

Supreme Court of New Jersey



Administrative Determinations

in response to the

Report and Recommendation of the

Supreme Court Commission

on the

Rules of Professional Conduct

September 10, 2003

In January 2001, the Supreme Court created an *ad hoc* Commission on the Rules of Professional Conduct. Retired Associate Justice Stewart G. Pollock was designated as Chair and Thomas F. Campion, Jr., Esquire, as Vice-Chair. The Court directed the Commission to review the existing Rules of Professional Conduct in the light of the work of the American Bar Association's Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000 Commission"). In addition, the Commission was to pay special attention to issues such as the "appearance of impropriety rule," multijurisdictional practice, and the existing *bona fide* office rule. R. 1:21-1(a).

During the ensuing twenty-two months, the Commission -- familiarly known as the "Pollock Commission" -- met in subcommittees and plenary sessions. It conducted public hearings on the issues before it. In December 2002, the Commission filed a comprehensive report with the Court. The report was published for comment. Given the importance of the issues addressed in the Commission's recommendations, the Court provided for an extended comment period, which closed on April 15, 2003. Responses were received from the New Jersey State Bar Association, the Attorney General's Division of Law, the New Jersey Office of Government Integrity, the Pennsylvania and Philadelphia Bar Associations, the New Jersey Lawyers' Fund for Client Protection, the Office of Attorney Ethics, and several individuals.

On April 23, 2003, the Supreme Court conducted a public hearing on the reports of the Pollock Commission and the *Ad Hoc Committee on Bar Admissions*. In addition to some of those who had provided written comments, a representative of the Attorney General's Division of Criminal Justice participated. The Court invited the Commission to reply to the comments that had been made.

The Commission's comments completed the record. In reviewing each recommendation of the Pollock Commission, the Court considered the proposal in the context of the language of and policies underlying the existing Rules of Professional Conduct, pertinent case law, and the comments that had been submitted. During the review process, the Court developed a deep appreciation for the amount of time and effort that the Commission and its staff devoted to their assignment. Although the Court did not adopt every recommendation of the Commission, its decisions were solidly grounded in the knowledge that the Pollock Commission had given all of the issues confronting it both thoughtful and detailed consideration. The Court extends its sincere thanks to Justice Pollock, Vice-Chair Campion, the other members of the Commission, Counsel to the Commission Keith M. Endo, and staff support Barbara Moore, all of whom should be proud of their contributions to the process.

Appended to this introduction is a rule-by-rule delineation of the Court's actions in respect of the Rules of Professional Conduct and, when appropriate, the Rules of Court. The following discussion addresses a number of the specific rules and issues considered by the Court in making its administrative determinations.

Among the Court's actions are the following:

1. Eliminated the "appearance of impropriety" language from the Rules of Professional Conduct;
2. Generally made a municipal prosecutor's disqualifications personal, and brought Rule 1:15-4 into conformity with that disposition;
3. Rejected proposed RPC 1.8(j), which would have explicitly prohibited sexual relations between a lawyer and client in the absence of a pre-existing consensual relationship. As noted under that RPC, the Court agreed with the State Bar Association that the proposal was too broad and that inappropriate sexual contact can be dealt with through existing rules, such as RPC 8.4;
4. Codified in RPC 1.11 the existing policy of the Office of the Attorney General that prohibits former government lawyers from serving certain clients for the six months immediately following the termination of the lawyer's government service;
5. Amended RPC 3.3(a)(5), *Candor Toward the Tribunal*, in light of the concerns of the Bar and a significant minority of the Commission. The revised paragraph, which prohibits a lawyer from knowingly failing "to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal," includes language that excepts disclosures that are "protected by a recognized privilege" or are "otherwise prohibited by law;"
6. Declined to adopt the Commission's proposal on multijurisdictional practice (RPC 5.5). In lieu thereof, the Court approved the language proposed by the *Ad Hoc* Committee on Bar Admissions, which more narrowly tailored the expanded scope of the Rule. The Committee's version appears in this Administrative Determination;
7. Modified RPC 7.2, *Advertising*, to include coverage of the "internet or other electronic media;" and
8. Declined to adopt the Commission's modifications of RPC 7.3's regulation of live solicitation of prospective clients.

The Court also opted to amend the *bona fide* office Rule (R. 1:21-1(a)) in the form recommended by the Wallace Committee. That amendment, and the multijurisdictional practice RPC, will be evaluated at the end of three years. At that time, the Court will have its Professional Responsibility Rules Committee prepare a report and recommendations. Ultimately, the Court will decide whether to retain or modify the current amended language.

The Court notes that it also has adopted an amendment to *Rule* 1:20-1 to make clear the obligations to the Lawyers Fund for Client Protection, the New Jersey Lawyers Assistance Program, and the funding of the attorney disciplinary system by attorneys who avail themselves of the opportunities covered by this RPC. Similarly, the Court has amended several other Rules of Court to address other obligations of those attorneys and the responsibilities of the Office of Attorney Ethics in respect of multijurisdictional practice attorneys. Additional Rule amendments may follow, if they become necessary.

RPC 1.0 TERMINOLOGY

- (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent."
- (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
- (d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
- (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (h) "Primary responsibility" denotes actual participation in the management and

direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.

- (i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely adoption and enforcement by a law firm of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
- (m) Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- (n) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or

legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

- (o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Commission Comment:

RPC 1.0 is a new rule that provides definitions for "confirmed in writing," "informed consent," "screened," "tribunal," "writing," "primary responsibility" and amends the definitions for "firm and "fraud." RPC 1.0 also strengthens the definition of "screened" from that originally proposed in MRPC 1.0.

The MRPC definition of "screened" proposed in the November 2000 report of the ABA Commission does not contain certain safeguards included in our Commission's recommendation. In particular, our Commission recommends that screening be enforced by the "screened" attorney's firm through written procedures established pursuant to RPC 1.10(f).

The Commission also discussed whether to expand the definition of "tribunal" to include non-binding arbitration and mediation proceedings in order to bring those proceedings within the heightened disclosure requirements of RPC 3.3, Candor Toward the Tribunal, and whether to expand the definition to include court-referred or court-involved mediation proceedings. The Commission believes that the differences between adversarial proceedings and settlement negotiations support continuation of the existing distinctions between RPC 3.3 and RPC 4.1, Truthfulness in Statements to Others. The Commission thus favors adoption of the proposed MRPC definition of tribunal. Both RPC 3.3 and RPC 4.1 prohibit a lawyer from lying but RPC 3.3(a)(5) additionally requires a lawyer to disclose a material fact to a tribunal if the lawyer knows that the tribunal may be misled by the lawyer's failure to disclose.

SUPREME COURT ACTION: Adopts the Commission's recommendations. The Court notes, however, that the Commission's Comment in respect of RPC 3.3(a)(5) should be viewed in the light of the Court's modification of that paragraph.

RPC 1.1 COMPETENCE

A lawyer shall not:

- (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
- (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Commission Comment:

The Commission recommends no change to existing RPC 1.1, which carries forward the terms “gross negligence” and “pattern of negligence” to identify ethical deviations from professional conduct.

SUPREME COURT ACTION: Adopts Commission's recommendation.

**RPC 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY
BETWEEN CLIENT AND LAWYER**

- (a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c); and (d) and ~~(e)~~, and as required by Rule 1.4, shall consult with the client ~~as to~~ about the means ~~by which they are to be pursued~~ to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to ~~accept an offer of settlement of~~ settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, abide by the client's decision ~~, after consultation with the lawyer,~~ as to a on the plea to be entered, ~~whether to waive jury trial and whether the client will testify.~~
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the ~~objectives~~ scope of the representation if the ~~client consents after consultation~~ limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

~~(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.~~

Commission Comment:

The Commission recommends adoption of the substantive changes in proposed MRPC 1.2 for the reasons set forth by the ABA Commission. The major substantive change is the addition of a sentence in paragraph (a) acknowledging the lawyer's implied authority to take action to carry out representation.

SUPREME COURT ACTION: Adopts the Commission's recommendation. The Court notes that former paragraph (e) of this rule has been redesignated as RPC 1.4(d).

