SUPREME COURT OF NEW JERSEY
PROFESSIONAL RESPONSIBILITY RULES COMMITTEE

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January 9, 2012

Hon. Glenn A. Grant, J.A.D., Acting Administrative Director
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P.O. Box 037
Trenton, NJ 08625-0037

Re: 2010-2012 Report of the Professional Responsibility Rules Committee

Dear Judge Grant:

On behalf of the Professional Responsibility Rules Committee, I am pleased to submit the enclosed 2010-2012 Rules Cycle Report. We appreciate this privilege to be of service.

Very truly yours,

Walter R. Barisonek

Enclosure

cc: Chief Justice Stuart Rabner and Associate Justices
Mary Neary, Esq., Clerk, Supreme Court
Steven D. Bonville, Esq., Chief of Staff, Administrative Office of the Courts
Members of the Professional Responsibility Rules Committee

2010 – 2012 Rules Cycle Report

of the

New Jersey Supreme Court
Professional Responsibility Rules Committee

January 9, 2012

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INTRODUCTION

The Professional Responsibility Rules Committee (the "PRRC" or the "Committee") recommends the proposed amendments and new rules contained in this report. Part I contains proposed rule amendments. Part II summarizes proposals considered but not recommended for adoption. The Committee's "non-rule recommendations" are contained in Part III. Part IV summarizes recommendations previously presented to the Court during this 2010-2012 rules cycle, and, as applicable, the actions taken thereon by the Court. Part IV also includes technical changes, if any, that the Court made to the Rules of Professional Conduct since the Committee's last cycle report.

In the proposed rule amendments, added text is underlined. Deleted text is [bracketed]. Because existing paragraph designations and captions are indicated by underscoring, proposed new paragraph designations and captions are indicated by double underscoring. No change in the text is indicated by ". . . no change."

I. PROPOSED RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. RPC 1.6 Duty of Confidentiality: Permitted Disclosure to Prevent Client Suicide

With limited exceptions, RPC 1.6 prohibits lawyers from "reveal[ing] information relating to the representation of a client." While the Committee was contemplating a possible "wrongful-incarceration exception" (discussed *infra*, Part IV, Out-of-Cycle Activity), it also considered a request for an unrelated amendment regarding client suicide. Specifically, members brought to the Committee's attention reports of attorneys seeking guidance from their colleagues and from the "Ethics Hotline" operated by the Advisory Committee on Professional Ethics about what they can do when a client tells the attorney that he wants to commit suicide but does not authorize the attorney to reveal that information to another person.

The Committee is unaware of any conscious intent by rule drafters to subject a lawyer to discipline for revealing information to prevent a client's suicide. Presently, however, RPC 1.6 prohibits such disclosure because none of the exceptions to confidentiality apply. For example, RPC 1.6(b)(1) permits disclosure only if the act sought to be prevented is a "criminal" or "illegal" act and the disclosure is made to prevent "the death or substantial injury . . . *of another*" (emphasis added). Attempted suicide is no longer illegal in many jurisdictions. It does, however, attempt to cause death and/or can result in substantially bodily harm. Under the American Bar Association's Model Rules of Professional Conduct, an attorney who wants to speak out to prevent a client's suicide does not face the same quandary. Although it does not expressly mention suicide, Model Rule 1.6 (b)(1) permits disclosure "to prevent reasonably certain death or substantial bodily harm" but without specifying whose harm; the comment to this rule explains that the exception "recognizes the overriding value of life and physical integrity." The Model Rule's crime/fraud exception is contained in an entirely distinct paragraph.

The Committee recommends amending RPC 1.6 to permit an attorney to disclose client information when the attorney *has a reasonable belief* that disclosure is necessary to prevent the client from causing death or substantial bodily harm to himself. The basis for allowing such disclosure is to protect the client. While some members would prefer a mandatory disclosure rule, the majority is concerned that suicidal threats may be made more frequently in certain practice areas (such as family law) than others and absent training, attorneys have no special expertise to determine whether a client actually intends to harm himself/herself. Further, the majority believed that a duty to report every client that mentions suicide could operate to destroy client relationships.

