

Indiana Rules of Professional Conduct: A Comparison with the Old Code

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I. BACKGROUND AND OVERVIEW

The Indiana Rules of Professional Conduct are based almost entirely on the American Bar Association (ABA) Model Rules of Professional Conduct.¹ Because of concern over the efficiency of the Model Rules of Professional Responsibility, upon which Indiana and other states had based professional conduct codes, the ABA in 1977 appointed a commission chaired by Robert J. Kutak to draft new rules.² The Model Rules went through several changes in the stages between the draft prepared by the Kutak Commission and the final version of the Model Rules adopted by the ABA House of Delegates in August of 1983. A brief overview of some of these changes gives light to the concerns about attorney conduct held by both the members of the Kutak Commission and the ABA Delegates as a whole.

In the Discussion Draft of the Model Rules, the language of Rule 6.1 "required" that attorneys perform pro bono work.³ However, in the final version of the Model Rules, Rule 6.1 was tempered and attorneys were only "encouraged" to perform or support pro bono work.⁴ Next, Discussion Draft Model Rule 1.5 sought to require that all fee arrangements be in writing.⁵ By the time the ABA House of Delegates approved the final draft, Rule 1.5 required only that contingent fee arrangements be in writing.⁶ Further, attorneys employed by an organization who learned of an intended violation of law by an officer or employee of

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¹*Annual Meeting Highlights*, 29 RES GESTAE 284, 285 (December 1985).

²Hodes, *Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 745 (1981).

³MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (Discussion Draft 1980).

⁴MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983). [Hereinafter MODEL RULES].

⁵MODEL RULES, *supra* note 4, Rule 1.5 (Discussion Draft 1980).

⁶MODEL RULES, *supra* note 4, Rule 1.5.

the organization were authorized by the Discussion Draft of the Model Rules to disclose client confidences "to the extent necessary" if they were unsuccessful in seeking a suitable remedy within the organization.⁷ The final version of Model Rule 1.13 calls for the resignation of organization attorneys if, after referral to the highest authority in the organization, the organization insists upon the illegal action.⁸

The Model Rules either have already replaced or are in the process of replacing the various Codes of Professional Responsibility in a majority of the states.⁹ Twenty-three states have adopted a version of the ABA's Model Rules. A version of the Model Rules is currently pending before the highest courts of eleven states. Further, ten other states are currently employing study committees to review the Model Rules.¹⁰ The Indiana Supreme Court's adoption of the Rules of Professional Conduct effective January 1, 1987,¹¹ ended a review process that featured lively debate over client confidentiality rules and resulted in a set of Rules that differs from the Model Rules in two areas.

The Indiana State Bar Association's Code of Conduct Study Committee reviewed the ABA's Model Rules and recommended their adoption to the Indiana State Bar Association (ISBA) House of Delegates in 1985 with only two exceptions.¹² Adopted without debate¹³ was the proposal to retain Indiana's rules regarding attorney advertising.¹⁴ The Committee's recommended revision of Model Rule 1.6 on client confidentiality, however, was much more controversial and met with resistance from the ISBA House of Delegates.¹⁵

The Indiana debate over Rule 1.6 began even before the Code of Conduct Study Committee submitted its proposed revision to the ISBA House of Delegates. In a 1985 article, Frederick E. Rakestraw, co-chairman of the Code of Conduct Study Committee, explained his views on the revelation of client confidences.¹⁶ Rakestraw believed that the ABA's Model Rules did not permit attorneys enough discretion when revealing client confidences in the event that the client planned to commit

⁷MODEL RULES, *supra* note 4, Rule 1.13 (Discussion Draft 1980).

⁸MODEL RULES, *supra* note 4, Rule 1.13.

⁹Information release from American Bar Association (May 28, 1987).

¹⁰*Id.*

¹¹INDIANA RULES OF PROFESSIONAL CONDUCT (1987) [hereinafter RULES].

¹²Rakestraw, *Proposed Model Rules of Professional Conduct*, 28 RES GESTAE 475, 475-76 (March 1985).

¹³*Id.*

¹⁴*Annual Meeting Highlights*, 29 RES GESTAE 284, 285-86 (December 1985).

¹⁵*Id.*

¹⁶Rakestraw, *Proposed Model Rules of Professional Conduct*, 28 RES GESTAE 475 (March 1985).

an illegal act.¹⁷ Model Rule 1.6 allows a lawyer to reveal information pertaining to the representation of a client to the extent the lawyer believes necessary “to prevent the client from committing a criminal act . . . likely to result in imminent death or substantial bodily harm,” as well as in legal proceedings between the lawyer and client and situations where the lawyer is the object of a criminal charge or civil claim based upon conduct in which the client was involved.¹⁸ The Committee’s proposed Rule 1.6 allowed a lawyer to reveal client confidences to the extent reasonably necessary “to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm, or in substantial injury to the financial interests or property of another.”¹⁹ This amendment was designed to maintain consistency with Disciplinary Rule 7-102(B) of the Code of Professional Responsibility, which charged a lawyer with the responsibility to call upon a client to rectify a fraud perpetrated in the course of the lawyer’s representation of the client and, failing that, to reveal the fraud “to the affected person or tribunal.”²⁰

Leon R. Kaminski and John T. Sharpnack co-authored an article in which they urged that the Code of Conduct Study Committee’s proposed amendments to Model Rule 1.6 be rejected by the ISBA House Delegates.²¹ Kaminski and Sharpnack expressed their fear that the Committee’s proposal to expand the Model Rule’s exceptions to attorney-client confidentiality would have the effect of undermining clients’ confidence in attorneys and discourage clients from making full disclosure of their contemplated conduct to attorneys.²² Kaminski and Sharpnack also shared the opinion that the more disclosure the Rules of Professional Conduct permitted, the more likely compulsory disclosure or liability for damages could be imposed upon an attorney who did not disclose information that could prevent financial injury.²³

The ISBA House of Delegates reviewed the proposed Rules of Professional Conduct in the course of its annual meeting in October of 1985 and the amendments to Model Rule 1.6 were the only debated provisions of the Committee’s proposed Rules.²⁴ Despite Rakestraw’s

¹⁷*Id.* at 476-79.

¹⁸MODEL RULES, *supra* note 4, Rule 1.6.

¹⁹Rakestraw, *Proposed Model Rules of Professional Conduct*, 28 RES GESTAE 475, 476 (March 1985) (emphasis added).

²⁰INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1971) [hereinafter CODE].

²¹Kaminski and Sharpnack, “. . . to preserve inviolate the secrets of my client” 28 RES GESTAE 480 (March 1985).

²²*Id.* at 481.

²³*Id.* at 481-82.

²⁴*Annual Meeting Highlights*, 29 RES GESTAE 284, 285 (December 1985).

argument before the delegates that the Committee's amendments were necessary to prevent "a fraud to a widow and her life fortune" among other financial misdeeds, a motion to delete the Committee's amendments was approved and the proposed Rules were sent to the Indiana Supreme Court with Rule 1.6 in conformity with the ABA's Model Rules.²⁵

The Rules of Professional Conduct adopted by the Indiana Supreme Court included the following provisions concerning confidentiality of information received from a client:

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

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

(1) to prevent the client from committing any criminal act;
or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.²⁶

Indiana's Rule 1.6 thus differs from the ABA Model Rule 1.6 in that an Indiana attorney is permitted to reveal client confidences if it is reasonably necessary to do so in order to prevent *any* criminal act,²⁷ while the Model Rule 1.6 allows such disclosure only if necessary to prevent a criminal act "that the lawyer believes is likely to result in imminent death or substantial bodily harm."²⁸ Rule 1.6, as adopted by the Indiana Supreme Court, thus more closely resembles in its application the version of Rule 1.6 proposed by the ISBA Code of Conduct Study Committee than the version submitted by the ISBA House of Delegates.

The practical effect of Indiana's deviation from the ABA's Model Rules is that Indiana attorneys are now vested with broad discretion to reveal more client confidences regarding future criminal activity than ever before authorized by the Code of Professional Responsibility.²⁹ The

²⁵*Id.* at 285-86.

²⁶RULES, *supra* note 11, Rule 1.6.

²⁷*Id.*

²⁸MODEL RULES, *supra* note 4, Rule 1.6.

²⁹RULES, *supra* note 11, Rule 1.6. It is interesting to note that the expansion from crimes against the person to any crime would include such crimes as deception, IND. CODE § 35-46-3-2 (Supp. 1983), nonsupport of a dependent, IND. CODE § 35-42-4-3 (1982), and many federal criminal statutes such as securities fraud.

Comment accompanying Rule 1.6 provides the only limitation to the scope of the attorney's discretion by stating that "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary for the purpose."³⁰

In summary, attorneys are not subject to disciplinary action for the failure to commit time or financial support to pro bono publico service; only contingent fee agreements need be in writing; attorneys employed by organizations may be required to resign if the organization's policymakers refuse to alter illegal conduct; and, attorneys in Indiana have wide latitude in disclosing client confidences to prevent any criminal act. Also noteworthy is Indiana's decision to retain its former rules on advertising rather than adopting the more relaxed standards in the Model Rules.

Besides the more prominent changes, minor adjustments of both a substantive and procedural nature have been made. With few exceptions the new Rules have streamlined the somewhat eclectic compilation of prohibitions and mandates found in their predecessor, the Code of Professional Responsibility. The most obvious nonsubstantive change in the newly adopted Rules of Professional Conduct, as compared to the former Code of Professional Responsibility, is the format. The Code was based upon nine Canons.³¹ The broad statements of the Canons were further divided into Ethical Considerations and Disciplinary Rules.³² The Ethical Considerations represented a standard of behavior desirable for lawyers, yet not mandatory.³³ The Disciplinary Rules amplified the Canons with directives which stated the minimum level of competency required of attorneys.³⁴ The Rules have abandoned the Canons and instead rely on eight general topic areas.³⁵ Despite the rejection of ethical considerations and disciplinary rules, the Rules are cast both in imperatives such as "shall" and "shall not" and in permissive terms such as "may."³⁶ The Comments to the Rules of Professional Conduct, which were adopted by the Indiana Supreme Court, do not carry the potential for disciplinary action even when presented in terms such as "should."³⁷ This article is devoted to a comparison between the former Code of Professional Responsibility and the new Rules of Professional Conduct.

