

CODE OF  
PROFESSIONAL RESPONSIBILITY

As Adopted By The Nebraska Supreme Court

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CANON 1

A LAWYER SHOULD ASSIST IN MAINTAINING THE  
INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION

Ethical Considerations

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

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

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

EC 1-4. The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he or she believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC 1-5. A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. A lawyer should be temperate and dignified and should refrain from all illegal and morally reprehensible conduct. Because of his or her position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. Respect for the law includes, inter alia, compliance with support orders. To lawyers especially, respect for the law should be more than a platitude.

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

EC 1-5 amended September 9, 1999.

Disciplinary Rules

DR 1-101 Maintaining Integrity and Competence of the Legal Profession.

(A) A lawyer is subject to discipline if he or she has made a materially false statement in, or if he or she has deliberately failed to disclose a material fact requested in connection with, the lawyer's application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him or her to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102 Misconduct.

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer should not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers, or court personnel on the basis of the person's race, national origin, gender, or religion. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.
- (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
- (7) Willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Neb. Rev. Stat. § 43-1717.

DR 1-102(A)(5) amended June 17, 1998; DR 1-102(A)(7) adopted September 9, 1999.

DR 1-103 Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CANON 2

A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN  
FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE

Ethical Considerations

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

### Recognition of Legal Problems

EC 2-2. The legal profession should assist laypersons to recognize legal problems because such may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers. The problems of advertising on television require special consideration, due to the style, cost, and transitory nature of such media. If the interests of laypersons in receiving relevant lawyer advertising are not adequately served by print media and radio advertising, and if adequate safeguards to protect the public can reasonably be formulated, television advertising may serve a public interest.

EC 2-3. Whether a lawyer acts properly in volunteering inperson advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he or she may have legal problems or who is ignorant of his or her legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an inperson contact with a nonclient, personally or through a representative, for the purpose of being retained to represent him or her for compensation.

EC 2-4. Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers inperson advice likely to produce legal controversy may well be suspect if he or she receives professional employment or other benefits as a result. A lawyer who volunteers inperson advice that one should obtain the services of a lawyer generally should not himself or herself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

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

### Selection of a Lawyer: Generally

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

EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about the availability of lawyers, the qualifications of particular lawyers, and the expense of legal representation leads laypersons to avoid seeking legal advice.

EC 2-8. Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties--relatives, friends, acquaintances, business associates, or other lawyers--and disclosure of relevant information about the lawyer and his or her practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his or her employment. A lawyer should not compensate another person for recommending him or her, for influencing a prospective client to employ him or her, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, television or radio, should be formulated to convey only information that is necessary to make an appropriate selection.

#### Selection of a Lawyer: Lawyer Advertising

EC 2-9. The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer, and prior experience with unrestricted lawyer advertising require that special care be taken by lawyers to avoid misleading the public and to ensure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in law advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

EC 2-10. A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts, or causes to be published or broadcasted is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him or her. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cased in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers to prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions; whether the proposal accords with standards of accuracy, reliability, and truthfulness; and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. Any change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

EC 2-11. The name under which a lawyer conducts his or her practice may be a factor in the selection process. Accordingly, a lawyer in private practice should not practice under a firm name that is false, fraudulent, or deceptive or that would tend to mislead laypersons as to the identity of the lawyers actually practicing in the firm, the relationship of the lawyers practicing in such firm, or the nature of the firm's law practice. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his or her name to remain in the name of the firm if the lawyer

actively continues to practice law as a member thereof. Otherwise, the lawyer's name should be removed from the firm name, and he or she should not be identified as a past or present member of the firm; and the lawyer should not hold himself or herself out as being a practicing lawyer.

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

EC 2-14. In some instances a lawyer confines his or her practice to a particular field of law. In the absence of state controls to ensure the existence of special competence, a lawyer should not be permitted to hold himself or herself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his or her practice to one or more particular areas or fields of law in which he or she practices. If a lawyer discloses areas of law in which he or she practices or to which he or she limits his or her practice, the lawyer should avoid any implication that he or she is either in fact certified or officially recognized as a specialist.

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

#### Financial Ability to Employ Counsel: Generally

EC 2-16. The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

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

EC 2-17. The determination of a proper fee requires consideration of the interests of both client and lawyer. The lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laypersons from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his or her client effectively and to preserve the integrity and independence of the profession.

