advise a client to communicate directly with a represented person, if that person is legally competent, without obtaining consent from the represented person's counsel, and may advise a client with respect to those communications (including by drafting papers for the client to present to the represented person), provided the lawyer gives reasonable advance notice to the represented person's counsel that such

communications will be taking place. “Reasonable advance notice” means notice provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented person’s lawyer has an opportunity to advise his or her own client with respect to the client-to-client communications before they take place. A lawyer who advises a client with respect to communications with a represented person should also advise the client against engaging in abusive, harassing or unfair conduct. A lawyer who is a party or who is otherwise personally involved in a legal matter or transaction, whether appearing pro se or represented by counsel, may communicate with a represented person on the subject matter of the representation pursuant to the provisions of DR 7-104(A) and (B). If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance a lawyer should not undertake to give advice to the person who is not represented by a lawyer, except to advise the person to obtain a lawyer.

### **Duty of the Lawyer to the Adversary System of Justice**

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

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

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

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

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

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

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

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

**EC 7-27** Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that the lawyer or the client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of being unavailable as witness therein.

**EC 7-28** Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to being a witness; however, a

lawyer may pay or agree to pay an expert witness a reasonable fee for services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that the client and lay associates conform to these standards.

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

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

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

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

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

**EC 7-34** The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an officer or employee of a tribunal except as permitted by the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with the Code of Judicial Conduct.

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

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

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

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

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

## **DISCIPLINARY RULES**

### **DR 7-101 [§1200.32] Representing a Client Zealously.**

- A.** A lawyer shall not intentionally:
1. Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided DR 7-101 [1200.32] (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 the 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 the lawyer may withdraw as permitted under DR 2-110 [1200.15], DR 5-102 [1200.21] and DR 5-105 [1200.24].
3. Prejudice or damage the client during the course of the professional relationship, except as required under DR 7-102 [1200.33](B) or as authorized by DR 2-110 [1200.15].

**B.** In the representation of a client, a lawyer may:

1. Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.
2. Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

**DR 7-102 [§1200.33] Representing a Client Within the Bounds of the Law.**

**A.** In the 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 the client when the lawyer knows or when it is obvious 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 the lawyer 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 the lawyer is required by law to reveal.
4. Knowingly use perjured testimony or false evidence.
5. Knowingly make a false statement of law or fact.
6. Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.
7. Counsel or assist the 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. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.
2. A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

**DR 7-103 [§1200.34] 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 or she knows or it is obvious that the charges are not supported by probable cause.

**B.** A public prosecutor or other government lawyer in criminal litigation shall

make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

**DR 7-104 [§1200.35] Communicating with Represented and Unrepresented Parties.**

- A. During the course of the representation of a client a lawyer shall not:
  - 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.
  - 2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.
- B. Notwithstanding the prohibitions of DR 7-104 [1200.35] (A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

**DR 7-105 [§1200.36] Threatening Criminal Prosecution.**

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

**DR 7-106 [§1200.37] Trial Conduct.**

- A. A lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer 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. Controlling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel.
  - 2. Unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.
- C. In appearing as a lawyer before a tribunal, a lawyer shall not:
  - 1. State or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
  - 2. Ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
  - 3. Assert personal knowledge of the facts in issue, except when testifying as a witness.
  - 4. Assert a 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 the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

5. Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply.
6. Engage in undignified or discourteous conduct which is degrading to a tribunal.
7. Intentionally or habitually violate any established rule of procedure or of evidence.

**DR 7-107 [§1200.38] Trial Publicity.**

- A. A lawyer participating in or associated with a criminal or civil matter, or associated in a law firm or government agency with a lawyer participating in or associated with a criminal or civil matter, shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in that matter. Notwithstanding the foregoing, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement so made shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- B. A statement ordinarily is likely to prejudice materially an adjudicative proceeding 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, 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.
  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. Provided that the statement complies with DR 7-107 [1200.38](A), a lawyer involved with the investigation or litigation of a matter may state the following 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.