³⁰RULES, *supra* note 11, Rule 1.6 comment.

³¹See CODE, *supra* note 20.

³²*Id.*

³³CODE, *supra* note 20, preliminary statement.

³⁴*Id.*

³⁵See RULES, *supra* note 11,.

³⁶RULES, *supra* note 11, Scope.

³⁷*Id.*

II. DISCUSSION

A. Client-Lawyer Relationship

Sixteen rules comprise "Client-Lawyer Relationship," the first topic area in the newly adopted Rules of Professional Conduct.³⁸ Rule 1.1 states: "Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."³⁹ The accompanying Comment urges that new lawyers can be as competent as more experienced lawyers because basic to any legal undertaking is the ability to determine the legal issues involved.⁴⁰ The Comment goes on to encourage participation in continuing legal education. The Comment acknowledges that, following careful self-assessment of a lawyer's knowledge and experience, and after an assessment of the complexities of the subject matter, the lawyer may refer the matter to or consult with an attorney of established competence in the area.⁴¹ Rule 1.1 along with its comments addresses the same topic area as Disciplinary Rule 6-101(A).⁴²

Rule 1.2(a) requires attorneys to accede to clients' wishes regarding whether to settle civil actions, and in criminal cases whether to accept a plea agreement, waive jury trial or whether the client will testify.⁴³ The Comment instructs lawyers to consult with clients regarding all aspects of a case.⁴⁴ However, while clients determine the goals of representation, it is the attorney's responsibility, guided by professional obligations, to control the means of obtaining the clients' goals.⁴⁵ Rule 1.2 (a) has no direct parallel in the Code. However, Ethical Considerations 7-7 and 7-8, and Disciplinary Rule 7-101(A)(1) together counsel attorneys to allow clients to make decisions which depend upon "non-legal factors" while "avoiding offensive tactics."⁴⁶ Rule 1.2(a) more clearly defines the decision-making roles of attorneys and clients, than did the relevant portions of the Code.

The Comment to Rule 1.2(a) advises that if a client appears to suffer from a mental disability or is otherwise unable to aid in the

³⁸RULES, *supra* note 11, Rule 1.

³⁹RULES, *supra* note 11, Rule 1.1.

⁴⁰RULES, *supra* note 11, Rule 1.1 comment.

⁴¹*Id.*

⁴²CODE, *supra* note 20, DR 6-101(A)(1), (2).

⁴³RULES, *supra* note 11, Rule 1.2(a).

⁴⁴RULES, *supra* note 11, Rule 1.2(a) comment.

⁴⁵*Id.*

⁴⁶CODE, *supra* note 20, EC 7-7, -8, DR 7-101(A)(1).

decision-making process, the attorney should refer to Rule 1.14.⁴⁷ Under Rule 1.14, when the lawyer perceives the client as being incapable of attending to the client's own interests, the lawyer may request the appointment of a guardian or take other measures.⁴⁸ The Comment to Rule 1.14 readily acknowledges the precarious footing upon which lawyers tread in assessing clients' varying degrees of competence.⁴⁹ Further, the Comment would impose overseer-like duties upon the lawyer, to take steps to prevent or rectify bad acts of a legal representative in accordance with Rule 1.2(d).⁵⁰ The Comment raises another complicating factor in that attorneys need to consider the adverse affects upon clients' interests if a disability is disclosed.⁵¹ In comparison, Ethical Consideration 7-12 allowed attorneys to make decisions for impaired clients unless the client was legally required to make the decision.⁵²

Rule 1.2(b) is less a rule and more in the nature of an inducement for lawyers to accept clients who are unpopular or whose cases are unsavory.⁵³ The Rule is self-explanatory. It provides that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities."⁵⁴ This Rule has no correlative disciplinary rule in the Code.

Also without a counterpart in the Code is Rule 1.2(c) which allows an attorney to "limit the objectives of the representation if the client consents after consultation."⁵⁵ Review of its Comment suggests that Rule 1.2(c) may be directed to the rather new pre-paid legal service plans as well as attorneys who represent insureds on behalf of insurance companies.⁵⁶ Any situation where representation is limited requires full disclosure of the purpose for which the lawyer has been retained and of the extent of the limitations on representation.⁵⁷ The Comment also condemns limiting the objectives or means of representation that the "lawyer regards as repugnant or imprudent."⁵⁸ In limiting the scope of

⁴⁷The Comment suggests seeking the advice of a trained diagnostician. RULES, *supra* note 11, Rule 1.2(a) comment (1987). The attorney should attempt to proceed as in a normal lawyer-client relationship. *Id.*

⁴⁸RULES, *supra* note 11, Rule 1.14.

⁴⁹RULES, *supra* note 11, Rule 1.14 comment.

⁵⁰*Id.*

⁵¹*Id.*

⁵²CODE, *supra* note 20, EC 7-12.

⁵³RULES, *supra* note 11, Rule 1.2(b).

⁵⁴*Id.*

⁵⁵RULES, *supra* note 11, Rule 1.2(c).

⁵⁶RULES, *supra* note 11, Rule 1.2(c) comment.

⁵⁷*Id.*

⁵⁸*Id.* See also RULES, *supra* note 11, Rule 6.2 (appears on its face to be in contrast with the duties imposed by Rule 1.2(a), RULES, *supra* note 11, Rule 1.2(a).

representation a lawyer must be guided by the competency standards imposed by Rule 1.1.⁵⁹

Rule 1.2(d) prohibits counseling or assisting a client in conduct that is criminal or fraudulent but does allow an attorney to counsel the client as to ramifications of proposed conduct or to explore the “validity, scope, meaning or application” of a law.⁶⁰ The Comment notes that an attorney’s position is especially delicate when the client has embarked upon the illegal course of action.⁶¹ Portions of Rule 1.2(d) echo ethical considerations and disciplinary rules found in the Code. Disciplinary Rule 7-102(A)(7) precluded counseling or assisting a client in illegal or fraudulent conduct.⁶² Disciplinary Rule 7-106 prohibited advising a client to disregard an order or rule of a tribunal, but allowed a good faith challenge of the order or rule’s validity.⁶³ A lawyer could not help create or preserve false evidence under Disciplinary Rule 7-102(A)(6).⁶⁴ Ethical Consideration 7-5 stated that “A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment thereafter.”⁶⁵

Rule 1.2(e) states “When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.”⁶⁶ No comment accompanies this section: It may be difficult for an attorney to determine what the client “expects.” Two disciplinary rules found in the Code address the same subject area. Disciplinary Rule 2-110(C)(1)(c) demanded withdrawal from representation when a client insisted the attorney act in an illegal manner or in a manner prohibited by the Code.⁶⁷ Any statement or implication that an attorney could improperly influence a court, legislature, or public official was forbidden by Disciplinary Rule 9-101(C).⁶⁸ In summary, Rule 1.2 embodies a broad range of concerns endemic to the client-lawyer relationship. Special attention to Rule 1.2 is warranted when an attorney is establishing the ground work for representation of a new client.

Rule 1.3 states, “A lawyer shall act with reasonable diligence and promptness in representing a client.”⁶⁹ As the Comment reminds lawyers,

⁵⁹RULES, *supra* note 11, Rule 1.2(c) comment.

⁶⁰RULES, *supra* note 11, Rule 1.2(a).

⁶¹RULES, *supra* note 11, Rule 1.2(d) comment. However, Rule 1.6 may allow disclosure. See *supra* note 26 and accompanying text.

⁶²CODE, *supra* note 20, DR 7-102(A)(7).

⁶³CODE, *supra* note 20, DR 7-106.

⁶⁴CODE, *supra* note 20, DR 7-102(A)(6).

⁶⁵CODE, *supra* note 20, EC 7-5.

⁶⁶RULES, *supra* note 11, Rule 1.2(c).

⁶⁷CODE, *supra* note 20, DR 2-110.

⁶⁸CODE, *supra* note 20, DR 9-101(c).

⁶⁹RULES, *supra* note 11, Rule 1.3.

“no . . . shortcoming is more widely resented than procrastination.”⁷⁰ Neglect of a legal matter is the most common complaint by clients.⁷¹ Rule 1.3 more particularly sets out the considerations that were found in Disciplinary Rules 6-101(A)(3),⁷² 7-101(A)(1),⁷³ and 7-101(A)(3),⁷⁴ and Canon 7.⁷⁵ The prohibition against neglecting “a matter entrusted” to the lawyer found in Disciplinary Rule 6-101(A)(3) and the requirement that a lawyer “represent a client zealously within the bounds of law” prescribed in Canon 7 are most closely analogous to Rule 1.3.

Communicating with a client regarding the status of a legal matter and explaining legal considerations sufficiently to allow the client to make necessary decisions in the representation⁷⁶ form the basis of Rule 1.4.⁷⁷ The Comment recommends against full disclosure of information to clients when the client may react inappropriately as in the case of mental infirmity or when the lawyer is under court order or rule not to divulge information as required under Rule 3.4(c).⁷⁸ While the Code has no direct counterpart to Rule 1.4, Disciplinary Rule 9-102(B) required notification of the receipt of a client’s funds or property.⁷⁹ Additionally, Ethical Considerations 7-8 and 9-2 urged lawyers to inform clients of relevant considerations prior to the client making decisions and to keep clients abreast of developments in their legal matters.⁸⁰

Types of fee arrangements and the factors which should be considered when determining a fee are the subjects of Rule 1.5.⁸¹ Rule 1.5 specifically defines perimeters that were implicit in the Code. The overriding concern regarding fees is reasonableness.⁸² Also, a lawyer should consider:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the accept-

⁷⁰RULES, *supra* note 11, Rule 1.3 comment.