EC 2-18. The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required; the lawyer's experience, ability, and reputation; the nature of the employment; the responsibility involved; and the results obtained. It is a commendable and longstanding tradition of the bar that special consideration is given in the fixing of any fee for services rendered a fellow lawyer or a member of his or her immediate family.

EC 2-19. As soon as feasible after a lawyer has been employed, it is desirable that the lawyer reach a clear agreement with his or her client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is

usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him or her may have had little or no experience with fee charges of lawyers, and for this reason the lawyer should explain fully to such persons the reasons for the particular fee arrangement he or she proposes.

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

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

EC 2-22. Without the consent of his or her client, a lawyer should not associate in a particular matter another lawyer outside his or her firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

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

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

EC 2-24. A layperson whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him or her. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-25. Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

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

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

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

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

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

EC 2-31. Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his or her client by advising whether to take an appeal and, if the appeal is prosecuted, by representing the client through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

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

EC 2-33. As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that his or her relationship with a qualified legal assistance organization

in no way interferes with providing independent, professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

### Disciplinary Rules

#### DR 2-101 Publicity.

(A) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Code of Professional Responsibility or other law; or

(3) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

(B) Subject to the requirements of DR 2-101(A) and DR 2-104(B), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact. A copy or recording of an advertisement or written communication shall be kept for one year after its dissemination along with a record of when and where it was used.

(C) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(D) Unless otherwise specified in the advertisement, if a lawyer publishes fee information in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes fee information in a publication that is published once a month or less frequently, he or she shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes fee information in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(E) Unless otherwise specified, if a lawyer broadcasts fee information, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(F) On the front of each envelope in which an advertisement of a lawyer is mailed or delivered or on the front of each postcard, if the advertisement is printed on a postcard, shall be placed the words: "This is an

advertisement". These words shall be printed in type size at least as large as the print of the address and shall be located in a conspicuous place on the envelope or postcard.

DR 2-101(A)(1) amended September 14, 1994.

#### DR 2-102 Firm Names and Letterheads.

(A) A lawyer shall not use a firm name, letterhead, or other professional designation that violates DR 2-101. A trade name may not be used by a lawyer in private practice. A firm may be designated by the names of all or some of its members, or by the names of deceased or retired members where there has been a continuing succession in the firm's identity.

(B) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(C) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(D) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

DR 2-102(A) amended September 14, 1994.

#### DR 2-103 Recommendation of Professional Employment.

(A) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by these rules and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(B) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

#### DR 2-104 Personal Contact with Prospective Clients.

(A) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (B):

(1) If the prospective client is a close friend, relative, former client, or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee, or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(B) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress, or harassment.

#### DR 2-105 Limitation of Practice.

Deleted May 15, 1992.

#### DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

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

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

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

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

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

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

(8) Whether the fee is fixed or contingent.

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

#### DR 2-107 Division of Fees Among Lawyers.

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

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

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

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his or her right to practice law.

DR 2-109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if the lawyer knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for that person, merely for the purpose of harassing or maliciously injuring any person.

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

DR 2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) The lawyer knows or it is obvious that his or her client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him or her, merely for the purpose of harassing or maliciously injuring any person.

(2) The lawyer knows or it is obvious that his or her continued employment will result in violation of a Disciplinary Rule.

(3) The lawyer's mental or physical condition renders it unreasonably difficult for him or her to carry out the employment effectively.

(4) The lawyer is discharged by his or her client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The lawyer's client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his or her employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.

(3) The lawyer's inability to work with cocounsel indicates that the best interests of the client likely will be served by withdrawal.

(4) The lawyer's mental or physical condition renders it difficult for him or her to carry out the employment effectively.

(5) The lawyer's client knowingly and freely assents to termination of the lawyer's employment.

(6) The lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

DR 2-111 Sale of Law Practice.

(A) A lawyer or law firm may sell or purchase a private law practice, including goodwill, provided:

(1) Upon transferring the law practice to the purchaser, the seller shall cease to engage in the private practice of law in the geographic area in which the law practice has been conducted.

(2) The seller shall sell the law practice as an entirety to a single purchaser, which is another lawyer or law firm licensed to practice law in the State. Without violating this provision, the seller may agree to transfer all matters in one legal field to one purchaser, while transferring all matters in another legal field to another purchaser.

(3) The seller shall not disclose any specific information relating to a client without the client's prior written consent.

