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REPORT ON ETHICS RULES OF THE ADVISORY GROUP/COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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Prefatory Note

Prior to the enactment of the Civil Justice Reform Act of 1990 the United States District Court for the Eastern District of New York had in place a Committee on Civil Litigation comprised of lawyers with widely varying practices, academicians and Court personnel, which advised the Court on various matters affecting the civil justice system in the Court. Such a Committee, under various names, had been advising the Court since November 30, 1982. See 142 F.R.D. 185, 195-196. With the advent of the Civil Justice Reform Act the Court's Committee on Civil Litigation was further enlarged, including with the addition of non-lawyers, and appointed as the Committee pursuant to the Act. Thus, currently this body functions as both the statutory Committee and the Court's Committee on Civil Litigation (hereinafter referred to as the "Committee").

Background

Under General Rules 2(a) and 4(f) of the Rules of the United States District Courts for the Southern and Eastern Districts of New York, which identify the ethical codes that a lawyer admitted to the Eastern District must obey, a lawyer may be subject to discipline if, after notice and an opportunity to be heard, he or she is found guilty by clear and convincing evidence of "conduct violative of the Codes of Professional Responsibility of the

American Bar Association or the New York Bar Association from time to time in force. . . ."

By letter dated March 26, 1993 to then Chief Judge Platt (Appendix A hereto), Professor Stephen Gillers of the New York University School of Law identified a problem presented by the current Rules given (a) the abandonment of the Model Code of Professional Responsibility ("Model Code") by the American Bar Association ("ABA") in favor of the Model Rules of Professional Conduct ("Model Rules"), and (b) the subsequent rejection of the Model Rules by the New York State Bar Association, which continues to adhere in substantial part to the Model Code. The net result is that lawyers practicing in the Eastern District under the current Rules are subject to two sets of ethical rules which are materially inconsistent in a number of respects. Without promoting one set of Rules over another, Professor Gillers suggested that the Court consider amending its Rules to avoid confusion among practitioners. Chief Judge Platt promptly forwarded Professor Gillers' letter to the Chair of the Committee and asked the Committee to consider the matter.

The Chair thereupon appointed a Subgroup on Ethics, currently comprised of Richard W. Reinthaler, Esq., Chair of the Subgroup, and members Joel Berger, Esq., Robert N. Kaplan, Esq., C. Evan Stewart, Esq. and Lawrence J. Zweifach, Esq.[1] The Subgroup met on May 18, 1993 to consider the matter, which was followed by several exchanges of correspondence and numerous telephone conversations among members of the Subgroup in an effort to achieve consensus. The conclusions reached by the Subgroup were then reported to the full Committee, which discussed the matter at length at its July 7, 1993 meeting. Following that meeting, a draft preliminary report and recommendation was prepared by the Chair of the Committee, which was then distributed to the full Committee and considered and

[1] Also participating in the deliberations of the Subgroup, in an ex officio capacity, was Victor J. Rocco, Esq.

approved at a meeting on August 24, 1993. The preliminary report and recommendation was then transmitted to the Board of Judges.

In its preliminary report and recommendation, the Committee noted its agreement with Professor Giller's assessment of the problem caused by the current Rules and expressed its belief that Rules 2(a) and 4(f) should be amended to specify one set of rules of general application to all lawyers practicing in the Eastern District. It concluded that the most appropriate set of rules to apply was the New York Code, and not the ABA Model Code or Model Rules.

In reaching this conclusion, the Committee noted that Federal courts have the inherent power to determine, as a matter of Federal law, which disciplinary rules should govern the conduct of lawyers appearing in Federal court. In re Snyder, 472 U.S. 634, 645 n.6 (1985). It was further noted that the majority of District Courts had adopted by way of local rule the disciplinary codes of the forum states in which they sat, as amended from time to time, rather than either the ABA Model Code or Model Rules. While it appeared that some District Courts had specified certain state rules they will not follow, the Committee noted that most District Courts had simply adopted one set of rules in its entirety. (Attached as Appendix B is a copy of pages 923-927 from Gillers and Simon, Regulation of Lawyers (1995), summarizing the various local rules on attorney discipline that have been adopted by the various District Courts.)

Although the "legislative history" of Rule 4(f) was not available to the Committee, the language of the current Rule appeared to suggest that the original intent was to follow the New York Code of Professional Responsibility, which at the time was substantially identical to the ABA Model Code. Case law in this Circuit appeared to confirm

this conclusion, see Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (Francis, M.J.), aff'd, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990) (Haight, D.J.), although precedent also existed suggesting that in interpreting the New York Code Federal judges may also look to the ABA Model Rules for guidance. See County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989) (Weinstein, D.J.); see also Rand v. Monsanto, 926 F.2d 596 (7th Cir. 1991).

In light of the fact that the New York Code had been amended in significant respects and was therefore no longer substantially the same as the ABA Model Code (which, in turn, has been rejected by the ABA and replaced by the Model Rules), the Committee concluded that the current language of Rule 4(f) no longer made any sense and should be revised. While noting that all lawyers practicing in Federal court should be familiar with the ABA Model Code and Model Rules, as well as the specific rules adopted by the states in which they are admitted, the Committee concluded that the need for predictability and certainty strongly weighed in favor of having one set of rules applicable to lawyers appearing in the Eastern District.

As noted above, the Committee recommended (with one member dissenting) that the one set of rules that ought to apply in the Eastern District should be the New York Code rather than the ABA Model Rules or Model Code. The Committee concluded that adopting the New York Code would enable lawyers practicing in both the Federal and state courts in this District to be governed fundamentally by the same set of ethics rules.

It was recognized, however, that conflicts can (and do) arise between Federal policies and principles and the ethical rules contained in the New York Code. In such cases, state rules have given way to overriding Federal policies. See, e.g., County of Suffolk, supra, and Rand, supra. The Committee noted that one way of dealing with such conflicts would be to expressly recognize via Local Rule the flexibility afforded judges in interpreting and

applying the rules in individual cases in light of overriding Federal policies and principles. Alternatively, the Committee indicated that it could engage in a detailed rule-by-rule analysis in an effort to determine whether the specific provisions of the New York Code were preferable, from a Federal policy standpoint, to those contained in the ABA Model Rules. This latter approach, it was recognized, would present a difficult, time-consuming and controversial task, and the Committee questioned its jurisdiction to engage in such an analysis absent a specific request from the Court. It thus recommended the adoption of a Rule that would afford Federal judges flexibility in individual cases to apply a standard more lenient than that provided in the New York Code, while indicating its preparedness to engage in a rule-by-rule analysis if so requested by the Court.

Finally, the preliminary report and recommendation urged the continued utilization of the "clear and convincing" standard of proof in determining whether Rule 4(f) has been violated. The report noted that the clear and convincing standard has long been the threshold of proof in disciplinary proceedings both in this District and in the Southern District of New York, and that all of the reported Federal cases involving discipline of attorneys practicing in Federal court have applied the clear and convincing standard. In re Medrano, 956 F.2d 101 (5th Cir. 1992); Matter of Thalheim, 853 F.2d 383 (5th Cir. 1988); In re Fisher, 179 F.2d 361 (7th Cir. 1950); In re Levine, 675 F. Supp. 1312 (M.D. Fla. 1986); In re Ryder, 263 F. Supp. 260 (E.D. Va. 1967). But cf. Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) (applying preponderance of the evidence standard to attorney disciplinary proceeding before Federal administrative agency).

The Advisory Committee's review of state court decisions also revealed that by far the most common standard applied in attorney disciplinary proceedings is the clear and

convincing standard (see Wolfram, Modern Legal Ethics 108-110 (1986), for a listing of state cases applying the clear and convincing standard). It noted that a handful of states, however, including New York, had applied the preponderance of evidence standard in attorney disciplinary proceedings. See, e.g., In the Matter of Capoccia, 59 N.Y.2d 549, 466 N.Y.S.2d 268 (1983) ("It has consistently been held by the Appellate Divisions that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence.").

While endorsing the substantive standards adopted by the New York State courts, the Advisory Committee concluded that, given the serious consequences that may flow from disciplinary proceedings, and the long-standing rule in the Eastern District, an enhanced standard of proof remained appropriate.[2]

The Board of Judges, after considering the preliminary report and recommendation, requested the Advisory Committee to undertake a detailed rule-by-rule analysis of the rules of ethics that should apply in the Court. A press release dated January 10, 1994 was issued announcing that a "working group" (i.e., the Subgroup) had been appointed to consider and report on the matter to the full Committee, and that the working group had requested several academic authorities on ethics to act as a special Advisory Panel, to bring their collective experience and learning in the area to the deliberations of the working group. The Advisory Panel was comprised of Professors Monroe Freedman of Hofstra

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[2] In addition to considering the standard of proof utilized under Rule 4(f), the Subgroup also has been studying the procedures used by the Eastern District to discipline attorneys who previously had been disciplined by state courts, as well as attorneys who are charged with improper conduct in connection with activities before the Eastern District. Members of the Subgroup have been discussing these procedures with judges on the Court, attorneys and representatives from the Clerk's Office. It also has had discussions with staff members of local grievance committees. With regard to the imposition of discipline by the Eastern District on attorneys who previously had been disciplined by a New York State court, the Subgroup has also been examining the legal issues which arise from the fact that the State of New York employs the fair preponderance standard in disciplinary proceedings, while the Eastern District uses the clear and convincing standard. The Subgroup will be issuing a separate report on these disciplinary procedures later this year.

University Law School, Stephen Gillers of New York University Law School, Marjorie Silver of Touro Law Center and Carol Ziegler of Brooklyn Law School.

In the release (which was published several times in the New York Law Journal) the Court stated that the working group had been asked "to explore all options without preconceived notions as to the outcome of their analysis" and that it would be "considering both the ABA Model Rules and the New York Code, and it may recommend one or the other in its entirety, or it may recommend some combination of the two sets of rules, or it may recommend some entirely different rules." (A copy of the press release is attached as Appendix C.) Consistent with past practice, Chief Judge Platt announced that even while the study was ongoing, and before recommendations were formulated, public comments were welcome and should be submitted in writing on or before February 18, 1994 to Messrs. Wesely and Reinthaler.

Two written comments were received (copies of which are attached as Appendices D and E). By letter dated February 18, 1994, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York urged the Eastern District to "embrace the Code of Professional Responsibility as adopted and amended from time to time by the Appellate Divisions. . . ." Doing so, it was urged, would promote uniformity and clarity and avoid situations in which a lawyer could be subject to discipline by the Federal courts for conduct required by the lawyer's state of admission (presumably New York). The Committee recognized, however, that in certain circumstances principles of Federal law or procedure may require exceptions to the uniformity they proposed, and that supplemental rules may be needed to address particular problems that are not addressed in the New York Code. In such circumstances, the Committee stated that it "hoped" that any

modifications to the ethics rules that would impose greater restrictions on attorneys would be applied prospectively in order to provide the Bar with adequate notice.

The second comment letter, dated February 25, 1994, was received from the Association of the Bar's Committee on Professional Responsibility, which also urged the Court to adopt the New York Code "to the extent the Code is consistent with federal law and the procedural rules prescribed by the United States Supreme Court." The Committee explained the metamorphosis of the current New York Code, noting that it had been amended to include certain provisions from the ABA Model Rules, and expressed concern about engaging in a rule-by-rule analysis, which according to the Committee, in addition to being time-consuming, "could potentially result in yet another conflicting set of ethical standards governing lawyers' conduct." The Committee recognized that, to the extent Federal judges in individual cases believed that application of the New York Code would be inconsistent with Federal law or policy, they could apply a different standard, but urged that no lawyer be disciplined for violation of a newly-established standard as to which the lawyer had no prior notice.

The Subgroup thereafter met, both alone (on October 19, 1993 and June 2, 1994) and in conjunction with the special Advisory Panel (on February 24, 1994), to discuss the parameters of the task they had been asked to undertake. Notwithstanding the continued concern expressed by a majority of members with respect to the advisability of engaging in a rule-by-rule analysis, the Subgroup concluded that in order to fulfill the mandate of the Court, it would be necessary, first, to identify the principal areas of conflict between the New York Code and the ABA Model Rules applicable to the conduct of litigation in the Eastern District. The Subgroup agreed that, given the Advisory Committee and the Subgroup's previously expressed preference for the New York Code over the ABA Model Rules, a rebuttable presumption ought to exist in favor of the New York Code provision over its

Model Rule counterpart and that lawyers in Federal court should not, absent some overriding Federal policy or principle, be subjected to a more stringent standard than required by the New York Code. Within these parameters, the Subgroup, with the assistance of the Special Advisory Panel, identified the following subjects for discussion:

1. Candor toward the Tribunal: DR 7-102(B) v. MR 3.3(a) and (b).

2. Preservation of Confidences and Secrets -- The Crime/Fraud Exception: DR 4-101(C)(3) v. MR 1.6.

3. Alteration, Suppression or Destruction of Evidence: DR 7-109(A) v. MR 3.4(a).

4. Requesting Non-Clients to Refrain from Voluntarily Giving Relevant Information: MR 3.4(f).

5. Conflicts of Interest: Simultaneous Adverse Representation: DR 5-101(A) and 5-105(D) v. MR 1.10.

6. Imputed Disqualification/Screening: DR 5-105(D), 5-109 and 9-101 v. MR 1.9 and 1.10.

7. Communications with Persons Represented by Counsel: DR 7-104(A)(1) v. MR 4.2.

8. The Entity as a Client: EC 5-18 and DR 5-109 v. MR 1.13.

9. Prohibited Business Transactions with Clients: DR 5-104(A) v. MR 1.8(a).

10. Providing Financial Assistance to the Client: DR 5-103(B) v. MR 1.8(e).

11. Trial Publicity: DR 7-103 and 7-107 v. MR 3.6 and 3.8.

12. Choice of Law: MR 8.5.

To assist the members of the Subgroup in considering these issues, a memorandum describing the areas of conflict was circulated in late September 1994, along with a compendium of selected reference materials, cases and articles. A questionnaire was sent to each member, which framed the issues and formed the basis of the Subgroup's subsequent discussions. Meetings were then held on March 29, April 12, May 9, 16, 24, and

June 15, 1995, at which the issues were discussed and debated at length. A draft report was then prepared and circulated for comment to members of the Subgroup and Special Advisory Panel. Following a joint meeting on September 28, 1995, the draft report was revised to incorporate certain of the comments and suggestions of the Special Advisory Panel.[3]

During the course of the Subgroup's consideration of the issues before it, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Standing Committee") began its own review of the issue of the regulation of lawyers practicing before federal courts, and solicited the views of the bar with respect to the issues raised. Two different approaches were identified by the Standing Committee: (a) a uniform national set of standards (such as the Model Rules) or (b) an Erie-style rule directing all federal courts to the proper state ethics law to be applied. The approach taken by the Subgroup, as requested by the Board of Judges, is consistent with this latter approach.

In response to the Standing Committee's request for comments, the Association of the Bar's Committee on Professional Responsibility submitted a lengthy report, dated March 28, 1995, entitled Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation. The report comprehensively described "the current system of

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[3] The recommendations contained in this report are those of the Subgroup and the Committee/Committee on Civil Litigation and do not necessarily reflect the views or represent the recommendations of the members of the Special Advisory Panel. One member of the panel, in particular, while agreeing with many of the proposed changes, expressed concern that adoption by the Eastern District of a set of rules that differed from the extant New York Code provisions would lead to forum shopping, and noted that a number of the recommendations appeared to reflect changes viewed as "improvements" rather than changes necessitated by the federal, as opposed to state, forum. According to this member, "some of the proposed changes affect pre-choice-of-forum conduct, and a lawyer would be unable to anticipate which set of rules would apply. Although no examples come readily to mind, it is conceivable that differences may even affect case outcome, and run afoul of principles of federalism." The best solution, according to this member, would be to encourage the state courts to join with the federal courts in making desirable changes, perhaps by inviting the appropriate body in the state system to work with the Advisory Committee jointly to recommend agreed-upon changes.

patchwork lawyer regulation in federal court" and urged that it be changed "in order to achieve greater predictability and integration of lawyer regulation among the states and the federal judicial system." Report at 1. See also Mullenix, Multiforum Federal Practice: Ethics and *Erie*, 9 Georgetown J. of Legal Ethics 89-159 (1995). The report noted that, like the Standing Committee, the members of the City Bar Committee were "equally divided on the issue of how best to improve the status quo." The "barest majority" of members, it was reported, favored the adoption of the Model Rules (by Enabling Act, rulemaking on statute) as the uniform national standard. The other half favored the adoption of a "national but state-centered 'bright line' Erie-style choice of law rule directing courts to the proper state ethics law to be applied." Id. at 1-2.[4] The Committee urged the adoption of either approach as preferable to the present system. The Committee also urged that the new rule contain an express safe harbor providing that, prior to the commencement of federal litigation, all lawyer conduct be adjudged in accordance with the ethics rules in effect in the state in which the lawyer primarily practices.

On July 5, 1995, Daniel R. Cocquillette, Reporter for the Standing Committee, issued his report to the Committee, in which he identified "four fundamental options for long-term reform." Cocquillette, Report on Local Rules Regulating Attorney Conduct, presented to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States at 3 (July 5, 1995). One option identified was the adoption of a uniform national set of rules governing attorney conduct in federal courts through the Rules Enabling Act (either

[4] The Committee recognized that under the Erie-style approach, exceptions to the forum state's rules "can be crafted for situations where deference to a given state's law of lawyering might undermine a compelling federal interest." Id. at 3 n.6. They recommended that such exceptions be made only by Enabling Act rulemaking or legislation by Congress.

the Model Rules or some variation of the Model Rules). A second option identified was the establishment of a uniform national rule adopting relevant state standards in all federal courts. (The Report, however, does not address state rules that may be inconsistent with federal policy.)

A third option would be to attempt the same results through model local rules, following the initiative first begun in 1978 by the Committee on Court Administration and Court Management (i.e., the Federal Rules of Disciplinary Enforcement, which have been adopted, in whole or in part, in 15 Districts). The fourth option would be to do nothing -- which, according to the Reporter, "can only lead to a continuing deterioration of standards, to the disadvantage of all." Id.

The Report concludes with a recommendation that a special invitational session of the Standing Committee be held immediately preceding the next Standing Committee meeting in January 1996, at which representatives of each of the major affected constituencies, including Congressional staffs and the Department of Justice, would be invited. The purpose would be to discuss each of the four fundamental options and to develop a "long-term solution" through the Judicial Conference. A two day conference with this purpose was held on January 9-10, 1996. A second preliminary conference on the subject was held in Washington, D.C., in mid-June 1996, with no resolution being reached.

The Subgroup forwarded its proposed report and recommendations to the full Committee on or about November 21, 1995. The Committee thereafter met on December 11, 1995, January 22, 1996, March 18, 1996, April 8, 22 and 29, 1996, and June 6, 1996 to discuss the proposed report. It was the consensus of the Committee that, notwithstanding the mandate from the Board of Judges to engage in a rule-by-rule analysis and the substantial effort undertaken by the Subgroup, the need for predictability and certainty weighed strongly in favor of having one set of rules rather than a different set of standards applicable in federal

court that conflicted with those applicable to lawyers admitted to practice in New York. The Committee unanimously agreed that the New York Code should therefore be adopted as the governing standard for lawyers practicing in the Eastern District of New York. In reaching this conclusion, the Committee noted that the admission, regulation and discipline of lawyers has historically been left to the states, and no member of the Committee voiced an opinion that a separate, inconsistent set of regulations by the federal courts would be beneficial or cost-effective. Accordingly, the Committee decided to recommend that the rule-by-rule analysis be used either (a) as guidance by federal judges in addressing specific ethical issues or (b) for submission to the appropriate New York State authorities for consideration as proposed amendments to the New York Code.

On February 29, 1996, while the Committee was in the midst of its deliberations, the New York State Bar Association's Special Committee to Review the Code of Professional Responsibility issued a report to the House of Delegates proposing numerous amendments to the New York Code. Included in the proposed amendments are a number of changes that are substantially identical to and/or consistent with the recommendations made by the Subgroup in its proposed report. After discussion, the Committee decided to consider each of the applicable "proposed" amendments to the New York Code during the ensuing discussion of the Subgroup's report in order that the final report submitted to the Board of Judges would reflect the views of the Committee regarding the proposed amendments. The Board of Judges would then be in a position to decide whether to submit (or have the Committee/Committee on Civil Litigation submit) their comments to the New York State Bar Association. To facilitate this, Mr. Wesely requested the Subgroup to prepare a separate report summarizing the views of the Committee/Committee on Civil Litigation on the specific

amendments that have been proposed. That report is being submitted under separate cover. The members of the Committee recommend that they be authorized to transmit such report, as expressing the views of the members only, to the New York State Bar Association.

Set forth below is the rule-by-rule analysis performed by the Subgroup, as modified and approved by the Committee/Committee on Civil Litigation, followed by the proposed text of Local Rules 2(a) and 4(f), together with proposed explanatory comments, which are attached as Appendices F and G. To facilitate matters, each section of the report dealing with specific issues addressed by the Committee has been organized beginning with an introduction to the issue, followed by a listing of the specific questions considered and conclusions reached, followed by a selective bibliography of authorities consulted, and the text of the current New York Code and Model Rule provisions at issue.

Candor toward the Tribunal: DR 7-102(B) v. MR 3.3(a) and (b)

Introduction

Both the Model Rules and the New York Code of Professional Responsibility require lawyers, in their capacities as "officers of the court," to reveal when a fraud has been perpetrated upon the court by a client and, under the New York Code at least, by other persons as well. See DR 7-102(B); MR 3.3(a).[5] DR 7-102(B)(1) and MR 3.3(a) appear to be in conflict in at least four respects.