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.
7. In a criminal case:
  - a. The identity, age, residence, occupation and family status of the accused.
  - b. If the accused has not been apprehended, information necessary to aid in apprehension of that person.
  - c. The fact, time and place of arrest, resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission, or statement.
  - d. The identity of investigating and arresting officers or agencies and the length of the investigation.

**DR 7-108 [§1200.39] 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 the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.
- B. During the trial of a case:
  1. A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.
  2. A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.
- C. DR 7-108 [1200.39] (A) and (B) do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings.
- D. After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.
- E. A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a member of the venire or a juror.
- F. All restrictions imposed by DR 7-108 [1200.39] upon a lawyer also apply to communications with or investigations of members of a family of a member of the venire or a juror.
- G. A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

**DR 7-109 [§1200.40] Contact with Witnesses.**

- A. A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.
- B. A lawyer shall not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of making the person 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 or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
  - 1. Expenses reasonably incurred by a witness in attending or testifying.
  - 2. Reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel.
  - 3. A reasonable fee for the professional services of an expert witness.

**DR 7-110 [§1200.41] Contact with Officials.**

- A. A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with the Code of Judicial Conduct.
- 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 the lawyer promptly delivers a copy of the writing to opposing counsel or to an adverse party who is not represented by a lawyer.
  - 3. Orally upon adequate notice to opposing counsel or to an adverse party who is not represented by a lawyer.
  - 4. As otherwise authorized by law, or by the Code of Judicial Conduct.



# CANON 8

## *A Lawyer Should Assist in Improving the Legal System*

### ETHICAL CONSIDERATIONS

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

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

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

**EC 8-4** Whenever a lawyer seeks legislative or administrative changes, the lawyer should identify the capacity in which he or she appears, whether on behalf of the lawyer, a client, or the public. A lawyer may advocate such changes on behalf of a client even though the lawyer does not agree with them. But when a lawyer purports to act on behalf of the public, the lawyer should espouse only those changes which the lawyer conscientiously believes to be in the public interest. Lawyers involved in organizations seeking law reform generally do not have a lawyer-client relationship with the organization. In determining the nature and scope of participation in law reform activities, a lawyer should be mindful of obligations under Canon 5, particularly DR 5-101 through DR 5-110. A lawyer is professionally obligated to protect the integrity of the organization by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially affected.

**EC 8-5** Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by the obligation to preserve the confidences and secrets of the client, a lawyer should reveal to appropriate authorities any knowledge the lawyer may have of such improper conduct.

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

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

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

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

## **DISCIPLINARY RULES**

### **DR 8-101 [§1200.42] Action as a Public Official.**

- A.** A lawyer who holds public office shall not:
1. Use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest.
  2. Use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.
  3. Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

**DR 8-102 [§1200.43] Statements Concerning Judges and Other Adjudicatory Officers.**

- A. A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
- B. A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

**DR 8-103 [§1200.44] Lawyer Candidate for Judicial Office.**

- A. A lawyer who is a candidate for judicial office shall comply with section 100.5 of the Chief Administrator's Rules Governing Judicial Conduct (22 NYCRR) and Canon 5 of the Code of Judicial Conduct.



# CANON 9

## *A Lawyer Should Avoid Even the Appearance of Professional Impropriety*

### ETHICAL CONSIDERATIONS

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

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

**EC 9-3** A lawyer who leaves judicial office or other public employment should not thereafter accept employment in connection with any matter in which the lawyer had substantial responsibility prior to leaving, since to accept employment would give the appearance of impropriety even if none exists.