⁷¹31 RES GESTAE 162 (October 1987) (statistics on complaints referred to Disciplinary Commission of the Supreme Court of Indiana).

⁷²CODE, *supra* note 20, DR 6-101(A)(3).

⁷³CODE, *supra* note 20, DR 7-101(A)(1).

⁷⁴CODE, *supra* note 20, DR 7-101(A)(3).

⁷⁵CODE, *supra* note 20, DR 7-101(A)(3).

⁷⁶The Comment to Rule 1.4 recommends review of Rule 1.2(a) regarding client decisions, Rule 1.14 regarding mentally disabled clients, and Rule 1.13 regarding corporate clients. RULES, *supra* note 11, Rule 1.4 comment.

⁷⁷RULES, *supra* note 11, Rule 1.4.

⁷⁸RULES, *supra* note 11, Rule 1.4 comment.

⁷⁹CODE, *supra* note 20, DR 9-102(B).

⁸⁰CODE, *supra* note 20, EC 7-8, 9-2.

⁸¹RULES, *supra* note 11, Rule 1.5.

⁸²*Id.*

ance of the particular employment will preclude other employment by the lawyer;

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.⁸³

The Comment notes that the underlying basis for a fee need not be fully disclosed to a client, but factors relied upon directly must be disclosed.⁸⁴ When initially informing a client about fees it may be sufficient to discuss with the client hourly rates, a fixed fee or an estimated fee.⁸⁵ The latter should be altered as circumstances require.⁸⁶ Disciplinary Rule 2-105(A) prohibited charging or collecting excessive or illegal fees.⁸⁷ The factors to consider when determining the amount of a fee in Rule 1.5(a) are identical to those recited in Disciplinary Rule 2-105(B).⁸⁸

Rule 1.5(b), aimed at the representation of clients who the lawyer does not regularly represent, requires disclosure of the terms or rate of the fee prior to or soon after representation begins.⁸⁹ The Rule encourages written statements regarding fees.⁹⁰ If a fee is paid in advance, the Comment requires return of unearned portions when the lawyer-client relationship ends.⁹¹ It may be acceptable for an attorney to receive property as payment of a fee. The attorney must be mindful of the provisions of the Rule forbidding the acquisition of a proprietary interest in the subject matter of the representation, except to the extent that a contingent fee is allowed or an attorney's lien to secure fees may be sought.⁹² Although the services rendered may be commensurate with the client's ability to pay, a client should not be placed in a position of

⁸³*Id.*

⁸⁴RULES, *supra* note 11, Rule 1.5 comment.

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷CODE, *supra* note 20, DR 2-105(A).

⁸⁸CODE, *supra* note 20, DR 2-105(B).

⁸⁹RULES, *supra* note 11, Rule 1.5(b).

⁹⁰RULES, *supra* note 11, Rule 1.5(b) comment.

⁹¹*Id.* Rule 1.16(d) requires a refund of an unearned advance payment when representation is terminated. RULES, *supra* note 11, Rule 1.16(d).

⁹²RULES, *supra* note 11, Rule 1.5(b) comment.

compromising a legal matter or bargaining for further services.⁹³ Rule 1.5(b) more strongly advises written fee agreements than did the Code. No disciplinary rule directly embraces the concerns found in Rule 1.5(b). However, Ethical Consideration 2-19 did suggest written statements as to the fee, especially in contingent fee arrangements. If a dispute arises concerning fees, a lawyer should submit to any established procedures for resolving such disputes.⁹⁴

Contingent fee agreements must be in writing pursuant to Rule 1.5(c).⁹⁵ The agreement must contain the method of calculating the fee, taking into consideration possible settlement, various levels of litigation and whether expenses are deducted prior to determining the contingent fee.⁹⁶ The Rule also requires a written statement of the outcome of the client's action.⁹⁷ However, Rule 1.5(d) prohibits contingent fee agreements in any matter concerning the dissolution of a marriage or in criminal cases.⁹⁸ The Comment cautions attorneys to offer alternatives to contingent fees when a contingent fee may be unsuitable.⁹⁹ In comparison, Disciplinary Rule 2-105(c) prohibited contingent fee arrangements when the lawyer represented criminal defendants.¹⁰⁰

Rule 1.5(e) concerns division of fees between lawyers not associated in the same firm.¹⁰¹ The following circumstances, stated in the conjunctive, must be present before division of fees should occur:

- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.¹⁰²

The most significant alteration in the division of fees when compared to the Code is the provision in Rule 1.5(e)(1) allowing division of fees without regard to proportion of services if the attorneys assume joint responsibility for the representation. Because the Code made no such provision the Rule more accurately reflects lawyers' practices.

⁹³*Id.*

⁹⁴*Id.*

⁹⁵RULES, *supra* note 11, Rule 1.5(c).

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹RULES, *supra* note 11, Rule 1.5(d) comment.

¹⁰⁰CODE, *supra* note 20, DR 2-105(c).

¹⁰¹RULES, *supra* note 11, Rule 1.5(e).

¹⁰²*Id.*

Rule 1.7 observes general conflict of interest considerations when a lawyer accepts employment.¹⁰³ A lawyer should not represent a client if doing so could negatively affect another client's interest.¹⁰⁴ Neither should the lawyer accept employment if another client's interests or the lawyer's personal interests could burden successful representation of the new client.¹⁰⁵ The Rule recognizes exceptions when the lawyer reasonably believes that no client's interests would suffer and the clients consent to the representation.¹⁰⁶ If a lawyer represents multiple clients in a single transaction, the lawyer must disclose the negative and positive implications of joint representation.¹⁰⁷ The overriding principle is client loyalty.¹⁰⁸

The Comment narrows the potential for a conflict to those situations where the clients' interests are directly affected.¹⁰⁹ Consequently, no conflict requiring disclosure would necessarily arise when a lawyer undertakes representation of two clients with competing pecuniary interests when the representation does not involve related matters.¹¹⁰ The Code contained similar provisions in Disciplinary Rule 5-101(A) and Disciplinary Rule 5-105(A). The former prohibited representation of a client absent full disclosure if the lawyer's interest could conflict with those of the client. The latter required rejection of employment if the proposed employment could interfere with the lawyer's professional independent judgment on behalf of another client.¹¹¹

The Comment to Rule 1.7 stresses the potential for conflict when multiple representation of criminal defendants is undertaken. Because criminal defendants often have competing interests, normally such representation should be avoided.¹¹² However, in either civil or criminal cases a lawyer may represent multiple clients if their interests are comparable and the potential for negative consequences is minimal.¹¹³ The Comment refers to Rule 2.2, which allows an attorney to act as an intermediary between clients in establishing or adjusting an entrepreneurial relationship.¹¹⁴ As in any other joint representation, the lawyer must

¹⁰³RULES, *supra* note 11, Rule 1.7.

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹RULES, *supra* note 11, Rule 1.7 comment.

¹¹⁰*Id.* Interestingly, the Comment suggests that a conflict may arise when an attorney asserts opposing positions on the same legal issue in different matters pending in a trial court. Yet, the Comment condemns as improper the assertion of differing positions in independent matters pending before an appellate court. *Id.*

¹¹¹CODE, *supra* note 20, DR 5-101(A), 105(A).

¹¹²RULES, *supra* note 11, Rule 1.7 comment.

¹¹³*Id.*

¹¹⁴RULES, *supra* note 11, Rule 2.2.

assess the possibility that a client's interests will be damaged and must reasonably conclude that the matter will be resolved in each client's best interest.¹¹⁵ Moreover, if a mutually acceptable resolution is not forthcoming, the attorney must withdraw from the representation and discontinue representation of any of the clients regarding the subject matter.¹¹⁶ The Comment to Rule 2.2 is somewhat contradictory in that it states that multiple representation situations should not diminish the rights of each client in the lawyer-client relationship.¹¹⁷ Yet, the Comment recognizes that usually the attorney-client privilege does not exist between commonly represented clients.¹¹⁸ Accordingly, the Comment opines that in the eventuality of litigation between clients, the privilege will not protect the communications, and clients should be so advised.¹¹⁹ Joint representation of clients and especially the situation where the lawyer acts as an intermediary requires great sensitivity by the lawyer to all clients' needs and to the potential for deterioration of the representation.¹²⁰

With regard to multiple clients, Disciplinary Rule 5-105¹²¹ in the Code allowed such representation when each client consented after being informed of possible consequences.¹²² If the lawyer's independent professional judgment could be negatively affected, requiring withdrawal or refusal of employment, the lawyer's partners, associates and firm were also disqualified.¹²³ Also included in the Comment to Rule 1.7 is a concern raised in Disciplinary Rule 5-107(B) of the Code.¹²⁴ When a person or organization other than the client is responsible for the lawyer's fee, the lawyer must ensure proper representation without interference from the outside source.¹²⁵ The Comment requires disclosure to and the consent of the client prior to representation, whereas the Disciplinary Rule did not.¹²⁶ Rule 1.8(f) expresses the same consideration in the form of a Rule.¹²⁷

Rule 1.8 outlines specific transactions that would constitute a conflict of interest.¹²⁸ The version of Rule 1.8 adopted in the Model Rules

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷RULES, *supra* note 11, Rule 2.2 comment.

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹CODE, *supra* note 20, DR 5-105(B), (C), (D).

¹²²*Id.*

¹²³RULES, *supra* note 11, Rule 1.7 comment.

¹²⁴CODE, *supra* note 20, DR 5-107(B).

¹²⁵RULES, *supra* note 11, Rule 1.7 comment.

¹²⁶*Id.*

¹²⁷RULES, *supra* note 11, Rule 1.8(f).