RPC 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Commission Comment:

The Commission recommends no change to existing RPC 1.3, identical to MRPC 1.3, which requires that a lawyer act with reasonable diligence and promptness in representing a client.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 1.4 COMMUNICATION

- (a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.
- ~~(a)~~(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- ~~(b)~~(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

Commission Comment:

The Commission recommends adoption of a new paragraph (a) of RPC 1.4 to impose a duty on lawyers to fully inform clients of how, when, and where they may communicate with their lawyer. The Commission also recommends adoption of the ABA Commission's proposal to delete MRPC 1.2(e) and add it as paragraph (d) of RPC 1.4. The result is that the provision, which imposes a duty on the lawyer to communicate with the client regarding limitations on the lawyer's conduct, will be located in the RPC generally governing lawyer-client communications.

SUPREME COURT ACTION: In all but one respect, the Court adopts the amendments proposed by the Commission. The Commission recommended inclusion of the phrase "and where client files are kept" in paragraph (a). The New Jersey State Bar Association (NJSBA) suggested that because "files" may now be maintained in a variety of formats and locations, the proposed language might create compliance problems and confusion for clients. The Court agrees with NJSBA's position and has deleted the phrase from the amended RPC as adopted.

RPC 1.5 FEES

- (a) A lawyer's fee shall be reasonable. The factors to be considered 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.
- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or

appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
 - (2) the client is notified of the fee division; and
 - ~~(2)~~(3) the client consents to the participation of all the lawyers involved; and
 - ~~(3)~~(4) the total fee is reasonable.

Commission Comment:

The Commission recommends the retention of RPC 1.5, but adds the requirement that lawyers must notify a

client of a division of fee between lawyers who are not in the same firm. The Commission does not support the ABA Commission's proposal to require a client's consent to the division of a fee between lawyers who are not in the same firm.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), ~~and (c)~~, and (d) .
- (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
- (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
 - (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
- (c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
- ~~(e)~~(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
- (1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy

between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to comply with other law.

~~(d)~~(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), ~~or (c)~~, or (d).

Commission Comment:

As approved by the ABA House of Delegates, MRPC 1.6 permits disclosure of client information to the extent the lawyer believes disclosure is necessary to prevent reasonably certain death or substantial bodily injury. Our present RPC 1.6(b) differs from the proposed MRPC in that it requires a lawyer to disclose information to the proper authorities but conditions disclosure on the necessity to prevent the client from committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another.

The Commission has determined not to recommend adoption of the ABA proposal. Instead, the Commission recommends expanding the disclosure requirement of RPC 1.6(b) to require a lawyer to reveal information to the proper authorities not only to prevent the client from committing a criminal, illegal or fraudulent act likely to result in death or substantial bodily or financial injury to another, but also to prevent any other person from committing such an act. In addition, the Commission recommends adding a provision to permit the lawyer to reveal the information to the person threatened as well as the proper authorities if the lawyer believes that such disclosure is necessary to prevent the harms set forth in RPC 1.6(b).

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 1.7 CONFLICT OF INTEREST: GENERAL RULE

- (a) ~~A~~ Except as provided in paragraph (b), a lawyer shall not represent a client if the representation ~~of that client will be directly adverse to another client unless~~ involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) ~~the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and~~ the representation of one client will be directly adverse to another client; or
 - (2) ~~each client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation.~~ there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
- (b) ~~A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:~~ Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) ~~the lawyer reasonably believes the representation will not be adversely affected; and~~ each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a

public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) ~~the client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.~~ the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

(e) ~~This rule shall not alter the effect of case law or ethics opinions to the effect that:~~

(1) ~~in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial, and~~

(2) ~~in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses~~

~~substantial risk of disservice to either the public interest or the interest of one of the clients.~~

Commission Comment:

The ABA Commission reorganized MRPC 1.7, Conflict of Interest ..., to clarify the rule. It also replaced "consent after consultation" with "informed consent" and added a requirement that the informed consent be in writing. Our Commission recommends that the informed consent follow full disclosure and consultation. If a lawyer represents multiple clients, the consultation is to include an explanation of the common representation, including its advantages and risks.

The Appearance of Impropriety as an Ethics Violation. The Commission recommends elimination of the appearance-of-impropriety provisions in the RPCs. No rule has engendered as much criticism as that constituting "the appearance of impropriety" as a separate ethics violation. After careful consideration, the Commission has concluded that other, more objective rules better serve the interests of the bench, bar, and public. Further informing the Commission's conclusion is the Court's constitutional power over practice and procedure through which the judiciary may control the conduct of attorneys in judicial proceedings. In sum, the Commission believes that the elimination of the appearance-of-impropriety rule will not lower the standards of the Bar and expose the public to unethical conduct.

The appearance of impropriety provisions in the RPCs seek to reduce the risk of improper conflicts. Because of their vagueness and ambiguity, those provisions, however, are not appropriate as ethics standards. Moreover, courts have the independent authority, which they have exercised, to take corrective action when the risk of improper conflict threatens the administration of justice.

As stated in RPC 1.7, the appearance-of-impropriety rule prohibits a lawyer from representing a client in those situations "in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients." Lawyers and courts can only guess at what an ordinary citizen acquainted with the facts might conclude. Furthermore, a lawyer often cannot ascertain beforehand what that conclusion might be. Thus, the bar does not know whether the conduct will be deemed to create the appearance of impropriety until after the Advisory Committee on Professional Ethics or a court reaches that conclusion.

As an ethics concept, the appearance of impropriety is too vague to support discipline. In only one case, was the standard the sole factor in the imposition of discipline, *IMO Doyle*, 149 N.J. 397 (1997). *Doyle* is a one-sentence order that reprimands a temporarily-suspended attorney for an unspecified appearance of impropriety.

The Commission acknowledges that a court properly may consider the appearance of impropriety as a factor in determining that multiple representation poses an unwarranted risk of disservice either to the public interest or to the interest of a client. The Commission does not believe that attorneys also should be exposed to the risk of an ethics violation for failing to predict correctly the outcome of a court's subsequent assessment. Finally, the appearance-of-impropriety rule is subject to abuse by lawyers who invoke it to seek the disqualification of other lawyers in judicial proceedings and other contexts.

Our Commission joins the Kutak Commission, the Debevoise Commission, the ABA, the NJSBA, and practically every other state, in recommending its elimination from the RPCs.

The Effect of a Municipal Prosecutor's Disqualification. The Commission also recommends not extending to members or associates of the municipal prosecutor's law firm the disqualification of a municipal prosecutor from criminal defense work within the same county. The disqualification, nonetheless, would apply to criminal defense work that involves matters that have occurred in the municipality of the prosecutor or that involve law enforcement personnel and other material witnesses from that municipality. In reaching its recommendation, the Commission reasoned that: 1) the better basis for personal and imputed disqualifications of a part-time municipal prosecutor is the Supreme Court's rule-making authority over practice and procedure, *see State v. Clark*, 162 N.J. 201, 205-06 (2000), 2) the critical considerations for determining such a disqualification are fairness in the prosecution of criminal and quasi-criminal matters, preservation of the right to a fair trial, effective assistance of counsel, prosecutorial impartiality, and the integrity of the administration of criminal justice, and 3) an ethics rule, particularly one based on the appearance of impropriety standard is unnecessary.

SUPREME COURT ACTION: For the reasons stated by the Commission in its report and set forth above, the Court approves the elimination of the "appearance of impropriety" language from the RPCs. The Court has concluded, however, that the current prohibition against consent by public entities to the conflict of interests covered by this rule should be retained (see paragraph (b)(1)).

The Court also agrees that the effect of a municipal prosecutor's disqualification should be personal to him or her except in the circumstances set forth in the Commission's comments. *Rule 1:15-4* is being amended to conform to this disposition.