First, and most fundamentally, while DR 7-102(B)(1) has an exception for information protected as a "confidence or secret," MR 3.3(b) requires disclosure even if

[5] Under the Model Rules, a lawyer's duty of candor to third persons is covered by MR 4.1. MR 4.1(a) states that a lawyer shall not make a false statement of material fact to a third person in the course of representation of a client. MR 4.1(b) requires disclosure of a material fact to a third person when "disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Candor to third persons under the New York Code is subsumed by DR 7-102.

compliance would require the disclosure of information protected by MR 1.6, the confidentiality rule. MR 4.1, in contrast, in dealing with fraud on persons, favors confidentiality over revelation.

Second, a conflict exists between the Model Rules and the Code in that DR 7-102(B)(2), read literally, would appear to require a lawyer to correct witness perjury notwithstanding that such correction may require the lawyer to reveal a client confidence. The Model Rules, on the other hand, impose no duty on lawyers to correct the perjury of a witness who the lawyer has not called. As pointed out by Professor Freedman, the fact that the disclosure requirements under DR 7-102(B)(2) do not contain the same limiting language found in (B)(1) (i.e., "except when the information is protected as a confidence or secret") was probably an oversight, and he recommends that the exception for confidences and secrets present in DR 7-102(B)(1) be "read into" DR 7-102(B)(2). This conclusion is in accord with the New York State Bar Association Committee on Professional Ethics, Opinion No. 593 (June 30, 1980), which interpreted DR 7-102(B)(2) as if the limiting language were included.

The third conflict arises out of the requirement under the New York Code that a lawyer who receives information clearly establishing that his or her client has 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." Under the Model Rules, a lawyer has a duty to "take reasonable remedial measures" only when the lawyer has offered material evidence and subsequently comes to know of its falsity. The Comment to the Model Rules suggests that withdrawal without revealing the fraud to the tribunal may be sufficient "if that will remedy the situation." ABA

Opinion 87-353, on the other hand, says that ordinarily withdrawal will not suffice to remedy a fraud on a tribunal.

Finally, MR 3.3(c) confers discretion on a lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false, whereas DR 7-102(A)(4) prohibits a lawyer from "knowingly" using perjured testimony or false evidence. The Model Rule provision thus gives greater latitude to lawyers than the equivalent New York Code provision.

The conflicts between MR 3.3(a) and DR 7-102(B)(1) are significant because they go to the heart of the attorney-client relationship. In choosing between the two rules -- or at least between the exception for confidences and secrets present in DR 7-102(B)(1) and the unconditional duty to reveal in MR 3.3(a) -- lawyers are required to make a value judgment between the relative importance of candor to the court and the secrecy of client communications. The Model Rules have chosen candor to the court as the more important of the two. See Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 3.3:101, at 576 (1992 Supp.) (hereinafter "Hazard & Hodes") ("According to [MR 3.3(a)], where there is a danger that the tribunal will be misled, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the interests of the administration of justice itself."). The New York Code emphasizes confidentiality over candor. Proponents of the New York approach argue that adoption of the Model Rule provision would lead to a fundamental alteration in the attorney-client relationship in that lawyers would be required at the outset of an engagement to provide Miranda-like warnings to clients, many of whom, understandably, would be less likely to confide in their counsel.[6]

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[6] Section 180 of the ALI 's proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12 (May 15,1996), similar to MR 3.3(a), would require a lawyer who has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity to take "reasonable remedial measures" and would permit a lawyer in such circumstance to disclose confidential client information when necessary to remedy the situation. The rule also would permit a lawyer to refuse to offer testimony or other evidence

The choice between DR 7-102(B) and MR 3.3(a) must also be considered in the criminal law context and the various constitutional issues that arise therein. A landmark decision in this area is Nix v. Whiteside, 475 U.S. 157 (1986), in which the Supreme Court held that a criminal defendant is not entitled to the assistance of counsel in giving false testimony and that a lawyer who refuses to provide such assistance has not deprived the client of effective assistance of counsel. See Hazard & Hodes, at 599-620.

Issues Presented and Conclusions Reached

1. Should the Eastern District adhere to the general approach of the New York Code, which places paramount importance on the preservation of client confidences, or should the Court adopt the general approach of the Model Rules, which elevates candor to the tribunal over client confidentiality?

There was a clear split of opinion on this issue. Several members expressed a preference for the Model Rule because it elevated candor over client confidentiality. These members believed that imposing a duty to reveal a fraud on a tribunal, subsequently discovered, would have the effect of avoiding potentially unjust results caused by a client's fraudulent conduct at trial.

Those favoring the New York Code provision, on the other hand, emphasized the need to protect client confidentiality. Imposing a Model Code duty of candor on lawyers would not, according to New York Code proponents, achieve the desired result because lawyers would be forced to provide Miranda-like warnings to clients that would inhibit them from confiding in the first place. (Even without such warnings, client trust in lawyers would undoubtedly erode.) They also suggested that a lawyer should be under no greater duty to reveal a fraud committed on a tribunal (which the lawyer was unaware of at the time it was

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the lawyer "reasonably believes" (as opposed to knows) is false.

committed and thus could not have avoided) than the duty imposed on a lawyer when asked to undertake the representation of a client that has committed any other crime. They also emphasized that the New York Code provision (DR 7-102(B)(1)) is limited in scope -- it only applies to a fraud that a lawyer subsequently discovers as a result of a client confidence or secret. It does not prevent a lawyer from revealing a fraud otherwise discovered,[7] nor does it permit a lawyer in the course of an ongoing proceeding to rely upon or use testimony that he/she subsequently learns was perjurious (for example, in a closing argument or in a brief on appeal).

The Committee concluded that this appeared to be one of those seemingly unresolvable issues as to which reasonable minds could differ. Given the fact that the members were equally divided on the issue with no reasonable hope of achieving consensus, it was agreed that no recommendation for change to the New York Code should be made in the absence of a clearly articulated paramount federal interest, which it was agreed was not present here.

2. Should the language of DR 7-102(B)(2) dealing with witness perjury be expanded and clarified by adding the phrase "except when the information is protected as a confidence or secret" at the end?

The discussion of this issue boiled down to the following question -- should either the New York Code or the Model Rules distinguish between client perjury and witness perjury? All members thought that the answer to this question should be "no." Model Rule 3.3(a)(4) does not draw this distinction -- it applies only to "material" evidence "offered" by the lawyer. It thus does not apply to evidence offered by any other party, including a co-party whose perjured testimony may be highly material. This was viewed as a serious flaw in the

[7] Given the broad interpretation of "secrets" to encompass just about everything learned in the course of a representation, it has been suggested by proponents of the Model Rule that DR 7-102(B)(1) is a virtual non sequitur.

Model Rules. The New York Code counterpart does not contain this flaw -- it applies to the testimony of any witness (including a co-party). The issue presented by the New York Code is whether the words "except when the information is protected as a confidence or secret" should be added or read into DR 7-102(B)(2). Those who would elevate client confidentiality over candor answered this question "yes." In short, the Committee (a) favors the New York Code provision, inter alia, because it applies to all witnesses, not just to material evidence offered by the lawyer, (b) believes that client and witness perjury should be treated the same, but (c) differs as to that treatment in light of the split of opinion with respect to whether candor to the court or client confidentiality should take precedence. In light of its recommendation with respect to the resolution of the preceding question, the Committee would favor expanding the language of the New York Code provision by adding the limiting language found in (B)(1), thus making explicit what was viewed as being implicit in the rule. See New York State Bar Ass'n, Comm. on Prof. Ethics, Opinion No. 593 (June 30, 1980). The proposed amendments to the New York Code do not address this issue. The Committee recommends that this change be brought to the attention of the State Bar. With this change, DR 7-102(B)(2) would read as follows (new material underscored):

DR 7-102(B)(2) Representing a Client Within the Bounds of the Law.

B. A lawyer who receives information clearly establishing that:

* * *

2. A person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal, except when the information is protected as a confidence or secret.

ıge of DR 7-102(B)(1) and (2) be modified to require the lawyer to take "reasonable remedial measures" (see MR 3.3(a)(4)) which would include measures short of revealing the fraud to the affected person or tribunal?

All members expressing a view on this issue strongly believed that the answer to this question should be "no." In their view, requiring a lawyer to take "reasonable remedial measures" short of revealing the fraud to the affected person or tribunal would make no sense in the context of the New York Code. But see ABA Opinion 87-353 (commenting on the Model Rules).

4. Do the provisions against offering false evidence apply to situations where a lawyer (a) "knows" or (b) "reasonably believes" that the evidence to be offered is false?

Both the New York Code and the Model Rule provisions require a lawyer to act when the lawyer "receives information clearly establishing" or when the lawyer "knows" that evidence previously given was false. This is in contrast to Model Rule 3.3(c) which states that a lawyer may (prospectively) refuse to offer evidence that the lawyer "reasonably believes" is false. No one thought it appropriate to incorporate this standard into DR 7-102(B) or MR 3.3(a).

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Preservation of Confidences and Secrets -- The Crime/Fraud Exception: DR 4-101(C)(3) v. MR 1.6

Introduction

The confidentiality of communications between the attorney and the client is crucial to the effective assistance of counsel in our adversary system of justice. See EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer."). That a client may be sure that what he or she tells a lawyer will remain confidential fosters truth telling and ultimately the representation of the client's interests in litigation.

There are limits, however, to the confidentiality of attorney-client communications. For example, if a client informs a lawyer that the client is about to commit a crime, the rules permit the lawyer to reveal such intention under prescribed circumstances. This is known as the "crime/fraud" exception to client confidentiality. The crime/fraud exception is a corollary to the rule, found in both the Model Rules and the New York Code, which prohibits a lawyer from assisting a client in committing a fraud or crime. See MR 1.2(d) ("[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"); DR 7-102(A)(7) ("In the representation of a client, a lawyer shall not [c]ounsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.").

A conflict exists between MR 1.6 and DR 4-101(C)(3) with respect to the scope of the "crime/fraud" exception. MR 1.6(b) provides that a lawyer may reveal confidences only when he or she believes it is necessary to prevent the client from "committing a criminal act the lawyer believes is likely to result in imminent death or substantial bodily harm." DR 4-101(C)(3), on the other hand, is more lenient and allows the

lawyer to generally reveal the intention of a client to commit a crime and the information necessary to prevent the crime." Note that neither rule actually requires the disclosure of attorney-client information. Commentators have suggested that, at least in the case of a risk to human life, attorneys should be required to reveal confidences. See Monroe H. Freedman, Understanding Lawyers' Ethics 103 (1990) (hereinafter "Freedman"). Professor Freedman has also criticized both the Model Rule and New York Code provisions to the extent they only apply (a) where necessary to prevent a crime or criminal act (b) by the client. Acts which the lawyer believes are likely to lead to death but which do not constitute a crime, and the prevention of such acts by persons other than the client, are not covered by the existing rules.[8]

It is difficult to characterize the conflicts between MR 1.6 and DR 4-101 in terms of a clear choice of principle.[9] For example, although the Model Rules contain a

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[8] The ALI appears to be leaning toward adopting a rule that would permit disclosure to the extent necessary to prevent (a) "death or serious bodily injury" as a result of a "crime" that the client has committed or intends to commit, or (b) substantial financial loss as a result of a "crime or fraud" that the client has committed or intends to commit. See ALI Restatement of the Law Governing Lawyers § 117A, Proposed Final Draft No. 1 (March 29, 1996).

[9] Other problems with the rules that have been identified include:

(a) the requirement in the Model Rules that the likelihood of death be "imminent";

(b) the fact that DR 4-101(C)(4) and MR 1.6(b)(2) permit a lawyer to divulge confidences and secrets in order to collect a fee, even if no action or proceeding is pending in which the disclosure of such information is necessary to establish a claim or defense; and

(c) the fact that the New York Code permits (in DR 4-101(C)(2)) a lawyer to reveal a confidence or secret if required by law or court order, whereas the comment to MR 1.6(a), in direct contradiction to the language of the rule itself, states that a lawyer "must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." According to Professor Freedman, this latter provision "appears to leave the lawyer whipsawed. If a court orders a lawyer to reveal a client's confidences or secrets, the lawyer faces contempt if she refuses and disciplinary action if she complies." Freedman, at 106.

narrower exception in Rule 1.6(b), the Rules provide for broader disclosure than the Code in Rule 3.3(a), which requires disclosure to the tribunal when necessary to prevent any fraudulent or criminal act by the client, regardless of the confidentiality rules in MR 1.6.

Another apparent conflict between MR 1.6 and DR 4-101 can be found in the scope of the information that an attorney must keep confidential. DR 4-101 requires that "confidences" and "secrets" be kept confidential. Confidences equate to the evidentiary privilege which protects communications between attorney and client. Secrets represent a broader concept, which starts with all confidences, but also includes "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."

MR 1.6, on the other hand, requires the lawyer not to reveal "information relating to representation of a client." This phrase may be a bit broader than the secrets provision of DR 4-101 in that it is not limited to information "gained in the professional relationship," but would include information "even if it is acquired before or after the relationship existed." Model Code Comparison.

A final "conflict" between the New York Code and the Model Rules lies in the fact that the New York Code, in DR 4-101(C)(5), contains an explicit exception to the confidentiality duty that is missing in the text of the Model Rules (although a variation can be found in the Comment to Rule 1.6) by permitting lawyers to reveal "[c]onfidences 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." This is an issue that can arise in litigation, especially if DR 7-102(B) is retained and MR 3.3(a) and (b) are rejected. DR 4-101(C)(5) gives lawyers who under the rules may not reveal client

confidences to rectify a concluded fraud on the court, a distinct, lesser option of withdrawing an inaccurate opinion that is still being relied upon. Lawyers operating under the Model Rules, on the other hand, may have to reveal such a fraud on the court, and thus the option of withdrawing the opinion is of lesser importance. Given the Committee's clear preference, as noted below, for the New York Code approach to client confidentiality, further consideration of this "conflict" was deemed unnecessary.

Issues Presented and Conclusions Reached

1. Should the Committee recommend that the Board of Judges adopt DR 4-101(C)(3), which broadly permits a lawyer to reveal a confidence or secret if necessary to prevent a client from committing a prospective crime (as contrasted to a concluded fraud upon a person or tribunal, which is covered by DR 7-102(B)), or should it endorse the more restrictive approach taken in the Model Rules, which (a) permits a lawyer to reveal "information relating to representation of a client" that is "reasonably necessary" to prevent the client from committing a criminal act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm (MR 1.6(b)(1)) but (b) requires a lawyer to reveal a client fraud that has been committed on a tribunal even if it requires disclosure of a client confidence or secret (MR 3.3(a)(4) and (b))?

The members of the Committee preferred the New York Code provision over the Model Rule. The Model Rule was viewed as overly restrictive. The New York Code provision was thus preferred even by those members who preferred Model Rule 3.3(a) and (b) over DR 7-102(B).

2. Should a lawyer be required to reveal a confidence or secret if necessary to prevent an act that is reasonably likely to result in death or substantial bodily harm?

This was viewed as a very close call, with the members of the Committee evenly divided. Accordingly, given the even division of opinion among the members and the inability to identify a paramount federal policy interest in favor of one formulation, it was

agreed that no change to the New York Code provision, which does not require (although it clearly permits) such disclosure, was needed.[10]

3. Should the rule relating to disclosure of a confidence or secret apply to acts of third parties as well as acts of clients?

The members of the Committee agreed that the answer to this question should be "yes," although no paramount federal policy could be identified to support what was viewed as a logical extension of the existing rule. Even those who believed that a lawyer should be required to reveal a confidence or secret if necessary to prevent an act that is reasonably likely to result in death or substantial bodily harm agreed that no distinction should be drawn between acts of clients and third parties.

4. Should the language DR 4-101(C)(4) be clarified so as to permit a lawyer to reveal a confidence or secret only in the context of an action or proceeding and only to the extent necessary to establish a claim or defense therein?

The members of the Committee expressing a view on this issue concluded that a lawyer should not be permitted to reveal a confidence or secret to a third party, outside the context of a pending action or proceeding, in order to collect a fee. Any other rule, according to such members, would be subject to widespread abuse and that the revelation of a confidence or secret should, as a matter of federal policy, be a last resort (to a tribunal) in an effort to collect a fee.[11]

With respect to the second half of DR 4-101(C)(4), which permits a lawyer to reveal a confidence or secret necessary to defend the lawyer against an accusation of

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[10] Footnote 16 to the ABA Model Code of Professional Responsibility cites to ABA Opinion 314 (1965), which states that "a lawyer must disclose even the confidences of his clients" if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed." (Emphasis added).

[11] Other than Professor Freedman's criticism of the existing rules on this point, the Committee is unable to point to any precedent or articulated federal policy to support this recommendation, which was nevertheless viewed favorably by all members of the Committee as well as all members of the Special Advisory Panel.

wrongful conduct, it was decided that no clarification of the existing rule was necessary, and that it would be imprudent to restrict it only to pending actions or proceedings or to limit the disclosure "to the extent necessary to establish a claim or defense therein." The same conclusion was reached with respect to MR 1.6(b)(2), which is broader than DR 4-101(C)(4) in that it applies to "any controversy" (not just a controversy over fees) between the lawyer and client, whether or not the lawyer is accused of engaging in "wrongful" conduct. For this reason, certain members of the Committee preferred the Model Rule provision, provided that it were modified to permit revelation of confidences or secrets in a controversy over fees only in the context of a proceeding before a tribunal.

Incorporating the changes to DR 4-101(C)(3) recommended in response to questions 3 and 5 above would result in the following provision (new material underscored) which the Committee recommends be proposed to the New York State Bar Association:

DR 4-101(C)(3) Preservation of Confidences and Secrets of a Client.

C. A lawyer may reveal:

* * *

3. The intention of a client <u>or a person other than the client</u> to commit a crime and the information necessary to prevent the crime.

4. Confidences or secrets necessary to establish or collect, <u>in a proceeding pending before a</u> tribunal, the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

5. Should DR 4-101(C)(2) be changed to eliminate the confusion caused by the rule, which permits a lawyer to reveal a confidence or secret if the lawyer is required by law or court order to do so?

Although some members of the Committee said that the rule as written is not confusing, others believed a clarification is needed. Even if ordered by a court to disclose a

confidence or secret, a lawyer, for a variety of reasons, may choose to disobey and suffer the legal consequences. Query, whether such a refusal should also subject the lawyer to disciplinary action? The discretion afforded a lawyer under the New York Code insulates a lawyer from disciplinary action in either case. The Model Rule, on the other hand, does appear to "leave the lawyer whipsawed," as Professor Freedman points out. The New York Code approach is thus preferable to the apparent dilemma facing lawyers under MR 1.6(a). Given this dilemma, it was agreed that the New York Code language, which permits a lawyer to reveal a confidence where required by law or court order to do so, makes eminent good sense as is.

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Alteration, Suppression or Destruction of Evidence: DR 7-109(A) v. MR 3.4(a)

Introduction

Model Rule 3.4(a) provides that "[a] lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." DR 7-109(A) states that "[a] lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." It has been stated that "Model Rule 3.4(a) . . . consolidates DR 7-109(A), DR 7-109(B), and DR 7-106(C)(7)." Solum & Marzen, Truth & Uncertainty: Legal Control of the Destruction of Evidence, 36 Emory L.J. 1085, 1132 (1987). Arguably, the Model Rule is a bit broader than DR 7-109(A) in that it expressly prohibits the destruction of evidence. See Comment, Limiting the Scope of Discovery: The use of Protective Orders and Document Retention Programs in Patent Litigation, 2 Albany L.J. of Sci. & Tech. 175, 204 (1992) ("Unlike the Model Code, the Model Rules deal directly with the destruction of evidence.").

In Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991), a litigant's duty to preserve evidence was stated as follows: A litigant "is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery suit." See also Skeete v. McKinsey & Co., Inc., 1993 WL 256659 (S.D.N.Y. July 7, 1993) (Leisure, J.); United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956) (Weinfeld, J.). These decisions have all adopted a more expansive view of a lawyer's duties under the New York Code than a literal reading might suggest.

A number of commentators (including members of our Advisory Panel) have expressed a strong preference for Model Rule 3.4(a) or its Washington D.C. counterpart, which is more explicit than the Model Rule and provides that a lawyer shall not:

> Obstruct another party's access to evidence or alter, destroy or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good faith effort to preserve it and to return it to the owner, subject to Rule 1.6.

Section 178 of the ALI's proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12 (May 15, 1996) would, if adopted, specifically deal with a lawyer's "destruction," "falsification" or obstruction of evidence and would also prohibit a lawyer from counseling a client to destroy or suppress evidence when the client's activity would violate (a) a criminal statute dealing with obstruction of justice or a similar offense; or (b) a statute, regulation or ruling requiring the retention of the evidence.

Issues Presented and Conclusions Reached

1. Should the somewhat broader provisions of MR 3.4(a) be incorporated into DR 7-109(A) so as to make clear that it covers the destruction as well as the suppression of evidence?

It was agreed that the Model Rule provision to the extent it deals with the alteration, destruction or concealment of evidence, and to the extent it provides that a lawyer shall not counsel or assist another person to do any such act, was a superior formulation to the New York Code provision, which only deals with the "suppression" of evidence that the lawyer or the client has a legal obligation to reveal or produce. The New York Code does not define "suppression," and it is unclear whether it encompasses alteration or destruction as well as concealment of evidence, although it was recognized that the drafters may have intended the Model Rule provision to be functionally equivalent to the original Code

provision. A question was raised as to whether "suppression" requires an overt act on the part of the lawyer as opposed to passively allowing a client to destroy evidence. The Model Rule, to a certain extent, raises the same question in precluding a lawyer from "assisting" another person in destroying evidence. Particularly in light of the large number of federal and state statutes and regulations that mandate the retention of documents, and the adoption of written document retention and destruction policies by businesses, the view was expressed that a lawyer's ethical responsibilities should not include an affirmative duty to insure that clients comply with such laws, regulations or policies. Disciplinary action should be warranted, it was agreed, only where a lawyer provides affirmative advice or assistance to a client that results in an unlawful obstruction, alteration, destruction or concealment of evidence.