¹²⁸RULES, *supra* note 11, Rule 1.8.

contained ten parts.¹²⁹ On September 4, 1987, the Indiana Supreme Court added an eleventh section, Rule 1.8(k),¹³⁰ defining and limiting the type of civil practice proper for part-time prosecutors.¹³¹

Rule 1.8(a) forbids business transactions with clients or business interests adverse to a client unless three conditions are met.¹³² The lawyer must acquire only a fair and reasonable interest which is disclosed to the client in writing; the client must be given an opportunity to consult with other counsel; and the client must consent in writing.¹³³ Similar concerns were expressed in Disciplinary Rule 5-104(A)¹³⁴ along with Ethical Consideration 5-3.¹³⁵

Rule 1.8(b) is unambiguous and has a direct counterpart in the Code. The new Rule prohibits the use of information gained from representation of a client to the client's disadvantage unless the client consents.¹³⁶ Disciplinary Rule 4-101(B) provided that an attorney could neither use confidences of the client to the client's disadvantage nor use confidences for the advantage of another without the client's consent.¹³⁷

Rule 1.8(c) precludes the preparation of an instrument for a client wherein the lawyer or a relative of the lawyer receives a substantial gift "including a testamentary gift, except where the client is related to the donee."¹³⁸ No complementary disciplinary rule appeared in the Code, although Ethical Consideration 5-5 expressed similar prohibitions.

"Prior to the conclusion of representation of a client," a lawyer must not "make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account" relating to the subject of the representation is the teaching of Rule 1.8(d).¹³⁹ The Comment excludes from the Rule a fee comprised of a share in literary property if the fee comports with Rule 1.5.¹⁴⁰ The Code contained Disciplinary Rule 5-104(B) which effected the same goal.¹⁴¹

¹²⁹MODEL RULES, *supra* note 4, Rule 1.8.

¹³⁰RULES, *supra* note 11, Rule 1.8(k).

¹³¹RULES, *supra* note 11, Rule 1.8(k). *See also* CODE, *supra* note 20, EC 5-14 to -20.

¹³²RULES, *supra* note 11, Rule 1.8(a).

¹³³*Id.*

¹³⁴CODE, *supra* note 20, DR 5-104(A).

¹³⁵CODE, *supra* note 20, EC 5-3.

¹³⁶RULES, *supra* note 11, Rule 1.8(b). It is difficult to perceive how an attorney can competently represent a client while determining whether the client will allow the attorney to reveal confidences to the client's disadvantage.

¹³⁷CODE, *supra* note 20, DR 4-101(B)(2)(3).

¹³⁸RULES, *supra* note 11, Rule 1.8(c).

¹³⁹RULES, *supra* note 11, Rule 1.8(d).

¹⁴⁰RULES, *supra* note 11, Rule 1.8(d) comment.

¹⁴¹CODE, *supra* note 20, DR 5-104(B).

The Rules relax the Code's mandate that a lawyer not advance any costs or expenses of litigation for which the client was not ultimately responsible.¹⁴² According to Rule 1.8(c) a lawyer still cannot render financial assistance to a client, yet the lawyer may advance costs and expenses of litigation with repayment contingent upon a recovery.¹⁴³ Also, the Rule allows an attorney to pay litigation expenses without the expectation of repayment if the client is indigent.¹⁴⁴ The new Rule recognizes, to some extent, the relative financial disparity between many plaintiffs and defendants. The Rule stops short of allowing attorneys to provide subsistence funds to clients who have been injured or disabled and who are faced with a lengthy litigation process.¹⁴⁵

Agreements to limit lawyers' liability for malpractice are prohibited in Rule 1.8(h), except when in compliance with applicable laws and when the client has obtained independent counsel.¹⁴⁶ Further, a lawyer cannot settle a malpractice action without advising the client or former client in writing that the client should consult another lawyer regarding the claim.¹⁴⁷ The Code provision most closely aligned with Rule 1.8(h) is Disciplinary Rule 6-102(A).¹⁴⁸

Rule 1.8(i) disqualifies related attorneys from representing different clients on opposing sides of a controversy, unless the clients consent.¹⁴⁹ The Comment notes that the disqualification attaches to the related lawyers rather than members of their law firms.¹⁵⁰ A similar rule appeared in the Code.¹⁵¹

Rule 1.8(j) prohibiting a lawyer from obtaining an interest in the subject matter of a client's representation should be read in conjunction with Rule 1.5 and its Comments. Rule 1.8(j) specifically excludes lawyers liens for fees and contingent fee matters as noted in the Comment to Rule 1.5.

The addition of Rule 1.8(k) to Indiana's Rules of Professional Conduct represents a departure from the Model Rules. The Rule states:

(k) A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain

¹⁴²See CODE, *supra* note 20, DR 5-103(B).

¹⁴³RULES, *supra* note 11, Rule 1.8(e).

¹⁴⁴*Id.*

¹⁴⁵This measure was debated in the House of Delegates.

¹⁴⁶RULES, *supra* note 11, Rule 1.8(h).

¹⁴⁷*Id.*

¹⁴⁸See CODE, *supra* note 20, DR 6-102(A).

¹⁴⁹RULES, *supra* note 11, Rule 1.8(i).

¹⁵⁰RULES, *supra* note 11, Rule 1.8(i) comment. The Rule presupposes that the lawyers are associated with different firms. *Id.*

¹⁵¹CODE, *supra* note 20, DR 5-101(A).

from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities. This restriction is not intended to prohibit representation in tort cases in which investigation and any prosecution of infractions has terminated, nor to prohibit representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express written limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent private clients in cases involving family law.¹⁵²

The various sections of Rule 1.8 are largely as applicable to ongoing representation of a client as they are to employment by a new client. Indiana's Rule 1.8(k) clarifies the type of private practice available to part-time or deputy prosecutors.

After a lawyer has represented a client in a legal matter, Rule 1.9(a) mandates the refusal of employment in a related matter if a new client's interests are opposed to those of the former client, unless the lawyer obtains the permission of the former client.¹⁵³ The Rule is not intended to deter representation of a new client in a position adverse to that taken for a former client on a matter not related to the former client's representation.¹⁵⁴ As in many situations arising from the rules, an attorney may be able to extricate himself/herself from potential problems by disclosing the circumstances to the client and obtaining the client's permission to proceed.

Rule 1.9(b) prohibits the "use of information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when information has become generally known."¹⁵⁵ This provision is substantially similar to Rule 1.8(b). Rule 1.8(b) refers to information of a current client¹⁵⁶ while Rule 1.9(b) refers to a former client.¹⁵⁷ Rule 1.9 has no representation in the disciplinary rules of the Code. Similar concerns were addressed through Ethical Consideration 4-6 which encouraged the preservation of a former client's "confidences and secrets."¹⁵⁸

Rule 1.10 logically expands the conflict of interest disqualifications for attorneys found in Rules 1.7, 1.8 and 1.9 to the attorneys in law

¹⁵²RULES, *supra* note 11, Rule 1.8(k).

¹⁵³RULES, *supra* note 11, Rule 1.9(a).

¹⁵⁴But see *supra* note 110 and accompanying text.

¹⁵⁵RULES, *supra* note 11, Rule 1.9(b).

¹⁵⁶RULES, *supra* note 11, Rule 1.8(b).

¹⁵⁷RULES, *supra* note 11, Rule 1.9(b).

¹⁵⁸CODE, *supra* note 20, EC 4-6.

firms associated with the attorneys who would be disqualified.¹⁵⁹ In the case of a lawyer extinguishing association with a firm, attorneys in the firm are not necessarily disqualified from employment by a client whose interests are adverse to those of a client represented by the formerly associated lawyer.¹⁶⁰ However, if the matter of the representation “is the same or substantially related to that in which the formerly associated lawyer represented the client; and . . . any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter” a disqualification may be appropriate.¹⁶¹ As often provided in the Rules, a lawyer or the firm¹⁶² may not be required to refuse employment if the client who would be adversely affected waives the protection.¹⁶³ This question of disqualification was minimally addressed in Disciplinary Rule 5-105(D).¹⁶⁴ It required law firms to withdraw or refuse employment in a matter in which an attorney associated with the firm was disqualified.¹⁶⁵

Aimed at curbing the exploitation of governmental or public service employment for the advantage of a private client, Rules 1.11(a) and (b) limit the participation by lawyers or their firms in matters for private clients if the lawyers personally acted in the matter while employed by a government agency.¹⁶⁶ The disqualification may be relaxed if the government agency consents to the representation after disclosure.¹⁶⁷ The Code counterpart to Rule 1.11(a), Disciplinary Rule 9-101(B), stated “A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.”¹⁶⁸

In the cases where government employment succeeds private employment or a government employee considers pursuit of private employment, Rule 1.11(c) controls.¹⁶⁹ Rule 1.11(c)(1) precludes participation by a public employee “in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful del-

¹⁵⁹RULES, *supra* note 11, Rule 1.10.

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²As to what type of group constitutes a “firm,” the Comment specifically includes private law firms, corporate counsel within the same entity and legal services organizations. RULES, *supra* note 11, Rule 1.10 comment. Less obvious are cases where attorneys share office space, unincorporated organizations with affiliates and some governmental units.

¹⁶³RULES, *supra* note 11, Rule 1.10.

¹⁶⁴CODE, *supra* note 20, DR 5-105(D).

¹⁶⁵*Id.*

¹⁶⁶RULES, *supra* note 11, Rule 1.11(a), (b).

¹⁶⁷*Id.*

¹⁶⁸CODE, *supra* note 20, DR 9-101(B).