**RPC 1.8 CONFLICT OF INTEREST: ~~PROHIBITED TRANSACTIONS~~
CURRENT CLIENTS: SPECIFIC RULES**

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner and terms that should have reasonably been can be understood by the client; ;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice ~~on~~ concerning the transaction; ; and
 - (3) the client ~~consents in writing thereto~~ gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) ~~A~~ Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client ~~consents after consultation~~ after full disclosure and consultation, gives informed consent.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer

or a person related to the lawyer ~~as parent, child, sibling or spouse~~ any substantial gift from a client, including a testamentary gift, except where the client is related to the donee unless the lawyer or other recipient of the gift is related to the client.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
 - (3) A non-profit organization authorized under R. 1:21-1(e) may provide financial assistance to indigent clients whom it is representing without fee.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client ~~consents after consultation~~ gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

- (3) information relating to representation of a client is protected as required by RPC 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement
- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless ~~(1) the client fails to act in accordance with the lawyer's advice or refuses to permit the lawyer to act in accordance with the lawyer's advice and~~ (2) and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or
- (2) ~~A lawyer shall not settle a claim or potential claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith~~ unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of

independent legal counsel in connection therewith.

- ~~(i)~~ A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
- ~~(j)~~(i) 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 the lawyer 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.
- ~~(k)~~(j) The provisions of RPC 1.7(c) are applicable as well to situations covered by this rule. While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.
- (k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

Commission Comment:

The ABA Commission proposal for MRPC 1.8 clarifies the rules governing a lawyer's business transactions with clients. Accordingly, the proposed rule requires a lawyer to advise the client in writing of the desirability of securing independent legal counsel on the transaction. Furthermore, the lawyer must obtain the client's informed written consent to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. The proposed rule prohibits a lawyer from soliciting a substantial gift from a client unless the lawyer is related to the client. The ABA Commission proposes deletion of the current provision addressing conflicts based on a family relationship between lawyers. It also proposed a new paragraph (j) that prohibits a lawyer from having sexual relations with a client unless they had a sexual relationship when the

client-lawyer relationship commenced.

Our Commission supports the foregoing changes with additional modifications requiring "full disclosure and consultation" prior to informed consent in paragraphs (b) and (g). The Commission also favors a modification of subparagraph (h)(1) and the addition of a new paragraph (l). The new provision places a lawyer employed by a public entity, whether as a lawyer or in some other role, under an obligation to assess whether client representation presents a substantial risk that the lawyer's responsibilities to the public entity and would limit the lawyer's ability to provide independent advice or diligent and competent representation or would enable the lawyer to improperly influence the decision of a government agency or public official, and to cure that risk if it exists.

SUPREME COURT ACTION: The Court has adopted most, but not all, of the Commission's proposals in respect of this RPC. The NJSBA objected to the recasting of paragraph (g), which would have required written consent of all clients in multi-party cases prior to settlement. NJSBA argued that the proposed language was unworkable in the context of class action litigation. The Court agrees with NJSBA and has reinstated the current language in paragraph (g).

NJSBA also objected to the addition of proposed paragraph (j), which would have explicitly prohibited sexual relations between a lawyer and client unless a consensual relationship existed prior to the creation of the lawyer-client relationship. The Bar argued that the proposal was too broadly worded and that inappropriate sexual contact can be dealt with by other existing RPCs such as 8.4. The Court agrees with NJSBA and has declined to adopt the proposed paragraph (j). That action has resulted in a renumbering of the remaining paragraphs of the RPC.

Proposed paragraph (l) -- now paragraph (k) -- places an obligation on lawyers for public entities to assess whether client representation would present a substantial risk to the lawyer's responsibilities to the public entity. NJSBA argued that although the first portion of the proposed rule created an appropriate conflicts standard, the final clause -- "or would enable the lawyer to improperly influence the decision of a government agency or public official responsible for a decision in the matter" -- should be deleted as confusing, vague, and as an indirect attempt to remold part of the appearance of impropriety standard. The Court agrees with NJSBA that the final clause of the proposed RPC does not add a workable standard. That language has been deleted. The Court notes, however, that individual public agencies may impose additional requirements on its lawyers that are specific to the functions of the entity.

RPC 1.9 CONFLICT OF INTEREST: DUTIES TO FORMER CLIENTS

- (a) A lawyer who has represented a client in a matter shall not thereafter ~~:(1)~~ represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client ~~consents after a full disclosure of the circumstances and consultation with the former client;~~ or gives informed consent confirmed in writing.
- ~~(2) use information relating to the representation to the disadvantage of the former client except as RPC 1.6 would permit with respect to a client or when the information has become generally known.~~
- (b) ~~The provisions of RPC 1.7(c) are applicable as well to situations covered by this rule.~~ A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary

responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Commission Comment:

The ABA Commission proposes a title change and replacement of the requirement of "consent after consultation" with "informed consent" in paragraphs (a) and (b). It also adds a requirement that the informed consent be confirmed in writing. Our Commission supports these recommendations with the addition of a modification to the circumstances set forth in MRPC 1.9(b)(2) under which a lawyer is prohibited from representing a person. Our Commission recommends the addition of a new subparagraph (b)(3), which prohibits screening where the attorney had sole or primary responsibility for the matter in the lawyer's previous firm. Our Commission has also recommended that "primary responsibility" be included among the definitions in RPC 1.0. In keeping with the Commission's recommendation to abandon the appearance of impropriety as an ethical standard, the Commission has deleted reference to that standard from proposed RPC 1.9.

SUPREME COURT ACTION: Adopts Commission's recommendation with language modifications to the last sentence of paragraph (b), which appeared as "(b)(3)" in the Commission's recommendation.

RPC 1.10 ~~IMPUTED DISQUALIFICATION~~ IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

- (a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7, ~~RPC 1.8~~, or RPC 1.9, ~~or RPC 2.2~~ unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
- (b) When a lawyer ~~becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by RPC 1.6 and RPC 1.9(a)(2)^{*} that is material to the matter~~ has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter.
- (c) When a lawyer ~~has terminated an association with a firm, the firm is not~~

~~prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless~~ becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

- (1) ~~the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and~~ the matter does not involve a proceeding in which the personally disqualified lawyer had a primary role;
- (2) ~~any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(b) ^{*} that is material to the matter.~~ the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule:

~~(d) When lawyers terminate an association in a firm, none of them, nor any other lawyer with whom any of them subsequently becomes associated, shall knowingly represent a client when doing so involves a material risk of violating RPC 1.6 or RPC 1.9.~~

~~(e)(d)~~ A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in RPC 1.7 ~~except where prohibited by law or regulation, such as the prohibition against a public entity waiving an attorney conflict of interest.~~

(e) The disqualification of lawyers associated in a firm with former or current

government lawyers is governed by RPC 1.11.

- (f) Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that: 1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter, 2) the screened attorney acknowledge the obligation to remain screened and takes action to insure the same and 3) the screened attorney is apportioned no part of the fee therefrom.

Commission Comment:

The ABA Commission originally proposed the use of screening to prevent the attribution of personal conflicts to other lawyers in a conflicted lawyer's firm. During its August 2001 meeting, however, the ABA House of Delegates rejected that proposal. It disapproved proposed MRPC 1.10(c), which would have permitted a law firm to keep a client if a lawyer in the firm who is personally disqualified from representing the client is screened from participation in the matter. Our Commission continues to favor the use of screening to prevent the attribution of personal conflicts to other lawyers in a conflicted lawyer's firm but with some further limitations on its use.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

- (a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who has formerly served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:
- (1) in which the lawyer participated personally and substantially as a public officer or employee, or
 - ~~(2)~~ ~~about which the lawyer acquired knowledge of confidential information as a public officer or employee, or~~
 - ~~(3)~~(2) for which the lawyer had substantial responsibility as a public officer or employee, or
 - (3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.
- (b) ~~An appearance of impropriety may arise from a lawyer representing a private client in connection with a matter that relates to the lawyer's former employment as a public officer or employee even if the lawyer did not personally and substantially participate in it, have actual knowledge of it, or substantial responsibility for it. In such an event, the lawyer may not represent a private client, but a firm with which that lawyer is associated may undertake or continue representation if: (1) the disqualified lawyer is screened from any participation in~~

~~the matter and is apportioned no part of the fee therefrom, and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.~~ Except as law may otherwise expressly permit, a lawyer who has formerly served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

(c) In the event a lawyer is disqualified under (a) or (b), the lawyer may not represent a private client, but a firm with which that lawyer is associated may undertake or continue representation if:

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

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

~~(e)~~(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment,

~~(1)~~(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or unless the private party gives its informed consent, confirmed in writing, and

~~(2)~~(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally or substantially or for which the lawyer

has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c).