Other issues that were raised with respect to the Model Rule and New York Code provisions included:

(a) Does the word "unlawfully" in MR 3.4(a) require a criminal act, or does it encompass anything a court might require such as a litigant's duty to preserve evidence as articulated in Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991)? The Comment to the Model Rule suggests that the intention was to make it unethical for a lawyer to act only where such conduct would constitute a criminal act. The D.C. counterpart, however, does not use the word "unlawfully" and thus arguably reaches conduct that is not criminal. After discussion, the Committee concluded that the omission of the word "unlawfully" from the D.C. rule was a prudent choice given that obstruction of justice statutes are in many instances narrowly drawn and do not encompass all circumstances involving the

alteration, destruction, or concealment of evidence or potential evidence. The proposed Restatement approach is in accord with this.

(b) Does the New York Code provision only apply to lawyer conduct or does it also apply to the suppression of evidence by other persons (upon the advice or with the assistance of the lawyer), as the Model Rule clearly provides? The answer, it was agreed, depended on how broadly the word "suppress" was defined. Without reaching a consensus as to the meaning of the word "suppress," all agreed that the Model Rule formulation was preferable due to its clarity on this point.

(c) Do DR 7-109(A) and/or MR 3.4(a) only apply to conduct in the context of a pending proceeding or action, or do they also apply to future proceedings whose commencement may be reasonably foreseeable? The Comment to the Model Rule seems to support the latter view; it was noted that the 1981 Draft of the Rule contained such language, but the final Draft replaced such language with the more ambiguous reference to material "having potential evidentiary value." The New York Code provides no guidance on the subject. The sense of the Committee was that pre-commencement conduct should be covered whenever the commencement of proceedings was reasonably foreseeable by the lawyer. What is "reasonably foreseeable," however, was viewed as a matter of degree and interpretation. The fact that litigation in today's society is regularly commenced in connection with certain events (such as corporate acquisitions, negative news announcements, employee firings and product failures), does not mean that litigation is "reasonably foreseeable" in all such circumstances. What is required is an assessment under all the circumstances that a specific claim by an identifiable plaintiff is reasonably likely to be filed.

In short, the Committee concluded that neither the New York Code nor the Model Rule formulations were ideal, that both contained latent or patent ambiguities, and that

both could be improved, but that on balance the Model Rule provision was clearer, more in line with prevailing federal case law and thus preferable to its New York counterpart.

2. Alternatively, should the Committee recommend adoption of the more explicit provision of the D.C. Code quoted above? (Please note that the D.C. Code does not require that the alteration, concealment or destruction be "unlawful" in order for it to be unethical.)

It was the consensus of the Committee that, with minor modifications as indicated below, the first sentence of the D.C. counterpart to MR 3.4(a) was preferable to either the Model Rule or New York Code provisions. The preferred articulation of the rule (marked to show changes from the D.C. rule in effect), which would replace the existing DR 7-109(A), would read as follows:

> A. A lawyer shall not obstruct another party's access to evidence, or alter, destroy or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence may be the subject of discovery, disclosure or subpoena in any pending proceeding or one that is reasonably foreseeable.

The reference to "disclosure" was viewed as necessary in light of the Civil Justice Reform Act and the recent amendments to the Fed. R. Civ. P. The reference to proceedings that are "reasonably foreseeable" was viewed as preferable to "imminent."

The proposed amendments to the New York Code do not recommend any changes to DR 7-109. The Committee recommends that the proposed revisions described above be brought to the attention of the New York State Bar Association.

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Requesting Non-Clients to Refrain from Voluntarily Giving Relevant Information: MR 3.4(f)

Introduction

Model Rule 3.4(f) prohibits a lawyer from requesting a person other than a client to refrain from voluntarily giving relevant information to another party, unless (i) the person is a relative, employee or other agent of the client and (ii) the lawyer reasonably believes it will do the person no harm not to reveal the information. The Comment to the Rule states that paragraph (f) permits a lawyer to advise (as opposed to request) employees of a client to refrain from giving information to another party, given that employees may identify their interests with those of the client.

The premise of this rule, of course, is that the lawyer ordinarily may suggest that the client not volunteer information to the opposition. "[F]ailing to volunteer information is not the same as obstructing access to it." Hazard & Hodes, § 3.4:701 at 646.

There are a number of problems presented by the text of MR 3.4(f). First, on its face it applies to all cases, both civil and criminal. The law in many jurisdictions, however, imposes a duty on defense counsel to volunteer fruits, instrumentalities and physical evidence of a crime, and a duty on prosecutors to turn over exculpatory matter to the defense. E.g., Brady v. Maryland, 373 U.S. 83 (1963). Requesting or advising a witness not to speak to the other side may run afoul of the criminal law or infringe upon the constitutional rights of defendants in such cases. Inserting the words "except as permitted by law" after the words "to another party" in paragraph (f), similar to what has been done in MR 3.4(a), may be a solution to this problem.

The second problem lies with the provision permitting a lawyer to request or advise employees of a client to refrain from volunteering information to an adversary. If the

definition of an entity as a client does not encompass all employees for purposes of the attorney-client privilege or under the rules governing ex parte communications with witnesses (see DR 7-104(A)), query whether all employees should be covered by this provision. See generally Tate, Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection than the Model Rules Provide, 23 Ind. L. Rev. 1 (1990) (proposing amendment to MR 3.4(f) which would require attorney to explain his or her role vis-a-vis the corporation to the employee prior to making the request; the presumption is that MR 3.4(f) would apply to all employees); Stahl, Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis, 44 Wash. & Lee L. Rev. 1181 (1987) (presuming that MR 3.4(f) would apply to all employees).

Another issue posed is whether a request or advice to employees, coupled with a threat of termination of employment if an employee volunteers information to an adversary, is improper. Professors Hazard and Hodes believe that such conduct would not violate MR 3.4(a) or (b). Accord Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 n.3 (D. Mont. 1986); Michigan Bar Association, Committee on Professional and Judicial Ethics, Formal Op R-2 (1989). However, many states have enacted "whistleblower" statutes, and the courts in a number of states have held that it unlawful for an employer to fire an employee for cooperating with authorities or refusing to participate in unlawful conduct. See, e.g., Wieder v. Skala, 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992). Here, again, the addition of the word "unlawfully" at the beginning of paragraph (f) would appear to go a long way toward ameliorating this problem.[12]

[12] Professor Freedman has noted that MR 3.4(f) may run counter to whistleblowing statutes and has questioned whether it should apply to employees of the client. This view is also held by Professor Ziegler.

There is no direct counterpart to MR 3.4(f) in the New York Code. The closest New York Code provision is DR 7-104(A)(2), which provides that a lawyer shall not "give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." This provision, however, does not address the issue of the propriety of requesting or advising third parties or employees of a party, whose interests are not in conflict with the client, to refrain from voluntarily giving relevant information to another party.

Issues Presented and Conclusions Reached

1. Should the substance or text of MR 3.4(f) be added to DR 7-104 as a new subsection?

After considerable discussion, it was agreed that the substance or text of MR 3.4(f) should not be added to DR 7-104 (and thus no recommendation for change be made to the New York State Bar Association), for several reasons. First, the view was expressed that MR 3.4(f) was confusing and poorly drafted and raised a whole set of problems of interpretation and scope that were not answered by the text or in the official Comment to the Rule. For example, it was noted that, as written, Rule 3.4(f) would appear to permit a lawyer to advise all employees of a client to refrain from giving information to another party. See Comment 4 to MR 3.4(f). The rule was thus viewed by some as inconsistent with the holding in Niesig v. Team I, 76 N.Y.2d 363, 558 N.E.2d 1030, 599 N.Y.S.2d 493 (1990) to the extent it allows counsel to advise or "instruct" employees, who are not protected by the rule against ex parte communications, to refrain from communicating with an adversary.[13]

[13] Others disagreed with the view that MR 3.4(f) was inconsistent with Niesig.

More importantly, the view was expressed that the adoption of the Washington D.C. counterpart of MR 3.4(a), as the Committee would urge, would in large part obviate the need to include Rule 3.4(f), given that Rule 3.4(a) by its terms would apply to any unlawful obstruction or concealment of evidence. It was believed that to the extent MR 3.4(f) could be read to impose ethical obligations on lawyers that exceeded those imposed by subsection (a), by proscribing conduct that was not unlawful, it imposed a standard that would create more problems than it would solve. It was further noted that to the extent MR 3.4(f) could be read as setting a substantive standard for attorney misconduct, it raised an issue better left to the courts and legislative branch.

2. Should the world "unlawfully" be added at the beginning of the paragraph to add clarity in criminal cases and cases involving corporate employees?

Given the answer to the preceding question, this question was arguably rendered moot. However, to the extent the Board of Judges or New York State Bar Association may disagree with this recommendation and decide instead to adopt the substance or text of MR 3.4(f), the members of the Committee were of the view that the beginning of paragraph (f) should be amended to provide that a lawyer shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party except as permitted by law."

3. Should the rule apply to all employees or only those covered by the attorney-client privilege or the definition of an entity as a party?

Again, this question requires no answer unless MR 3.4(f) is added to DR 7-104. As the discussion below with respect to the issues raised by Tab 7 shall confirm, the members of the Committee concluded that the issue of which employees should be included within the definition of the entity as a client was one of substantive law, not professional responsibility, that should be left to the courts to decide on a case-by-case basis.

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Conflicts of Interest: Simultaneous Adverse Representation: DR 5-101(A) and 5-105(A)-(C) v. MR 1.7

Introduction

There is no provision in the New York Code or the Model Rules arguably more important to litigators and to the conduct of litigation than the rules dealing with conflicts of interest, which in recent years have spawned an increasing number of disqualification motions, a significant number of which are brought on for apparent tactical reasons. Conflicts can (and do) take many forms. They can arise in the context of litigation between clients whose interests are clearly (e.g., plaintiff v. defendant) or potentially (e.g., co-defendants) adverse, or they can arise in contexts other than litigation where the potential for conflict may be more difficult to measure. Conflicts may involve existing clients (simultaneous adverse representation) or former clients (successive adverse representation), or they may involve lawyers whose employment at a former firm may give rise to an actual or potential conflict. Each of these variables (other than issues relating to former government employees) is separately discussed below or in subsequent sections.

Simultaneous Adverse Representation

The general rules relating to conflicts of interest involving multiple existing clients can be found in DR 5-101 and 5-105 and MR 1.7. DR 5-101(A) requires a lawyer to obtain client consent before accepting employment if the exercise of professional judgment "will be or reasonably may be affected by" the lawyer's own financial, business, property, or personal interests. DR 5-105 applies substantially the same standard to multiple existing clients. Thus, a lawyer may not accept (5-105(A)) or continue (5-105(B)) employment if the exercise of independent professional judgment will be or is likely to be adversely affected by

acceptance or continuation of multiple employment,[14] or if "it would be likely to involve the lawyer in representing differing interests," except where it is "obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect" of such dual representation (DR 5-105(C)).

Professor Freedman has noted a number of problems created by the text of DR 5-105. First, he notes that it is unclear, due to the differing terminology in DR 5-101 and 5-105, whether the standard for determining if a conflict exists is one of reasonably possibility ("reasonably may be") or probability (is or would be likely). Query whether there ought to be a single standard (Professor Freedman suggests "reasonable possibility of an adverse effect" since it would require the lawyer to inform the client and seek its consent in more instances)?

Second, he points out the problem presented by the text of DR 5-105(C), which permits a lawyer to represent multiple clients with adverse interests only (a) if it is "obvious" that the lawyer can adequately represent the interest of each and (b) each consents to the representation. Professor Freedman states that it is hard to imagine any case involving multiple representation in which it would be "obvious" that the representation of both would be adequate under all future contingencies. According to Professor Freedman, if a lawyer has to turn down every representation except when it is obvious (to whom?) that the lawyer can adequately represent the interests of each client, then no consent would ever be effective: thus, the problem caused by the use of the conjunctive "and."[15]

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[14] The underscored language differs from the standard articulated in DR 5-101 (A). It is unclear whether this was a deliberate or inadvertent decision on the part of the drafters.

[15] The same problem exists with respect to the Model Rules which also uses the conjunctive in MR 1.7.

Professor Freedman offers two suggested ways to obviate this problem. First, he suggests that the word "and" could be changed to "or." Second, he suggests that consideration could be given to an opinion issued by the D.C. Bar Legal Ethics Committee which has construed the phrase "adequately represent the interest of [each] client" as being defined by the consent of each client. See D.C. Bar, Committee on Legal Ethics, Opinion No. 49 (1978). In other words, if two clients consent after full disclosure to the dual representation, then it would be "obvious" that a lawyer could adequately represent the interest of each as limited and defined by the consents. It would be a relatively easy task to modify the language of DR 5-105(C) to make this clear.[16]

The Model Rules present some of the same, plus a number of additional, problems. MR 1.7(a) provides that a lawyer shall not represent a client if the representation of that client "will be directly adverse" to another client, unless the lawyer "reasonably believes" that the representation "will not adversely affect the relationship with" the other client, and each client consents after consultation (which presumably implies full disclosure). MR 1.7(b) goes on to provide that a lawyer shall not represent a client if the representation of that client "may be materially limited by" the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer "reasonably believes the representation will not be adversely affected" and the client consents after consultation.

In contrast to the New York Code, MR 1.7 uses a "reasonable belief" standard instead of the "unless it is obvious" test employed in DR 5-105(C); it appears to equate conflicts created by a lawyer's own interest with those created by multiple clients with differing interests; it talks about conflicts that adversely affect the lawyer-client relationship

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[16] Professor Ziegler has expressed a preference for DR 5-105 over MR 1.7, but would provide for an explanatory comment following the substance of the D.C. Bar Ethics Committee Opinion No. 49.

as opposed to whether a lawyer's "independent professional judgment" is likely to be adversely affected or whether the lawyer can "adequately" represent multiple clients; and it appears to draw a distinction between "direct" conflicts (MR 1.7(a)) and situations in which the lawyer's representation "may be materially limited" by the lawyer's responsibilities to others (i.e., potential conflicts).

With respect to the litigation context, the Comment to MR 1.7 states that paragraph (a) prohibits representation of opposing parties in litigation, whereas paragraph (b) deals with simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants. The text of the rule itself, however, does not clearly support this distinction, nor does it purport to address conflicts in the litigation context as opposed to other conflict situations.

Professor Freedman has argued that MR 1.7(a) -- which deals with direct adversity as opposed to potential adversity -- is essentially redundant. He claims that all instances of direct adversity will by definition also involve a representation of one client that "may be materially limited" by the lawyer's responsibilities to the other client. He also points out that MR 1.7(b) is broader than MR 1.7(a) to the extent that it focuses on the effect on the representation of, as opposed to the relationship with, the client. He posits two alternative solutions -- one which would view subsection (a) as being the exclusive provision dealing with direct adversity, with the other viewing subsection (b) as the controlling provision in all cases. Professor Freedman favors the latter approach.

Former Clients

The New York Code, unlike the Model Code, provides in DR 5-108 that, except with the consent of a former client after full disclosure, a lawyer who has represented

the former client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are "materially adverse" to the interests of the former client. This provision is substantially identical to MR 1.9(a). Professor Freedman believes that the formulation in MR 1.9 (and thus DR 5-108), which does not require the lawyer to have a "reasonable belief" (or that it be "obvious") that the representation will not adversely affect the interests of either client, and which uses the phrase "materially adverse," is superior to the differing, and conflicting, formulations in MR 1.7 (and DR 5-105). He queries whether the standard applicable to former clients should be utilized for conflicts between existing clients.

The proposed amendments to the New York Code address most of the issues identified above. DR 5-101(A) would be amended to read as follows (new material underscored):

DR 5-101 <u>Conflicts of Interest - Lawyer's Own Interests</u>

> A. <u>A</u> lawyer shall not accept <u>or continue</u> 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, <u>unless the lawyer reasonably believes 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</u>.

As explained by the State Bar Special Committee, these changes are intended (a) to expand the rule to take into account circumstances in which the interest giving rise to the conflict <u>arises</u> after the inception of the attorney-client relationship, (b) to incorporate the limitations on consent found in DR 5-105, and (c) to clarify the disclosure required in these circumstances. The change also requires exercise of the lawyer's <u>own</u> judgment regardless of client consent, a concept missing from the prior text but added several years ago by interpretation. <u>See</u> N.Y. State Bar Op. No. 595 (1988).

The State Bar Committee also proposes to add language to EC 5-15 and 5-16 taken from the Comments to MR 1.7, to clarify the conflict of interest rules, and to provide guidance to lawyers regarding the nature of the disclosure required in obtaining waivers and the circumstances in which consent of the affected clients will not be sufficient or available to cure a conflict of interest. The proposed new text of EC 5-15 and 5-16 (new material underscored) is as follows:

> EC 5-15 <u>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.</u>
>
> <u>Simultaneous representation in unrelated matters of clients whose interests are only generally diverse, such as competing economic enterprises, does not necessarily 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.</u>
>
> EC 5-16 <u>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 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</u>

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 clients' 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 represents 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.

The State Bar Committee also proposes to amend DR 5-105(c) to replace the vague and unworkable "obviousness" test with a "reasonable belief" standard, as well as to elaborate upon the nature of the disclosure required to be made to clients. The proposed new text would read as follows (new material underscored):

DR 5-105 Conflict of Interest - Simultaneous Representation

* * *

C. In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if the lawyer reasonably believes that the representation of each client will not be adversely affected thereby and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Issues Presented and Conclusions Reached

1. Should the standard for conflicts of interest be that set forth in the New York Code (the "obvious" test), the Model Rules (the "reasonably believes" test) or some variation thereof?

All members of the Committee concluded, for the reasons expressed by Professor Freedman, that the "reasonably believes" standard was the appropriate standard and

that the language of DR 5-105(C) should be modified in accordance with the recommendation of the New York State Bar Committee.

2. Should the word "and" in DR 5-105(C) be changed to "or"?

The members of the Committee agreed that use of the conjunctive "and" should be retained, particularly if the "reasonably believes" standard is incorporated into the Rule. It was noted that use of the disjunctive "or" in DR 5-105(C) may run afoul of the Supreme Court's holding in Wheat v. U.S., 486 U.S. 153 (1988), and other cases involving waiver of the right to conflict-free counsel in the criminal context. It was also agreed that, even with client consent, a lawyer should not be permitted to represent multiple clients where the lawyer reasonably believes that his or her ability to exercise independent professional judgment will be or is likely to be adversely affected. The same concern was expressed with respect to DR 5-101(A), which on its face permits a lawyer to accept employment where the lawyer's professional judgment will be or reasonably may be adversely affected by the lawyer's own financial, business, property, or personal interests, as long as the client consents after full disclosure. See New York State Bar Opinion 595 (Nov. 2, 1988). It was concluded that the conjunctive "and" standard embodied in DR 5-105(C), as also articulated in MR 1.7, should also be the standard under DR 5-101(A). The Committee therefore recommends that DR 5-101(A) be revised in accordance with the recommendation of the New York State Bar Committee.

3. If the conjunctive "and" is retained, should the words "as limited or defined by the client's consent" be inserted after "adequately represents the interest of each" in DR 5-105(C)?

All agreed that the inclusion of the "reasonably believes" standard in DR 5-105(C) would obviate the need for this additional language.

4. Should the language of DR 5-101(A), 5-105(A) and 5-105(B) be modified to make clear that the standard for determining whether there is a conflict of interest is one of a (a) reasonable possibility or (b) reasonable probability of an adverse effect?

All agreed that DR 5-105(A) and (B), which require a lawyer to decline employment where the lawyer's exercise of independent professional judgment in behalf of a client "will be or is likely to be adversely affected," was the preferred standard and that the same standard should be applied to DR 5-101(A), 5-105(A) and 5-105(B). Accordingly, the Committee recommends that the New York State Bar Association be asked to consider this change in addition to the changes that have already been proposed.

5. Should the conflict of interest rules expressly recognize a distinction between litigation and other conflict situations?

All members of the Committee answered this question "no."

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Imputed Disqualification/Screening:
DR 5-105(D), 5-108 and 9-101 v. MR 1.9 and 1.10

Introduction

The issues of screening and imputed disqualification are raised in fact patterns involving "successive adverse representation" by an attorney, i.e., when an attorney whose previous law firm formerly represented or continues to represent a legal interest adverse to an interest currently represented by his new firm. Examples include:

1. Attorney A is a member of Firm X, which represents p in the action p -v- • . A then quits Firm X and joins Firm Y, which represents • in that same action.
2. Attorney A is a member of Firm Y, which represents • in the action p -v- • . A quits Firm Y and joins Firm Z, which represents a third party suing • in a related action.
3. Attorney A is a member of Firm Z, which represents p in the action p -v- • . A then leaves Firm Z and joins Firm B, taking all of the business of client p with him/her. Shortly thereafter Firm Z is approached by a new client who wishes to sue p in an action related to the claims p is pursuing against • .

In the first two examples, is Attorney A disqualified from working on the case p -v- • in his/her new firm? Is the new firm similarly disqualified from continuing its representation of its existing client whose interests are adverse to that of the client represented by Attorney A's former firm? Is the answer dependent upon whether Attorney A had worked for the client whose interests are adverse and/or had acquired confidential information material to the matter? In the third example, may Firm Z undertake the

representation of new client B after Attorney A has departed? Would the adoption of appropriate screening procedures overcome imputed disqualification issues raised? The answers to these questions are not straight-forward.

The Model Rules and the New York Code contain essentially identical rules on imputed disqualification. DR 5-105(D) provides that "[w]hile 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(A), DR 5-105(A), (B) or (C), DR 5-108 or DR 9-101(B) except as otherwise provided therein." In a similar vein, MR 1.10(a) states that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." In each of the first two examples above, the initial question that must be addressed is whether Attorney A by virtue of his/her prior employment is personally disqualified from working on the same or substantially related matter at his/her new firm for a client whose interests are adverse to those of the client represented by the former firm. If so, then absent some exception to the rule all of the lawyers at Attorney A's new firm would be disqualified as well.