The Committee also considered whether to permit disclosure of client information to prevent suicide by a person other than the client. Although preventing any harm is an important goal, a majority of the members conclude it is preferable to take incremental steps and start with allowing disclosure of a client's confidential information only when it is to help that client. There is also concern that in some situations, a client may suggest that an opposing party has threatened suicide solely for the purposes of obtaining an advantage in litigation, for example, in a child-custody dispute.

In summary, the Committee proposes a new exception to client confidentiality to permit disclosure when the attorney has a reasonable belief that disclosure is necessary to prevent that client from committing suicide. The text of the proposal follows.

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), (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.

(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 prevent the client from causing death or substantial bodily harm to himself or herself; or

(4) to comply with other law.

(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), (c), or (d).

B. Rule 1:21-1(a): Bricks-and-Mortar Offices in the Modern Digital Age

In In re ACPE Opin. 718/ CAA Opin. No 41 (Joint Opin.) (Mar. 25, 2010), the Advisory Committee on Professional Ethics (ACPE) and Committee on Advertising (CAA) opined that a "virtual office" ("a type of time-share arrangement whereby one leases the right to reserve space in an office building on an hourly or daily basis") does not qualify as a bona fide office within the meaning of Rule 1:21-1(a) "because an attorney would be present only when he/she had reserved space, and because a jointly used receptionist would not satisfy the requirement of the presence of one who could act on the attorney's behalf." In its August 2010 order denying a petition to review that opinion, the Court directed that the PRRC, in consultation with the ACPE and the CAA, provide a report on "whether Rule 1:21-1(a) should be amended to permit the use of a virtual office."

The Court also referred to the PRRC a letter dated June 28, 2010, from then-President Richard H. Steen, Esq., New Jersey State Bar Association (NJSBA), which enclosed a report and proposed amendments to Rule 1:21-1(a) formulated by a NJSBA committee consisting of members of its Solo and Small Firm Section and Professional Responsibility and Unlawful Practice Committee. That report was prepared to address the fact that the "current rule governing bona fide offices does not reflect the realities of law practice today, and imposes significant financial burdens on lawyers, particularly solo, part-time and small firm practitioners." See Appendix A. Mr. Steen stated that the proposal "seeks to add flexibility to the bona fide office rule, without sacrificing the important requirements that serve as the rule's foundation, such as accessibility to clients and courts, and the safeguarding of records and files" and "would eliminate the current requirement for a fixed office location, in favor of functional tests that require a lawyer to structure a practice in a manner that stresses accessibility and

responsiveness." The NJSBA's proposed new language for Rule 1:21-1(a) states, in pertinent part:

> (i) An attorney need not maintain a fixed, physical location, but must structure his or her practice in such a manner as to assure prompt and reliable communication with, and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event service cannot be effectuated pursuant to the appropriate Rules of Court.
>
> (ii) An attorney who is not domiciled in this State ~~and does not have a bona fide office in this State~~, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in the preceding subjection. ~~all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event service cannot be effectuated pursuant to the appropriate Rules of Court.~~ The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.
>
> (iii) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(i).
>
> (iv) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.

In February 2011, the PRRC received reports from the CAA and the ACPE. See Appendices B and C. The CAA declined to "take a position on the definition of a bona fide office" because the CAA's role for the Court "is to enforce the rules governing attorney

communications," which would not be directly affected by an amendment to the bona fide office rule. The ACPE reported that it was divided on whether the bona fide office rule should be amended, but its members agreed that the rule's underlying purpose – ensuring "that attorneys are available and can be found by clients, courts, and adversaries" – are still paramount. The ACPE reported that its members who oppose an amendment maintain the view that requiring attorneys to maintain "a real office with a known street address" that is accessible "during normal business hours" operates to reassure clients of their attorney's accessibility. The ACPE members who favor an amendment to Rule 1:21-1 observed that in light of the 2004 removal of the in-state office requirement, accessibility "is not necessarily achieved by the requirement that attorneys practice law from a bona fide office." In their view, even attorneys who maintain a New Jersey office are not accessible at all times, and modern technology permits them to stay in communication electronically without regard to office space. These members noted, however, that if the rule is amended, it should include safeguards requiring attorneys to "disclose how the attorney may be contacted or served and where client files will be kept."