~~(d)~~(e) As used in this Rule, the term:

(1) “matter” includes: ~~(1)~~ any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and ~~(2)~~ any other matter covered by the conflict of interest rules of the appropriate government agency.;

~~(e)~~(2) ~~As used in this Rule, the term,~~ “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

Commission Comment: The Commission also favored screening to prevent the attribution of personal conflicts to a lawyer who has served as a government lawyer or public officer and, therefore favored the adoption of the ABA Commission's proposed MRPC 1.11 with some modification.

SUPREME COURT ACTION: The Department of Law & Public Safety, Division of Law, noted that the Commission's proposal would forever bar former Deputy Attorneys General from representing clients whose interests were materially adverse to the agency the DAG represented. The Attorney General's Office took the position that the existing six-month bar has worked well and should be retained. Although otherwise adopting the Commission's recommendations in respect of this RPC, the Court has modified paragraph (a)(3) to retain and codify the current six-month bar as recommended by the Division of Law.

RPC 1.12 FORMER JUDGE, OR ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL OR LAW CLERK

- (a) Except as stated in paragraph (c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral or law clerk to such a person, unless all parties to the proceeding have given consent, after disclosure confirmed in writing.
- (b) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
- ~~(b)~~(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, ~~or~~ arbitrator, mediator or other third-party neutral. A lawyer serving as law clerk to a ~~judge or arbitrator~~ such a person may negotiate for employment with a party or attorney involved in a matter in which the law clerk is participating personally and substantially, but only after the lawyer has notified the ~~judge or arbitrator~~

person to whom the lawyer is serving as law clerk.

(e) (d) An arbitrator selected ~~as a partisan of~~ by a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Commission Comment:

The current RPC requires consent from all of the parties if a firm represents a party in connection with a matter in which a lawyer in the firm participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk. The proposed MRPC requires screening and notice to the parties in lieu of consent. The Commission favors that proposal and further recommends that RPC 1.12(d)(formerly paragraph (c)) be revised to delete reference to the arbitrator's selection as a "partisan."

SUPREME COURT ACTION: Adopt Commission's recommendations.

RPC 1.13 ORGANIZATION AS THE CLIENT

- (a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope

and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:

- (1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

- (2) revealing the information is necessary in the best interest of the organization.
- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. If the organization's consent to the dual representation is required by RPC 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.
- (f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Commission Comment:

In part, proposed MRPC 1.13 obligates a lawyer for an organization to explain the identity of the client to persons associated with the organization when "the lawyer knows or reasonably should know that the organization's interests are adverse to those [so associated]." The existing MRPC requires disclosure if such a conflict is "apparent." New Jersey's RPC requires disclosure whenever "the lawyer believes that such an explanation is necessary to avoid misunderstanding...." It also permits a lawyer to take "remedial action," including disclosure of confidential information, in circumstances in which the highest authority of an organization is intent on taking action harmful to the organization. The proposed MRPC merely permits the lawyer to resign. New Jersey's RPC 1.13 also defines "litigation control group" for the purposes of defining who is or is not represented for the purpose of *ex parte* contacts pursuant to RPC 4.2 and 4.3. Our Commission has carefully reviewed the history of RPCs 1.13, 4.2, and 4.3 and favors the retention of our present RPC 1.13.

SUPREME COURT ACTION: Adopts Commission's recommendations.

RPC 1.14 CLIENT UNDER A DISABILITY

- (a) When a client's ~~ability~~ capacity to make adequately considered decisions in connection with the representation is ~~impaired~~ diminished, whether because of minority, mental ~~disability~~ impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) ~~A lawyer may seek the appointment of a guardian, or take other protective action with respect to a client, only when~~ When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Commission Comment:

The Commission recommends adoption of the changes to MRPC 1.14, as proposed by the ABA Commission. The changes consist of an increased focus on the continuum of a diminished client's capacity and the protective measures that the attorney may take in regard thereto.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 1.15 SAFEKEEPING PROPERTY

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.
- (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.
- (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- (d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

Commission Comment:

The Commission recommended retaining our present rule. The ABA Commission proposes a new MRPC 1.15(c), "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance to be withdrawn by the lawyer only as fees are earned or expenses incurred." Our rule does not require the deposit of legal fees into a trust account. A 1983 New Jersey Supreme Court decision holds that general retainers for legal services must be deposited in the attorney trust account only when there is an explicit understanding with the client to do so.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 1.16 DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client, ~~or if:~~
 - ~~(1)~~(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - ~~(2)~~(3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - ~~(3)~~(4) ~~a~~ the client insists upon ~~pursuing an objective~~ taking action that the lawyer considers repugnant or ~~imprudent~~ with which the lawyer has a fundamental disagreement;
 - ~~(4)~~(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

~~(5)~~(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

~~(6)~~(7) other good cause for withdrawal exists.

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. ~~When required to do so by rule or when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.~~
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Commission Comment:

The ABA Commission has proposed a number of changes to MRPC 1.16. Paragraph (b) clarifies that a lawyer may withdraw for any reason when "withdrawal can be accomplished without material adverse effect to the interests of the client," or, even if there will be such material adverse effect, if the lawyer has good cause, as set forth in paragraphs (b)(2) through (6). Paragraph (b)(4) has been rephrased to permit a lawyer to withdraw from representation if the client insists that the lawyer take action that the lawyer finds repugnant or, in some instances, if the lawyer has a fundamental disagreement with the action proposed by the client, regardless of whether the action concerns the client's objectives or the means of achieving those objectives. Paragraph (b)(4) also substitutes the phrase "with which the lawyer has a fundamental disagreement" for "imprudent." The rationale for the change is that allowing a lawyer to withdraw when the lawyer believes that the client's objectives or intended action is "imprudent" permits the lawyer to prevail in almost any dispute with a client by threatening to withdraw. That practice detracts from the client's ability to direct the course of the representation. Nevertheless, a lawyer should be permitted to withdraw when the disagreement over objectives or means is so fundamental that the disagreement threatens the lawyer's autonomy. Paragraph (c) has been changed to remind lawyers of court requirements of notice or permission to withdraw from pending litigation. The Commission is in favor of the changes to paragraph (b). Our RPC 1.16(c) already has a first sentence that reminds lawyers of their obligations under the Rules of Court.

SUPREME COURT ACTION: Adopts Commission's recommendations.

RPC 1.17 SALE OF LAW PRACTICE

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law in this jurisdiction.
- (b) The entire practice is sold as an entirety, ~~except in cases in which a conflict is present or may arise, to another lawyer~~ one or more lawyers or law firms.
- (c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.
 - (1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.
 - (2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall

obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

- (3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the *New Jersey Law Journal* and the *New Jersey Lawyer* at least thirty days in advance of the effective date of the transfer.
- (d) The fees charged to clients shall not be increased by reason of the sale of the practice.
- (e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.
- (f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

Commission Comment:

MRPC 1.17 deals with the sale of a law practice. The ABA Commission proposes two changes to MRPC 1.17. The first is to drop subparagraph (b)'s requirement that the sale of a law practice be to a single buyer. The second change is the elimination of the buying attorney's right to refuse to represent the seller's clients unless they agree to pay an increased fee. The second change brings MRPC 1.17(d) into accord with New Jersey's equivalent provision. The Commission supports the recommendation to eliminate the single-buyer requirement but otherwise favors keeping the language of our existing RPC.

SUPREME COURT ACTION: Adopts Commission's recommendations.

RPC 1.18 PROSPECTIVE CLIENT

- (a) A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.
- (b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).
- (c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.
- (d) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a “prospective client,” and if no client-lawyer relationship is formed, is a “former prospective client.”

Commission Comment:

The ABA Commission has proposed a new rule to address a lawyer's ethical obligations to a prospective client. Our Commission's version of MRPC 1.18 addresses the same obligations in clearer language.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation.