The basis for imputed disqualification lies in the assumption that when lawyers work together in a firm, there is a likelihood that they will share information they obtain in the course of representing a client with other lawyers in the firm. Under the substantial relationship test set forth in T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953), a court is entitled to presume that a lawyer formerly associated with a firm currently representing a party in litigation, who now works for another firm representing an adversary, gained by virtue of his or her former representation confidences bearing on the subject matter of the case which could be used by the formerly associated lawyer to the detriment of the client of the former firm.

The rule of imputed disqualification (absent client consent) clearly makes sense in the context of lawyers currently associated in the same firm, although critics maintain that in today's modern world of law firm practice there ought to be some relaxation of the rule where the clients of one office have no contact with lawyers in other offices of a large, multi-national law firm. But see Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (court ordered disqualification even though lawyers involved worked in different offices and never discussed their work with each other). The ability to obtain client consent in such situations, where the representation is limited to local matters, will, as a practical matter, often be sufficient to obviate the conflict.

Where consent cannot be so readily obtained, and where the courts have recognized some need to relax the imputed disqualification rule, is in the context of the lateral movement of lawyers, which is an accepted fact of life within the legal profession today. Courts have recognized the harshness of applying a per se disqualification rule in such circumstances and have tended to deny disqualification motions where the lawyer switching firms can show that he or she had not done substantive work for the client (i.e., had not "represented the client") and had not obtained actual knowledge of client confidences. The leading Second Circuit cases allowing the presumption of shared confidences to be rebutted in this way are Armstrong v. McAlpin, 625 F.2d 433, 444 (2d Cir. 1980) (en banc), vacated on other grounds and remanded, 449 U.S. 1106 (1981) and Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

Both the New York Code and the Model Rules address this issue. The New York Code provides in DR 5-108 that

> Except with the consent of a former client after full disclosure a lawyer who has represented the former client shall not:

> 1. Thereafter represent another person in the same or 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(C) or when the confidence or secret has become generally known.

The New York Code thus provides for automatic disqualification (absent client consent) if the lawyer switching firms had "represented the former client" at his or her prior firm, regardless of whether he or she had obtained actual knowledge of confidences or secrets. The rationale for making the presumption of shared confidences irrebuttable in such circumstances is that clients should not be required to reveal their confidences in order to protect them.

The Model Rules are to the same effect. MR 1.9(a), the counterpart to DR 5-108(a), provides that:

> A lawyer who has formerly represented a client in a matter shall not 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 unless the former client consents after consultation.

Both provisions are consistent with prevailing Second Circuit case law, as are DR 5-108(b) and its Model Rule counterpart, MR 1.9(c), which provide that a lawyer who has formerly "represented a client" may not thereafter "use any client confidences or secrets obtained to the disadvantage of the former client," thus making clear that a lawyer's duty of loyalty will survive his/her departure for another firm.

Where the New York Code and the Model Rules begin to diverge is in the treatment of a lawyer who did not "represent the client" at his/her former firm. As noted above, federal courts have permitted the presumption of shared confidences to be rebutted in such circumstances. The Model Rules are in line with prevailing Federal case law in this area. MR 1.9(b) provides that, absent client consent, a lawyer "shall not knowingly represent

a person in the same or a substantially related matter" in which the lawyer's previous firm had represented a client "(1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter." The Model Rules thus expressly permit the presumption of shared confidences to be rebutted consistent with the result in Silver Chrysler Plymouth.

The New York Code is silent on this point. However, the New York Court of Appeals appears to have accepted the result in Silver Chrysler Plymouth, but only in the large law firm setting. Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994) ("In smaller, more informal settings, the imputation of knowledge as a matter of law is necessary to protect the client and avoid the appearance of impropriety."). Neither the Model Rules nor federal case law have drawn this distinction.

Thus, in each of our first two examples, whether or not Attorney A would be disqualified under the Model Rules and prevailing federal case law would in large part depend upon whether Attorney A had "represented the client" at his or her former firm or acquired confidences or secrets of the client that could be used to its disadvantage. In New York state, whether Attorney A worked for a large or small firm would also be a relevant factor. Attorney A's disqualification (absent consent or rebuttal of the presumption of shared confidences) in each case would be imputed under both the New York Code and the Model Rules to all other lawyers in the new firm. See DR 5-105(D); MR 1.10(a).[17]

[17] Comment 10 to MR 1.9 provides that where a departing lawyer is disqualified only because of a surviving duty of loyalty (i.e., the lawyer has no confidential information that could be used to the disadvantage of the client), the new firm, but not the lawyer, can handle the matter. This exception to the rule of imputation, which finds no support in the text of MR 1.9 and 1.10(a), would appear applicable only in very limited and unusual contexts.

The Model Rules go on in MR 1.10(b) to deal with the issue posed by our third example, i.e., whether the departing lawyer's former firm may take on new work for a client with interests adverse to those of its former client. Under MR 1.10(b), the former firm may undertake such representation unless "(a) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (b) any lawyer remaining in the firm has information protected by Rules 1.9 and 1.9(c) that is material to the matter." The New York Code does not address this issue, although the New York courts have refused to disqualify large firms in circumstances similar to those envisioned by the Model Rules. See Solow v. W. R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994). Solow, however, does not mimic MR 1.10(b), which does not draw a distinction between large and small firms. Special rules dealing with the movement of lawyers to and from the government, and for former judges or arbitrators, are contained in MR 1.11 and 1.12, respectively.[18]

In short, the Model Rules, which are far more explicit than the New York Code (which is largely silent) in addressing the issues arising out of the lateral movement of lawyers, are more in line with federal policy, as articulated by Second Circuit cases, than the New York Code and case law, which do not appear to have accepted fully the federal policies articulated in cases such as Silver Chrysler Plymouth.

While MR 1.9(b) and 1.10(b) go a long way towards achieving a fair balancing of competing interests, they arguably do not go far enough. It is practically impossible today for law firms in performing due diligence with respect to lateral hires to obtain a list of all

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[18] MR 1.11 is substantially the same as DR 9-101 (B) except that MR 1.11(d) and (e), defining the terms "matter' and "confidential government information" for purposes of the Rule, have not been included in the New York Code. The counterparts to MR 1.12 in the New York Code are DR 9-101 (A) and EC 5-20, which differ from the Model Rules in a number of respects.

clients represented by the candidate's current firm in order to perform a complete conflicts check. In the case of lateral associates, particularly at the junior levels, it may not be fair to assume, even if the associate was working on a particular matter in some tangential way (such as performing a discreet legal research project), that he or she had access to confidences which could be used to the client's disadvantage elsewhere. The imputation of knowledge of all confidences would appear to be unreasonable under these circumstances. See United States v. Bronston, 658 F.2d 920, 931 (2d Cir. 1981) (Van Graafeiland, J., dissenting), cert. denied, 456 U.S. 915 (1982). But even in a case where a lateral hire's former involvement in a matter (i.e., the lawyer had previously "represented the client") is sufficient to raise a problem of imputed knowledge, it may be possible for the new firm to establish screening procedures[19] to eliminate the possibility of any impermissible sharing of confidences.

The use of screening devices has been considered by the courts in a variety of contexts. Second Circuit cases addressing the issues include Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903 (1981); Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 757 (2d Cir. 1975); and Laskey Bros. of W. Va. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956). New York District Court cases include Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534 (S.D.N.Y. 1989); Yaretsky v. Blum, 525 F. Supp. 24 (S.D.N.Y. 1981); Huntington v. Great W. Resources, Inc., 655 F. Supp. 565 (S.D.N.Y. 1987); Papanicolaou v. Chase Manhattan Bank, 720 F. Supp. 1080 (S.D.N.Y. 1989); and

[19] Commentators and courts have variously referred to screening procedures as establishing "Chinese Walls," "cones of silence," or "insulation walls."

Renz v. Beeman, 1989 WL 16062 (N.D.N.Y.).[20] The most recent decision in this area, In re Del-Val Fin. Corp. Sec. Lit., No. MDL 872, 1994 WL 395253 (S.D.N.Y. July 29, 1994), expressly approved the use of screening procedures in denying a motion to disqualify.

There are several policy arguments that support screening as a means of rebutting the presumption of shared confidences in order to avoid imputed disqualification. First, the rationale supporting imputed disqualification -- that responsible lawyers will, in performing their ethical obligations to one client, violate their ethical responsibilities to another client (or former client) by disclosing confidences or secrets obtained at a prior firm -- is "both unpalatable and unwarranted in fact." Hazard & Hodes, at § 1.10:207. Second, to prohibit a firm from continuing to represent a long-standing client or take on a significant new representation may be too severe a penalty for the firm and its clients if effective screening procedures are available. The fact that screening is expressly permitted in the case of government lawyers arguably demonstrates its acceptance and effectiveness in other contexts. Finally, proponents have argued that without screening the ethical rules would make "typhoid Marys" out of many mid-career lawyers, and that the use of screening devices is thus a necessity.

The use of screening procedures has been gaining in acceptance in recent years. Professors Hazard and Hodes state that the approach, which was considered but

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[20] Other federal court cases upholding or approving the use of screening devices as a means of rebutting the presumption of shared confidences include Panduit Corp. v. All State Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984); Geisler v. Wyeth Lab., 716 F. Supp. 520 (D. Kan. 1989); United States v. Titan Pac. Constr. Corp., 637 F. Supp. 1556 (W.D. Wash. 1986); and Nemours Found. v. Gilbane, 632 F. Supp. 418 (D. Del. 1986).

New York State cases addressing this issue include Solow v. W. R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994); People v. Mattison, 67 N.Y.2d 462, 494 N.E.2d 174, 503 N.Y.S.2d 709 (1986), cert. denied, 479 U.S. 984 (1986); People v. Shinkle, 51 N.Y.2d 417, 415 N.E. 2d 909, 434 N.Y.S.2d 918 (1980); Cardinale v. Golinello, 43 N.Y.2d 288, 372 N.E.2d 26, 401 N.Y.S.2d 191 (1977).

rejected by the Kutak Commission, "has merit." Professor Freedman, on the other hand, has expressed the opinion that screening is "unpoliceable" and that it compounds, rather than resolves, conflicts of interest. He also dissents from any rule that would make a distinction turn on the size of a firm, as appears to be the case in New York.[21] See Monroe H. Freedman, The Ethical Illusion of Screening, Legal Times, Nov. 20, 1995, at 24. Early drafts of the proposed Restatement of the Law Governing Lawyers have advocated the use of screening in private as well as governmental contexts. See Restatement of the Law Governing Lawyers § 204(2), Proposed Final Draft No. 1 (March 29, 1996).[22] At least twelve states, Arkansas, California, Delaware, Florida, Kentucky, New Jersey, Tennessee, Virginia, Pennsylvania, Illinois, Michigan and Oregon, have either specifically added a screening provision into their ethical codes or permit screening through judicial decision or ethics opinion.[23] The Pennsylvania provision (on which the Restatement is modeled) is illustrative:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer was associated, had previously represented a client whose interests are materially adverse to that

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[21] Professor Ziegler has also stated that she is "skeptical about the efficacy of screening," although she admits it would be helpful to have more information regarding screening's efficacy in the private firm context.

[22] The Restatement would remove imputation through screening only where confidential information possessed by the lawyer switching firms "is unlikely to be significant" in the matter; in the case of government lawyers, effective screening would remove imputation even when the confidential information may be significant in the succeeding representation. Under the Restatement, the circumstances of the lawyer's prior involvement and the nature and relevance of confidential information in the lawyer's possession would determine whether screening could be used, in lieu of client consent, to remove imputation.

[23] For example, the Tennessee Supreme Court Board of Professional Responsibility, in its Formal Opinion 89-F-1 18, 5 Law. Man. Prof. Conduct 121 (1989), approved of this technique. See also cases cited by Hazard & Hodes, § 1.10:207, at 334.1 n. 7.

person and about whom the lawyer had acquired [protected information], unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

This provision appears to be in line with developing federal case law, such as Del-Val, which have denied motions to disqualify where appropriate screening devices have been utilized.

The proposed amendments to DR 5-108 would incorporate the substance of Model Rules 1.9(b) and 1.10(b) into the New York Code and would add a new subsection (D) to permit screening to cure conflicts caused by former client relationships. The proposed DR 5-108(D) is patterned after the rule that has been in effect in Oregon since 1983 (and is also the formulation preferred by Professor Gillers). The proposed new text of DR 5-108(B), (C) and (D)[24] is as follows:

DR 5-108 Conflict of Interest - Former Client.

* * *

(A) 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 DR 4-101(B) that is material to the matter.

(B) Notwithstanding the provisions of DR 5-105(D), when a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests that are materially adverse to

[24] The State Bar Committee has also proposed that DR 5-108(A) be amended to make clear that former government lawyers need only satisfy the less restrictive standards of DR 9-101 (B) and do not have to satisfy the standard set forth in DR 5-108(A). The Committee supports this clarifying change.

those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

1. The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
2. Any lawyer remaining in the firm has information protected by DR 4-101(B) that is material to the matter.

(C) Notwithstanding the provisions of DR 5-105(D), the prohibitions stated in DR 5-108(A) and (B) shall not apply to the current firm of a lawyer who would otherwise be personally disqualified from representing a person in a matter, provided the following steps are taken to ensure that the personally disqualified lawyer is prevented from any form of participation or representation in the matter:

1. The personally disqualified lawyer shall provide the lawyer's former client, upon the commencement of the representation or the lawyer's affiliation with the law firm, with an affidavit attesting that during the period of the lawyer's disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other lawyer in the firm.

2. The personally disqualified lawyer shall provide the lawyer's former client with a further affidavit describing the lawyer's actual compliance with these undertakings set forth in DR 5-108(D)(1) promptly upon final disposition of the matter or representation.

3. At least one firm member shall provide the former client, upon the commencement of the representation or the lawyer's affiliation with the law firm, with a separate affidavit attesting that all lawyers in the firm are aware of the requirement that the personally disqualified lawyer be prevented from participating in or discussing the matter or the representation and describing the procedures being followed; and at least one firm member shall provide, if requested by the former client, a further affidavit describing the actual compliance by the firm with the procedures for preventing the personally disqualified lawyer from any form of participation or representation in the matter promptly upon final disposition of the matter or representation.

4. No violation of DR 5-105(C) or of the requirements of DR 5-105(D) shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter that would require the making a service of such affidavits and if all firm members having knowledge of the accepted employment do not know of the disqualification.

The State Bar Committee also proposes to amend EC 5-17 to comport with the proposed addition of DRs 5-108(B), (C) and (D). The new text of EC 5-17, which is derived from the Comments to MR 1.9, is as follows:

> A lawyer who has been associated with a firm but then ends that association may have to decide whether to undertake a representation adverse to a client represented by the former firm during that association. Many lawyers practice in firms and many move from one firm to another several times in their careers. If conflicts of interest were imputed to each group of associated lawyers each time a lawyer changed firms, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel. While lawyers must avoid compromising the confidences and secrets of their former clients, and refrain from putting themselves in situations that generate a significant risk that client confidences and secrets may be misused, consciously or subconsciously, where actual or potential misuse of client confidences and secrets is unlikely in the circumstances, or can be prevented with a reasonable degree of certainty by the implementation of screening mechanisms, representations may be undertaken or continued adverse to former clients even in substantially related matters. Any doubts as to the propriety of the representation or the degree of risk of disclosure or misuse of client confidences and secrets should be resolved against undertaking or continuing a representation.

Issues Presented and Conclusions Reached

1. Are the provisions of the Model Rules regarding imputed disqualification preferable to those contained in the New York Code?

The members of the Committee preferred the formulation in the Model Rules over the New York Code providing for the removal of imputed disqualification. The Model Rules were viewed as more explicit as well as in line with prevailing Federal case law, whereas the provisions of the New York Code were viewed as incomplete and thus inadequate. The New York Court of Appeals decision in Solow, partially adopting the Second Circuit's holding in Silver Chrysler Plymouth, did not, in the view of the Committee, go far enough in bringing New York law in line with prevailing federal policy. In particular, the distinction drawn in Solow between large and small firms was criticized, it being noted that the firm in Silver Chrysler Plymouth, which Solow cites, was a firm of 80 lawyers, which

at the time was considered large. The Committee therefore supports the proposed amendments to DR 5-108(B) and (C).

2. Should the New York Code be amended so as to permit the use of screening devices by law firms?

The members of the Committee support the proposed amendments to the New York Code which would permit, under the circumstances described therein, the use of "screening" devices by law firms. Permitting the use of appropriate screening devices was also viewed as consistent with developing federal policy. Several members of the Committee preferred the Pennsylvania formulation over the Oregon model but agreed that the Oregon model was far better than the current provision.

3. Should the rules draw a distinction between lateral partners and associates in terms of the imputation of knowledge of confidences?

The members of the Committee answered this question "no."

4. Should the rules draw a distinction between lateral hires who (a) were not involved at all in the representation of a client at a former firm (b) were involved but only in a tangential or insignificant way, or (c) were both involved and obtained access to confidential information during the course of the representation?

It was agreed that there would be no need to draw such distinctions if the proposed amendments to the New York Code were adopted. Drawing such a distinction would add a layer of complexity that should be avoided if at all possible.

5. Should the more explicit rules relating to former judges or arbitrators contained in MR 1.12 be incorporated into DR 9-1O1(A) and EC 5-20, respectively?

The members of the Committee believe that the rules relating to former judges or arbitrators should be equivalent to those applicable to other government officials and that the rule should be expanded to cover public interest organizations as well. The Committee

therefore recommends the following changes to DR 9-101 (new material underscored), all of which were viewed as consistent with existing or evolving federal policy:

DR 9-101 Avoiding Even the Appearance of Impropriety.

A. A lawyer shall not accept private employment in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such person, as a public officer or employee, or as an officer, director or employee of a pro bono or other public interest organization, unless the lawyer reasonably believes that the lawyer can adequately represent the interests of such private client and all parties to the proceeding and all appropriate government agencies or pro bono or other public interest organizations consent after full disclosure of the possible effect of such prior participation on the exercise of the lawyer's independent professional judgment.

B. Except as law may otherwise expressly permit:

1. No lawyer in a firm with which ^ a lawyer disqualified under DR 9-101(A) 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;

b. Written notice is promptly given to the appropriate judicial body, arbitral association, government agency, or pro bono or other public interest organization, to enable it to ascertain compliance with the provisions of this rule; and

c. 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 judge or other adjudicative officer, arbitrator or law clerk to such person, public officer or employee, or officer, director or employee of a pro bono or other public interest organization, 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 judge or other adjudicative officer, arbitrator or law clerk to such person, public officer or employee, or officer,

director or employee of a pro bono or other public interest organization, 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, except that a lawyer serving as a law clerk to a judge or other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified and obtained the consent of the judge or other adjudicative officer or arbitrator.

6. Should the rules expressly deal with summer associates, temps, legal assistants and/or other law firm employees?

Several members of the Committee believed that the rules as written already encompass temps, summer associates and/or legal assistants, either implicitly or on the theory that lawyers may be held accountable for the people they supervise. Other members disagreed, stating that the rules as written apply only to the conduct of lawyers; that while temps are lawyers and thus already covered by the rules, summer associates, legal assistants and other law firm employees (such as economists, accountants or other specialists) are not lawyers and thus are not bound by the rules. Given the decision of the Committee to endorse the proposed amendments to DR 5-108, the members concluded that expressly dealing with summer associates, temps, legal assistants and/or other law firm employees was unnecessary, and that while lawyers may, in appropriate circumstances, be held accountable for acts of non-lawyers they supervise, see Ass'n of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Op. 1995-11, N.Y.L.J. p. 7, col. 1 (July 12, 1995),

they should not be subject to discipline based upon knowledge imputed to them vicariously from non-lawyers. Other remedies (e.g., for breach of contract, breach of fiduciary duty and/or misappropriation) were viewed as a sufficient deterrent to misconduct in this area.

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Communications with Persons Represented by Counsel: DR 7-104(A)(1) v. MR 4.2

Introduction

DR 7-104(A)(1) ("Communicating with One of Adverse Interest") provides that

> 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 the other party or is authorized by law to do so.

MR 4.2, as amended in 1995, is substantially similar with the exception that the Model Rule now applies to represented "persons" not "parties."[25] The principal issues considered by the Committee were, first, whether the rule should apply to represented "persons"; second, who should be considered a "party" or represented "person" for purposes of the prohibition against attorney ex parte communications; third, should federal prosecutors be bound by the same restrictions as defense counsel and civil litigants; and fourth, how should the rule be applied in the pre-indictment, investigation phase of a criminal matter?

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[25] The only other apparent differences between DR 7-104(A)(1) and MR 4.2 are that (a) MR 4.2 contains no "adverse interest" requirement and (b) DR 7-104(A)(1) expressly prohibits a lawyer from "causing another" to communicate with a represented person in violation of the rule. But see MR 8.4(a) (a lawyer may not procure a violation of the rules, such as MR 4.2, through the acts of another). The additional language in DR 7-104 has been interpreted by some to preclude a lawyer from encouraging his or her client to communicate directly with an opposing party. See, e.g., Formal Opinion 1991-2 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, 7 Law. Man. Prof. Conduct 189 (1991). The official comment to MR 4.2, in contrast, makes clear that it is not intended to restrict the right of parties to a matter "to communicate directly with each other," and commentators such as Professors Hazard and Hodes have taken the position that a contrary interpretation of DR 7-104(A)(1) would stand the no-contact rule on its head. Hazard & Hodes, § 4.2:101, at p. 731. See also ABA Formal Op. 92-362 (1992), 8 Law. Man. Prof. Conduct 243 (1992).