In April 2011, a subcommittee formed by the PRRC reported that the NJSBA's proposals appropriately emphasize communication, accessibility and availability rather than the physical location of an attorney. See Appendix D. The subcommittee noted that although the Court's referral arose from an inquiry about whether what might be called "flex space" satisfies the bona fide office rule, a broader review is preferable because in some circles, "virtual office" means an internet practice and specifically *not* flex space. Rather than undertake to define "virtual office" or "bona fide office," the subcommittee found it more productive to focus on the issues sought to be addressed: the ability of clients, courts, adversaries, and others to meaningfully reach and communicate with the attorney, the need for physical access to inspect files, and for purpose of

service of process. The subcommittee found those goals are satisfied by the NJSBA proposal. The subcommittee also suggested that the title of Rule 1:21-1 should now include a reference to "Attorney Access and Availability."

The Committee largely agrees with the NJSBA's proposal. Although a majority does not recommend including the NJSBA's proposed new subsections (iii) and (iv), which would specify examples of what can satisfy the "prompt and reliable communication" requirement and which would obligate lawyers to meet clients in person. As so modified, and with additional changes discussed *infra*, a majority of the Committee concludes that the NJSBA proposal will serve the primary goals of accessibility and communication. The PRRC majority believed that those goals are not necessarily achieved by having a bricks-and-mortar office, which requirement a minority of the PRRC recommends be required. The majority of the PRRC also finds that to the extent there is a concern about misleading clients, because the clients might not understand that their attorney has no traditional "office." This concern is ultimately an advertising issue covered by RPC 7.2(a) (stating that attorney advertising is subject to RPC 7.1) and RPC 7.1(a) (prohibited lawyer from making false or misleading communications about lawyer or services). It is noted that the present bona-fide office rule does not explicitly require that an attorney ever meet in person with a client. All members agree, however, that there must be some physical location for receiving hand deliveries, serving of process, and facilitating the inspection of files by authorities.

The Committee's version of the proposal makes additional substantive changes to the language proposed by the NJSBA. The Committee's proposal includes a reference to RPC 1.4 to emphasize the communication requirement. Most significantly, the Committee recommends that the site of the designated "fixed, physical location" for file inspection, hand-deliveries, and

process service be located *in New Jersey*. This will increase the burden on non-resident attorneys who presently satisfy Rule 1:21-1(a) by maintaining their offices outside of New Jersey because, if adopted, the proposed amendments would require them to "designate" a *New Jersey* location for service, deliveries, and file inspection. Nonetheless, the members distinguished such a burden from the one at issue in Schoenefeld v. New York, No. 1:09-CV-00504 (N.D.N.Y. Sept. 7, 2011), available at 2011 U.S. Dist. LEXIS 100576 (holding that New York rule requiring non-resident attorneys to maintain in-state offices while resident attorneys can operate offices out of their basements violates Privileges and Immunities Clause of U.S. Constitution). The Committee is of the view that there is a distinction between a requirement to "maintain" a fixed physical office for practice and having to "designate" space for purposes of bringing files for inspection by authorities on short notice and for receiving hand-delivered mail and service of process.

Finally, the PRRC recommends a housekeeping amendment to eliminate the reference to the now-obsolete skill-and-methods-course rule, which was eliminated in December 2009 contemporaneously with the adoption of the mandatory continuing legal educations requirements. See historical comment to Rule 1:26, "Skills and Methods Course."

The proposed amendments to Rule 1:21-1 follow.

Rule 1:21-1. Who May Practice; Attorney Access and Availability; Appearance in Court

(a) Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State[, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission], is in good standing, and complies with the following requirements:[, except as provided in paragraph (d) of this Rule, maintains a *bona fide* office for the practice of law. For the purpose of this section, a *bona fide* office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time. For the purpose of this section, a *bona fide* office may be located in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter "a United States jurisdiction"). An attorney who practices law in this state and fails to maintain a *bona fide* office shall be deemed to be in violation of RPC 5.5(a).]

(i) An attorney need not maintain a fixed, physical location, but must structure his or her practice in such a manner as to assure prompt and reliable communication as set forth in RPC 1.4 with, and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations in New Jersey where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event service cannot be effectuated pursuant to the appropriate Rule of Court.