(4) The seller shall send a written notification to all clients whose files are currently active and all clients whose inactive files will be taken over by the buying lawyer or firm of lawyers. The written notification that the seller must send pursuant to this paragraph must include at the minimum:

(a) A statement that the law practice of the selling lawyer has been sold to the buying lawyer or law firm.

(b) A summary of the buying lawyer's or law firm's professional background including education and experience and the length of time that the buying lawyer or members of the buying law firm have been in practice.

(c) A statement that the client has the right to continue to retain the buying lawyer under the same fee arrangements as the client had with the selling lawyer or to have the client's complete file sent to the client or another lawyer of the client's choice.

(5) If the purchaser has identified a conflict of interest that the client cannot waive and that prohibits the purchaser from representing the client, the seller's notice to the client shall advise the client to retain substitute counsel to assume the client's representation and to arrange to have the substitute counsel contact the seller.

(6) If a client cannot be given notice, that matter shall not be included in the sale and the sale otherwise shall be unaffected.

(7) If a client does not retain other counsel and objects to the purchaser's substitution as counsel, or cannot be given notice, the seller shall comply with the requirements of DR 2-110.

(8) The agreement for the sale of a law practice may include restrictions on the seller's right to practice law in accordance with DR 2-108.

(9) The purchaser shall honor all fee agreements entered into between the seller and the seller's clients. The fees charged to the seller's or the purchaser's clients shall not be increased by reason of the sale.

(10) The seller and the purchaser may agree that the purchaser does not have to pay the entire sale price for the seller's law practice in one lump sum. The seller and the purchaser may enter into reasonable arrangements to finance the purchaser's acquisition of the seller's law practice without violating DR 2-107. The seller, however, shall have no control regarding the purchaser's conduct of the law practice.

(11) Lawyers and law firms participating in the sale of a law practice pursuant to this rule are subject to the ethical standards that apply when involving another lawyer in the representation of a client. See, e.g., EC 4-2.

(12) Unless expressly provided for by agreement between the seller and the purchaser, the purchaser shall not be deemed to have assumed any liability for the seller's law practice prior to the transfer under this rule.

(13) The seller or the purchaser may retain a broker to assist in the sale or purchase of a law practice. The seller or purchaser shall not disclose to a broker any specific information relating to a client without that client's prior written consent. The seller or purchaser may enter into reasonable arrangements with the broker to compensate the broker for his or her services. The broker, however, shall have no control over the purchaser's conduct of the law practice.

(14) The selling lawyer shall retain responsibility for the proper management and disposition of all inactive files that are not transferred as part of the sale of the law practice.

DR 2-111 adopted September 7, 2000.

### CANON 3

#### A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORIZED PRACTICE OF LAW

##### Ethical Considerations

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

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

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

EC 3-4. A layperson who seeks legal services often is not in a position to judge whether he or she will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he or she is subject to the regulations of the legal profession.

EC 3-5. It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others

that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his or her educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

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

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

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

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

#### Disciplinary Rules

DR 3-101 Aiding Unauthorized Practice of Law.

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

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR 3-102 Dividing of Legal Fees with a Nonlawyer.

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

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

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

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

DR 3-103 Forming a Partnership with a Nonlawyer.

(A) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

#### CANON 4

#### A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT

##### Ethical Considerations

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

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

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

EC 4-4. The lawyer-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his or her client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the lawyer-client privilege and timely to assert the privilege unless it is waived by the client.

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

EC 4-6. The obligation of a lawyer to preserve the confidences and secrets of his or her client continues after the termination of the lawyer's employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his or her client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

#### Disciplinary Rules

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

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

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

- (1) Reveal a confidence or secret of the lawyer's client.
- (2) Use a confidence or secret of the lawyer's client to the disadvantage of the client.
- (3) Use a confidence or secret of the lawyer's client for the advantage of himself or herself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

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

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

(4) Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by him or her from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

(E) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for purposes of the application of DR 1-103, DR 4-101, and DR 7-102(B).

DR 4-101(E) amended January 14, 1998.

## CANON 5

### A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT

#### Ethical Considerations

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

#### Interests of a Lawyer That May Affect His or Her Judgment

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

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

EC 5-4. If, in the course of a lawyer's representation of a client, the lawyer is permitted to receive from the client a beneficial ownership in publication rights relating to the subject matter of the employment, the lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his or her client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the lawyer's publication rights to the prejudice of his or her client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his or her employment has previously ended.

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

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

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

EC 5-8. A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his or her client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his or her cause of action, but the ultimate liability for such costs and expenses must be that of the client.