Who is a "Party" or Represented "Person"

In the case of an individual represented by counsel it is clear that an opposing counsel is prohibited from communicating with such individual absent the consent of the lawyer representing such person. When a corporation is the represented party, however, the rules do not state who within the corporation is to be considered the "party" or represented "person" for purposes of the rule. Thus, the initial issue posed by DR 7-104(A)(1) and MR 4.2 in the context of the representation of a corporation is similar to the issue left unanswered by MR 1.13(b) and EC 5-18, i.e., who within the corporation as an entity is to be considered the "client."[26]

Resolution of this issue is important in a number of contexts, such as in determining the scope of the attorney-client privilege, in deciding whether to represent corporate officers or directors sued in shareholder derivative suits (or in responding to a demand served on the corporation in connection with a derivative claim), and in representing corporate employees in government investigations.

Courts have struggled with this issue, with no clear consensus emerging. The Supreme Court in the Upjohn case rejected the "control group" test for purposes of determining the scope of the attorney-client privilege, holding that communications between lower level employees and corporate counsel were privileged. Upjohn Co. v. United States,

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[26] Another question left unanswered by the text of the rule is whether unnamed members of a class should be regarded as "parties" or represented "persons" so as to preclude opposing counsel from seeking informal discovery from them. The issue can be particularly troublesome where the class in question is a class of corporate employees suing the corporation. Should class members only be considered "parties" for purposes of this rule after the class has been certified and (in an opt-out case) only to the extent they have elected not to opt-out of the class? The ethical rules in general do not address class actions, which by their nature are different than other actions and have their own separate set of built-in procedural protections for class members. But query whether some recognition of their special nature should be included? For a further discussion of this issue, see Hazard & Hodes, § 4.2:102.

449 U.S. 383 (1981). But the Upjohn analysis, which is only binding on federal courts, has not been applied by state courts considering the restrictions on ex parte communications contained in DR 7-104 and MR 4.2. Nor have federal courts followed Upjohn in such circumstances.

In New York, the issue of which corporate employees "should be deemed parties for purposes of DR 7-104(A)(1)" was most recently addressed by the Court of Appeals (interpreting DR 7-104(A)(1)) in Niesig v. Team I, 76 N.Y.2d 363, 558 N.E.2d 1030, 599 N.Y.S.2d 493 (1990). The Court in Niesig recognized this as a policy choice between competing interests: the interests of a plaintiff in fact gathering, on the one hand, and the interests of a corporate defendant, on the other hand, in preserving the attorney-client relationship with its employees. The Court of Appeals rejected the definition of "party" that would have included all employees of the corporation as giving too much protection to the corporation, as well as one equivalent to the "control group" test rejected in Upjohn as not providing the corporation with enough protection. The Court instead defined the term "party" to include (1) all corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation; (2) those employees whose acts or omissions are imputed to the corporation for purposes of its liability; and (3) those employees implementing the advice of counsel.[27]

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[27] Compare the standard adopted by Niesig with that adopted in West Virginia. Dent v. Kaufman, 185 W. Va. 171, 406 S.E.2d 68 (W. Va. Ct. App. 1991) (a corporate "party" includes those officials who have the legal power to bind the corporation in the matter, who are responsible for implementing the advice of the corporation's lawyers, or whose own interests are directly at stake). Accord, Formal Opinion 1991-4 of the Committee on Professional and Judicial Ethics of the Ass'n of the Bar of the City of New York, 7 Law. Man. Prof. Conduct 277 (1991) (lawyer for party opposing government agency may interview governmental employees who were merely witnesses to underlying incident, but not supervisory employees).

A number of federal courts since Niesig have adopted its holding in interpreting the provisions of DR 7-104 and/or MR 4.2. See Miano v. AC&R Advertising, Inc., 148 F.R.D. 68 (S.D.N.Y. 1993) (Katz, M.J.); Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 91 (D.N.J. 1991). The only reported decision in the Eastern District of New York on the subject, Frey v. Dep't of Health & Human Serv., 106 F.R.D. 32 (E.D.N.Y. 1985), was decided before Niesig and did not discuss Upjohn. In that case Magistrate Judge Caden, relying, inter alia, on N.Y.S. Ass'n for Retarded Children v. Carey, 706 F.2d 956, 960 n.5 (2d Cir.), cert. denied, 464 U.S. 915 (1983), held that the term "party" in DR 7-104 encompasses "those employees who are the alter ego" of the corporate entity, that is, "those individuals who can bind it to a decision or settle controversies on its behalf." 106 F.R.D. at 35. But query whether such decisions are consistent (or need be) with the holding in Upjohn. Although Upjohn did not address the entity as a client in the context of an alleged ethical violation, its holding that the attorney-client privilege encompasses communications with all employees who by their acts or words can bind the company,[28] is arguably relevant to the issues raised by DR 7-104(A)(1) and MR 4.2. Although different policies influence whether or not a communication should be deemed privileged and whether the sources of the communication should be deemed the "client" for purposes of the no-contact rule, it is

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The Comment to MR 4.2 takes a somewhat different approach. It states that the rule prohibits ex parte communications with all "persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." No authority is cited to support this statement.

[28] In certain contexts the rule, although silent on the subject, has also been read to encompass communications with former employees, to the extent such employees were party to privileged communications while they were employed by their former employer. Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Inc. Serv., Ltd., 745 F. Supp. 1037 (D.N.J. 1990). But see Hazard & Hodes § 4.2:107, at p. 740 n.3 (saying that such decisions are "clearly wrong"; contra, Niesig, supra; Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990); ABA Comm. on Ethics and Professional Responsibility, Op. 91-359 (1991), Laws. Man. Prof. Conduct 1001:101.

unclear, given the result in Upjohn, whether the Supreme Court would adopt the Niesig approach.[29]

The DOJ Ex Parte Rule

Some commentators see Niesig as the latest decision in "an evolving trend in which courts are authorizing ex parte interviews of a wide range of corporate employees in the interest of efficient, cost-effective fact finding." Clauss & Homan, Recent Case Highlights Trend in Favor of Ex Parte Interviews, National L. Journal (December 10, 1993).[30] This trend was arguably taken to a new level in connection with the new Justice Department Rule on Ex Parte Communications (the "DOJ Ex Parte Rule"). See 59 Fed. Reg. 39910 (August 4, 1994) (to be codified at 28 C.F.R. Part 77). The new DOJ Ex Parte Rule, which became effective September 6, 1994, authorizes ex parte contacts by DOJ employees with virtually every employee and officer of a corporation, other than the general counsel and the officers or directors to whom that individual gives legal advice. See Curran & Wallance, Corporate

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[29] For an analysis of the relationship between the proscription against ex parte communications and the privilege rule announced in Upjohn, see Stahl, Ex Parte Unterviews With Enterprise Employees: A Post-Upjohn Analysis, 44 Wash. & Lee L. Rev. 1181 (1987) (arguing that the "ethical restrictions on a lawyer's ability to conduct ex parte interviews ought to be coextensive with the parameters of the attorney client privilege as defined in Upjohn"). The Court of Appeals in Niesig clearly did not adopt this position, holding instead that "a corporate employee who may be a 'client' for purposes of the attorney-client privilege is not necessarily a 'party' for purpose of DR 7-104(A)(1)." Niesig, supra, 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.2d at 497.

[30] The decision in Niesig has also been subject to criticism. See Report of The Comm. on Professional Responsibility of the Ass'n of the Bar of the City of New York, Balancing the Duty to Investigate Litigation Claims against the Bar on Communicating with an Adverse Corporate "Party" after Niesig, 47 The Record of the Ass'n 406 (Feb. 1992) (concluding that Niesig "neither provides sufficient certainty of application nor properly strikes the balance between the interests of the corporate client and those of the investigating attorney," and arguing instead for the adoption of the "control group" test). In a similar vein, Professor Ziegler has voiced concern that, as a practical matter, Neisig's "alter ego" test may prove to be a blanket ban on ex parte communications. She also believes that the meaning of the alter ego test in Niesig is not self-evident and may lead to new and expensive litigation.

Compliance: Employees May Need Instruction on Dealing with Federal Agents if a Justice Department Proposal on Ex Parte Contacts is Adopted, National Law Journal (July 25, 1994).

The DOJ Ex Parte Rule has three overall components. First, there is a general prohibition, subject to limited exceptions, against contacts with "represented parties." Second, the rule generally permits investigative contacts with "represented persons." Third, the rule prohibits ex parte contact with "represented persons" for the purpose of negotiating plea agreements, settlements, or other similar legal arrangements. 59 Fed. Reg. 39910 (Aug. 4, 1994). A person is a "represented party" when "(1) the person has retained counsel or accepted counsel by appointment or otherwise; (2) the representation is ongoing and concerns the subject matter in question; and (3) the person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation." 28 C.F.R. § 77.3. A person is a "represented person" when conditions (1) and (2) above exist, but condition (3) does not. See Id.

For present purposes, the most important subdivision of the DOJ Ex Parte Rule is Section 77.10, which treats the issue of ex parte communications with a current or former employee of an organization, i.e., the Niesig issue. Section 77.10(a) provides that

> A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual.

28 C.F.R. § 77.10(a) (emphasis added). A "controlling individual" is very narrowly defined as "a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter." Id. This is roughly equivalent to the third prong of the Neisig definition.

To the extent that an employee is considered a "controlling individual" -- and thus communications with such employee would be considered a "communication with the organization" -- then the prohibitions applicable to communications with "represented parties" and "represented persons" would apply, depending on whether the organization is considered a represented party or a represented person. To the extent that the organization is merely a represented person, the limitations on ex parte communications are somewhat insubstantial, the government attorney being generally permitted to communicate with such person provided the communication would not violate the provisions of Sections 77.8 (plea agreements) and 77.9 (deference to attorney-client relationships). But most importantly, if the employee is not considered a controlling individual, then such employee is treated as neither a represented party nor a represented person and a DOJ attorney would be permitted to interview and question such employee without regard to any of the restrictions under the Rule.

The comments to the new rule set up a four-part definition of "controlling individual." A controlling individual must: "(1) be a current employee or member of the organization; (2) hold a high-level position with the organization; (3) participate (as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter;) and (4) be known by the government to be engaged in such activities." 59 Fed. Reg. 39910, 39925 (Aug. 4. 1994). This definition essentially limits controlling persons to those employees of the corporation who have direct contact with the corporation's attorney and who are engaged in decisions regarding settlement and litigation strategies. Note that since the "controlling individual" standard is demonstrably narrower than the Niesig standard, a direct conflict appears to exist in the case of an employee who

would be considered a "party" under Niesig but not a "controlling individual" under the DOJ Ex Parte Rule.

The DOJ Ex Parte Rule, and its predecessors, has been the source of widespread criticism on a number of grounds, but most particularly because of the alleged advantage it gives prosecutors over defense counsel and civil litigants who believe they are ethically bound to avoid ex parte contacts with represented persons. See Donovan, Counsel Bypass Rule Irks Business Lawyers in ABA, Nat'l L.J., Aug. 22, 1994, at Bl; Association of the Bar of the City of New York, Committee on Criminal Law, Report on Establishing Ethical Standards for Federal Prosecutors and Defense Lawyers, 49 Record of the Assoc. 21 (Jan./Feb. 1994). Proponents of the rule emphasize the special needs of prosecutors in gathering evidence in the course of an investigation, and point to the "authorized by law" exception to DR 7-104 and MR 4.2 as further justification for the DOJ Ex Parte Rule. But query whether the DOJ Ex Parte Rule is consistent with prevailing Second Circuit authority, discussed in the following section, which has interpreted the "authorized by law" exception to permit prosecutors to "employ legitimate investigative technique in conducting or supervising criminal investigations," including the use of informants. United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990).

The Simels Decision

Recently, in Grievance Committee for Southern Dist. of New York v. Simels, 48 F.3d 640 (2d Cir. 1995), the Second Circuit comprehensively addressed the application of DR 7-104(A)(1) to federal criminal proceedings. Simels, an attorney, represented Davis, a defendant in a drug conspiracy case that was scheduled to go to trial. On the eve of trial, a witness in the case was shot. A suspect in the shooting, Harper, was arrested. During questioning Harper implicated Davis in the shooting. At Davis' request, Simels went to interview Harper the next day and learned during the interview that the court had appointed

a lawyer for Harper and that Harper's family was in the process of retaining private counsel to represent him. Simels made no attempt to contact Harper's counsel and continued the interview.

The issue before the court was whether Davis and Harper should be considered "parties" in the same "matter" within the meaning of DR 7-104(A)(1). Concluding that the Grievance Committee's interpretation of the rule "raises important issues of policy affecting federal law enforcement and the ability of defense counsel to provide the effective assistance and zealous representation that the Sixth Amendment and DR 7-101, respectively, guarantee to criminal defendants" that had not previously been addressed, the Court proceeded to articulate what it understood federal policy to be, and concluded that in light of such policy the rule against ex parte communications should be construed narrowly. Even though Harper was both a potential witness against Simel's client in the drug conspiracy case and a potential co-defendant in a related, but distinct, attempted murder case, the Court held that he should not be considered a "party" in the same "matter" as Davis for purposes of the rule.[31]

According to the Simels court, DR 7-104 is primarily a rule of professional courtesy. It presumably protects "a defendant from the danger of being tricked into giving his case away by opposing counsel's artfully crafted questions." United States v. Jamil, 707

[31] The Court began its discussion by noting that rules of ethics are not statutes, but standards of conduct, and that where neither the plain meaning nor the intent of the drafters can be discerned from the face of a disciplinary rule, matters of policy may appropriately be considered in determining its scope. Under established principles of federalism this means that federal courts should seek to discern the federal policy interests at stake; state interpretations or court decisions are simply irrelevant to this determination. The Simels court thus expressly declined to follow Ethics Opinion 676 (1990) issued by the New York County Lawyers Association, leaving federal and state interpretations of DR 7-104 in New York in a state of disarray.

F.2d 638, 646 (2d Cir. 1983), citing United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962), rev'd on other grounds, 377 U.S. 201, 84 S.Ct. 1199, 12 L. Ed. 2d 246 (1964). The rule also furthers other interests, such as

> protecting the client from disclosing privileged information or from being subject to unjust pressures; helping settle disputes by channeling them through dispassionate experts; rescuing lawyers from a painful conflict between their duty to advance their clients' interests and their duty not to overreach an unprotected opposing party; and providing parties with the rule that most would choose to follow anyway.

Simels, 48 F.3d at 647, quoting Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest, 127 U. Penn. L. Rev. 683, 686-87 (1979) (footnotes omitted).

Tracing the history of the rule, the Simels court noted that it was not until 1983 that the rule was affirmatively held to apply in criminal cases, Jamil, 707 F.2d at 645; that it had never previously been applied in the context of a disciplinary action against a defense attorney; and that in the context of applying the rule to federal prosecutors the Court of Appeals had never before been asked to examine the precise scope of the terms "adverse interest," "party," or "matter." The court then distinguished its prior holdings in Massiah; Jamil; United States v. Foley, 735 F.2d 45 (2d Cir. 1984), cert. denied, 469 U.S. 1161, 105 S. Ct. 915, 83 L. Ed.2d 928 (1985); United States v. Dennis, 843 F.2d 652 (2d Cir. 1988); United States v. Pinto, 850 F.2d 927 (2d Cir.), cert. denied, 488 U.S. 867, 109 S. Ct. 174, 102 L. Ed. 2d 143 (1988); and Hammad (noting, however, that the Court was "very careful . . . to urge restraint in applying the Rule in the pre-indictment context so as not to unduly hamper legitimate law enforcement investigations"), concluding that in none of these cases had the Court explicitly considered whether a potential defendant was a "party" under DR 7-104(A)(1).

Holding that the "vague terms of DR 7-104(A)(1) should be construed narrowly in the interests of providing fair notice to those affected by the Rule and ensuring vigorous advocacy not only by defense counsel, but by prosecutors as well," the court reasoned that:

> Balancing the purposes served by DR 7-104(A)(1) against the overriding concern of a defendant's Sixth Amendment right to the effective assistance of counsel and a lawyer's ethical duty of zealous advocacy, the Committee's ruling threatens to inhibit defense attorneys' efforts to interview witnesses and develop trial strategies. In our view, Harper was a potential witness against Simels' client in the drug conspiracy case and a potential codefendant - albeit in reality a potential witness - in a related, but distinct, criminal matter, the attempted murder of Diggins. Both we find to be an insufficient basis upon which to rest a violation of the Rule.

Simels, 48 F.3d at 650.

The Court then addressed what it termed the "threshold question" -- whether the "matter" at issue for DR 7-104(A)(1) purposes was the drug conspiracy case (in which case no ethical violation could have occurred because Harper was never a "party" to that "matter") or the anticipated charges for attempted murder, or both. Finding it unnecessary to resolve this issue, the Court held that, even if the attempted murder case was the relevant "matter," DR 7-104(A)(1) did not apply to contacts with potential witnesses or co-defendants.[32] Any other result, it was held, would threaten "to chill all sorts of investigation essential to a defense attorney's preparation for trial." Id. The Court was thus unwilling, absent a clear policy choice made by Congress or the Supreme Court, to bar defense counsel from contacting represented co-targets (or witnesses) during the pre-indictment, investigative stage of a criminal case.

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[32] The Court found it unnecessary to decide whether actual co-defendants are "Parties" for purposes of the Rule.

ABA Formal Opinion 95-396

On July 28, 1995, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 95-396 interpreting MR 4.2. In summary, the opinion concluded that:

(a) MR 4.2 applies equally to the conduct of civil and criminal matters, and covers all "persons" (and not just parties) known to be represented by counsel.

(b) The rule applies in criminal matters before arrest or the institution of criminal charges. However, the opinion recognizes that the rule has been interpreted by some courts (citing the Second Circuit decisions in Hammad and Jamil, but not Simels) not to prohibit contacts by investigative agents acting under the general direction of a lawyer, with a person known to be represented by counsel in the matter being investigated, and that such contacts must therefore be viewed as coming within the "authorized by law" exception.

(c) The "authorized by law" exception encompasses communications that are constitutionally protected, as well as communications that are specifically authorized by statute, court order, statutorily authorized regulation or judicial precedent.

(d) A lawyer is not barred from communication with a person known to be represented by counsel regarding matters that are beyond the scope of the representation.

(e) With respect to corporate clients known to be represented, the bar applies to those employees who have managerial responsibility, those whose acts or omissions may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question. The opinion cites both Upjohn and Niesig as being in accord with this interpretation.

(f) The bar applies even if the communication is initiated by the represented person.

(g) A lawyer may not avoid application of the rule through the use of an agent acting as the lawyer's alter ego.

(h) "Known" to be represented by counsel means actual knowledge, which may be inferred from the circumstances.

(i) Communications with a formerly represented person are permissible, provided the lawyer has reasonable assurance that the representation has in fact been terminated.

Proposed Amendments to the New York Code

The proposed amendments to the New York Code would change the word "party" to "person" in DR 7-104(A)(1). The State Bar Committee described this change as a "clarification" and noted that the use of the word "person" in DR 7-104(A)(2) had "given rise to the arguments that the no communication rule (i) applies only in matters that are being litigated and (ii) does not apply to non-party witnesses." The proposed change in the rule would thus make clear that the rule applies to non-parties and to pre-complaint conduct.

The State Bar Committee has also proposed the addition of language dealing with the ability of a lawyer to communicate indirectly with the a represented person by counseling a client in connection with the settlement of disputes. The text of the proposed new DR 7-104(B) is as follows:

> B. Notwithstanding the prohibitions of DR 7-104(A), a lawyer in a civil matter may cause a client to communicate with a represented person to discuss resolution of disputes between them, and counsel the client with respect to those communications, provided the lawyer representing such person is informed in advance that such communications will be taking place.

The ALI's Proposed Restatement

The ALI'S proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12, 158-162 (May 15, 1996) takes a broader approach to the anti-contact rule than either the Model Rules or the New York Code. The general anti-contact rule would prohibit communications with represented persons unless (a) the communication is by a government investigating lawyer[33] or concerns communications with a public officer or

[33] Significantly, §160 of the proposed Restatement states that "a prosecutor may communicate or cause another to communicate with a person accused or suspected of a crime if constitutional and other legal rights of the person are observed." The Comment to the rule goes on to state that a "suspect or accused person represented by counsel may initiate communication with a prosecutor without knowledge of counsel, even after the constitutional right to counsel attaches."

agency; (b) the lawyer is a party and represents no other client in the matter; (c) the lawyer's communication responds to an inquiry by the represented person that seeks specific factual information and conveys only such information; (d) the communication is authorized by law; (e) the communication reasonably responds to an emergency; or (f) the other lawyer consents. The rule is not intended to prohibit a lawyer from assisting his/her client in communicating with another represented person (on any subject), unless the lawyer thereby seeks to interfere with the lawyer-client relationship of the other person or to deceive or overreach the other person.

The proposed Restatement (which is still under advisement and subject to change) thus expressly attempts to accommodate the government's need to conduct legitimate undercover operations, and also allows lawyers great latitude in encouraging client-to-client contacts. It does not specifically deal, however, with the civil settlement context.

Issues Presented and Conclusions Reached

1. Should the rule apply to represented "persons" or "parties"?

There was a clear difference of opinion among the members of the Committee on this issue. A clear majority, however, were of the view that DR 7-104(A)(1) as originally drafted was intended to encompass all represented "persons" and that the use of the term "party" was inadvertent. These members pointed to the language of DR 7-104(A)(2), MR 4.2, ABA Formal Opinion 95-396 (July 28, 1995), which described the background and purposes of the anti-contact rule and concluded that the broader sense of the word "party," taking it as equivalent to "person," is "clearly the appropriate" interpretation, and various Reports of the Committee of the Association of the Bar of the City of New York, as evidencing a national consensus on this issue. These members viewed the proposed amendment, as does the State Bar Committee, as a "clarification" rather than as a substantive change, and believe that, as a matter of policy and ethics, the rule against ex parte contacts

should apply to represented targets and, in the grand jury and post-indictment context, represented witnesses.