¹⁶⁹RULES, *supra* note 11, Rule 1.11(c).

egation may be, authorized to act in the lawyer's stead in the matter."¹⁷⁰ In the second portion of the Rule, 1.11(c)(2), an attorney in public service is prohibited from negotiating private employment with an attorney or a person involved in a matter in which the government attorney is involved.¹⁷¹ The Comment accompanying Rule 1.11(c) notes that the section is directed to the lawyer personally involved, not other lawyers in the same public or governmental agency.¹⁷² The Code contained no counterpart to this Rule.¹⁷³

Rule 1.12 corresponds to Rule 1.11(c), but substitutes a judicial officer, an arbitrator or a law clerk to a judicial officer for the lawyer employed by a governmental agency.¹⁷⁴ The Comment includes within the term "adjudicative officer" judges pro tempore, referees, special masters, hearing officers, parajudicial officers, and part-time judges.¹⁷⁵ The law firm of any disqualified lawyer is also disqualified with few exceptions.¹⁷⁶ Although a judicial officer may not solicit employment with a party or lawyer in a matter in which the judge is actually participating, a law clerk may do so, after notifying the adjudicative officer by whom the law clerk is employed.¹⁷⁷ Also "an arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party."¹⁷⁸ In the Code Disciplinary Rule 9-101(A) forbade representation of a client in a matter in which the lawyer served in an adjudicative capacity on the merits.¹⁷⁹ Other portions of Rule 1.12 have no corresponding disciplinary rule in the Code. However, the Code of Judicial Conduct Canon 3 carries substantially similar import.¹⁸⁰

The special considerations necessary when an attorney is employed by a corporate client or organization are the subject of Rule 1.13.¹⁸¹ The attorney conducts the representation through "duly authorized constituents" of the organization.¹⁸² A communication by a constituent regarding the organization is protected by Rule 1.6. As noted in the

¹⁷⁰RULES, *supra* note 11, Rule 1.11(c)(1).

¹⁷¹RULES, *supra* note 11, Rule 1.11(c)(2).

¹⁷²RULES, *supra* note 11, Rule 1.11 comment.

¹⁷³*Id.*

¹⁷⁴RULES, *supra* note 11, Rule 1.12.

¹⁷⁵RULES, *supra* note 11, Rule 1.12 comment.

¹⁷⁶RULES, *supra* note 11, Rule 1.12.

¹⁷⁷RULES, *supra* note 11, Rule 1.12.

¹⁷⁸RULES, *supra* note 11, Rule 1.12 comment.

¹⁷⁹CODE, *supra* note 20, DR 9-101(A).

¹⁸⁰CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(b)-(d).

¹⁸¹RULES, *supra* note 11, Rule 1.13.

¹⁸²*Id.* The Comment defines constituents as "positions equivalent to officers, directors, employees, and shareholders." RULES, *supra* note 11, Rule 1.13 comment.

introduction, provisions in Rule 1.13 mandate some attempt at curative action by the attorney when a constituent contemplates the refusal to act or action in a manner repugnant to a legal obligation or in violation of the law.¹⁸³ After assessing the risk to the organization and the best course of conduct, a lawyer may take such measures as:

- (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.¹⁸⁴

At least two ethical considerations within the Code are applicable to Rule 1.13; however, the topic was not treated by the Code's disciplinary rules. Canon 5 in the Code stated, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."¹⁸⁵ In accordance with the Canon directive, Ethical Consideration 5-18 advised a lawyer employed by an organization that the entity and not the persons connected to the organization should be the focus of the lawyer's loyalty and attention.¹⁸⁶ In connection with a lawyer's exercise of independent professional judgment, Ethical Consideration 5-24 cautioned lawyers employed by corporations which necessarily depend upon officers and directors for business direction to decline interference from laymen when exercising professional judgment.¹⁸⁷ In general the new rules on conflict of interest, Rule 1.7 through Rule 1.13, provide more detailed factors and guidelines for successful resolution of such issues than did the Code.

Rule 1.15 on the safekeeping of property compares favorably with the Code's Disciplinary Rule 9-102. Both the new and old rules require maintenance of separate accounts for the lawyer's fund, prompt notification to a party of the receipt of property or funds by the lawyer, separation of amounts in dispute such as the lawyer's fee and complete records regarding property and funds.¹⁸⁸ Rule 1.15 extends the considerations beyond clients to also include third parties.¹⁸⁹ Also, Rule 1.15

¹⁸³See *supra* notes 7-8 and accompanying text.

¹⁸⁴RULES, *supra* note 11, Rule 1.13.

¹⁸⁵CODE, *supra* note 20, Canon 5.

¹⁸⁶CODE, *supra* note 20, EC 5-18.

¹⁸⁷CODE, *supra* note 20, EC 5-24.

¹⁸⁸RULES, *supra* note 11, Rule 1.15; CODE, *supra* note 20, DR 9-102.

¹⁸⁹RULES, *supra* note 11, Rule 1.15.

requires retention of records concerning funds and property for a period of five years after representation.¹⁹⁰

The final portion of Rule 1 is Rule 1.16 regarding the refusal of or withdrawal from representation. The Rule mandates the refusal of employment or withdrawal¹⁹¹ if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.¹⁹²

Rule 1.16(b) reminds lawyers in situations in which the lawyer wishes to withdraw from representation that decisions should be tempered by a determination of whether withdrawal would negatively affect the interests of the client.¹⁹³ The Rule goes on to recite factors which could instigate withdrawal, apparently without regard to an adverse impact on the client's interests.¹⁹⁴ These factors include the following:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.¹⁹⁵

Rule 1.16(d) insists that a lawyer who is withdrawing from employment protect the client's interests to the degree possible.¹⁹⁶ The lawyer

¹⁹⁰*Id.*

¹⁹¹Rule 1.16(c) notes that a lawyer may not be able to withdraw if ordered by a tribunal to continue representation. RULES, *supra* note 11 Rule 1.16(c).

¹⁹²RULES, *supra* note 11, Rule 1.16.

¹⁹³RULES, *supra* note 11, Rule 1.16(b).

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶RULES, *supra* note 11, Rule 1.16(d).

should consider temporal limitations on the client's ability to engage different counsel, return of the client's property, papers and funds including any unearned fee advanced by the client.¹⁹⁷ The Comment warns that retention of papers until payment of fee is permitted only to the extent recognized by law.¹⁹⁸ This rule correlates with Disciplinary Rule 2-109 in the Code, which addresses many of the same concerns.¹⁹⁹

B. *The Attorney as a Counselor*

Rule 2 addresses the attorney's role as a counselor. Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."²⁰⁰ Rule 2.1 embodies much of the impact of Ethical Consideration 7-8 in the Code.²⁰¹ However, Ethical Consideration 7-8 specified that nonlegal considerations influencing legal objectives should be ultimately determined by the court.²⁰²

Lawyers in public or private practice are occasionally called upon to render an opinion on a matter concerning a client. Rule 2.3 states:

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

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

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.²⁰³

Pursuant to the Comment, this Rule is not intended to encompass an investigation or evaluation of matters regarding a person who is not a client.²⁰⁴ The Code contained no counterpart to Rule 2.3.

¹⁹⁷*Id.*

¹⁹⁸RULES, *supra* note 11, Rule 1.16(d) comment. Lawyers who retain client's funds after withdrawal or discharge in order to secure payment of the lawyer's fee should consult Rule 1.5 and Rule 1.8(g).

¹⁹⁹CODE, *supra* note 20, DR 2-109.

²⁰⁰RULES, *supra* note 11, Rule 2.1.

²⁰¹CODE, *supra* note 20, EC 7-8.

²⁰²*Id.*

²⁰³RULES, *supra* note 11, Rule 2.3.

²⁰⁴RULES, *supra* note 11, Rule 2.3 comment.

C. *The Attorney as an Advocate*

Rule 3 purports to govern the lawyer in his or her role as an "Advocate."²⁰⁵ Attorneys are charged with the duty to assert only meritorious claims and contentions, to expedite litigation, to act with complete concern toward the tribunal, to be fair to opposing party and counsel and to respect the impartiality and decorum of the tribunal.²⁰⁶ Rule 3 also covers the lawyer's role in trial publicity and as a witness and sets out the responsibilities of a lawyer acting as a prosecutor or an advocate in nonadjudicative proceedings.²⁰⁷

Rule 3.1, entitled "Meritorious Claims and Contentions," limits a lawyer to asserting claims and contentions that are "not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."²⁰⁸ The Comment accompanying the Rule states that a claim may not be "frivolous" even if the lawyer does not believe that the client's argument will prevail, but a claim is frivolous if it is asserted "primarily for the purpose of harassing or maliciously injuring a person."²⁰⁹ Rule 3.1 extends to defense counsel in a criminal proceeding freedom to "defend the proceeding so as to require that every element of the case be established," regardless of any other requirements contained in Rule 3.1.²¹⁰ Similarly, Disciplinary Rule 7-102(A) prohibited both the filing of a suit merely to harass and the assertion of a non-meritorious claim and employed nearly the identical language used by Rule 3.1 to prohibit these actions.²¹¹ Rule 3.1 omits Disciplinary Rule 7-102(A)(1)'s qualifier, "when he (the lawyer) knows or when it is obvious that such action would serve merely to harass or maliciously injure another,"²¹² which changes the scrutiny of lawyer conduct in filing allegedly harassing claims from a subjective test of the lawyer's knowledge to an objective test.

Rule 3.2 charges a lawyer with the duty to "make reasonable efforts to expedite litigation consistent with the interests of his client."²¹³ The Comment accompanying the Rule focuses on the discouragement of delays solely for the purposes of the lawyer's convenience, benefit or the frustration of the opponent.²¹⁴ Further, the Comment articulates a

²⁰⁵RULES, *supra* note 11, Rule 3.

²⁰⁶*Id.*

²⁰⁷*Id.*

²⁰⁸RULES, *supra* note 11, Rule 3.1.

²⁰⁹RULES, *supra* note 11, Rule 3.1 comment.

²¹⁰RULES, *supra* note 11, Rule 3.1.

²¹¹CODE, *supra* note 20, DR 7-102(A).

²¹²RULES, *supra* note 11, Rule 3.1.

²¹³RULES, *supra* note 11, Rule 3.2.