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

EC 5-10. Problems incident to the lawyer-witness relationship arise at different stages; they relate to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, the lawyer's decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that the lawyer will be called as a witness because his or her testimony would be merely cumulative or if the lawyer's testimony will relate only to an

uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he or she will likely be a witness on a contested issue, the lawyer may serve as advocate even though he or she may be a witness. In making such decision, a lawyer should determine the personal or financial sacrifice of the client that may result from his or her refusal of employment or withdrawal therefrom, the materiality of the lawyer's testimony, and the effectiveness of the lawyer's representation in view of his or her personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his or her becoming or continuing as an advocate.

EC 5-11. A lawyer should not permit his or her personal interests to influence advice relative to a suggestion by his or her client that additional counsel be employed. In like manner, a lawyer's personal interests should not deter him or her from suggesting that additional counsel be employed; on the contrary, the lawyer should be alert to the desirability of recommending additional counsel when, in the lawyer's judgment, the proper representation of a client requires it. However, a lawyer should advise a client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and the lawyer should disclose the reasons for his or her belief.

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

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

#### Interests of Multiple Clients

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

EC 5-15. If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that his or her judgment may be impaired or his or her loyalty divided if he or she 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 a 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, he or she would have to withdraw from employment with likelihood of resulting hardship on the clients; 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; if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his or her clients.

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his or her need for

representation free of any potential conflict and to obtain other counsel if he or she 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 should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he or she should also advise all of the clients of those circumstances.

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

EC 5-18. A lawyer employed or retained by a corporation or similar entity owes his or her 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 should keep paramount its interests, and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him or her 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.

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

EC 5-20. A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity if he or she first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he or she should not thereafter represent in the dispute any of the parties involved.

#### Desires of Third Persons

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

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

EC 5-23. A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his or her individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client.

On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the action of the lawyers employed by it. Since a lawyer must always be free to exercise his or her professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his or her professional freedom.

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

#### Disciplinary Rules

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment.

(A) Except with the consent of his or her client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he or she knows or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in his or her firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his or her firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his or her firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of his or her client, the lawyer shall withdraw from the conduct of the trial and his or her firm, if any, shall not continue

representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in his or her firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness other than on behalf of his or her client, the lawyer may continue the representation until it is apparent that his or her testimony is or may be prejudicial to the client.

#### DR 5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that he or she may:

- (1) Acquire a lien granted by law to secure the lawyer's fee or expenses.
- (2) Contract with a client for a reasonable contingent fee in a civil case.

(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 a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

#### DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his or her employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which the lawyer acquires an interest in publication rights with respect to the subject matter of his or her employment or proposed employment.

#### DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his or her independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if 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 representation on the exercise of his or her independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate, or any other lawyer affiliated with the lawyer or his or her firm may accept or continue such employment.

DR 5-106 Settling Similar Claims of Clients.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his or her client after full disclosure, a lawyer shall not:

(1) Accept compensation for the lawyer's legal services from one other than the client.

(2) Accept from one other than the client any thing of value related to the lawyer's representation of or employment by the client.

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

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

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

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

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

DR 5-108 Lawyers--Conflict of Interest.

(A) A lawyer who has personally represented a former client in a matter shall not thereafter represent a current client in the same or a substantially related matter in which the current client's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(B) When a former client is represented by a lawyer's firm but not personally by the lawyer and the lawyer leaves the firm, the lawyer shall not represent a client whose interests are materially adverse to the former client in the same or a substantially related matter in which the firm with which the lawyer formerly was associated had previously represented the former client, unless the former client consents after consultation.

(C) When a lawyer has terminated an association with a firm, that firm is prohibited from thereafter representing a client with interests adverse to those of a former client personally represented by the formerly associated lawyer, unless the matter is not the same or substantially related to that in which the formerly associated lawyer represented the former client, or unless the former client consents to such representation.

DR 5-108 adopted July 23, 1997; DR 5-108(C) amended October 1, 1997.

DR 5-109 Support Personnel of a Law Firm--Conflict of Interest.

(A) For purposes of this rule, a support person shall mean any person, other than a lawyer, who is associated with a lawyer or a law firm and shall include but is not necessarily limited to the following: law clerks, paralegals, legal assistants, secretaries, messengers, and other support personnel employed by the law firm. Whether one is a support person is to be determined by the status of the person at the time of the participation in the representation of the client.