(ii) An attorney who ~~is not domiciled~~ does not maintain a fixed physical location for the practice of law in this State [and does not have a *bona fide* office in this State], but who meets all [the] other qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in subsection (a)(i) of this Rule. [all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court.] The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to this action or the guardian of the party; or (2) has been admitted to speak *pro hac vice* pursuant to R. 1:21-2; (3) is a law student or law graduate practicing within the limits of R. 1:21-3; or (4) is an in-house counsel licensed and practicing within the limitations of R. 1:27-2.

Attorneys admitted to the practice of law in another United States jurisdiction may practice law in this state in accordance with RPC 5.5(b) and (c) as long as they maintain a bona fide office.

No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

(b) Appearance. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action. An attorney admitted in another jurisdiction shall not be deemed to be making an appearance in this State by reason of taking a deposition pursuant to R. 4:11-4.

(c) Prohibition on Entities. Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1A (professional corporations), R. 1:21-1B (limited liability companies), R. 1:21-1C (limited liability partnerships), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:6-2(a) (pleas in municipal court), R. 7:8-7(a) (presence of defendant in municipal court) and by R. 7:12-4(d) (municipal court violations bureau), an entity, however formed and for whatever purpose, other than a sole proprietorship shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(d) Federal Government Agencies. Staff attorneys employed full time by agencies of the federal government that have an office in New Jersey may represent the interests of that agency in federal and state courts in New Jersey without complying with subsection (a)(i) of this Rule [maintaining a bona fide law office in this state].

(e) through (g) . . . no change

C. Implementing DeNike v. Cupo: Joint Recommendations of PRRC and ACEA to Amend Canon 3(C)(1) of Code of Judicial Conduct, Guidelines on the Practice of Law by Retired Judges, Rule 1:12-1, and RPC 3.5

In DeNike v. Cupo, 169 N.J. 502 (2008), the Court held that negotiations between a trial judge and an attorney concerning the judge's post-retirement employment created an appearance of impropriety and required a new trial under the circumstances. The Court also provided detailed guidance to the bench and bar which included the following principles:

> 1. . . . [U]nder RPC 1.12(c), judges may not discuss or negotiate for employment with any parties or attorneys involved in a matter in which the judge is participating personally and substantially. Similarly, lawyers may not approach a judge to discuss post-retirement employment while such a matter is pending. If the subject is raised in any fashion, judges should put a halt to the conversation at once, rebuff any offer, and disclose what occurred on the record. The judge and all parties can then evaluate objectively whether any further relief is needed.
>
> 2. Judges who engage in retirement discussions while still on the bench . . . should delay starting any discussions until shortly before their planned retirement, and should discuss post-retirement employment opportunities with the fewest possible number of prospective employers. . . .
>
> 3. To avoid raising reasonable questions about their impartiality, judges must disqualify themselves from matters involving parties or attorneys with whom they have discussed future employment [whether or not this leads to an employment relationship]. See [Code of Judicial Conduct,] Canon 3(C)(1); Rule 1:12-1(f). . . .
>
> 4. Judges should wait a reasonable period of time before discussing employment with an attorney or law firm that has appeared before the judge. . . .
>
> [Id. at 519-20 (emphasis added).]

The Court then referred the matter to the PRRC and the Advisory Committee on Extrajudicial Activities (ACEA) to coordinate their efforts to review the issues and provide a report with recommendations on additional, practical guidance. Id. at 521.

The ACEA, with its expertise in matters involving the activities of judges, focused its review on the Code of Judicial Conduct and Guidelines on the Practice of Law by Retired Judges, while the PRRC considered the attorney-responsibility side of the equation, involving both the RPCs and Rules of Court. Each Committee has concurred in the recommendations of the other. The Committees now jointly propose several amendments to implement the principles announced by the Court:

1. New paragraph (d) of Canon 3(C)(1) of the Code of Judicial Conduct provides that a judge should disqualify himself if he has discussed or negotiated post-retirement employment "with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally, regardless of whether or not the discussions or negotiations lead to employment of the judge by the party, attorney or law firm."

2. New Guideline on the Practice of Law by Retired Judges, which applies to judges on the eve of retirement, provides detailed guidance for judges in this area.