²¹⁴RULES, *supra* note 11, Rule 3.2 comments.

test for unreasonable delay—“whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.”²¹⁵ The Comments accompanying Rule 3.2 prohibit the same lawyer activity that Disciplinary Rule 7-102(A)(1) prohibited.²¹⁶ However, as in Rule 3.1, the Code requirement that a lawyer have actual knowledge of the destructive effect of his or her deleterious actions is eliminated. Perhaps the reasoning behind this strengthening of the proscription against delay can be found in the Comment’s express concern that “delaying practices bring the administration of justice into disrepute.”²¹⁷

Rule 3.3, entitled “Candor Toward the Tribunal,” prohibits a lawyer from knowingly making a false statement of material fact to a tribunal or concealing adverse material facts of legal authority from the tribunal.²¹⁸ Rule 3.3 also charges a lawyer with the duty to inform the tribunal of all adverse and favorable material facts in an *ex parte* proceeding.²¹⁹ The Comments accompanying Rule 3.3 focus chiefly on the duties of a lawyer who is presented with false evidence or testimony in favor of his or her client’s case. While Rule 3.3(c) gives the lawyer discretion, rather than a duty, to refuse to offer evidence the lawyer believes is false,²²⁰ the Comments set out three different criteria for a lawyer’s actions when a nonclient, a civil client and a criminal defendant client offer evidence the lawyer knows to be false. If the false evidence is offered by a nonclient, the Comments are clear—“the lawyer must refuse to offer it regardless of the client’s wishes.”²²¹ If the false evidence is provided by a civil client and the lawyer fails to persuade the client not to offer the false evidence, the lawyer must disclose the deception to the court and/or the opposing party.²²² If the false evidence is provided by a criminal defendant, and the lawyer cannot persuade the client not to offer the evidence, the Comments set out the following sequence that should be followed:

If perjured testimony or false evidence has been offered, the advocate’s proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should

²¹⁵*Id.*

²¹⁶CODE, *supra* note 20, DR 7-102(A)(1).

²¹⁷RULES, *supra* note 11, Rule 3.2 comments.

²¹⁸RULES, *supra* note 11, Rule 3.3.

²¹⁹*Id.*

²²⁰*Id.*

²²¹RULES, *supra* note 11, Rule 3.3 comments.

²²²*Id.*

make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.²²³

The Comments acknowledge the potential harm these actions may have to a criminal defendant and the probability of a mistrial, but state that these measures are justified by the need to prevent a lawyer from perpetrating a fraud on the court.²²⁴

Rule 3.3 does not deviate significantly from the provisions of the Code which prohibit a lawyer from knowingly using perjured testimony or false evidence,²²⁵ requires a lawyer to disclose knowledge of a fraud on the tribunal,²²⁶ prohibits lawyers from failing to disclose adverse facts or precedent,²²⁷ and prohibits lawyers from making false statements of law and fact.²²⁸ The requirement of full disclosure in an *ex parte* proceeding has no counterpart in the Code.

Rule 3.4, which is entitled “Fairness to Opposing Party and Counsel,” prohibits a lawyer from obstructing the pre-trial discovery process, participating in falsifying evidence or asserting personal knowledge of facts at a trial while acting as counsel.²²⁹ The provisions of Rule 3.4 appear to be little more than an elaboration on Rule 3.3, since acts such as those listed above would constitute a violation of a lawyer’s duty of candor toward the tribunal. The Comments point out that falsification or destruction of evidence is usually a criminal offense.²³⁰ The Comments cite the common law rule that prohibits payment of any fee to an occurrence witness or a contingent fee to an expert witness.²³¹ Rule 3.4 borrows most of its provisions from Disciplinary Rules 7-106 and 7-107, which governed “Trial Conduct”²³² and “Contact with Witness”²³³ respectively.

“Impartiality and Decorum of the Tribunal” is the subject of Rule 3.5, which proscribes *ex parte* communication and improper influence

²²³*Id.* The Comment admits that similar actions by a criminal defense attorney have been construed to be unconstitutional violations of due process rights and right to counsel in some jurisdictions. The Comment then points out the obvious fact that the Rules are subordinate to constitutional requirements when the courts find that the two conflict. *Id.*

²²⁴*Id.*

²²⁵CODE, *supra* note 20, DR 7-102(A)(4).

²²⁶CODE, *supra* note 20, DR 7-102(B)(1).

²²⁷CODE, *supra* note 20, DR 7-102(A)(3).

²²⁸CODE, *supra* note 20, DR 7-102(A)(5).

²²⁹RULES, *supra* note 11, Rule 3.4.

²³⁰RULES, *supra* note 11, Rule 3.4 comments.

²³¹*Id.*

²³²CODE, *supra* note 20, DR 7-106.

²³³CODE, *supra* note 20, DR 7-107.

of a judge, juror or prospective juror.²³⁴ Rule 3.5(c) contains a “mind your manners” requirement for a lawyer who is practicing before a tribunal,²³⁵ and the Comments outline a lawyer’s duties when faced with “abuse” from a tribunal:

A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.²³⁶

The effect of Rule 3.5 is identical to that of Disciplinary Rules 7-108,²³⁷ 7-109(C)²³⁸ and 7-106(C)(6).²³⁹

Rule 3.6 outlines the lawyer’s role in distributing information in connection with “Trial Publicity.”²⁴⁰ Rule 3.6(a) charges the lawyer with a general duty to avoid making public statements the lawyer “knows or reasonably should know” will prejudice a legal proceeding.²⁴¹ Rule 3.6(b) lists some of the subjects which are forbidden: criminal record of a party, guilty plea possibilities, physical evidence characteristics, opinions on guilt or innocence and any comments regarding evidence which is likely to be ruled inadmissible.²⁴² Rule 3.6(c) lists in detail what a lawyer may comment on, including public record information, results of any steps in the litigation and warnings of danger if necessary.²⁴³ The provisions of Rule 3.6 are nearly identical to those contained in Disciplinary Rule 7-107,²⁴⁴ the lone exception being that Rule 3.6 for the first time prohibits lawyer statements regarding the nature of seized physical evidence.²⁴⁵

Rule 3.7 generally prohibits a lawyer from acting as an advocate in a trial where the lawyer will be a witness, but also lists exceptions such

²³⁴RULES, *supra* note 11, Rule 3.5. The Comment accompanying Rule 3.5 refers the lawyer to the criminal code and the ABA Model Code of Judicial Conduct in order to be familiar with what conduct amounts to “improper influence.” RULES, *supra* note 11, Rule 3.5 comment.

²³⁵RULES, *supra* note 11, Rule 3.5.

²³⁶RULES, *supra* note 11, Rule 3.5 comments.

²³⁷CODE, *supra* note 20, DR 7-108(A)(B).

²³⁸CODE, *supra* note 20, DR 7-109(C).

²³⁹CODE, *supra* note 20, DR 7-106(C)(6).

²⁴⁰RULES, *supra* note 11, Rule 3.6.

²⁴¹*Id.*

²⁴²*Id.*

²⁴³*Id.*

²⁴⁴CODE, *supra* note 20, DR 7-107.

²⁴⁵RULES, *supra* note 11, Rule 3.6.

as testimony relating to an uncontested issue, testimony relating to the legal services provided in the case or the seemingly broad category of instances when disqualification of the lawyer would cause "substantial" hardship to the client.²⁴⁶ A balancing of prejudices is inevitable in the event of the last exception. The client's hardship must be weighed against the likely prejudice caused to the opposing party due to the lawyer's testimony. Though the Comments recognize this dilemma,²⁴⁷ they give no guidance as to who should have the job of deciding which interest is more vital. The Rule and Comments do not mention whether the lawyer should decide this question or present the dilemma to the trial judge for a ruling. In discussing whether a lawyer can testify in a case where another lawyer in the same firm is an advocate, the Comments note that it is the lawyer's responsibility to decide whether a conflict exists.²⁴⁸ Rule 3.7 does not deviate significantly from the terms of Disciplinary Rules 5-101(B)²⁴⁹ and 5-102,²⁵⁰ its Code counterparts.

Rule 3.8 governs the "Special Responsibility of a Prosecutor,"²⁵¹ and in light of the Comments' description of the prosecutor's role as a "minister of justice,"²⁵² this Rule charges the prosecutor with a duty to protect the constitutional rights of the criminal defendant.²⁵³ Rule 3.8's provisions calling for a prosecutor to bring only charges supported by probable cause and to disclose to the defense all relevant information regarding the case²⁵⁴ were contained in Disciplinary Rule 7-103.²⁵⁵ However, Rule 3.8 goes further than Disciplinary Rule 7-103 in that a prosecutor is now proscribed from obtaining a waiver of rights from an unrepresented client at a pre-trial hearing,²⁵⁶ and personnel assisting in the prosecution of a case are prevented from making any extrajudicial statements that Rule 3.6 would prevent the prosecutor from making.²⁵⁷

Rule 3.9, entitled "Advocate in Nonadjudicative Proceedings," simply requires a lawyer who is representing a client before a legislative or administrative tribunal to comply with Rules 3.3(a)-(c), 3.4(a)-(c), and

²⁴⁶RULES, *supra* note 11, Rule 3.7.

²⁴⁷RULES, *supra* note 11, Rule 3.7 comments.

²⁴⁸*Id.*

²⁴⁹CODE, *supra* note 20, DR 5-101(B).

²⁵⁰CODE, *supra* note 20, DR 5-102.

²⁵¹RULES, *supra* note 11, Rule 3.8.

²⁵²RULES, *supra* note 11, Rule 3.8 comments.

²⁵³RULES, *supra* note 11, Rule 3.8.

²⁵⁴*Id.*

²⁵⁵CODE, *supra* note 20, DR 7-103.

²⁵⁶RULES, *supra* note 11, Rule 3.8.