Commission Comment:

MRPC 2.1 calls for a lawyer to exercise independent professional judgment and to render candid advice in representing a client. Our RPC 2.1 and MRPC 2.1 are the same. The ABA Commission recommended no changes to MRPC 2.1. Our Commission recommends no changes to RPC 2.1.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 2.2—INTERMEDIARY

Subject to the provisions of RPC 1.7:

- (a) ~~A lawyer may act as intermediary between clients if:~~
 - (1) ~~the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;~~
 - (2) ~~the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and~~
 - (3) ~~the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.~~
- (b) ~~While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.~~
- (c) ~~A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.~~

Commission Comment:

The ABA Commission recommends deletion of this MRPC because its subject, common representation, is covered by MRPC 1.7. The Commission likewise recommends deletion of RPC 2.2.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 2.3 EVALUATION FOR USE BY THIRD PERSONS

- (a) A lawyer may ~~undertake~~ provide an evaluation of a matter affecting a client for the use of someone other than the client if: ~~(1)~~ the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client;
- (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless:
- ~~(2)~~(1) ~~the conditions of the evaluation are described~~ the lawyer describes the conditions of the evaluation to the client, in writing, including ~~contemplated~~ disclosure of information otherwise protected by RPC 1.6; ~~and~~
- (2) the lawyer consults with the client; and
- (3) the client ~~consents after consultation~~ gives informed consent.
- (c) Except as disclosure is ~~required~~ authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.
- ~~(b)~~(d) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

Commission Comment:

MRPC 2.3 pertains to the circumstances under which a lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client. Our RPC 2.3 differs substantively from MRPC 2.3 in that it also requires a description in writing to the client of the conditions of the evaluation including any contemplated disclosure of information otherwise protected by RPC 1.6. Our Commission does not regard the ABA Commission's proposed changes to MRPC 2.3 as presenting any substantial differences. In any event, the proposed

changes are improvements to the present text. The Commission recommends that they be incorporated into our RPC 2.3.

SUPREME COURT ACTION: Adopts Commission's recommendation. The Court notes that to enhance the clarity of the Rule, the Commission redesignated current paragraph (b) as paragraph (d). No changes were made to the language of that paragraph.

RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform the parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Commission Comment:

A lawyer who serves as an arbitrator or mediator in a dispute resolution may experience ethical problems arising out of the parties' possible confusion about the lawyer's role. The proposed new MRPC is designed to promote the parties' understanding of the role of a lawyer who acts in a neutral capacity. The Commission favors adoption of the MRPC with the slight modification that all parties be informed that the lawyer-neutral is not representing them.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, ~~or~~ reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Commission Comment:

In pertinent part, proposed MRPC 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." The ABA Commission's addition of "in law and fact" makes explicit the requirement that a claim must be non-frivolous, both factually and legally. The Commission supports the ABA recommendation and also recommends harmonizing the language of Rule 1:4-8 with RPC 3.1. At present, Rule 1:4-8(a)(2) follows the phrase "extension, modification or reversal of existing law" with "or the establishment of new law." The Rule and our RPC are in substantial agreement otherwise. The Commission recommends adding the "establishment of new law" phrase to the RPC because it covers the situation where there is no existing law and a nonfrivolous basis exists for establishing new law.

SUPREME COURT ACTION: Adopts Commission's recommendations.

RPC 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

Commission Comment:

MRPC 3.2 states, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The ABA Commission recommends no change to the MRPC. The New Jersey version adds "and shall treat with courtesy and consideration all persons involved in the legal process." This Commission recommends no change to RPC 3.2.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 3.3 CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
 - (5) fail to disclose to the tribunal a material fact ~~with knowledge that~~ knowing that the omission is reasonably certain to mislead the tribunal may tend to be misled by such failure, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Commission Comment:

RPC 3.3(a)(5) requires a lawyer to disclose a material fact to a tribunal if the lawyer knows that the tribunal may be misled by the lawyer's failure to disclose. The Commission members have engaged in extensive discussions of the implications of RPC 3.3(a)(5) for lawyer-client relations. The Commission narrowly rejected a proposal to recommend deletion of RPC 3.3(a)(5) and to amend RPC 3.3(a)(1) to provide that "a lawyer shall not knowingly make a false or misleading statement of material fact or law to a tribunal." Although the Commission supports the retention of existing RPC 3.3, it recognizes the tension that the rule places on the attorney-client relationship in placing an affirmative duty on the attorney to disclose material facts that are adverse to the attorney's client.

SUPREME COURT ACTION: The New Jersey State Bar Association recommended that the Court delete paragraph (a)(5) of the RPC "because the very nature of the rule makes compliance difficult." In light of the concerns of the Bar and the significant divergence of opinion in the Commission, the Court has elected to amend paragraph (a)(5) to clarify its scope. No change has been made to paragraph (a)(1).

RPC 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

- (g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

Commission Comment:

Subparagraphs (a) through (f) of MRPC 3.4 and RPC 3.4 are substantively the same. The New Jersey Supreme Court added a subparagraph (g), which prohibits a lawyer from presenting, participating in presenting, or threatening to present criminal charges to obtain an improper advantage in a civil matter. The ABA Commission recommends no changes to the MRPC. Likewise, this Commission recommends no changes to our RPC.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law; or
- (c) engage in conduct intended to disrupt a tribunal.

Commission Comment:

MRPC 3.5 and RPC 3.5 are the same. In particular, RPC 3.5 precludes ex parte communication with a juror except as permitted by law. Rule 1:16-1 prohibits an attorney from interviewing a juror except by leave of court on good cause shown. The absence of such an exception for *ex parte* communications with a juror, as the reporter's comments in the ABA Commission Report note, led a federal district court to hold that Hawaii's RPC 3.5(b) was overbroad as applied to post-verdict communications with jurors. The ABA Commission responded by recommending a number of changes to the existing MRPC. Our Commission notes the difference between Hawaii's law and ours and recommends no change to RPC 3.5.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 3.6 TRIAL PUBLICITY

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
- (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
- (1) ~~the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;~~
 - (2) ~~in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~
 - (3) ~~the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~
 - (4) ~~any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;~~
 - (5) ~~information the lawyer knows or reasonably should know is likely to be~~

~~inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or~~

- ~~(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.~~

~~(e)(b) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration may state:~~

- ~~(1) the general nature of the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;~~
- (2) the information contained in a public record;
- ~~(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;~~
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case; , in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the

accused;

- (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

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

Official Comment: A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless

proven guilty.

Commission Comment:

MRPC 3.6 begins, "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement..." By comparison, our RPC begins, "A lawyer shall not make an extrajudicial statement..." The MRPC's limitation of the prohibition to a lawyer who has participated in the investigation or litigation of a matter may be prompted by constitutional free speech concerns. *IMO Hinds*, 90 N.J. 604 (1986), involved a disciplinary proceeding against an attorney for making out-of-court statements that publicly criticized a trial judge's conduct of an on-going criminal trial. The predecessor rule to RPC 3.6 prohibited a lawyer "associated" with a criminal matter from making an extrajudicial statement that was reasonably likely to interfere with a fair trial. The *Hinds* opinion states that ordinarily speech restrictions will withstand constitutional scrutiny only if they are limited to prohibition of speech that creates a clear and present danger. The clear and present danger formulation, however, is not constitutionally compelled when the subject of the restriction is the extrajudicial speech of attorneys participating in criminal trials. The prohibition of DR 7-107(D) (the predecessor rule to RPC 3.6) does not apply unless the speech is made by an attorney "associated with" the criminal trial. This Commission favors the limitation of RPC 3.6's speech restrictions to a lawyer who is associated with a matter because of the concerns expressed in *Hinds*.

SUPREME COURT ACTION: Adopts Commission's recommendations, which included the removal of the examples contained in former paragraph (b) to what the Court has designated as a separate "Official Comment."

RPC 3.7 LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness ~~except where~~ unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

Commission Comment

MRPC 3.7(a) prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness unless: 1) the testimony relates to an uncontested issue; 2) the testimony relates to the nature and value of legal service rendered in the case; or 3) the disqualification of the lawyer would work substantial hardship on the client. In RPC 3.7(a), the same three exceptions follow the words, "except where." The Commission recommends the conformation of the language of our RPC to the MRPC.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing; ~~and~~
- (d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused ~~supports innocence~~ or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal- ;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and
 - (2) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and

extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Commission Comment:

The present version of MRPC 3.8 prohibits a prosecutor from: 1) issuing a subpoena to an attorney to present evidence about a past or present client except under limited circumstances and 2) making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless the statements are necessary to inform the public of the prosecutor's action and serve a legitimate law enforcement purpose. When our RPCs were adopted in 1984, these provisions did not exist in the version of the MRPC reviewed and recommended for adoption by the New Jersey Supreme Court Committee. Our Commission favors adding these provisions to RPC 3.8.