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

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

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

## **DISCIPLINARY RULES**

### **DR 9-101 [§1200.45] Avoiding Even the Appearance of Impropriety.**

- A.** A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.
- B.** Except as law may otherwise expressly permit:
  - 1. A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
    - a. The disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom; and
    - b. There are no other circumstances in the particular representation that create an appearance of impropriety.
  - 2. A lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may knowingly undertake or continue representation in the matter only if the disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom.
  - 3. A lawyer serving as a public officer or employee shall not:
    - a. Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental 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
    - b. Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.
- C.** A lawyer shall not state or imply that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.
- D.** A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

### **DR 9-102 [§1200.46] Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records.**

- A.** Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

**B. Separate Accounts.**

1. A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law, shall maintain such funds in a banking institution within the State of New York which agrees to provide dishonored check reports in accordance with the provisions of Part 1300 of the joint rules of the Appellate Divisions. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which he or she is a member, or in the name of the lawyer or firm of lawyers by whom he or she is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts which the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity, into which special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside the State of New York if such banking institution complies with such Part 1300, and the lawyer has obtained the prior written approval of the person to whom such funds belong which specifies the name and address of the office or branch of the banking institution where such funds are to be maintained.
2. A lawyer or the lawyer's firm shall identify the special bank account or accounts required by DR 9-102 [1200.46] (B)(1) as an "Attorney Special Account," or "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or lawyer's firm.
3. Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.
4. Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm shall be kept in such special account or accounts, 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 or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

**C. Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.**

A lawyer shall:

1. Promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest.
2. Identify and label securities and properties of a client or third person 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 or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them.

4. Promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.

**D. Required Bookkeeping Records.**

A lawyer shall maintain for seven years after the events which they record:

1. The records of all deposits in and withdrawals from the accounts specified in DR 9-102 [1200.46](B) and of any other bank account which concerns or affects the lawyer's practice of law. These records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement.
2. A record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.
3. Copies of all retainer and compensation agreements with clients.
4. Copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf.
5. Copies of all bills rendered to clients.
6. Copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed.
7. Copies of all retainer and closing statements filed with the Office of Court Administration.
8. All checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.
9. Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.
10. For purposes of DR 9-102 [1200.46](D), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

**E. Authorized Signatories.**

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only an attorney admitted to practice law in New York State shall be an authorized signatory of a special account.

**F. Missing Clients.**

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the

balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

**G. Designation of Successor Signatories.**

1. Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account who shall be a member of the bar in good standing and admitted to the practice of law in New York State.
2. An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this rule.
3. The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

**H. Dissolution of a Firm.**

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in DR 9-102 [1200.46] (D).

**I. Availability of Bookkeeping Records; Records Subject to Production in Disciplinary Investigations and Proceedings.**

The financial records required by this Disciplinary Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this subdivision shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the lawyer-client privilege.

**J. Disciplinary Action.**

A lawyer who does not maintain and keep the accounts and records as specified and required by this Disciplinary Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

## **ADVICE ON ETHICAL QUESTIONS**

An attorney may obtain ethical guidance regarding questions concerning the attorney's OWN professional conduct by writing to the Committee on Professional Ethics at the address below. Opinions of the Committee are advisory and are rendered only to attorneys concerning their own proposed conduct, not the conduct of another attorney. The Committee does not pass upon questions of law or on matters which are in litigation – such matters are within the authority of the court to determine. The Committee does not consider hypothetical questions or questions which have also been presented to another bar association's ethics committee.

The Committee's determinations are issued either in the form of an informal letter response, which is sent to the inquiring attorney only, or in a formal advisory opinion which is published.

New York State Bar Association  
Committee on Professional Ethics  
One Elk Street  
Albany, New York 12207  
(518) 463-3200  
FAX (518) 487-5694  
E-mail Ethics@nysba.org

## **PUBLISHED ETHICS OPINIONS**

Bound volumes of formal ethics opinions issued by the Committee on Professional Ethics are available for purchase. For subscription information, write to the Committee at One Elk Street, Albany, New York 12207. In addition, ethics opinions issued since 1994 are available on the Association's Web site (<http://www.nysba.org>) under "Ethics."

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