(B) A lawyer shall not knowingly allow a support person to participate or assist in the representation of a current client in the same or a substantially related matter in which another lawyer or firm with which the support person formerly was associated had previously represented a client:

(1) Whose interests are materially adverse to the current client; and

(2) About whom the support person has acquired confidential information that is material to the matter, unless the former client consents after consultation. The support person shall be considered to have acquired confidential information that is material to the matter unless the support person demonstrates otherwise.

(C) If a support person, who has worked on a matter, is personally prohibited from working on a particular matter under subsection (B), the lawyer or firm with which that person is presently associated will not be prohibited from representing the current client in that matter if:

(1) The former client consents, or

(2) There is no genuine threat that confidential information of the former client will be used with material adverse effect on the former client because the confidential client information communicated to the support person while associated with the former firm is not likely to be significant in the current client's case.

DR 5-109 adopted July 23, 1997.

## CANON 6

### A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY

#### Ethical Considerations

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

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

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

EC 6-4. Having undertaken representation, a lawyer should use proper care to safeguard the interests of his or her client. If a lawyer has accepted employment in a matter beyond the lawyer's competence but in which he or she expected to become competent, the lawyer should diligently undertake the work and study necessary to qualify himself or herself. In addition to being qualified to handle a particular matter, a lawyer's obligation to a client requires the lawyer to prepare adequately for and give appropriate attention to his or her legal work.

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

EC 6-6. A lawyer should not seek, by contract or other means, to limit the lawyer's individual liability to a client for malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit his or her liability for professional activities and one who does not handle the affairs of a client properly should not be permitted to do so. A lawyer who is a stockholder, member, manager, or partner in or is associated with a professional legal corporation, limited liability company, or limited liability partnership may, however, limit his or her liability for malpractice of associates in the corporation, but only to the extent permitted by law and the Nebraska Supreme Court Rule for Limited Liability Professional Organizations.

#### Disciplinary Rules

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

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

DR 6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself or herself from or limit his or her liability to a client for the lawyer's personal malpractice.

EC 6-6 amended June 16, 1999.

CANON 7

A LAWYER SHOULD REPRESENT A CLIENT  
ZEALOUSLY WITHIN THE BOUNDS OF THE LAW

Ethical Considerations

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

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

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

Duty of the Lawyer to a Client

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

EC 7-5. A lawyer as adviser furthers the interest of a client by giving a professional opinion as to what the lawyer believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the practical effect of such decision. A lawyer may continue in the representation of a client even though the client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he or she does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid a client to commit criminal acts or counsel a client on how to violate the law and avoid punishment therefor.

EC 7-6. Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his or her client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist a client in developing evidence relevant to the state of mind of the client at a particular time. A lawyer may properly assist a client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he or

she may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of a client, and in those situations the lawyer should resolve reasonable doubts in favor of the client.

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

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

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

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

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

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

to perform or make, either acting for himself or herself if competent, or by a duly constituted representative if legally incompetent.

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

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

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

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

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

EC 7-18. The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his or her client with a person the lawyer knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he or she has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself or herself, except that the lawyer may advise him or her to obtain a lawyer.

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

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

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

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

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

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

EC 7-24. In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his or her personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible

evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his or her client. However, a lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

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

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

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

EC 7-28. Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a nonexpert witness an amount in excess of reimbursement for expenses and financial loss incident to his or her being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his or her client and lay associates conform to these standards.

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

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

EC 7-31. Communications with or investigations of members of families of venirepersons or jurors by a lawyer or by anyone on his or her behalf are subject to the restrictions imposed upon the lawyer with respect to communications with or investigations of venirepersons and jurors.

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

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

EC 7-34. The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal except as permitted by Canon 4D(5) of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Canon 5B(1) and Canon 5C(2) of the Code of Judicial Conduct.

EC 7-34 amended October 27, 1999.

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

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

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

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

EC 7-39. In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their

decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

Disciplinary Rules

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his or her client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he or she may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his or her representation of a client, a lawyer may:

(1) Where permissible, exercise professional judgment to waive or fail to assert a right or position of a client.

(2) Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his or her representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

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

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

(7) Counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) A client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

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

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

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

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he or she has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating With One of Adverse Interest.

(A) During the course of his or her representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer in that matter unless he or she has the prior consent of the lawyer representing such other person or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

DR 7-104 amended Feb. 10, 1995.

DR 7-105 Threatening Criminal Prosecution.

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

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his or her client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him or her to be directly adverse to the position of a client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he or she represents and of the persons who employed him or her.