SUPREME COURT ACTION: The Division of Criminal Justice made suggestions for modification of the Commission's proposals in respect of this RPC. After due consideration, the Court has determined to retain the current RPC's use of the phrase "post-indictment" in paragraph (c). In addition, the Court has agreed with the Division's proposed that paragraph (e) should be modified. The RPC as adopted reflects the consolidation of proposed paragraphs (e)(1) and (2), the renumbering of proposed paragraph (e)(3) as "(e)(2)", and the deletion of the phrase "the successful completion of" from that portion of paragraph (e)(1) that refers to evidence being sought in an "ongoing investigation or prosecution."

RPC 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a) through ~~(e)~~ (d), RPC 3.4(a) through ~~(e)~~ (g), RPC 3.5(a), ~~and RPC 3.5~~ through (c).

Commission Comment:

The only textual change to MRPC 3.9 is the replacement of "legislative or administrative tribunal" with "legislative body or administrative agency." "Tribunal" is defined in proposed RPC 1.0(n) as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." Our Commission supports the change because it clarifies that RPC 3.9 applies to a lawyer's representation of a client in only nonadjudicative proceedings of a legislative body or administrative agency.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

- (a) In representing a client a lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a third person; or
 - (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
- (b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Commission Comment:

In pertinent part, MRPC 4.1(b) states, "In the course of representing a client a lawyer shall not knowingly: ... (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Our RPC deletes, "unless disclosure is prohibited by Rule 1.6", and adds a subparagraph that provides, "The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6, pertaining to the confidentiality of client communications." The Commission recommends no changes to the text of RPC 4.1.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Official Comment: Concerning organizations, RPC 4.2 addresses the issue of who is represented under the rule by precluding a lawyer from communicating with members of the organization's litigation control group. The term "litigation control group" is not intended to limit application of the rule to matters in litigation. As the Report of the Special Committee on RPC 4.2 states, "... the 'matter' has been defined as a 'matter whether or not in litigation.'" The primary determinant of membership in the litigation control group is the person's role in determining the organization's legal position. See *Michaels v. Woodland*, 988 F.Supp. 468, 472 (D.N.J. 1997).

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. See *State v. Bisaccia*, 319 N.J. Super. 1, 22-23 (App. Div. 1999).

Concerning communication with governmental officials, the New Jersey Supreme Court Commission on the Rules of Professional Conduct agrees with the American Bar Association's Commission comments, which state:

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer

representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

Commission Comment:

RPC 1.13, RPC 4.2 and RPC 4.3 were amended by the New Jersey Supreme Court in 1996. Before the adoption of these rules, the Supreme Court appointed an ad hoc committee on RPC 4.2 to address the issue of dealing with the employees and agents of a represented organization. In essence, the Committee recommended that the bar to *ex parte* communications with represented parties be extended only to the "litigation control group," roughly the current and former agents and employees responsible for or significantly involved in the organization's legal position in the matter. The Supreme Court adopted the Committee's recommendations. This Commission recommends no change to RPC 4.3. In RPC 4.2, the Commission recommends adding "court order" to the existing exceptions under which a lawyer is allowed to communicate with a person who is represented by another lawyer. It also recommends adding explanatory comments to RPC 4.2.

SUPREME COURT ACTION: Adopts Commission's recommendations, including the addition of an "Official Comment" to the RPC.

RPC 4.3 DEALING WITH UNREPRESENTED PERSON; EMPLOYEE OF ORGANIZATION

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

Commission Comment:

[See Commission Comment for companion rule, RPC 4.2.]

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or if he or she has begun to do so, stop reading the document, promptly notify the sender, and return the document to the sender.

Commission Comment:

RPC 4.4 addresses respect for the rights of third persons. The ABA Commission proposes a new subparagraph (b), which obligates a lawyer who receives a document that was sent inadvertently to promptly notify the sender. Our Commission is in favor of the proposal and also recommends extending the rule to obligate the recipient to stop reading the document on ascertaining that the document was inadvertently sent and to return the document to the sender.

SUPREME COURT ACTION: Adopts Commission's recommendations with minor language modifications.

RPC 5.1 RESPONSIBILITIES OF A PARTNERS, OR SUPERVISORY LAWYERS, AND LAW FIRMS

- (a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or ratifies the conduct involved; or
 - (2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Commission Comment:

Our Commission recommends amending the title of RPC 5.1 to reflect that its coverage extends beyond the individual lawyer. By adopting the definition of "law firm" contained in RPC 1.0(c), the existing language in RPC 5.1(a) now includes lawyers who practice in a corporate legal department. Otherwise, the Commission supports the retention of our RPC.

SUPREME COURT ACTION: Adopts the Commission's recommendations (see the RPC 1.0(c) definition of "law firm.").

RPC 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Commission Comment:

MRPC 5.2 and RPC 5.2 are identical. The ABA Commission recommended no changes to MRPC 5.2, and our Commission makes the same recommendation regarding RPC 5.2.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or ratifies the conduct involved;
 - (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or
 - (3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Commission Comment:

When the Supreme Court adopted our RPCs in 1984, it revised paragraph (a) of RPC 5.3 to direct the rule to "every lawyer or organization authorized ... to practice law" so the rule would apply to all entities engaged in the practice of law. Our Commission recommends that the RPC specify that a "law firm" -- as defined in RPC 1.0(c) -- has an independent duty to supervise its nonlawyer assistants. Otherwise, the recommendation is that RPC 5.3

remain unchanged.

SUPREME COURT ACTION: Adopt Commission's recommendations.

RPC 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

Except as otherwise provided by the Court Rules:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;
 - (3) a lawyers or law firms who purchases a practice from the estate of a deceased lawyer, or from any person acting in a representative capacity for a disabled or disappeared lawyer, may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed upon price; ~~and~~

- (4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
 - (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
 - (d) A lawyer shall not practice with or in the form of a professional corporation, association, or limited liability entity authorized to practice law for 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.

Commission Comment:

In pertinent part, RPC 5.4 follows MRPC 5.4 in that it prohibits fee-sharing with a nonlawyer except as provided in the RPC itself. It differs from MRPC 5.4 in that it also permits exceptions as otherwise provided in the court rules. Our RPC also differs in that the proposed MRPC would permit a lawyer to share court-awarded legal fees with a nonprofit organization that employed the lawyer. Our Commission's discussion centered around the ACLU's practice of sharing fees with its participating attorneys. A closely-divided Commission supports the

proposal to permit a lawyer to share court-awarded fees with a nonprofit organization.

SUPREME COURT ACTION: Adopts Commission's recommendations, but also modifies paragraph (a)(3) to conform it to the revised language of RPC 1.17(b).

RPC 5.5 [UNAUTHORIZED PRACTICE OF LAW] LAWYERS NOT ADMITTED TO THE BAR OF THIS STATE AND THE LAWFUL PRACTICE OF LAW

(a) A lawyer shall not:

[(a)] (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

[(b)] (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice *pro hac vice* pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution

program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or
(iv) the lawyer practices under circumstances other than (i) through (iii) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction; and

(4) not hold himself or herself out as being admitted to practice in this jurisdiction.

Official Comment: Three years from the effective date of this rule, the Supreme Court will have its Professional Responsibility Rules Committee undertake a comprehensive evaluation of the experience gained in multijurisdictional practice to determine whether any modifications to the RPC as adopted are necessary or desirable.

Commission Comment:

Over the course of the Commission's discussion on multijurisdictional practice, the Commission concluded that the national trend is towards multijurisdictional practice and it is difficult, if not impossible, to defend standards that serve as barriers to practice by out-of-State attorneys. At the same time, the Commission believed that New Jersey has a tradition of high legal ethical standards that it should not sacrifice to this trend. The Commission's recommendations in respect of RPC 5.5 and RPC 8.5 are based on the Commission's general intention to permit out-of-State attorneys to practice here temporarily so long as they comport themselves under New Jersey's ethical standards.