3. New paragraph (f) of Rule 1:12-1 adds a new cause for disqualification where the judge "has negotiated his or her post-retirement employment with any party, attorney or law firm involved in the matter"; and

4. New paragraph (d) of RPC 3.5 prohibits an attorney from impacting the impartiality of a tribunal by approaching a judge to initiate post-retirement employment discussions in certain circumstances.

The Committees do not intend for automatic disqualification under new Rule 1:12-1(f) when the topic of post-retirement employment is merely raised by an attorney who initiates the communication and, as provided by new Guideline 1, *infra*, the judge puts a stop to the discussion at once and takes further steps to apprise those involved in the case about the incident. In that

situation, it will remain within the judge's discretion to determine whether disqualification is necessary, because by immediately stopping the conversation, the judge may not have engaged in a two-way "discussion" or "negotiation" that would give rise to grounds for disqualification under Canon 3(C)(1) or Rule 1:12-1. The proposed amendments were drafted with language intended to negate "judge shopping" by an attorney who might attempt to create cause for disqualification by initiating the contact himself, which conduct by the attorney would now violate new RPC 3.5 (d).

The proposed amendments follow.

Proposed Amendments to Code of Judicial Conduct

Canon 3. A Judge Should Perform the Duties of Judicial Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities. . . . no change.

B. Administrative Responsibilities.. . . . no change.

C. Disqualification. (see R. 1:12-1)

(1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer or has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a witness concerning it;

Commentary

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child or any other member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be affected by the outcome of the proceeding;

(d) the judge has contacted, discussed or negotiated his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally, regardless of whether or not the discussions or negotiations lead to employment of the judge by the party, attorney or law firm.

Commentary

A matter pending before the judge includes any matter or aspect of a matter which has not been completed, even if only the performance of a ministerial act remains outstanding, such as signing a consent order or a similar order.

[(d)] (e) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as, or is in the employ of or associated in the practice of law with, a lawyer in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated of itself disqualifies the judge.

(iii) is known by the judge to have an interest that could be affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a witness in the proceeding.

(2) . . . no change.

(3) . . . no change.

D. Remittal of Disqualification. . . . no change.

Proposed New Guideline 1 to Guidelines on the Practice of Law by Retired Judges (amendments to Directive #5-08 (3/24/08), which superseded Directive #7-04 (5/17/04))

Guideline 1. A judge may not contact, discuss or negotiate his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally. A matter pending before the judge includes any matter or aspect of a matter which has not been completed, even if only the performance of a ministerial act remains outstanding, such as signing a consent order or a similar order. If the subject is raised in any fashion, the judge must put a halt to the discussion or negotiation at once, rebuff any offer, and disclose what occurred on the record in the presence of all parties and counsel. The judge, all parties and attorneys on the record can then evaluate objectively whether any further relief is needed.

A judge who engages in post-retirement employment negotiations or discussions while still on the bench with any party, attorney or law firm that does not have a matter pending before the judge, must do so in a way that minimizes the need for disqualification, does not interfere with the proper performance of the judge's judicial duties, and upholds the integrity of the courts. A judge should delay starting any such discussions or negotiations until shortly before his or her planned retirement, and should discuss post-retirement employment opportunities with the fewest possible number of prospective employers. A judge should also consult with his or her Assignment Judge or other supervisory judicial officers in this regard.

A judge should not contact, discuss or negotiate his or her post-retirement employment with a party, attorney or law firm that has in the past appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the case cannot reasonably be questioned. What is reasonable depends on the circumstances. For instance, an uncontested matter resolved swiftly by entry of a default judgment would not call for a lengthy interval of time. Toward the other end, prolonged or particularly acrimonious litigation would caution in favor of a longer delay. Actions likely to result in continuing post-judgment matters would also warrant a lengthier intervening period of time.

Guideline 2[1]. . . . no change to text.

Guideline 3[2]. . . . no change to text.

Guideline 4[3]. . . . no change to text.

Guideline 5[4]. . . . no change to text.

Guideline 6[5]. . . . no change to text.

Guideline 7[6]. . . . no change to text.

Guideline 8[7]. . . . no change to text.

Guideline 9[8]. . . . no change to text.

Guideline 10[9]. . . . no change to text.

Guideline 11[10]. . . . no change to text.