Other members of the Committee voiced strong opposition to the proposed amendment on the grounds that changing "party" to "person" would create special problems for the government in conducting undercover investigations and that, accordingly, civil and criminal cases should be treated differently. Concern was also expressed that the Committee not take a position that would imply that the government was acting unethically in conducting legitimate undercover investigations, which often involve counseling by government lawyers to undercover operatives.

The proponents of the proposed change stated that they recognized the need to balance the legitimate interests of the government in pursuing criminal investigations, particularly undercover investigations, against protecting the sanctity of the attorney/client relationship. They expressed the view that the appropriate vehicle for achieving that balance was through judicial interpretation of the "authorized by law" exception rather than through Justice Department rulemaking, and that until a national consensus on the issue could be reached -- which all of the members of the Committee would prefer to see -- the Committee's involvement should be confined to commenting on the specific amendments to the New York Code that have been proposed and encouraging the State Bar Association, prosecutors and the defense bar to engage in a constructive dialogue in an effort to reach a national consensus on this issue.

2. Should DR 7-104(A)(1) define the term "party" or "person" in the context of a corporation as the client? If so, should the definition be that adopted by the New York Court of Appeals in Niesig, or some other test?

There was a clear split of opinion within the Committee with respect to the most appropriate definition of the term "party" or "person" for purposes of DR 7-104(A)(1) in the context of an entity as the client. Several members favored or preferred the formulation adopted by the New York Court of Appeals in Niesig, while others argued in favor of a test that would define "client" for purposes of DR 7-104(A)(1) as encompassing all employees who by their acts or words can bind the company. Some members argued that the definition should be the same for purposes of the attorney-client privilege and the Code; others maintained that the different purposes served by the various rules justified different definitions, while noting that there appears to be no primary authority holding that everyone whose communications are privileged should thereby be deemed a client.

Although the Committee was unable to reach agreement on this issue, the members agreed that the Code was not the proper vehicle to address what was viewed as an issue of substantive law as opposed to ethics.

3. Should federal prosecutors be subject to the same ethical proscriptions with respect to ex parte communications with persons known to be represented by counsel as defense counsel and civil litigants? Does the "authorized by law" exception to DR 7-104(A)(1) and MR 4.2 apply to the DOJ Ex Parte Rule?

A clear majority of the Committee believed that federal prosecutors should be subject to the same ethical proscriptions as defense counsel with respect to ex parte communications with persons known to be represented by counsel; that the "authorized by law" exception to DR 7-104(A)(1) and MR 4.2 should not be read so as to encompass the DOJ Ex Parte Rule; and that the Rule should be read consistent with prevailing Second Circuit precedent in Hammad and Simels. A minority of members disagreed with this conclusion, arguing that different standards were needed in the criminal context so as not to impede legitimate law enforcement techniques and that the "authorized by law" exception was too ambiguous and inconsistently applied, thus creating a need for a more precise bright-line

standard in the rules. After extensive discussion, the Committee concluded that it would be inappropriate for it to attempt further to define the "authorized by law" exception through amendment to the Rules.

4. Should the "causing another" language in DR 7-104(A)(1) be modified to make clear that it does (or does not) preclude a lawyer from encouraging a client to communicate directly with an opposing party, whether or not represented by counsel, for purposes of settlement?

All agreed that the Rule should not prohibit clients from communicating on their own with each other with respect to the subject matter of the representation. Precluding such communications was viewed as both impractical (especially in the commercial context) and an impediment to the amicable resolution of disputes. It was noted that in August 1994 the Association of the Bar's Committee on Professional Responsibility had recommended that DR 7-104(A)(1) be amended to make clear that a lawyer may advise a client to communicate with a represented party in a civil matter to discuss possible resolution of disputed or unsettled issues, and that the proposed amendments to the New York Code, which would add a new DR 7-104(B), would accomplish the same result. There was a difference of opinion within the Committee as to whether the language in the proposed amendment requiring advance notice to counsel before client-to-client communications regarding settlement could occur was counter-productive since lawyers are often viewed as an obstacle to settlement. A majority of the members, however, favored the inclusion of the advance notice provision.

After consideration of this proposal, the Committee agreed to recommend the adoption of the amendments to DR 7-104 proposed by the State Bar Committee.

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The Entity as a Client:
EC 5-18 and DR 5-109 v. MR 1.13

Introduction

Both the New York Code and the Model Rules have adopted the entity theory of representation. The basic premise of the entity theory is that "[a] lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." EC 5-18. The Model Rules are to the same effect. Rule 1.13(a) provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

Stating that the client is the entity merely begs the question, who within the entity is the client? Is it the Board of Directors, management, or the shareholders of the corporation? Are all corporate officers, directors and employees the client? Are subsidiaries and affiliates part of the same client? Neither the New York Code nor the Model Rules provide clear answers to these questions.

The New York Code incorporates much of MR 1.13. EC 5-18 goes on to provide:

> 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, 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 should 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. Occasionally a lawyer for an entity is requested to represent a stockholder, 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.

The above-quoted text is substantially identical to MR 1.13(b) and (e). MR 1.13(d), which says that in dealing with any constituent of the organization, "a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing," is substantially identical to DR 5-109(A), which provides that:

> 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.

The only significant difference between the New York Code and the Model Rule provisions is that the former does not include the most controversial provision of the Model Rules, MR 1.13(c), which provides that:

> If despite the lawyer's efforts in accordance with paragraph (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 substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

This provision appears to limit a lawyer's options when faced with a corporate client whose highest authority insists upon action, or refuses to act, in a manner that is clearly in violation of law and is likely to result in substantial injury to the corporation, to that of withdrawal. The option of revealing to third parties the entity's intention to act does not exist, placing MR 1.13 in stark contrast to MR 1.6(b)(1), which in other contexts allows (but does not require) a lawyer to reveal confidences if the lawyer believes it reasonably necessary

"to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MR 1.13(c) is obviously more restrictive than MR 1.6(b)(1) and may be viewed as setting a double standard for individual clients as opposed to organizational clients. Professors Gillers and Freedman have been highly critical of this aspect of the Model Rules. See Gillers, Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure, 1 Geo. J. Legal Ethics 289 (1987) Freedman, supra, at pp. 201-205.[34]

The New York Code, on the other hand, does not provide for the same dichotomy of treatment. The failure to include the equivalent of MR 1.13(c) in the amended EC 5-18 leaves a lawyer representing an entity in the same position as a lawyer representing an individual client. Under DR 4-101(C)(3), the lawyer would be permitted (but not required) to reveal the "intention of a client to commit a crime and the information necessary

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[34] Professor Gillers has advocated the following revision of MR 1.13(c):

> If despite the lawyer's efforts in accordance with paragraph (b), the lawyer reasonably believes that the highest authority that can act on behalf of the organization
>
> (i) has violated or intends to violate a legal obligation to the organization by action or inaction that furthers the personal or financial interests of members of that authority and that has caused or is likely to cause substantial injury to the organization, or
>
> (ii) has authorized or acquiesced in a prospective or continuing violation of law that might reasonably be attributed to the organization and that is likely to cause substantial injury to the organization, the lawyer may disclose client confidences to the extent necessary to prevent or rectify the injury. In acting as authorized in this paragraph, the lawyer shall make reasonable efforts to assure that the extent of the disclosure is as restrictive as possible consistent with the goal of avoiding or rectifying injury to the organization. The lawyer's authority to disclose pursuant to this paragraph shall continue notwithstanding termination of the attorney-client relationship between the lawyer and the organization prior to the disclosure.

This provision would permit a lawyer to reveal confidences to the extent necessary to prevent or rectify an injury caused (i.e., past conduct) or likely be caused (future conduct) to the corporation, and would make clear that a lawyer's right to do so continues to exist after termination of the representation.

to prevent the crime." This provision, which has been criticized by some because it only applies to crimes and does not apply to conduct that is merely fraudulent, is nevertheless broader in scope than its counterpart in the Model Rules in that it encompasses all crimes, not merely those which are likely to result in imminent death or substantial bodily harm.

The above-cited rules have been criticized in a number of additional respects. Professor Freedman, for example, has pointed out that:

(1) Although the rules refer to the "appropriate authority" or the "highest authority" that can act on behalf of the organization as determined by applicable law, they do not identify who within the entity meets that description. The Comment to the Model Rules states that "ordinarily" the highest authority is the board of directors or similar governing body, but then goes on to say, however, that "applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example in the independent directors of a corporation."

(2) The rules do not make clear whether a corporate lawyer owe duties of loyalty, zeal and confidentiality to shareholders. Both the Model Rules and the New York Code refer to "shareholders" as constituents of the corporation, along with officers, directors and employees, but make it clear that the entity, not the shareholders or other constituents, is the client. The rules provide no guidance as to whether and, if so, under what circumstances a corporate lawyer may be permitted to go beyond the board of directors to the shareholders as the "highest authority" that can act on a given issue.

(3) In shareholder derivative actions, may a lawyer represent both the corporation, as the nominal party on whose behalf the action has purportedly been brought, and individual officers and/or directors named as defendants? Can the lawyer represent the

individual defendants alone? Neither the Model Rules nor the New York Code address this issue squarely. The Comment to the Model Rules states that:

> Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyers like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 [the general conflict of interest rule] governs who should represent the directors and the organization.

The problem with this formulation is that it is often difficult to determine at the commencement of a derivative action whether the charges are "serious" enough to cause a conflict between the interests of the entity and its board of directors or management. Professors Hazard and Hodes take the position that where the allegations challenge a business judgment of the board, the board should be prima facie entitled to control the defense of the litigation, but where the claims involve serious charges of fraud or mismanagement, calling into questions directors' and/or management's discharge of their duty of loyalty to the corporation, both the management group and the corporation "may have to obtain independent representation." Hazard & Hodes, § 1.13:602 at p. 433.

(4) At what point in time should a lawyer provide what has been described as a "Miranda-type" warning to constituents of a corporation, as contemplated by DR 5-109(A) and MR 1.13(d)? MR 1.13(d) says that this is to be done "when it is apparent that the organization's interests <u>are adverse</u>" to those of the individual in question. The New York Code says in DR 5-109(A) that it is to be done when "it appears that the organization's interests <u>may differ</u> from those of the constituents with whom the lawyer is dealing." What if an officer, director or employee confides in a lawyer that he or she is engaged in a crime or fraud on the incorrect assumption that the lawyer is representing him or her and that any information disclosed will be held confidential? May the lawyer use that information if no

"warning" was given to the individual by the lawyer before disclosure to the lawyer? Professor Freedman suggests that the rules state that warnings should be provided "at the outset of the lawyer-client relationship." Freedman, supra, at p. 200-201.

(5) Both the Model Rules and the New York Code provide that a lawyer's obligation to proceed to a "higher authority" only applies when a lawyer learns of conduct that is a "violation of a legal obligation" to the organization, or a "violation of law that may be imputed to the organization," and is "likely to result in substantial injury to the organization." Thus, if the conduct in question is not likely to be detected, or only involves conduct that may give rise to civil remedies (i.e., does not amount to a violation of law), or if the penalties are not likely to be "substantial," the lawyer's obligations are substantially circumscribed. Again, the standard seems inconsistent with other provisions of the Code, such as DR 2-110(C), which permits a lawyer to withdraw from representation whenever a client "persists in a course of action . . . that the lawyer reasonably believes is criminal or fraudulent," where the client "by other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively," or where the client "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 by the Disciplinary Rules."

(6) MR 1.13(c) permits withdrawal only where the organization persists in conduct that is "clearly a violation of law and is likely to result in substantial injury to the organization." MR 1.16(b), however, permits a lawyer to withdraw from representing an individual client where the client persists in conduct that the lawyer "reasonably believes" is criminal or fraudulent. Is there a rational basis for a more exacting standard for corporate counsel?

The proposed amendments to the New York Code include a number of changes to the text of EC 5-18 and DR 5-109, which are designed to incorporate, in part, the substance of MR 1.13(b) and provide further guidance to lawyers representing corporations, corporate affiliates, and individual corporate constituents. DR 5-109 would thus be amended by adding a new paragraph B as follows:

> 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 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.

EC 5-18 would be revised to include the following new language, which adds further guidance to lawyers representing corporate affiliates, consistent with ABA Formal Op. 95-390:

> Representation of a corporation or similar entity does not necessarily constitute representation of all of its affiliates. A number of factors should be considered, for example, 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 the organizational client as to whether its affiliates fall within the scope of the representation.[35]

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[35] The State Bar Committee has also proposed the following additional guidance in EC 5-18 for lawyers serving or asked to serve as directors of entity clients, the text of which is derived from the Comments to MR 1.7:

> 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 judgement on behalf of the corporation, the lawyer should not serve as a direct.

The Committee supports this addition.

The proposed amendments to the New York Code contain certain similarities to the recent revisions to Section 155 of the ALI's proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12 (May 15, 1996), which, in addition to incorporating the substance of MR 1.13(b), would also expressly recognize the right of an organizational lawyer in certain circumstances to (a) withdraw from the representation and (b) disclose the breach to persons outside the organization, when the lawyer reasonably believes that:

(a) the harm to the organization of the threatened breach that could be avoided or limited by disclosure is likely to exceed substantially the costs and other disadvantages of such disclosure;

(b) no other measure could reasonably be taken by the lawyer within the organization to protect its interests adequately; and

(c) following reasonable inquiry by the lawyer, no constituent of the organization, who is authorized to act with respect to the question of disclosure and who is not complicit in the breach, is available and willing to make a decision about such disclosure.

Issues Presented and Conclusions Reached

1. Should the language of EC 5-18 be moved into a Disciplinary Rule?

Initially, the members of the Committee were of the view that, absent a good reason for making a change, the language of EC 5-18 should remain where it is. Upon further reflection, however, it was agreed that if the text of MR 1.13(c) were added to the New York Code, it would be advisable either to move the text of EC 5-18 into the Disciplinary Rules or, alternatively, to move the text of MR 1.13(c) into the EC. The former was the preferred approach.

2. Should the provisions of MR 1.13(c) be added to the New York Code?

After considerable discussion, the members of the Committee concluded that a modified version of MR 1.13(c) should be added to the New York Code that would conform with DR 4-101(C), by permitting a lawyer, in addition to the option of withdrawing or resigning (in the case of in-house counsel), to reveal confidences or secrets to the extent permitted therein. It was agreed that MR 1.13(c) as written may unduly (and perhaps unintentionally) limit the options available to corporate counsel, and that the responsibilities of a lawyer for an entity in dealing with criminal or fraudulent conduct should be coextensive with the responsibilities that exist with respect to individual clients.

3. Should the lawyers for an entity have responsibilities in connection with dealing with criminal or fraudulent conduct that is coextensive with the responsibilities that exist with respect to individual clients?

The members of the Committee answered this question "Yes," for the reasons set forth in response to question 2 above.

4. Should an alternative formulation of MR 1.13(c) such as that advocated by Professor Gillers be adopted?

One or more members of the Committee initially advocated the adoption of the Gillers formulation of MR 1.13(c) on the grounds that its specificity provided clearer guidance to in-house counsel. Other members of the Committee disagreed, finding that the Gillers formulation raised as many questions as it answered. All agreed, however, that the reference in subparagraph (ii) of the Gillers formulation, requiring the lawyer to "make reasonable efforts to assure that the extent of the disclosure is as restrictive as possible consistent with the goal of avoiding or rectifying injury to the organization," would be a worthwhile addition to the rule. The Solomon Brothers case was cited as an example of the problems faced by in-house counsel which would be ameliorated by the insertion of MR 1.13(c), along with its proposed revisions, into the New York Code.

5. Should the language of the rule be modified to make clear who the highest authority for a corporation is (e.g., the board, independent directors, shareholders)?

The members of the Committee answered this question "no," on the grounds that this was a matter of state law and that the standard need not be contained in the code of professional responsibility.

6. Should the language of the rule be modified to make clear that a lawyer representing a corporation also represents its subsidiaries and controlled affiliates?

In light of the inherently fact intensive nature of the inquiry required in each case and the fact that all possible variations cannot be anticipated, it was the consensus of the Committee that the code should remain silent on this point. ABA Formal Op. 95-390, recently issued on this subject, together with the proposed addition to EC 5-18, was viewed as providing sufficient guidance to lawyers practicing in federal court.

7. Should the language of the rule be modified to clarify the circumstances under which a lawyer representing an organization may represent its officers or directors in shareholder derivative litigation?

The consensus of the Committee was that the Hazard & Hodes formulation of the rule seemed very practical and consistent with federal case law. As a result, the members concluded that it would be preferable either to include such language in the code or as a comment to the rule, with one modification that would make clear that separate representation may be required where officers and/or directors charged with wrongdoing clearly have differing or adverse interests.

8. If the provisions of MR 1.13(c) are added to the New York Code, should the language be modified to permit a lawyer to withdraw whenever the lawyer "reasonably believes" that the corporate client is engaged or about to engage in conduct that is criminal or fraudulent?

Here, again, the members of the Committee agreed that the language of MR 1.13(c) should be consistent with DR 4-101. See the response to question 2 above.

9. Should the language of EC 5-18 and/or MR 1.13 be expanded to encompass conduct that may result in injury to third parties, as opposed to the organization?

Given the desire of the Committee to apply the same standard to individual and corporate clients, if DR 4-101(C) were to be modified (as has elsewhere been suggested) to encompass third parties as well as clients, it was agreed that the language of EC 5-18 and/or MR 1.13 should be conformed accordingly.

10. Should the language of EC 5-18 and/or MR 1.13(c) be modified to make clear that a lawyer's responsibilities to act to protect the entity shall continue notwithstanding termination of the attorney-client relationship?

All members of the Committee believed that this change was unnecessary, because it was a self-evident proposition that a lawyer's responsibilities to a client do not terminate upon the termination of the attorney-client relationship.

In light of the above, the Committee proposes that DR 5-109 be revised by adding the following new paragraphs B and C:

DR 5-109 Conflict of Interest - Organization as Client.

* * *

B. A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer shall keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. 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 shall proceed as is reasonably necessary in the best interest of the entity. 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 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 shall 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. Occasionally a lawyer for an entity is requested to represent a stockholder, 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. For example, in shareholder derivative litigation, a lawyer for the organization may represent individual officers or directors named as defendants unless the lawyer is convinced that differing interests are present, such as when serious charges of fraud or mismanagement have been leveled against individual officers and/or directors, in which case such officers and/or directors may have to obtain independent representation.

C. If, despite the lawyer's efforts in accordance with DR 5-109(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 substantial injury to the organization, the lawyer may, in addition to revealing information to the extent permitted by DR 4-101(C), withdraw from the representation in accordance with DR 2-110. In acting as authorized by this paragraph, the lawyer shall make reasonable efforts to assure that the extent of any disclosure of confidences or secrets is as restrictive as possible consistent with the goal of avoiding or rectifying injury to the organization.

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Prohibited Business Transactions with Clients:
DR 5-104(A) v. MR 1.8(a)

Introduction

MR 1.8(a) provides that a lawyer

> shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms 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 which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

DR 5-104(A) states that 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 the client has consented after full disclosure."

MR 1.8(a) differs from DR 5-104(A) in a number of respects, and is preferred by Professors Gillers, Freedman and Ziegler. The Model Rule is more specific than the New York Code, encompasses more than lawyer/client business relationships, adds a "fair and reasonable" requirement on such transactions, and expressly requires that the client be given a reasonable opportunity to seek the advice of independent counsel. In short, MR 1.8(a), although similar in purpose and intent to DR 5-104(A), adds several glosses onto the rule that may or may not be viewed as implicit in the New York Code.

The proposed amendments to the New York Code include an amendment to DR 5-104(A) that would incorporate the language of MR 1.8(a). The explanation offered for the proposed change is to "[p]rovide greater specificity for lawyers seeking to enter into

business transactions with a client," by, among other things, requiring written consent on the part of the client after being given an opportunity to consult with independent counsel.

Consistent with the above change to the disciplinary rules, the State Bar Committee has also proposed that EC 5-4 be amended by the inclusion of the following language, the text of which is derived from the comments to MR 1.8:[36]

> EC 5-4 As a general principal, 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. . . .

Issues Presented and Conclusions Reached

1. Should the more specific provisions of MR 1.8(a) be adopted in lieu of the more general, though substantively similar, provisions of DR 7-104(A)?

Several members of the Committee expressed a preference for retaining the general provisions contained in DR 7-104(A) over the language contained in MR 1.8(a), for a number of reasons. First, although MR 1.8(a) at first glance may appear to provide more specific guidance to lawyers, in certain respects it falls far short of doing so. For example, MR 1.8(a)(1) permits a lawyer to acquire an "ownership, possessory, security or other pecuniary interest adverse to a client" if, among other things, "the transaction and terms on

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[36] The State Bar Committee has also proposed amendments to EC 5-3 (to counsel lawyers to obtain written consent from clients whenever they own property in which their clients also have an interest) and to EC 5-4 (to clarify the scope of the prohibition on the sale of media rights so as to conform with proposed amendments to DR 5-104(B). The Committee did not consider, and thus takes no position with respect to, either of these proposals.

which the lawyer acquires the interest are fair and reasonable to the client . . . ." What is fair and reasonable to the client, however, is a highly subjective issue as to which reasonable minds may disagree, particularly with the benefit of hindsight. Although the "fair and reasonable" standard has been applied by the courts, drawing on fiduciary duty law, in addressing lawyer-client deals, neither the Model Rule nor the official Comment thereto provide any guidance as to how lawyers and clients are to determine what is "fair and reasonable" in a given case. This was viewed as a drawback in the Model Rule not present in the New York Code.

Second, it was noted that DR 5-104(A) and MR 1.8(a) are not, in fact, substantively similar, in that DR 5-104(A) only regulates lawyers' conduct in entering into business relationships with clients, whereas the Model Rule also covers lawyers' conduct in "knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to a client." It thus encompasses more than lawyer/client business relationships. This additional language, which, according to the official Comment, was included to prevent a lawyer from exploiting information relating to the representation to the client's disadvantage, was viewed by various members of the Committee as superfluous in light of DR 4-101(B) which provides that a lawyer shall not (except in limited circumstances) 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.