²⁵⁷*Id.*

Rule 3.5.²⁵⁸ Rule 3.9 makes mandatory the behavior recommended by Ethical Considerations 7-15,²⁵⁹ 7-16²⁶⁰ and 8-5.²⁶¹

D. Attorney Conduct Toward Nonclients

When a lawyer's representation of a client touches upon the interests of persons who are not clients, Rule 4.1 through Rule 4.4 should be consulted. Rule 4.1 cautions that attorneys can neither make false statements to a third person nor decline to reveal information to a third person "necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."²⁶² The Code contained similar statements in Disciplinary Rule 7-102(A)(5).²⁶³

Rules 4.2 and 4.3 outline considerations for an attorney who communicates with a party or person about the subject of the representation. Rule 4.2 precludes discussion of the legal matter with a party who is represented by counsel absent the consent of a person's lawyer, unless the communication is authorized by law.²⁶⁴ The Rule is almost identical to Disciplinary Rule 7-104(A)(1).²⁶⁵ Rule 4.3 prohibits the statement or implication that the lawyer is a detached expert on law, when the lawyer is communicating with an unrepresented person.²⁶⁶ If the lawyer realizes that the unrepresented person misapprehends the lawyer's role, the lawyer must attempt to clarify the misunderstanding.²⁶⁷ The Comment warns against offering advice to an unrepresented person, except to advise the person to seek counsel.²⁶⁸ Rule 4.3 coupled with its Comment imparts responsibilities similar to those in Disciplinary Rule 7-104(A)(2).²⁶⁹

Rule 4.4 is a catch-all rule for the proper course of conduct concerning third persons. The rule states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."²⁷⁰ Several disciplinary rules in the Code would relate to Rule 4.4. Disciplinary Rules

²⁵⁸RULES, *supra* note 11, Rule 3.9.

²⁵⁹CODE, *supra* note 20, EC 7-15.

²⁶⁰CODE, *supra* note 20, EC 7-16.

²⁶¹CODE, *supra* note 20, EC 8-5.

²⁶²RULES, *supra* note 11, Rule 4.1.

²⁶³CODE, *supra* note 20, DR 7-102(A)(3)(5).

²⁶⁴RULES, *supra* note 11, Rule 4.2.

²⁶⁵CODE, *supra* note 20, DR 7-104(A)(1).

²⁶⁶RULES, *supra* note 11, Rule 4.3.

²⁶⁷*Id.*

²⁶⁸RULES, *supra* note 11, Rule 4.3 comment.

²⁶⁹CODE, *supra* note 20, DR 7-104(A)(2).

²⁷⁰RULES, *supra* note 11, Rule 4.4.

7-106(C)(2), 7-102(A)(1), 7-108(D) and 7-108(E) prohibited actions, questions, and investigations which were calculated to harass, injure or degrade third persons.²⁷¹

E. The Attorney in an Organization

Questions of professional ethics unique to law firms and associations are the focus of Rule 5. Rule 5.1 defines the duties of a supervisory lawyer or partner in a firm to oversee the professional conduct of other lawyers in the firm.²⁷² Rule 5.1(a) charges partners with the responsibility for reasonably ensuring conformity with the Rules by all lawyers in the firm.²⁷³ Similarly, Rule 5.1(b) specifically directs lawyers in a supervisory capacity over other lawyers to take measures to establish that the other lawyers' conduct follows the Rules.²⁷⁴ The Comment recognizes that the means of compliance with Rule 5.1(a) and Rule 5.1(b) must be tailored to the size and circumstances of the firm, except that continuing legal education may be appropriate for the members of large or small firms.²⁷⁵ Rule 5.1(c) imposes liability on one lawyer for another's violations if the lawyer ordered or ratified the conduct, or if the lawyer is a partner or supervisory attorney and knows of the violation while an opportunity exists for corrective action but the lawyer fails to take such action.²⁷⁶ The Comment notes that Rule 5 and Rule 8.4(a) are the sole rules imposing disciplinary liability upon lawyers for violations by another lawyer.²⁷⁷ The Code's disciplinary rules did not explicitly address the requirements of Rule 5.1. However, Disciplinary Rule 1-103(A) demanded that a lawyer report to the proper authorities any unprivileged knowledge of another lawyer's professional misconduct.²⁷⁸ Disciplinary Rule 1-103(A) is analogous only because it could impose disciplinary liability upon one lawyer for another's violations of professional conduct rules.

Rule 5.2 notes that all lawyers are responsible for conforming their conduct to the Rules even though their action is directed by a supervisory lawyer.²⁷⁹ When the appropriate course of conduct is not readily apparent, a subordinate lawyer who acts at the direction of a supervisory lawyer

²⁷¹CODE, *supra* note 20, DR 7-102(A)(1), -106(C)(2), -108(D), -108(E).

²⁷²RULES, *supra* note 11, Rule 5.1. The Comment to Rule 5.1 expands the scope of a firm to legal departments of government agencies and organizations. RULES, *supra* note 11, Rule 5.1 comment.

²⁷³RULES, *supra* note 11, Rule 5.1(a).

²⁷⁴RULES, *supra* note 11, Rule 5.1(b).

²⁷⁵RULES, *supra* note 11, Rule 5.1 comment.

²⁷⁶RULES, *supra* note 11, Rule 5.1(c).

²⁷⁷RULES, *supra* note 11, Rule 5.1(c) comments.

²⁷⁸CODE, *supra* note 20, DR 1-103(A).

²⁷⁹RULES, *supra* note 11, Rule 5.2.

does not violate the Rules, if the action is reasonable.²⁸⁰ The Code had no correlative disciplinary rule.

Rule 5.3 echoes the partner's or supervisory lawyer's obligations imposed in Rule 5.1, except the duty is one of controlling nonlawyer employees.²⁸¹ The Comment charges a lawyer with the duty to supervise and to instruct nonlawyers on confidentiality and other relevant ethical considerations.²⁸² The lawyer should assume responsibility for the nonlawyer's work product. Additionally, the lawyer must consider that the nonlawyer employees have not completed legal training and are not subject to discipline under the Rules.²⁸³ As with Rule 5.1, Rule 5.3 has no counterpart in the Code. Disciplinary Rule 4-101(D) cautioned lawyers to take reasonable measures to ensure that employees and third parties did not reveal a client's confidences and secrets.²⁸⁴ Disciplinary Rule 7-107(I) was aimed at prevention of extrajudicial statements by employees and others, if the lawyer was prohibited from making the extrajudicial statements.²⁸⁵

Rule 5.4, requiring lawyers to avoid control of their professional independence by a nonlawyer, draws upon the teachings of several disciplinary rules found in the Code. Rule 5.4 states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

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

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

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

(b) A lawyer shall not form a partnership with a nonlawyer

²⁸⁰*Id.*

²⁸¹RULES, *supra* note 11, Rule 5.3.

²⁸²RULES, *supra* note 11, Rule 5.3 comment.

²⁸³*Id.*

²⁸⁴CODE, *supra* note 20, DR 4-101(D).

²⁸⁵CODE, *supra* note 20, DR 7-107(I).

if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.²⁸⁶

The applicable provisions of the Code are Disciplinary Rules 3-102(A), 3-103(A), 5-107(B) and 5-107(C), and Ethical Consideration 5-24.²⁸⁷

Canon 3 in the Code stated "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law."²⁸⁸ Rule 5.5 states a lawyer must not cooperate with a nonlawyer in conduct that furthers the unauthorized practice of law by the nonlawyer.²⁸⁹ The Comment excepts from the prohibitions of the Rule a lawyer employing a nonlawyer to perform work for which the lawyer remains responsible.²⁹⁰ Also, a lawyer may instruct a nonlawyer on legal issues pertinent to the nonlawyer's employment, or in cases where the nonlawyer is proceeding pro se in a matter.²⁹¹ In the Code, Disciplinary Rule 3-101 expressed the same concerns as Rule 5.5.²⁹²

Rule 5.6 condemns employment agreements or any other contracts which purport to restrict a lawyer's ability to practice law, except as such an agreement concerns retirement benefits.²⁹³ According to the Comment, the Rule encompasses a settlement on behalf of a client in which the lawyer agrees to limit representation of other persons.²⁹⁴ Rule

²⁸⁶RULES, *supra* note 11, Rule 5.4.

²⁸⁷CODE, *supra* note 20, DR 3-102(A), -103(A), 5-107(B), -107(C), EC 5-24.

²⁸⁸CODE, *supra* note 20, Canon 3.

²⁸⁹RULES, *supra* note 11, Rule 5.5.

²⁹⁰RULES, *supra* note 11, Rule 5.5 comment.

²⁹¹*Id.*

²⁹²CODE, *supra* note 20, DR 3-101(A), (B).

²⁹³RULES, *supra* note 11, Rule 5.6.

²⁹⁴RULES, *supra* note 11, Rule 5.6 comment.

5.6 compares favorably with Disciplinary Rules 2-107(A) and 2-107(B).²⁹⁵

F. *Pro Bono Services*

The duty of the legal profession to engage in pro bono publico service, the subject of Rule 6, is couched in permissive terms urging compliance.²⁹⁶ Yet the Comment to Rule 6.1 states that the Rule “is not intended to be enforced through disciplinary process.”²⁹⁷ Rule 6.1 lists several means by which an attorney can fulfill the moral obligation to perform pro bono services. Rather than the traditional method of performing work for no fee or a reduced fee, a lawyer may contribute financial support to “organizations that provide legal services to persons of limited means.”²⁹⁸ As in the present Rules, the Code did not attach disciplinary repercussions for failure to engage in pro bono work. The Code did, however, include three ethical considerations advancing the laudatory nature of pro bono service.²⁹⁹

Rule 6.2 advises lawyers not to refuse an appointment to represent a person made by a tribunal unless good cause exists.³⁰⁰ Good cause may include the following: the representation could result in a violation of the Rules, the representation will probably result in a burdensome financial loss, or the representation is so repugnant to the lawyer that it is likely to color the attorney-client relationship or the lawyer’s ability to competently represent the client.³⁰¹ Again, no disciplinary rule compares to Rule 6.2, but Ethical Considerations 2-29 and 2-30 together communicated the same concerns.³⁰² While Ethical Consideration 2-29 stated that the refusal of an appointment should not be based upon a repugnance for the person or cause,³⁰³ Ethical Consideration 2-30 allowed refusal of employment if the lawyer’s personal feelings in the matter could affect the representation of the client.³⁰⁴

Rule 6.3 allows a lawyer to participate in a legal services organization as a member, director or officer even though clients in the lawyer’s private practice may have interests differing from those of the persons served by the organization.³⁰⁵ The lawyer must not knowingly become

²⁹⁵Compare RULES, *supra* note 11, Rule 5.6 with CODE, *supra* note 20, DR 2-107(A), (B).