Ad Hoc Committee on Bar Admissions Comment:

In addition to in-house counsel, the Committee considered the many faces of the practice of law by lawyers not admitted to the New Jersey bar, and approved a rule that comprehensively addresses the issues. The proposal is largely consistent with the NJSBA Report; is responsive to the concerns and comments expressed at the public hearings; and recognizes that the nature of the practice of law is changing. The proposal provides a number of categories, avoiding the danger of having only illustrative examples.

SUPREME COURT ACTION: The Commission on the Rules of Professional Conduct recommended amendments to RPC 5.5 that tracked the language adopted by the American Bar Association. As noted above, the *Ad Hoc* Committee on Bar Admissions opted to base its recommendation, in part, on the multijurisdictional practice language proposed by NJSBA. The Court duly considered the proposed amendments as drafted by the Commission and the Committee in the light of the comments received and the source material. In making its decision, the Court's intent was to establish a multijurisdictional practice rule that is both realistic and enforceable. It viewed the more conservative NJSBA approach as the preferable method of formally introducing the concept of multijurisdictional practice into our Rules of Professional Conduct. Further, it is hoped that the more specific categories contained in the adopted version will aid the Court in evaluating the effects of the RPC's operations. The Court has, therefore, adopted the version of RPC 5.5 recommended by the Committee.

As with the amendment to the *bona fide* office Rule (R. 1:21-1(a)), the Court has decided that there should be an evaluation of the experience gained under the RPC after a reasonable period of time has elapsed. To that end, the Court is directing its Professional Responsibility Rules Committee, with the assistance of the Clerk of the Supreme Court, the attorney disciplinary system, the Lawyers' Fund for Client Protection, and the Administrative Office of the Courts, to monitor RPC 5.5 over the next three years. At the end of the three-year period, the PRRC will coordinate an evaluation of the rule's effects based on collected data, as supplemented by the comments of the bench, the bar, and the public. The amended rule will

remain in place until the Court acts on the report presented by the PRRC. At that time, the Court will decide whether the RPC should be retained permanently, modified, or rescinded.

The Court also is directing the same entities to identify practical and reasonable means of tracking attorneys who avail themselves of the opportunities provided by RPC 5.5. Those attorneys should, for example, pay the annual attorney assessments required of those who are eligible to practice in this jurisdiction. That analysis and report should be made as soon as may be practicable.

RPC 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Commission Comment:

MRPC 5.6 and RPC 5.6 are identical. The ABA Commission and this Commission recommend retention of the existing MRPC and RPC, respectively.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 6.1 VOLUNTARY ~~PRO BONO PUBLICO~~ PUBLIC INTEREST LEGAL SERVICE

~~A lawyer should~~ Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Commission Comment:

The Commission recommends that the title of RPC 6.1 be amended to read, "Voluntary Public Interest Legal Service." It also recommends that the first sentence of the RPC, "A lawyer should render public interest legal service," be replaced by "Every lawyer has a professional responsibility to provide legal services to those unable to pay."

SUPREME COURT ACTION: Adopts the Commission's recommended amendment to the RPC's caption. Revised the proposed amendatory language in the first sentence of the rule.

RPC 6.2 ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Commission Comment:

The Commission favors leaving RPC 6.2, RPC 6.3, and RPC 6.4 unchanged. They are virtually identical to the corresponding MRPCs and have worked well in practice.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if:

- (a) the organization complies with RPC 5.4 concerning the professional independence of its legal staff; and
- (b) when the interests of a client of the lawyer could be affected, participation is consistent with the lawyer's obligations under RPC 1.7 and the lawyer takes no part in any decision by the organization that could have a material adverse effect on the interest of a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.

Commission Comment: [See Comment on RPC 6.2.]

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client, except that when the organization is also a legal services organization, RPC 6.3 shall apply.

Commission Comment: [See Comment to RPC 6.2]

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICE PROGRAMS

- (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
- (1) is subject to RPC 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
 - (2) is subject to RPC 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by RPC 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), RPC 1.10 is inapplicable to a representation governed by this RPC.

Commission Comment:

MRPC 6.5 is new. It arises out of the ABA Commission's concern that a strict application of the conflict-of-interest rules may deter lawyers from serving as volunteers in nonprofit or court-annexed limited legal services programs. MRPC 6.5 provides for a limited relaxation of the conflict-of-interest rules in situations where lawyers provide clients with short-term limited legal services under the auspices of a program sponsored by a nonprofit organization or court. Our Commission recommends adoption of the proposed rule.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICE

- (a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. 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 Rules of Professional Conduct or other law;
 - (3) compares the lawyer's services with other lawyers' services; or
 - (4) relates to legal fees other than:
 - (i) a statement of the fee for an initial consultation;
 - (ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;
 - (iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
 - (iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of

hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

- (v) the availability of credit arrangements; and
- (vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive.

- (b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19–3(d).

Commission Comment:

The original MRPC 7.1 prohibits: 1) false and misleading statements, 2) statements that create an unjustified expectation of results, or 3) comparisons with other lawyers that are not subject to factual substantiation. The ABA Commission's proposed MRPC 7.1 deletes the provisions prohibiting the creation of unjustified expectations and requiring factual substantiation of comparisons. RPC 7.1 supplements the original MRPC with additional specified permitted and prohibited advertising practices. Among the practices specifically prohibited are comparisons of a lawyer's services with other lawyer's services and communications about fees (with limited exceptions). Our Commission supports the retention of RPC 7.1 in its present form.

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 7.2 ADVERTISING

- (a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.
- (b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used.
- (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Commission Comment:

Proposed MRPC 7.2(a) permits a lawyer to advertise services through electronic communication. The ABA Commission recommends deleting MRPC 7.2(b)'s two-year recordkeeping requirement. MRPC 7.2(a) requires that advertising communications include the name and office address of at least one lawyer responsible for its content.

Our Commission recommends: 1) amending RPC 7.2(a) to provide for electronic advertising by inserting "internet or other electronic medium" after "television" and 2) the retention of RPC 7.2(b)'s three-year recordkeeping requirement. Our Commission also recommends eliminating MRPC 7.2(a)'s prohibition against drawings, animation, dramatization, music, or lyrics and, instead, requiring that such advertising techniques conform to the requirements of RPC 7.1 concerning false or misleading communications. The recommendation arises from concerns about the constitutionality of the prohibition and the absence of ethics prosecutions for violations of the prohibition.

Our Commission did not take a position in regard to an ABA recommendation to amend MRPC 7.2(b), a recommendation that bears on multidisciplinary practice, because of the short time available to consider the recommendation. In August of 2002, the ABA House of Delegates approved the recommendation of the ABA Standing Committee on Ethics and Professional Responsibility to amend MRPC 7.2(b) to provide that lawyers' referral arrangements, as long as they are non-exclusive and are revealed to the clients being referred do not fall under the rule's prohibition of a lawyer "giving something of value to another for recommending the lawyers services."

SUPREME COURT ACTION: The Court adopts the Commission's recommended inclusion of "internet and other electronic media" in the listing of permissible venues for attorney advertising. It has declined to accept the remainder of the changes recommended by the Commission for this RPC, including the Commission's expression of concern over the constitutionality of the limiting language contained in the first paragraph of the rule.

RPC 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(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; or
- (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; or
- (4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or
- (5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter:
 - (i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text; and
 - (ii) contains the following notice at the bottom of the last page of text:

"Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

- (iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, ~~CN~~ P.O. Box 037, Trenton, New Jersey 08625.

- (c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if:
 - (1) the promotional activity involves use of a statement or claim that is false or misleading within the meaning of RPC 7.1; or
 - (2) the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.
- (d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

- (e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by RPC 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's client:
- (1) a legal aid office or public defender office:
 - (i) operated or sponsored by a duly accredited law school.
 - (ii) operated or sponsored by a bona fide nonprofit community organization.
 - (iii) operated or sponsored by a governmental agency.
 - (iv) operated, sponsored, or approved by a bar association.
 - (2) a military legal assistance office.
 - (3) a lawyer referral service operated, sponsored, or approved by a bar association.
 - (4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions

are satisfied:

- (i) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters when such organization bears ultimate liability of its member or beneficiary.
- (ii) neither the lawyer, nor the lawyer's partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have received any financial or other benefit from such initiation or promotion.
- (iii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
- (iv) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
- (v) any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own

expense except where the organization's plan provides for assuming such expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.