(C) In appearing in his or her professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

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

(3) Assert the lawyer's personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the lawyer's intent not to comply.

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

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

DR 7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making 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 it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(A1) Notwithstanding paragraph (A), a lawyer may state:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making 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 it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter and that relates to:

- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
- (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
- (3) The existence or contents of any confession, admission, or statement given by the accused or his or her refusal or failure to make a statement.
- (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
- (5) The identity, testimony, or credibility of a prospective witness.
- (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

- (1) The name, age, residence, occupation, and family status of the accused.
- (2) If the accused has not been apprehended, any information necessary to aid in his or her apprehension or to warn the public of any dangers the accused may present.
- (3) A request for assistance in obtaining evidence.
- (4) The identity of the victim of the crime.
- (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
- (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
- (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
- (8) The nature, substance, or text of the charge.
- (9) Quotations from or references to public records of the court in the case.
- (10) The scheduling or result of any step in the judicial proceedings.
- (11) That the accused denies the charges made against him or her.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter and that relates to the trial, parties, or issues in the trial or other matters

that are reasonably likely to interfere with a fair trial, except that he or she may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication if the lawyer knows or reasonably should know it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter and that relates to:

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
- (4) His or her opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
- (5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter and relates to:

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
- (4) His or her opinion as to the merits of the claims, defenses, or positions of an interested person.
- (5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or her or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his or her employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under DR 7-107.

DR 7-107(A), (A1), (B), (D), (G), and (H) amended November 23, 1999, effective January 3, 2000.

DR 7-108 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he or she knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

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

(C) DR 7-108(A) and (B) do not prohibit a lawyer from communicating with venirepersons or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which a lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his or her actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireperson or a juror.

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireperson or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireperson or a juror, or by another toward a venireperson or a juror or a member of his or her family, of which the lawyer has knowledge.

DR 7-109 Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that the lawyer or his or her client has a legal obligation to reveal or produce.

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

(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his or her loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

DR 7-110 Contact with Officials.

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except as permitted by Canon 4D(5) of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Canon 5B(1) and Canon 5C(2) of the Code of Judicial Conduct.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if he or she is not represented by a lawyer.

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

(4) As otherwise authorized by law, or by Canon 3B(7) of the Code of Judicial Conduct.

DR 7-110(A) and (B) 4 amended October 27, 1999.

CANON 8

A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM

Ethical Considerations

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

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

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

EC 8-4. Whenever a lawyer seeks legislative or administrative changes, the lawyer should identify the capacity in which he or she appears, whether on behalf of himself or herself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though the lawyer does not agree with them. But when a

lawyer purports to act on behalf of the public, the lawyer should espouse only those changes which he or she conscientiously believes to be in the public interest.

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

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

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

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

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

#### Disciplinary Rules

DR 8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

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

(2) Use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or of a client.

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

DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.

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

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

DR 8-103 Lawyer Candidate for Judicial Office.

(A) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 5 of the Code of Judicial Conduct.

DR 8-103(A) amended October 27, 1999.

## CANON 9

### A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY

#### Ethical Considerations

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

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

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

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

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

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

EC 9-7. A lawyer shall exercise good faith judgment in determining initially whether funds of a client are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds shall not be placed in an interest-bearing insured depository account for the benefit of the client. The lawyer should also consider such other factors as (1) the cost of establishing and maintaining the account, service charges, accounting fees, and tax reporting procedures; (2) the nature of the transaction(s) involved; and (3) the likelihood of delay in the relevant proceedings.

EC 9-8. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of client funds.

EC 9-9. It is unnecessary to notify clients of the placement of funds which are nominal in amount or are to be held for a short period of time in an interest-bearing account established in accordance with DR 9-102, but there is no impropriety in a lawyer or firm notifying their clients of the deposit of such funds in such an account, and the disposition and use of the interest earned by such account.

#### Disciplinary Rules

DR 9-101 Avoiding Even the Appearance of Impropriety.

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

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

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

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

(A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay account charges may be deposited therein.

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

(B) A lawyer shall:

- (1) Promptly notify a client of the receipt of his or her funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

NOTE: The Trust Accounts and Blanket Bonds Rules contain additional trust account requirements.

DR 9-102(C)(2) amended December 9, 1992; DR 9-102(A) amended December 23, 1992; DR 9-102 and DR 9-102(A). amended September 19, 2001; DR 9-102(C) deleted September 19, 2001.