The Committee was also unable to articulate a paramount federal policy that favored the Model Rule over the New York Code provision. Finally, the Committee separately considered whether DR 5-104(A) should be expanded by adding at the end the

phrase "and a reasonable opportunity to seek the advice of independent counsel." It was the sense of the Committee that affording clients an opportunity to seek independent advice from other counsel was implicit in the existing rule and subsumed by the requirement of full disclosure. It was further noted that the phrase "unless the client has consented after full disclosure" appears throughout the Code, and that it would be unwise to add a gloss on such language in DR 5-104(A), which might be interpreted as reflecting an intent to give such language a different meaning, without reviewing (and perhaps revising) every other provision in which such language appeared.

Proposed Final Draft No. 1 of the ALI's proposed Restatement of the Law Governing Lawyers (March 29, 1996), recently issued for comment, adopts an approach similar to that taken by MR 1.8(a). Section 207 of the proposed Restatement would provide as follows:

> §207 Business Transaction Between Lawyer and Client
>
> A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:
>
> (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
>
> (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
>
> (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in 202 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

Members of the Committee, in commenting on this language, noted the following: (a) that the Reporter's Comment states that the requirement that the transaction be fair is to be determined "from the perspective of an objective observer" based on facts that reasonably could be known at the time of the transaction, not as the facts later develop; (b) that 207 only deals with business or financial transactions with a client and does not apply to the

acquisition of an ownership, possessory, security or other pecuniary interest adverse to a client; and (c) that the proposed Restatement, without adopting the specific text of DR 4-101(B), cites it with approval in the Reporter's Note to 112, dealing with the Lawyer's Duty to Safeguard Confidential Client Information which, in relevant part, (i) would prohibit a lawyer from using or disclosing confidential client information if there is a reasonable prospect that doing so will adversely affect a material interest of the client and (ii) would require lawyers to account to their clients for any profits derived from the use of confidential client information, even if doing so would not adversely affect a material interest of the client.

The Committee concluded that it was unprepared at this time to make any recommendation to the New York State Bar Association regarding the inclusion of these additional features, many of which have traditionally been addressed under fiduciary duty law as opposed to ethics.

In view of the difference of opinion within the Committee and the inability to identify a paramount federal interest, it was concluded that no recommendation or comment should be made to the New York State Bar Association with respect to the proposed amendment to DR 5-104(A).

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Providing Financial Assistance to the Client:
DR 5-103(B) v. MR 1.8(e)

Introduction

Model Rule 1.8(e) generally prohibits a lawyer from providing financial assistance to his or her client, except that a lawyer "may advance costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." DR 5-103 (B), on the other hand, generally prohibits a lawyer from providing financial assistance to the client, except that the lawyer "may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses." Both the Model Rules and the New York Code contain an exception to the above for indigent clients, on whose behalf a lawyer is permitted to pay court costs and the reasonable expenses of litigation.

A clear conflict exists between the rules in that MR 1.8(e) allows repayment to be contingent on the outcome of the case, whereas DR 5-103 (B) requires that the client remain ultimately liable for the advance. Professors Gillers, Freedman and Ziegler have all expressed a preference for MR 1.8(e) over DR 5-103(B), which was also the conclusion reached by Judge Weinstein in County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990) (holding that the provisions of Fed. R. Civ. P. 23 reflect an overriding federal policy that supersedes DR 5-103(B) at least in the context of class actions); Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991) (same).

Another issue raised in connection with the Committee's consideration of this rule was whether lawyers should be allowed to advance "living expenses" to clients under MR 1.8(e) or DR 5-103(B). At least five states, Alabama, California, Louisiana, Minnesota and

Texas, have modified the general prohibitions against financial aid to clients to allow for the advancement of living expenses. Others (e.g., Illinois) have done so by judicial decision. Professor Freedman has urged expanding the applicable rule to include the advancement of living and medical expenses that are reasonably necessary to enable the client to hold out through the delays of pretrial and trial, which Professor Freedman has noted are sometimes purposefully extended by defendants to force unfair settlements. Professor Ziegler agrees with this position.

Issues Presented and Conclusions Reached

1. Should the Committee recommend the adoption of MR 1.8(e) instead of DR 5-103(B)?

The Committee agreed that, based in large part on Judge Weinstein's reasoning in County of Suffolk, the Committee would recommend that the language of MR 1.8(e) be adopted by the New York State Bar Association instead of the current text of DR 5-103(B). In reaching this conclusion, it was noted that the Association of the Bar's Committee on Professional Responsibility had recently urged the adoption of a slightly modified version of MR 1.8(e) which would read as follows:

> A lawyer may pay, advance or guarantee court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

In support of this recommendation the Association of the Bar's Committee on Professional Responsibility opined that the proposed rule "more closely reflects the realities of the practice of law and will enable clients of modest means access to the courts without posing the dangers of encouraging extreme attorney behavior or overreaching." According to the Committee, "jettisoning outmoded rules that are widely disregarded can only enhance the ethics of the profession, improving the practice of law by removing anachronistic restraints on access to the courts." Other authorities have also recognized that

reimbursement, as a practical matter, almost never occurs. In re Union Carbide Corp. Consumer Prod. Bus. Sec. Lit., 724 F. Supp. 160, 165 (S.D.N.Y. 1989) (Brieant, J.); Weinstein, Jack B., Individual Justice in Mass Tort Litigation, at 76 (1995).

Several members of the Committee, while recognizing the realities of modern practice and the existence of substantial support for the adoption of MR 1.8(e), nevertheless expressed reservations regarding the Model Rule. First, if and to the extent MR 1.8(e) was (and is) designed to enable clients of modest means to obtain access to the courts, the language of the rule itself is not so limited and would permit lawyers to underwrite the entire cost of litigation for clients that can afford to pay their own costs, thus encouraging speculation (or "trafficking") in litigation by lawyers. At the very minimum, the sentiment was expressed by these members that the practice of lawyers taking a financial interest in litigation where their clients can afford to pay was an unseemly one that should not be encouraged.

Second, if and to the extent Judge Weinstein's decision in County of Suffolk was based on policy considerations arising out of Fed. R. Civ. P. 23, those same considerations arguably do not apply, or do not apply to the same degree, outside the class action context. Permitting lawyers to advance costs is necessary in the class context in order to encourage the filing of such suits, which have high up-front costs that neither the named representative nor unnamed class members should in fairness be required to pay. The same cannot be said for all private actions.

Section 48 of the proposed Restatement of the Law Governing Lawyers as currently drafted builds on the language in MR 1.8(c) by providing that:

> (2) A lawyer may not make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client, except that the lawyer may[:
>
> > (a)] make or guarantee a loan covering court costs and expenses of litigation, the repayment of which to the lawyer may be contingent on the outcome of the matter[; and
> >
> > [(b) make or guaranty a loan on fair terms, the repayment of which to the lawyer may be contingent on the outcome of the matter, if: (i) the loan is needed to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits; and (ii) if the lawyer does not promise or offer the loan before being retained.][37]

Subsection (2)(a) essentially tracks the language of MR 1.8(e), except that it also permits the making of loans and guarantees of loans in addition to advances of court costs and litigation expenses. The proposed Comment to § 48 states that "[a]llowing lawyers to advance [court costs and litigation] expenses is indistinguishable in substance from allowing contingent fees, and has similar justifications (see § 47, Comment c), notably enabling poor clients to assert their rights." This justification echoes the rationale given by the Association of the Bar's Committee on Professional Responsibility, but does not address, let alone resolve, the concerns noted above that were expressed by certain members of the Committee. Notwithstanding these concerns, it was the consensus of the Committee that MR 1.8(c), rather than DR 5-103(B) or the variation contained in the proposed Restatement, was the preferred formulation. The proposed revisions to the New York Code announced by the State Bar Committee do not contain any amendment to DR 5-103(B). The Committee therefore recommends that the text of DR 5-103(B) be amended as follows (new material underscored):

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[37] The Council to the Members of the ALI voted in October 1995 to delete Subsection (b)(2) and its accompanying commentary but agreed to their being printed in brackets in the Proposed Final Draft issued on March 29, 1996. The deletion of this provision was subsequently ratified by the ALI at its May 1996 annual meeting.

DR 5-103(B) Avoiding Acquisition of Interest in Litigation.

* * *

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, the repayment of which to the lawyer may be contingent on the outcome of the matter.

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.

2. Should lawyers be allowed to advance living and medical expenses, as well as litigation expenses? If so, should there be a limitation on the types of cases (e.g., personal injury) in which such expenses may be advanced?

The members of the Subgroup initially advocated that the answer to this question should be "no," thereby taking issue with the views expressed by Professors Freedman and Ziegler. The members of the Subgroup believed that permitting lawyers to advance living and/or medical expenses would not further the public policy underlying MR 1.8(e) -- to promote access to the courts by clients of limited means. Allowing the advancement of expenses other than court costs and litigation expenses (which even MR 1.8(e) does not contemplate) would, in the opinion of several members of the Subgroup, lead us down "a very slippery slope" that should be avoided.

As the discussion of the previous question indicates, § 48(2)(b) of the proposed Restatement as approved in 1991 (but subsequently deleted) would, under certain circumstances, have permitted a lawyer to make or guarantee a loan on fair terms to enable a client to "withstand delay in litigation that might otherwise unjustly induce the client to

settle or dismiss a case because of financial hardship rather than on the merits," provided that the lawyer does not promise or offer the loan or guarantee before being retained. This provision was apparently intended to authorize a loan to pay living expenses in a situation where a financially pressed client might be tempted to accept an inadequate settlement offer in order to pay for food, clothing, shelter or medical expenses. A substantial majority of the Committee, taking issue with the Subgroup, favored the initial Restatement approach with respect to living and medical expenses, despite the absence of any articulated federal policy with respect to this issue. The Committee recommends that the New York State Bar Association be asked to consider this issue.

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Trial Publicity: DR 7-103 and 7-107 v. MR 3.6 and 3.8

Introduction

At the 1994 ABA Annual Meeting in New Orleans, the House of Delegates adopted changes to Model Rules 3.6 and 3.8 relaxing prohibitions on extrajudicial statements by lawyers. The amended MR 3.6 now reads as follows:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a 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 the matter.
>
> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;
>
> (3) that an investigation of the matter is in progress;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto;
>
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
>
> (7) in a criminal case, in addition to subparagraphs (1) through (6):
>
> (i) the identity, residence, occupation and family status of the accused;
>
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
>
> (iii) the fact, time and place of arrest; and
>
> (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

> (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
>
> (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

The amended Model Rule 3.6 has similarities to New York's DR 7-107, but there are significant differences as well. The rules are similar in that they both adopt the standard of "substantial likelihood of materially prejudicing an adjudicative proceeding" to determine whether speech by an attorney is prohibited. The rules are different in that (i) the new MR 3.6 has dropped the specific examples of types of speech that would breach this standard currently listed in DR 7-107(B)[38]; (ii) there are certain specific differences in the safe harbor provisions (MR 3.6(b) vs. DR 7-107(C)); (iii) the new MR 3.6 has added a section, MR 3.6(c), which allows an attorney to make certain statements to protect a client from undue prejudice caused by recent publication; and (iv) the new MR 3.6 has added a section, MR 3.6(d), which makes clear that partners and associates in law firms and government agencies are restricted from making statements in cases where other partners or associates would be so prohibited.

The landmark case regarding ethical constraints on trial publicity is Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). In Gentile, which was a split decision, the Supreme Court, per Justice Rehnquist, upheld the standard adopted by MR 3.6 and by New York's DR 7-107(A) of "a substantial likelihood of materially prejudicing an adjudicative proceeding." The Court, per Justice Kennedy, however, held that the "safe harbor" provision of Nevada's MR 3.6, which was substantially similar to the old MR 3.6, was

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[38] Note that this list has survived as a part of the comment to the new Model Rule 3.6.

unconstitutionally void for vagueness. The safe harbor provision provided that notwithstanding the prohibition on commenting about trials in a way that would have a "substantial likelihood of materially prejudicing" the trial, an attorney may nevertheless state without elaboration "the general nature of the claim or defense," and various other elements of the case which were listed in the rule. Justice Kennedy ruled that the words "without elaboration" and "general" provided lawyers with insufficient guidance and the rule was accordingly held void for vagueness. See Id. at 1048.

The problems created by the Gentile decision have been extensively discussed in the literature. See Day, The Supreme Court's Attack on Attorney's Freedom of Expression: The Gentile v. State Bar of Nevada Decision, 43 Case W. Res. L. Rev. 1347 (Summer 1993); Berkowitz-Caballero, In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules, 68 N.Y.U. L. Rev. 494 (1993). The ABA's response to the Gentile decision was simply to drop the word "general" from paragraph (b)(1) and to add subsection (C). But query as to whether these changes are sufficient to overcome Justice Kennedy's concerns?

In response to the Gentile decision, the Association of the Bar's Committee on Professional Responsibility undertook a comprehensive re-examination of DR 7-107. See Report of the Committee on Professional Responsibility, Association of the Bar of the City of New York, The Need for Fair Trials Does Not Justify a Disciplinary Rule that Broadly Restricts and Attorney's Speech, 20 Fordham Urb. L.J. 881 (Summer 1993) (hereinafter the "City Bar Report"). The City Bar Report noted two problems with DR 7-107. First, DR 7-107 uses substantially the same safe harbor provision that was struck down as unconstitutionally vague in Gentile. Second, the Report noted that there exists an inherent

conflict between DR 7-107(B)(4), which prohibits a statement of opinion concerning the guilt or innocence of the defendant, and DR 7-107(C)(1), which permits a statement concerning the general nature of the claim or defense. According to the City Bar Committee:

> There can be nothing more "general" than the defendant counsel's statement that "my client is innocent," and yet that is the very type of statement which appears to run afoul of subsection (b)(4). Such a whipsaw effect undoubtedly violates the First Amendment under the analysis in Gentile.

The Committee went on to propose that DR 7-107 be amended to read as follows:

> During a jury trial, and during the month immediately preceding the scheduled commencement of that trial, no lawyer participating in or associated with that trial shall 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 present a clear and present danger of material prejudice to the trial.

City Bar Report at *7. This proposal would materially change the existing rule in a number of significant respects: (a) it would only apply to jury trials; (b) it would be temporally limited to statements during the trial or in the month immediately preceding the scheduled commencement of trial; (c) it would adopt a "clear and present danger" test as opposed to the "substantial likelihood of materially prejudicing an adjudicative proceeding" test, which the Supreme Court expressly upheld in Gentile[39]; and (d) it would eliminate subsections (B) and (C).

The ABA at its 1994 Annual Meeting also adopted an amendment to MR 3.8, dealing with special responsibilities of a prosecutor. The amendment added a new subsection (g), providing that in a criminal case a prosecutor shall:

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[39] The ABA Litigation Section also advocated this change when the amendments to MR 3.6 were under consideration by the ABA. The official commentary to the revisions indicate that this proposal was rejected.

> except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

This new paragraph was intended to supplement MR 3.6. The comment to the amendment states that it is not intended to restrict the statements that a prosecutor may make which may comply with Rule 3.6, but rather is intended to encourage prosecutors to avoid, wherever possible, "comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused."

DR 7-103, the New York Code counterpart to MR 3.8, differs substantially from the Model Rule and contains no provision addressing extrajudicial statements by prosecutors. The New York provision has been criticized on the grounds that DR 7-103 and 7-107, read together, place significantly more restraints on defense counsel than prosecutors.[40]

The State Bar Committee, in its proposed amendments to the New York Code, has recommended that the substance of MR 3.6(c) and (d), as amended in 1994, be incorporated into DR 7-107(A), which as amended would read as follows:

> 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

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[40] Professor Ziegler has noted the agreement, even among some prosecutors, that both MR 3.6 and DR 7-107 give prosecutors an unfair advantage. This point is discussed in more detail by Professor Freedman. See Freedman, Muzzling Trial Publicity: New Rule Needed, Legal Times, April 5, 1993, at 24; Freedman, Silencing Defense Lawyers, Legal Times, May 6, 1991, at 22.

> 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.

Notably, the State Bar Committee has not recommended the incorporation of MR 3.8 or any changes to the language in DR 7-107(C) that the Supreme Court in Gentile found objectionable (i.e., a lawyer may state "without elaboration . . . the general nature of the claim or defense").

The proposed Restatement of the Law Governing Lawyers takes a more simplistic approach to the issue of publicity. Section 169 of the proposed Restatement would provide as follows:

> In representing a client in a matter before a tribunal, a lawyer may not make a statement outside the proceeding that a reasonable person would expect to be disseminated by means of public communication when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing a lay fact finder or influencing or intimidating a prospective witness in the proceeding.

This provision is functionally equivalent to the first sentence of DR 7-103(A).

Issues Presented and Conclusions Reached

1. Should the Committee recommend the adoption of the proposed amendments to DR 7-107?

Various members of the Committee expressed concern that lawyers (prosecutors and defense counsel alike) routinely appear to disregard their ethical obligations by engaging in prejudicial pretrial and trial publicity, and that, apart from occasional action taken against criminal defense counsel and "gag" orders (that by and large have also proven ineffective), judges have not enforced the proscriptions of DR 7-107 and/or MR 3.6. In addition, many lawyers perceive that the playing field is not level when it comes to controlling prejudicial pretrial publicity. Indeed, one member noted that he was unaware of any instance in which a federal prosecutor has been subjected to disciplinary action for engaging in prosecutorial misconduct arising out of extrajudicial statements or "leaks" of prejudicial

(often inadmissible) evidence. The only effect ethical rules such as DR 7-107 or MR 3.6, or their Eastern District counterpart, Local Criminal Rule 7, have had, according to this member, is to chill defense counsel.

The view was also expressed that, unless and until judges and lawyers take their obligations seriously, it made little sense to be debating the merits of DR 7-107 v. MR 3.6, and that since the rules appear to be honored in the breach, perhaps we would be better off with no rule at all so that the playing field is level for all concerned. The O. J. Simpson trial, which engendered a daily barrage of extrajudicial statements that appeared to go well beyond what Local Criminal Rule 7 would permit, is an example of what some members categorized as a lack of professionalism that has permeated our profession. Members of the Subgroup are not alone in their criticism. Former ABA president, George Bushnell, was most vociferous in his criticism of the lawyer/commentators covering the O. J. Simpson trial, who, according to him, had "pimp[ed] their dubious talents and hustle[d] the public" with their daily observations about the conduct of the lawyers and the judge handling the case.

The decision in Gentile, to the extent it can be read to promote, on First Amendment grounds, a lawyer's right to make extrajudicial statements purportedly to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or client, has been viewed by some as only exacerbating the problem. All members of the Committee believe that cases should be tried in the courtroom, not in the press, and that rules such as DR 7-107, MR 3.6 and Local Criminal Rule 7, which attempt to strike an appropriate balance between a defendant's right to a fair trial and the public's right to know, should not be viewed as an empty shell, but should be strictly followed and enforced. The

failure to follow and enforce such rules only impairs the public's already poor perception of our profession and undermines the fairness of our judicial system.

Having said all this, it was recognized that, notwithstanding the frustration expressed by many, there was merit to having an ethical rule on the books that sets forth a standard all lawyers should strive to achieve. Not wanting to reinvent the wheel, four different versions of the rule were considered: DR 7-107, MR 3.6 (as amended in 1994), Local Criminal Rule 7, and the Ass'n of the Bar's proposed rewrite of DR 7-107, which would only apply to jury trials and provide temporal limits within which certain extrajudicial statements would be proscribed.

After considerable debate, it was agreed that, in light of Gentile, the preferred formulation was the one contained in MR 3.6, as amended; rather than recommend the adoption of MR 3.6, however, the Committee concluded that it would be better to amend DR 7-107 to incorporate the changes made in MR 3.6 in 1994 (other than the deletion from the rule of the list of specific examples of types of speech that would breach the standard set forth in the rule, which can now be found in the comment to MR 3.6 in lieu of the text). This is the approach taken by the State Bar Committee in its proposed amendments to DR 7-107.

Having concluded that MR 3.6 was the preferred formulation[41], the Committee recognized the need to harmonize the rule with Local Criminal Rule 7, and agreed that it would be unwise to have two different standards applicable to criminal cases. Several different approaches to harmonizing the two rules were considered. First, by recommending the elimination of Local Criminal Rule 7 as being redundant in light of the existence of a

[41] A minority of members urged that the text of MR 3.6(d) be deleted from the proposed amendments to the New York Code on the grounds that it only encouraged "tit for tat" escalation of prejudicial publicity.

general ethical rule governing trial publicity.[42] Another approach considered was to exclude DR 7-107 from the Code, which would have the effect of regulating trial publicity only in criminal cases, and not as an issue of professional responsibility. Alternatively, it was suggested that the Local Rule could be expanded to cover civil as well as criminal cases. The Committee also considered limiting the ethical rule to civil cases, with a cross-reference to Local Criminal Rule 7 covering criminal cases, but concluded that this approach made little sense. Other possibilities were also considered.

The Committee then considered the Subgroup's recommendation that DR 7-107 be modified to conform where appropriate to the language contained in Local Criminal Rule 7 and that the Board of Judges be urged to consider modifying Local Criminal Rule 7 to remove the portions of the rule that are redundant, cross-referencing instead to the code of professional responsibility.