Proposed Amendment to Rule 1:12

Rule 1:12-1. Cause for Disqualification; On the Court's Motion

The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, if the judge

(a) is by blood or marriage the second cousin of or is more closely related to any party to the action;

(b) is by blood or marriage the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, employees or office associates of any such attorney except where the Chief Justice for good cause otherwise permits;

(c) has been attorney of record or counsel in the action; [or]

(d) has given an opinion upon a matter in question in the action; [or]

(e) is interested in the event of the action;[or]

(f) has negotiated his or her post-retirement employment with any party, attorney or law firm involved in the matter; or

(g) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.

Paragraphs (c), (d) and (e) shall not prevent a judge from sitting because of having given an opinion in another action in which the same matter in controversy came in question or given an opinion on any question in controversy in the pending action in the course of previous proceedings therein, or because the board of chosen freeholders of a county or the municipality in which the judge resides or is liable to be taxed are or may be parties to the record or otherwise interested.

Proposed Amendment to RPC 3.5

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[.]; or

(d) contact a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral (hereinafter "judge") to discuss the judge's post-retirement employment while the lawyer (or a law firm with or for whom the lawyer is a partner, associate, counsel, or contractor) is involved in a pending matter in which the judge is participating personally.

D. Implementing In re Boggia: Joint Recommendations of PRRC and ACEA to Amend Canon 7 of the Code of Judicial Conduct and RPC 5.1 to Ban Political Contributions by Firms with Municipal Judges

In In re Boggia, 203 N.J. 1 (2010), the Court considered whether to discipline a part-time municipal court judge whose law partner made political contributions from the firm's business account. Under the unique circumstances of the case, the Court found that the judge did not violate Canon 7A(4) of the Code of Judicial Conduct (providing that judge shall not "make a contribution to a political organization or candidate . . ."). The Court determined, however, that contributions by a law firm or partner of a judge "can readily run afoul of the ban separating judges and politics." Id. at 12-14. Accordingly, the Court held that "the ban on making political contributions from a law firm's business account must apply not only to part-time municipal judges themselves but to the lawyers with whom they practice law and the firms where they do so. A fair rule must apply with equal force to a two-person partnership and a large firm." Id. at 13-14. Moreover, the Court recognized that: (1) judges take on "an 'implicit burden' to be 'vigilant in detecting possible impropriety' as well as the appearance of impropriety," and this requires that a judge "take sufficient measures, to the best of his ability, to ensure that the Firm no longer ma[kes] political contributions," Boggia, supra, 203 N.J. at 11 (quoting In re Gaulkin, 69 N.J. 185, 198-99 (1976)); and (2) "[i]t would be untenable to require that part-time judges undertake efforts to prevent colleagues at a firm from making political contributions, only to be overridden by a partner with a contrary view." Id. at 14. The Court's decision instructs that in the future, it will be insufficient to simply orally instruct partners and staff to cease making firm political contributions without taking further action to monitor whether those instructions are followed; and "[t]o avoid the appearance of impropriety, judges and firms must fashion appropriate measures" to prevent what happened in Boggia. Id. at 11-12.

The Court referred the matter to the PRRC and the Advisory Committee on Extrajudicial Activity (ACEA) to implement its ruling and to "develop appropriate rules . . . to ensure compliance by part-time judges as well as other lawyers in their respective firms." Id. at 14. In considering the Court's directive, the ACEA focused its review on the Code of Judicial Conduct, while the PRRC considered the attorney-responsibility side of the equation. Each Committee has concurred in the recommendations of the other. The Committees now jointly propose two amendments to implement the principles announced by the Court:

1. New section (D) of Canon 7 of the Code of Judicial Conduct sets forth a judge's obligations regarding political contributions by the firm with which the judge is associated; and

2. New paragraph (d) of RPC 5.1 implements the Court's determination that firm personnel and law partners of part-time judges are not permitted to make political contributions from firm business accounts.

The Committees specifically declined to address any First Amendment implications. See Banning All Contributions, 202 N.J.L.J. 218 (Oct. 11, 2010) (editorial questioning whether Boggia unconstitutionally limits free speech rights of law firms and suggesting that Committees study this). Such issues are beyond the scope of the Court's referral. Moreover, as to other attorneys in a judge's firm, the Court held: "[W]e are plainly not limiting the First Amendment rights of attorneys who practice law with part-time municipal judges because those lawyers may continue to make personal political contributions."