²⁹⁶RULES, *supra* note 11, Rule 6.1.

²⁹⁷RULES, *supra* note 11, Rule 6.1 comment.

²⁹⁸RULES, *supra* note 11, Rule 6.1.

²⁹⁹

³⁰⁰RULES, *supra* note 11, Rule 6.2.

³⁰¹*Id.*

³⁰²CODE, *supra* note 20, EC 2-29.

³⁰³*Id.*

³⁰⁴CODE, *supra* note 20, EC 2-30.

³⁰⁵RULES, *supra* note 11, Rule 6.3.

personally involved in action taken by the organization which would negatively affect the lawyer's responsibilities to a private client.³⁰⁶ Conversely, the lawyer must not make a decision which would adversely affect a client of the organization in order to benefit a private client.³⁰⁷ The Code does not contain provisions similar to Rule 6.3.

Rule 6.4 provides that a lawyer may participate as a member, director or officer of an entity dedicated to reform of the law even though the reform may involve interests of a client.³⁰⁸ If a client's interests may be materially advanced by a decision in which the lawyer participates, the lawyer must reveal that information, but not necessarily the client's identity.³⁰⁹ This Rule is an extension of Rule 6.3 and has no counterpart in the Code.

Rule 7, as adopted in Indiana, is materially different than the provisions of the Model Rules. The version of Rule 7.1 as adopted in Indiana is substantially the same as Disciplinary Rule 2-101 on publicity and advertising.³¹⁰ However, Disciplinary Rule 2-101 prohibited a public communication which included a pictorial depiction of a person who was not a lawyer in the firm unless a specific disclaimer appeared on the communication. That prohibition was removed from Rule 7.1.³¹¹ Rule 7.1 in the Model Rules treated the subject of false or misleading statements or communications, or implications that certain results may be obtained by the lawyer.³¹²

Rule 7.2 regarding professional notices, letterhead, office names and law lists is identical to Disciplinary Rule 2-102 in the Code.³¹³ Model Rule 7.2 involves advertising and communication aimed at obtaining clients.³¹⁴ The Comment suggests that Rule 7.2 dispels the traditionally held view that lawyer advertisements should not be for the purpose of seeking clients.³¹⁵

The version of Rule 7.3 adopted in Indiana is the same as Disciplinary Rule 2-103 on recommending or soliciting professional employment.³¹⁶ Rule 7.3 specifically does not allow many types of written communication with prospective clients, and specifically prohibits any "in-person contact" soliciting employment when the potential client has not sought the

³⁰⁶*Id.* See also RULES, *supra* note 11, Rule 1.7.

³⁰⁷RULES, *supra* note 11, Rule 6.3.

³⁰⁸RULES, *supra* note 11, Rule 6.4.

³⁰⁹*Id.*

³¹⁰Compare RULES, *supra* note 11, Rule 7.1 with CODE, *supra* note 20, DR 2-101.

³¹¹*Id.*

³¹²MODEL RULES, *supra* note 4, Rule 7.1.

³¹³RULES, *supra* note 11, Rule 7.2; CODE, *supra* note 20, DR 2-102.

³¹⁴MODEL RULES, *supra* note 4, Rule 7.2.

³¹⁵*Id.*

³¹⁶Compare RULES, *supra* note 11, Rule 7.1 with CODE, *supra* note 20, DR 2-101.

lawyer's services.³¹⁷ The Model Rule 7.3 addresses the subject of contact with potential clients but generally distinguishes between communication to solicit employment which targets a recipient and those solicitations in the form of a letter or advertising circular delivered to persons whose needs for legal services are unknown.³¹⁸

Rule 7.4, the last section within Rule 7, is worded identically to Disciplinary Rule 2-104, except references to Code sections are altered.³¹⁹ Rule 7.4 discusses the limitation of a lawyer's practice to certain areas of law. In general, direct or indirect statements that a lawyer is a specialist in a certain area of law are prohibited except by lawyers who engage in patent, trademark or admiralty law.³²⁰ The Rule does not, however, preclude statements that a lawyer's practice is limited to a particular area of law.³²¹ Although Model Rule 7.4 is similar to Indiana's version of Rule 7.4, the Comment to the Model Rule recommends against a statement that the lawyer's practice "is limited to" or "concentrated in" a certain area because those phrases generally connote specialization in the fields.³²²

H. Professional Integrity

Rule 8 comes under the heading "Maintaining the Integrity of the Profession" and its five sections cover "Bar Admission and Disciplinary Matters," "Judicial and Legal Officials," "Reporting Professional Misconduct," "Misconduct" and "Jurisdiction."³²³ Rule 8.1 prohibits either an applicant for admission to the bar or a lawyer connected with such an application or a disciplinary matter from making false statements of fact, or failing to disclose necessary facts in connection with those proceedings.³²⁴ Although Rule 8.1 covers familiar ground in its prohibitions of certain actions by lawyers, this Rule is unique in that it extends to persons who have not yet been admitted to the Bar and subjects those persons to disciplinary action after admission.³²⁵ Rule 8.1 is parallel to Disciplinary Rule 1-101(A) with respect to an application for admission to the Bar.³²⁶

³¹⁷RULES, *supra* note 11, Rule 7.3.

³¹⁸MODEL RULES, *supra* note 11, Rule 7.3.

³¹⁹Compare RULES, *supra* note 11, Rule 7.4 with CODE, *supra* note 20, DR 2-104.

³²⁰RULES, *supra* note 11, Rule 7.4.

³²¹*Id.*

³²²MODEL RULES, *supra* note 4, Rule 7.4 comment.

³²³RULES, *supra* note 11, Rule 8.

³²⁴RULES, *supra* note 11, Rule 8.1. A disclaimer at the end of Rule 8.1 states that "this rule does not require disclosure of information otherwise protected by Rule 1.6." *Id.*

³²⁵*Id.*

³²⁶CODE, *supra* note 20, DR 1-101(A).

Rule 8.2 prohibits a lawyer from making a statement about a judge, legal official or a candidate for those offices that is either false or made “with reckless disregard as to its truth or falsity.”³²⁷ Further, a lawyer who is a candidate for judicial office must comply with applicable provisions of the Code of Judicial Conduct.³²⁸ Portions of Rule 8.2 are identical in effect to the provisions of Disciplinary Rule 8-102,³²⁹ but with respect to lawyers who are candidates for judicial office there exists no counterpart in the Code.

Rule 8.3 requires a lawyer to inform the proper authorities of professional misconduct of either another lawyer or a judge that “raises a substantial question” as to the fitness of the lawyer or judge.³³⁰ Rule 8.3 is parallel to Disciplinary Rule 1-103 except that the Rule gives the lawyer with knowledge of a violation some flexibility in deciding whether to report an incident of professional misconduct. The Comments explain that rules requiring the reporting of every offense were “unenforceable” and, therefore, only offenses which “a self-regulating profession must vigorously endeavor to prevent” should be reported.³³¹

Rule 8.4 defines professional misconduct for a lawyer as any act in violation of the Rules, certain criminal acts, fraudulent or dishonest acts and interference with the administration of justice.³³² The Comments accompanying Rule 8.4 explain that not all criminal acts are included in the purview of “professional misconduct” because a lawyer should be professionally, as opposed to criminally, answerable only for “offenses that indicate lack of those characteristics relevant to law practice.”³³³ Those offenses include crimes involving violence, dishonesty and breach of trust.³³⁴ The sections of Rule 8.4 do not deviate significantly from the provisions of Disciplinary Rule 1-102(A)³³⁵ and Rule 8.4’s proscription of implying an ability to influence a government agency or official is identical to Disciplinary Rule 9-101(c).³³⁶ Rule 8.5 closes the Rules of Professional Conduct by asserting disciplinary jurisdiction over any lawyer admitted to practice in this jurisdiction, regardless of whether the lawyer is also engaged in practice elsewhere.³³⁷

³²⁷RULES, *supra* note 11, Rule 8.2.

³²⁸*Id.*

³²⁹CODE, *supra* note 20, DR 8-102.

³³⁰RULES, *supra* note 11, Rule 8.3.

³³¹CODE, *supra* note 20, DR 1-103.

³³²RULES, *supra* note 11, Rule 8.4.

³³³RULES, *supra* note 11, Rule 8.4 comment.

³³⁴*Id.*

³³⁵CODE, *supra* note 20, DR 1-102(a).

³³⁶CODE, *supra* note 20, DR 9-101(c).

³³⁷RULES, *supra* note 11, Rule 8.5.

III. CONCLUSION

Generally, the new Rules require full disclosure to a client of matters relevant to the representation. When a potential conflict of interest can be foreseen by the attorney, rejection of employment or withdrawal from representation may be appropriate. If the potential for conflict is minimal, disclosure and/or the client's consent to the representation may be required. If the new Rules were reduced to two watch words, these words would be "disclosure" and "consent." While the new Rules form a solid framework for attorney-client relationships and attorney ethical considerations, common sense must prevail. An elevated standard of care may be required given certain circumstances or contingencies, not all of which can be addressed within the Rules.