In attempting to harmonize the two rules, the Subgroup:

(a) Decided that it would be unwise to incorporate into DR 7-107 aspects of Local Criminal Rule 7 that were deleted from amended MR 3.6. For example, the

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[42] On May 28, 1996, the Federal Bar Council Committee on Second Circuit Courts issued a report entitled "Local Rules Limiting Attorney Speech in Criminal Proceedings." the report, which was the product of several years of study and debate, concludes that Local Criminal Rule 7, as written, unconstitutionally burdens the First Amendment rights of lawyers. The report goes on to propose four sets of changes to bring the rule "into harmony" with the Constitution. Thus, the report proposes that Rule 7(a) be amended by (1) replacing the "reasonable likelihood" standard with a "substantial likelihood" standard; (2) clarifying that during criminal investigations the prohibition applies exclusively to government lawyers; (e) clarifying that the rule applies both to lawyers and non-lawyers whom the lawyers supervise; and (4) eliminating the categorical prohibition of speech on certain subjects. The report also proposes (a) that Rule 7(c) be amended to authorize trial judges to issue "special orders" to protect fair trial rights against the risk of prejudice in any appropriate criminal case, (b) that the rule explicitly pre-empt disciplinary provisions under General Rule 4(f), and (c) that the rule specifically provide that violators be subject to disciplinary action according to General Rule 4.

Subgroup decided that language that would have permitted disclosure in a criminal case of information as to any resistance to arrest, pursuit, use of weapons and a description of physical evidence seized, other than as contained only in a confession, admission, or statement, should be omitted. This language was excluded from MR 3.6 presumably due to concerns raised by Gentile; the members of the Subgroup were strongly in favor of proscribing such disclosure due to its obvious prejudicial impact.

(b) Decided that it would be unwise to limit the provisions of DR 7-107 in criminal matters, as does Local Criminal Rule 7, to conduct occurring "from time of arrest, issuance of an arrest warrant or the filing of a complaint, information or indictment, in any criminal matter until the commencement of trial or disposition without trial." The Subgroup concluded that the rules should apply with equal force to pre-arrest, pre-complaint conduct occurring during the investigation of a criminal matter.

(c) As noted above, Local Criminal Rule 7 draws a distinction between pre-trial and trial conduct which appears to impose more severe restrictions on lawyers and law firms once a trial has begun. This dichotomy of treatment finds some support in the Ass'n of the Bar Committee's proposal which would draw the line 30 days before trial. Because the Board of Judges has previously seen fit to draw a distinction, the Subgroup proposed that the Court retain the provision governing trial (as opposed to pre-trial) publicity in Local Criminal Rule 7 (but not to incorporate it into DR 7-107). This approach was viewed as consistent with the view that courts may, in any case and without regard to the minimum standards imposed by the code of professional responsibility, impose more restrictive rules on lawyers, in the interests of justice. This approach also helps explain the last two paragraphs of Local Criminal Rule 7 which impose, or authorize judges to impose, more restrictive rules in particular cases.

Taking the above into account would have resulted in the following proposed text of DR 7-107, which the Subgroup recommended (new material underscored):

DR 7-107 Trial Publicity.

A. A lawyer participating in or associated with the investigation, prosecution or defense of a criminal or civil matter shall not make an extrajudicial statement that goes beyond the public record 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.

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 or accused in a criminal matter, or the identity or credibility 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 charged or a lesser offense.

3. The existence or contents of any confession, admission, or statement given by a party, suspect or accused, or that person's refusal or failure to make a statement.

4. 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 seized or expected to be presented.

5. Any opinion as to the merits of or evidence in the case or to the guilt or innocence of an accused or suspect in a criminal case or proceeding that could result in incarceration.

6. 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.

C. Provided that the statement complies with DR 7-107(A), a lawyer involved with the investigation or litigation of a criminal or civil matter may state the following:

1. The claim, offense or defense involved and, except where prohibited by law, the identity of the victim or other persons involved.

2. The information contained in a public record.

3. That an investigation of the matter is in progress.

4. The scheduling or result of any step in litigation.

5. A request for assistance in obtaining evidence and information necessary thereto.

6. A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.

7. In a criminal case, in addition to the information set forth in DR 7-107(C)(1) through (6):

   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.

   d. The identity of investigating and arresting officers or agencies and the length of the investigation.

   e. That the accused denies the charges.

D. Notwithstanding DR 7-107(A), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by or on behalf of the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.[43]

The Committee, after considering the matter at length, concluded (a) that the proposed amendments to the New York Code represented an improvement and should be approved; (b) that the State Bar Association should be urged to consider further amending DR 7-107(C)(1) in accordance with the Subgroup's recommendation in order to overcome the concerns expressed in Gentile; (c) that the remaining clarifying changes recommended by the Subgroup be transmitted to the State Bar Association for consideration by the State Bar

[43] Because what the Subgroup proposed would have required an amendment to Local Criminal Rule 7, it suggested that the Court's Committee on Criminal Litigation be asked to review the matter before submitting a final recommendation to the Court.

Committee; and (d) that the Board of Judges consider amending Local Criminal Rule 7 to conform with the text of DR 7-107 as amended.

2. Should the Committee recommend the adoption of a "clear and present danger" test, as suggested by the ABA Litigation Section and the Association of the Bar's Committee on Professional Responsibility, as opposed to the "substantial likelihood of materially prejudicing an adjudicative proceeding" test contained in both MR 3.6 and DR 7-107, which the Supreme Court expressly upheld in Gentile?

The Committee unanimously answered this question "no." The "clear and present danger" test was viewed as raising more of an academic than a practical issue that, if adopted, would only complicate matters. Members also concluded that consideration of the "clear and present danger" test, apparently borrowed from prior restraint cases, was unnecessary and unwise given the Supreme Court's endorsement in Gentile of the "substantial likelihood of materially prejudicing an adjudicative proceeding" test found in both DR 7-107 and MR 3.6.

3. Should the language of DR 7-107 be altered (a) in subsection (C)(1) by deleting the word "general" in light of the holding in Gentile; (b) by deleting subsection (B) and placing it instead in an EC solely as guidance to lawyers; (c) in subsection (C)(7)(c) by deleting the words "a description of physical evidence seized, other than as contained in a confession, admission or statement," on the grounds that such information may be substantially prejudicial and is frequently the subject of pretrial suppression motions; or (d) by the inclusion in DR 7-107 of a new subsection identical to MR 3.6(c), entitling a lawyer to respond as necessary where adverse publicity has been initiated by an opposing party or third person?

As noted above, the Committee agreed that the language of DR 7-107 should be amended as suggested in (a), (c) and (d) and that DR 7-107(B) should remain in the rule rather than placed in an EC.

4. Should the provisions of DR 7-107 be limited to criminal matters only or to cases involving jury trials?

The members of the Committee answered this question "no." While the risk of prejudice occurs less frequently in the context of civil and/or non-jury trials, it exists

nevertheless. While it is true that the right to a fair trial may not be threatened by a rule permitting unlimited extrajudicial statements by lawyers in most civil and/or non-jury cases, the members of the Committee believe that allowing unrestricted public contacts will only encourage unprofessional behavior. To this extent, the Committee disagrees with the proposal of the Ass'n of the Bar's Committee on Professional Responsibility. It was further noted that the New York Code itself drew a distinction between criminal and civil matters, as well as jury and non-jury trials, as factors to be considered in assessing the propriety of extrajudicial statements. While the present code provision admittedly sets a less bright-line test than the City Bar proposal, it recognizes the potential for prejudice that may exist in civil cases and non-jury trials and attempts to set an appropriate balance in the treatment of such cases.

5. Should the provisions of DR 7-107 be temporally limited, as proposed by the Ass'n of the Bar's Committee on Professional Responsibility, to statements made during trial or within a prescribed period (such as 30 days) before trial? Is that Committee's proposed rewrite of DR 7-107 preferable to either the current rule or the Model Rule provision?

The members of the Committee, while sympathetic to the concerns expressed by the Ass'n of the Bar's Committee on Professional Responsibility, did not believe that a temporal limitation on extrajudicial statements would eliminate the risk of prejudice defendants face in highly publicized cases, where the public's perception of an accused's guilt or innocence (or a defendant's liability) can be (and frequently is) influenced and shaped by the media's early reporting of events, often by means of lawyers' "sound bites" commenting on the evidence or strength of the prosecutor's or defendant's case.

6. Should the Committee recommend the incorporation of MR 3.8(g) into DR 7-103 with respect to the conduct of prosecutors?

The members of the Committee agreed that the adoption of MR 3.8 would not be a worthwhile addition to DR 7-103. The Committee noted that the State Bar Committee,

while incorporating the substance of MR 3.6 into DR 7-107, is not recommending the inclusion of MR 3.8 into DR 7-103. The Comments to MR 3.8 state that the rule is intended to "supplement" the changes to MR 3.6, which apply to prosecutors as well as defense counsel. No member was able to identify a statement covered by MR 3.8 that would not also be covered by MR 3.6. It was therefore the consensus of the Committee that MR 3.8 was superfluous and that its inclusion could only engender confusion as to the standard applicable to prosecutors.

7. If DR 7-103 is the preferred formulation, are there any provisions in the MR 3.8 (such as subsections (b), (e), (f) or (g)) which in fairness to defendants should be added to the New York Code provision?

The members of the Committee agreed that, with the possible exception of subsection (e), which compliments subsection (g), which itself was viewed as superfluous, the addition of other provisions regulating prosecutors' conduct found in MR 3.8 was neither necessary nor appropriate at this time. It was decided that the conduct dealt with in MR 3.8(b) and (e) presented more of an issue of substantive law rather than ethics, and that both were adequately and appropriately a matter for ad hoc determination under existing case law.

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Choice of Law: MR 8.5

Introduction

Although choice of law as an issue in legal ethics has received relatively little attention, it is arguably of prime importance, particularly to large law firms that have offices in multiple jurisdictions. Questions that can arise in the choice of law area as it impacts legal ethics include (i) which ethical codes should govern when litigators are working together out of offices located in different states or districts and a conflict exists between the applicable ethical codes; and (ii) should a litigator admitted in one state but trying a case, or conducting depositions, in another, be subject to the ethical codes of his or her home state or of the state in which the case or deposition is taking place, or both?

The New York Code is silent on this point. As originally adopted in 1983, Model Rule 8.5 provided that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." This provision made no attempt to resolve choice of law issues raised in multijurisdictional contexts.

In 1993 the ABA substantially amended MR 8.5 to provide clear guidelines for most cases in which a lawyer is potentially subject to differing ethical requirements in more than one jurisdiction. The present Rule thus provides:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be 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,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this 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.

Adoption of this rule (or some variation thereof) would make clear that lawyers admitted in the Eastern District of New York (either generally or pro hac vice) are subject to the disciplinary authority of the Court for any conduct in connection with proceedings in the Eastern District, regardless of where the conduct occurs. Conduct in conformity with the Eastern District rules would not result in disciplinary action here, although such conduct could subject lawyers to potential disciplinary action in other jurisdictions which have not adopted the amended MR 8.5 and/or whose choice of law rules would require application of the rules of another jurisdiction.

For firms with offices in multiple jurisdictions, who staff cases in the Eastern District with lawyers admitted and/or located elsewhere, the adoption of MR 8.5 would subject counsel of record to the risk of disciplinary action if he or she fails to supervise the conduct of other lawyers working on the case, who would be expected to conform their conduct at all times to the standards applicable in the Eastern District. The Comment to the Rules states that it is not intended to apply to transnational practice. In the context of federal court litigation, however, there would seem to be little reason to draw a distinction between

lawyers located in the Eastern District and those located and/or admitted abroad who are assisting in the conduct of litigation in this District.

Given that the Advisory Committee is concerned with issues relating to the conduct of litigation in the Eastern District, the choice of law provisions in MR 8.5(b) may be viewed as superfluous in the federal court context, on the grounds that it is unlikely that the exercise of disciplinary authority would ever be needed for conduct that has no connection with a case pending in federal court. Proponents of such a view may believe that the regulation of such conduct should appropriately be left to state disciplinary bodies. Even if the choice of law provisions in MR 8.5(b) were deemed unnecessary, inclusion of paragraph (a) (or some variation thereof) may be needed to make clear that the rules to be applied in any disciplinary action in the Eastern District shall be the rules adopted by the Board of Judges of the Eastern District.

Several issues to be considered are (a) whether pre-complaint conduct in connection with a proceeding subsequently commenced in the Eastern District should be subject to disciplinary action there; (b) which set of ethics rules should apply to conduct in transferred cases; and (c) what rules ought to govern conduct in multidistrict litigation. It is entirely possible, for example, that a pre-complaint investigation may involve contact with witnesses known to be represented by counsel. Query whether such conduct, if impermissible here but permissible in the jurisdiction in which the contact occurred or where the lawyer is admitted, should be subject to disciplinary action in the event an action is later brought in or transferred to this District? The Association of the Bar's Committee on Professional Responsibility, in its March 28, 1995 Report on Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation, suggests that all pre-complaint conduct be

governed by the ethics rules of the sate in which the lawyer primarily practices. A contrary approach, suggested by members of the subgroup, would be to apply the law of the forum except where it would have been unreasonable for the lawyer to have expected or anticipated the commencement of litigation in that forum. Both approaches have some merit; neither presents a perfect solution.

The proposed amendments to the New York Code contain a choice of law provision, DR 1-105, that is substantially identical to MR 8.5. The proposed amendment does not address or attempt to resolve the ambiguities in the Model Rule identified above.

Issues Presented and Conclusions Reached

1. Should MR 8.5 (or some variation thereof) be added to the New York Code?

It was agreed that if the Board of Judges were considering its own set of ethical rules, only subsection (a) of MR 8.5 would be needed, and that the balance of MR 8.5, containing the choice of law rules, would be superfluous. Members agreed that the Board of Judges should be primarily concerned with enforcing ethical rules applicable to lawyers admitted, either generally or pro hac vice, in the Eastern District, with respect to conduct relating to litigation pending there. While the Board of Judges (or individual judges) may (and should) seek information to determine whether any disciplinary action has been taken (or other sanctions imposed) elsewhere against lawyers admitted, or seeking admission, to practice in the Eastern District, it was agreed that the choice of law rules contained in MR 8.5 were not needed to enable the Court to police its own attorney rolls. The text of MR 8.5 itself, which provides two sets of rules -- one for conduct in connection with litigation (in which the rules of the jurisdiction in which the case is pending govern), the other covering "any other conduct" -- supports the conclusion that no choice of law rule is needed where,

as here, all that the Court needs to be concerned about is litigation (as opposed to other conduct) within the District.

The Committee recognized that in the context of multi-district litigation, a lawyer may be subject to differing standards and to the risk of disciplinary action for conduct permissible in one jurisdiction but not in another. Absent the promulgation of a uniform federal standard, however, this was viewed as a risk that no choice of law rule (other than one providing a safe-harbor for conduct permissible in other jurisdictions) would obviate, and that it would impose no undue burden on lawyers to expect them to conform their conduct in such situations to comply with the most restrictive set of ethical rules applicable. It was also recognized that by permitting disciplinary action only with respect to conduct occurring in connection with an action pending in the Eastern District, judges would not be required to discipline lawyers for conduct occurring in cases transferred to New York, prior to the date of transfer.

Given the Committee's conclusion that the Board of Judges should adopt the New York Code as the standard applicable in the Eastern District, the Committee proceeded to consider the merits of the choice of law provisions in MR 8.5(b) and the proposed new DR 1-105(B). It was the consensus of the group that the proposed new DR 1-105(B) as written was ambiguous and did not provide a bright-line test applicable to pre-complaint conduct, transferred cases or multijurisdictional litigation, but that on balance the rule as written was better than having no rule at all. A difference of opinion was expressed with respect to the proposed new rule providing that where two or more jurisdictions are involved, the more restrictive (or liberal) ethical rule ought to apply; others expressed the view that such a rule could result in inconsistent standards applicable to the conduct of different lawyers in the

same case. The Committee concluded that, on balance, proposed new DR 1-105 was a worthwhile addition to the New York Code, but that the New York State Bar Association should be encouraged to reexamine the text of the proposed rule, particularly the "in connection with" language in Subsection (B)(1), in an effort to clarify its application to (a) prelitigation conduct, (b) transferred cases and (c) multijurisdiction litigation.

2. Should the rule, if adopted, apply to pre-complaint conduct?

Several members of the Committee advocated that, within reason, the answer to this question should be "yes." Pre-complaint conduct (such as ex parte contact with witnesses) in cases ultimately commenced in the Eastern District should, according to such members, be subject to disciplinary action unless it occurred at a time or in circumstances where it would have been unreasonable for the lawyer to have expected or anticipated application of the Eastern District's rules (e.g., a lawyer located in another state conducting a pre-complaint investigation without knowing that the Eastern District had jurisdiction or that suit would be filed there). In such cases, pre-complaint conduct would thus be governed by the ethics rules of the state in which the lawyer primarily practices. As noted above, in transfer cases, substantial sentiment was expressed that the transferor court's rules should govern conduct occurring prior to the date of transfer to the Eastern District. No consensus was reached on this issue other than to recommend further study of the issue by the New York State Bar Association.

3. Should the rule, if adopted, apply transnationally to lawyers involved in the conduct of litigation?

It was agreed that while the rules should apply only to lawyers admitted to the forum, it should encompass all conduct (wherever committed) in connection with litigation pending there. Lawyers admitted in New York State or the Eastern District would thus be subject to disciplinary action for conduct committed by subordinates or associated lawyers

(whether or not admitted there and regardless of whether such conduct was permissible in such other jurisdiction). Since the purpose of the proposed rule is to preserve the integrity of the judicial process in the forum, all relevant conduct, including conduct abroad, should be subject to scrutiny, and lawyers should be accountable for the conduct of others whose actions they control.

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2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, § 8.5:101-102, at 966-968.3 (1993 Supp.).

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Conclusion

In accordance with the foregoing, the Committee hereby recommends the adoption of the proposed revisions to Local Rules 2(a) and 4(f) in the form attached as Appendices F and G.

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APPENDIX F

PROPOSED AMENDMENT TO RULE 2(a)

Rule 2(a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York is hereby amended to read as follows (new material underscored; bracketed material deleted):

> (a) A member in good standing of the bar of the state of New York, or a member in good standing of the bar of the United States District Court in New Jersey, which such district court is located, provided such district court by its rule extends a corresponding privilege to members of the bar of this court, may be admitted to practice in this court on compliance with the following provisions: Each applicant for admission shall file with the clerk, at least ten (10) days prior to hearing (unless, for good cause shown, the judge shall shorten the time), a verified written petition for admission stating: (1) applicant's residence and office address; (2) the time when, and court where, admitted; (3) applicant's legal training and experience; (4) whether applicant has ever been held in contempt of court, and if so, the nature of the contempt and the final disposition thereof; (5) whether applicant has ever been censured, suspended or disbarred by any court, and if so, the facts and circumstances connected therewith; and (6) the applicant has read and is familiar with (a) the provisions of the Judicial Code (Title 28, U.S.C.) which pertain to the jurisdiction of, and practice in, the United States District Courts; (b) the Federal Rules of Civil Procedure for the district courts; (c) the Federal Rules of Criminal Procedure for the district courts; (d) the Federal Rules of Evidence for the United States Courts and Magistrates; (e) the Rules of the United States District Court for the Southern and Eastern Districts of New York; [and] (f) the Lawyers' Code of Professional Responsibility [of the American Bar Association] adopted by the Appellate Divisions of the State of New York, and (g) the ABA Model Rules of Professional Conduct, and will faithfully adhere to all rules applicable to applicant's conduct in connection with any activities in this court.
>
> The petition shall be accompanied by a certificate of the clerk of the court for each of the states in which the applicant is a member of the bar, which has been issued within thirty (30) days and states that the applicant is a member in good standing of the bar of that state court. The petition shall also be accompanied by an affidavit of an attorney of this court who has known the applicant for at least one year, stating when the affiant was admitted to practice in this court, how long and under what circumstances the attorney has known the applicant, and what the attorney knows of the applicant's

character and experience at the bar. Such petition shall be placed at the head of the calendar and, on the call thereof, the attorney whose affidavit accompanied the petition shall personally move the admission of the applicant. If the petition is granted, the applicant shall take the oath of office and sign the roll of attorneys.

COMMENT: **See Comment to Rule 4(f) which is incorporated herein by reference.**

The changes in Subsections (f) & (g) have been made to reinforce the need for all lawyers to be familiar with other authoritative sources on ethical standards while assuring compliance with the specific ethical rules adopted by the district courts.

APPENDIX G

PROPOSED AMENDMENT TO RULE 4(f)

Rule 4(f) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York is hereby amended to read as follows (new material underscored; bracketed material deleted):

> "(f) If, in connection with activities in this court, any attorney admitted to practice pursuant to Rules 2(a), (b) or (c) is found [guilty] by clear and convincing evidence, after notice and opportunity to be heard, to have engaged in [of] conduct violative of the Lawyers' Code[s] of Professional Responsibility adopted by the Appellate Divisions of the State of New York [of the American Bar Association or the New York Bar Association], as amended from time to time [in effect], and as interpreted and applied by the United States Supreme Court, the United States Court of Appeals for the Second Circuit and this court, the attorney may be disciplined by this court, in accordance with the provisions of paragraph (g)."

COMMENT: **The amendment to Rule 4(f) is designed to make clear that, the provisions of the New York Lawyers' Code of Professional Responsibility govern the conduct of lawyers appearing in the Eastern District of New York, while at the same time providing the Judges of the Court with flexibility in interpreting and applying such provisions in individual cases. Since the issue is one of Federal law, decisions of the New York State courts and interpretations by state and local bar associations should not be considered binding, although they may be given persuasive effect. Lawyers appearing in this Court, although bound to follow the New York Code, are also expected to be familiar with the provisions in the ABA Model Rules of Professional Conduct.**

The Rule retains the clear and convincing evidence standard that has long governed disciplinary proceedings in this District.

The Court may, by specific rule, alter, amend or supplement any provision of the New York Code as it deems appropriate, or it may adopt new or different rules to be applied prospectively.

Federal policies and principles may at time conflict with the New York Code of Professional Responsibility and require the application of paramount Federal policies and principles. In addition, each Judge of the Court retains the residual authority in the circumstances of a particular case to apply a standard more lenient than that provided by the New York Code of Professional Responsibility. A more stringent standard will not be applied as it would unfairly and unjustly surprise the lawyer.