The proposed amendments follow.

Proposed Amendment to Code of Judicial Conduct

Canon 7. A Judge Should Refrain from Political Activity

A. A judge shall not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(3) attend political functions or functions that are likely to be considered as being political in nature; or

(4) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, or purchase tickets for political party dinners, or other functions[;].

B. A judge shall resign from office when the judge becomes a candidate for an elective office or nomination thereto.

C. A judge shall not otherwise engage in any political activity.

D. A part-time municipal court judge shall not affiliate with a law firm as a partner, director, of counsel, associate, or some other comparable status if the law firm, or any lawyer of the firm on the law firm's behalf, makes political contributions such as those included in Section A(4). It shall be the responsibility of a part-time municipal judge to take reasonable measures to ensure that a law firm with which the judge is affiliated does not make political contributions. Lawyers within the firm with whom the part-time municipal judge is affiliated, may nonetheless make personal political contributions.

Proposed Amendment to RPC 5.1

RPC 5.1. Responsibilities of Partners, 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.

(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate or holds some other comparable status with the firm.

E. RPC 5.5/Multijurisdictional Practice: Clarifying Amendment to "Association" Exception: Non-New Jersey Attorney Limited to "Occasional" Practice and Must "Designate and Disclose" to All Parties in Interest the Identity of the "Responsible" New Jersey Lawyer

In 2010, on the recommendation of the PRRC, the Court adopted RPC 5.5(b)(3)(iv) to permit a person who is admitted to practice law in another state but not in New Jersey to practice law here if the out-of-state lawyer "associates" in the matter with a New Jersey attorney who will be held responsible for the lawyer's conduct in the matter. The PRRC received a report from the Committee on the Unauthorized Practice of Law Committee (UPLC) requesting modifications to that provision to (1) set a temporal limitation requiring that the out-of-state lawyer's practice in New Jersey be "occasional" to preclude ongoing and recurring New Jersey practice, and (2) require that the associated New Jersey attorney "actively participates" in the matter to prevent New Jersey clients from being represented by "uninformed out-of-state lawyers . . . without substantive involvement by a New Jersey lawyer." See Appendix E.

The UPLC prepared its report at the direction of the Court, in response to concerns the UPLC had raised that RPC 5.5(b)(3)(iv) operates to permit non-New Jersey attorneys employed by New Jersey firms to provide legal services in this state to New Jersey clients on a routine and recurring basis without ever seeking admission to the New Jersey bar, contrary to In re Jackman, 165 N.J. 580 (2000). Another troubling scenario brought to the UPLC's attention by way of the "Ethics Hotline" was a situation in which an out-of-state lawyer formed an out-of-state firm and hired a newly admitted New Jersey attorney as "of counsel" to his firm to satisfy—in an illusory fashion—the "association" requirement of the rule and thereby embark on a practice of continuous representation of New Jersey clients in New Jersey matters without admission to our bar.

The UPLC has proposed the following amendments to address these concerns:

> (iv) the lawyer's practice in this jurisdiction is occasional and the lawyer associates in [a] the matter with a lawyer admitted to the Bar of this State who actively participates in the matter and who shall be held responsible for the conduct of the out-of-State lawyer in the matter . . . .

The UPLC reports that by amending the rule, it would become "aligned with the Model Rules" and "accedes to the intent of the PRRC to broaden multijurisdictional practice, but emphasizes that the practice in New Jersey cannot be on-going and recurring and the involvement of the New Jersey attorney must be substantive." The UPLC report also suggests adoption of an official comment that highlights "the personal responsibility of the New Jersey attorney in the matter, including potential liability for malpractice by the out-of-state attorney...."

As explained below, the PRRC recommends adoption of the UPLC's proposed temporal limitation to require that the non-New Jersey attorney's practice in this jurisdiction be "occasional." A majority of the PRRC, however, disagrees that the rule should mandate "active participation" by the New Jersey attorney and instead suggests an alternative amendment that would require the out-of-state lawyer to disclose to interested parties the identity of the local lawyer who will be held responsible for the non-New Jersey attorney's conduct in the matter.