(vi) the lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

(f) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule.

Commission Comment:

With limited exception, proposed MRPC 7.3 prohibits the live solicitation of prospective clients. New Jersey's RPC 7.3 is far more detailed and explicit than its proposed MRPC counterpart. Our Commission recommends that the Court adopt the ABA Commission's recommendation for MRPC 7.3(a) restrictions on "in-person, live telephone or real-time electronic contact" but retain the detailed restrictions now present in RPC 7.3(b). In general, our Commission recommends that attorneys be permitted to engage in live solicitation of business and governmental entities.

SUPREME COURT ACTION: Except for the limited technical amendment to paragraph (b)(5)(iii), the Court has declined to accept the proposed recommendations of the Commissions in respect of this rule. In so doing, the Court agrees with most of the comments of NJSBA, which argued, in part, that the amendment to paragraph (a) was not necessary and that the proposed amendment to paragraph (b) could result in inappropriate solicitations of small businesses in the aftermath of a mass disaster. The Court is satisfied that the current RPC is achieving its intended purpose.

RPC 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.
- ~~(b)~~(d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

Commission Comment:

Both the present and proposed versions of MRPC 7.4 specifically permit a lawyer to communicate the lawyer's admission to practice as a patent attorney and engagement in an admiralty practice. Proposed MRPC 7.4 eliminates an MRPC provision that allows lawyers to claim certification as a specialist even though the certifying authority is not approved by an appropriate state authority or accredited by the ABA. The ABA Commission takes the position that states should protect the public from misleading claims by requiring certifying organizations to be

approved by the state authority or the ABA. Our Commission supports the ABA Commission's recommendation on patent and admiralty practice. The federal Patent and Trademark Office governs the registration of attorneys and agents qualified to practice before it.

SUPREME COURT ACTION: Adopts Commission's recommendations.

RPC 7.5 FIRM NAMES AND LETTERHEADS

- (a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. Except for organizations referred to in R. 1:21-1(d), the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.
- (b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a firm name, any advertisement, letterhead or other communication containing the firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.
- (c) A firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.
- (d) Lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.

- (e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language.
- (f) In any case in which an organization practices under a trade name as permitted by paragraph (a) above, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

Commission Comment:

The proposed MRPC 7.5(b) states that a law firm may use the "same name or other professional designation" The ABA Commission proposes to add "other professional designation" to the Rule to clarify that the Rule applies to website addresses and other ways of identifying law firms in connection with their use of electronic media. Following the report of its Committee on Attorney Advertising, our Court adopted a revised and renumbered DR 2-105 in 1984. RPC 7.5 is far more detailed and specific than proposed MRPC 7.5. Our Commission recommends retention of our present rule.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

[MRPC 7.6 - Political Contributions to Obtain Government Legal Engagements or Appointments by Judges (existing MRPC, not included in our present rules).]

MRPC 7.6 provides:

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

The model rule arose out of the ABA's concern over the ethics of making campaign contributions in order to qualify for government-awarded legal work - "pay to play." The history of the proposed rule reflects a vigorous discussion within the ABA over whether it was appropriate to deal with the broader issue of campaign finance reform by targeting lawyers' political contributions for ethical review. Another issue was whether the rule was overbroad in that it improperly infringed on lawyers' legitimate participation in the political process.

The ABA House of Delegates approved the proposed rule in February of 2000. The ABA Ethics 2000 Commission recommended no change to the rule and the ABA House of Delegates approved that recommendation in August of 2002 as part of its general approval of the ABA Ethics 2000 Commission's report. As of yet, no state has adopted the rule.

In our discussion, our Commission agreed that when lawyers make political contributions and receive government-awarded legal work, legitimate questions may arise over whether the work was awarded on the basis of competence and merit. A member observed that a United States Supreme Court decision holds that a government agency may not exclude an outside contractor from being hired because of the contractor's refusal to make a political contribution. *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996). The Commission members also recognized that lawyers historically have actively engaged in the political process. Over the course of the discussion, the Commission members also noted that existing RPC 8.4(b) comes into play if a lawyer makes or solicits a political contribution that constitutes a bribe or other crime.

Ultimately, the Commission concluded to withhold recommending adoption of MRPC 7.6 because of the difficulty in defining the difference between unethical and legitimate political contributions and the potential for mischief occasioned by the lack of clear distinction between the two. Our Commission agreed, however, that the Court might reconsider the issue if other branches of government undertake broader efforts in the area of campaign finance reform.

SUPREME COURT ACTION: Agrees with Commission's recommendation to withhold adoption of MPRC 7.6.

RPC 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

Commission Comment:

The ABA Commission recommends no changes to the text of MRPC 8.1. Likewise, the Commission recommends no changes to the identical text of RPC 8.1.

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 8.2 JUDICIAL AND LEGAL OFFICIALS

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Commission Comment:

The ABA Commission recommends no changes to the text of MRPC 8.2. Likewise, this Commission recommends no changes to the substantially identical text of RPC 8.2. Currently, RPC 8.2(b) states, "A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct;" the MRPC begins, "A lawyer who is a candidate"

SUPREME COURT ACTION: Agrees that no amendment of the current RPC is required.

RPC 8.3 REPORTING PROFESSIONAL MISCONDUCT

- (a) A lawyer ~~having knowledge~~ who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer ~~having knowledge~~ who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.
- (d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:
 - (i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and
 - (ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any

other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Commission Comment:

The ABA Commission proposes nonsubstantive changes to paragraphs (a) and (b) of MRPC 8.3. Those paragraphs now require a lawyer "having knowledge" that another lawyer or judge has committed misconduct that raises a substantial question as to that person's fitness to inform the appropriate authority. The proposed changes would switch "having knowledge" to "who knows" in both paragraphs. Paragraph 3(c) of the MRPC states that this Rule does not require disclosure of information otherwise protected by MRPC 1.6 or information gained by a lawyer or judge while serving as a member of a lawyer's assistance program (LAP) to the extent that such information would be confidential if it related to the representation of a client. It differs from our RPC 8.3 in that in our RPC, a new paragraph (d) was added in 1993 that defines when knowledge obtained as a result of participation in a LAP is subject to disclosure under paragraph (a). The Commission recommends no changes to RPC 8.3 other than to change "having knowledge" to "who knows" in paragraphs (a) and (b).

SUPREME COURT ACTION: Adopts Commission's recommendation.

RPC 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Commission Comment:

MRPC 7.1 currently provides that a lawyer may not make a false or misleading communication about the lawyer or the lawyer's services. The rule further provides that a communication is false or misleading if, among other things, it "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law." RPC 8.4 defines professional misconduct. Our Commission recommends repeating the foregoing language in paragraph (e) of RPC 8.4 to clarify that the prohibition is not limited to statements made in connection with marketing legal services. RPC 8.4(g) also makes it unethical for a lawyer acting in a professional capacity to discriminate based on race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap.

SUPREME COURT ACTION: Adopts Commission's recommendations.

RULE 8.5 JURISDICTION DISCIPLINARY AUTHORITY; CHOICE OF LAW

- (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction ~~although engaged in practice elsewhere~~ regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
- (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be:
- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

Commission Comment:

Under proposed MRPC 8.5, our disciplinary jurisdiction has been expanded to cover "any lawyer not admitted in this State who practices law or renders or offers to render any legal services in this State." The conflict-of-laws provision of the rule applies to "tribunals" in order to bring binding arbitration and other methods of formal adjudication within our disciplinary jurisdiction. Lawyers who participate in such adjudications should be bound by the RPCs of the jurisdiction in which the tribunal sits unless the rules of the tribunal provide otherwise.

For other conduct, the RPCs to be applied are the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction.

The Commission's belief that New Jersey practice currently reflects the nationwide trend to

multijurisdictional practice underlies the Commission's recommendation to put lawyers who provide or offer to provide legal services in New Jersey under New Jersey's disciplinary authority.

SUPREME COURT ACTION: Adopts Commission's recommendations.