Regarding a temporal limitation, the "association" provision of RPC 5.5(b)(3)(iv) was not intended to permit attorneys to circumvent In re Jackman, 165 N.J. 580 (2000), in which the Court found that an attorney who engaged in an "unabashed practice" in transactional law in New Jersey for seven years without a license to practice here had engaged in the unauthorized practice of law "in direct conflict with the plain terms of Rule 1:21-1(a)." In proposing what became subsection (b)(3)(iv), the PRRC intended to broaden multijurisdictional practice to permit a non-New Jersey attorney to represent a New Jersey client in New Jersey, and so there was no requirement that the representation be on behalf of an existing client from a jurisdiction where the attorney is admitted to practice. However, the original proposal did not specifically

include the word “occasional” (or other temporal term, such as “temporary”), although such a limitation continues to exist in the catchall provision, subsection (b)(3)(v).

Turning to the suggested “active participation” mandate, a minority of the PRRC agrees with this aspect of the UPLC’s proposal because it would help ensure that the New Jersey lawyer fully appreciates the import of the “held responsible” language and would require that lawyer to do more than simply lend his or her name to a non-New Jersey attorney before that attorney may practice law in New Jersey without being admitted to the New Jersey bar. In their view, requiring some measure of involvement by the New Jersey attorney at the outset could help prevent problems, whereas the current rule only addresses who may be held responsible if a problem occurs.

The majority of the PRRC, however, opposes an active participation requirement and finds that the current “held responsible” language, together with an alternative new amendment, adequately addresses concerns about responsible representation and control over the non-New Jersey lawyer. The PRRC majority proposes that instead of requiring active participation, the non-New Jersey attorney be required to “designate and disclose to all parties in interest” the identity of the New Jersey attorney. In the majority’s view, an amendment requiring designation and disclosure of the New Jersey attorney will help to ensure both that the parties know which New Jersey lawyer may be held responsible, and that the New Jersey lawyer appreciates that he will be “held responsible” for the out-of-state attorney’s conduct in the matter.

In the PRRC majority’s view, requiring active participation is paternalistic. Assuming the New Jersey lawyer knows of the designation as the local lawyer who will be held responsible, that lawyer is capable of deciding the level of involvement to have in light of the fact that, no matter how involved, under the existing rule that lawyer will remain subject to discipline,

malpractice actions, and so on for the conduct of the out-of-state attorney in the matter. The majority further finds that requiring "active participation" will intrude on the client's interests and preferences by requiring that he or she create a new attorney-client relationship with a New Jersey lawyer that must actively participate the matter, while already being represented by the client's chosen out-of-state lawyer. The members also observe that even under the current rule, both the local attorney and the out-of-state lawyer may be held responsible if the latter violates professional ethics rules.

To recap: (1) the PRRC unanimously concurs with the UPLC recommendation to amend RPC 5.5(b)(3)(iv) to require that "the out-of-State lawyer's practice in this jurisdiction is occasional"; and (2) some members of the PRRC concur with the UPLC proposal to require the "active participation" of the New Jersey attorney, while a majority of the PRRC instead proposes an amendment to require the non-New Jersey lawyer to "designate and disclose to all parties in interest" in the matter the identity of the New Jersey attorney with whom the non-New Jersey attorney is associated. The text of the PRRC variation on the UPLC's proposed amendments follows.

RPC 5.5. Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) (1) to (a)(2) . . . no change

(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 and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(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;

(iv) the out-of-State lawyer's practice in this jurisdiction is occasional and the lawyer associates in [a] the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) 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)(1) to (c)(6) . . . no change

II. PROPOSED RULE AMENDMENTS CONSIDERED BUT NOT RECOMMENDED

A. Rule 2:15-20: Grievant Confidentiality in Judicial Disciplinary Proceedings

Following its decision in R.M. v. Supreme Court of New Jersey, 185 N.J. 208 (2005) (holding that confidentiality rule applicable in attorney-discipline matters violated freedom of speech provisions of federal and state constitutions), the Court amended Rule 1:20-9(b) to expressly permit the grievant in an attorney disciplinary proceeding to "make public statements regarding the disciplinary process, the filing and content of the grievance, and the result, if any, of the grievance." The Court also asked the PRRC to work with the Advisory Committee on Judicial Conduct (ACJC) to review the confidentiality provisions governing the operation of the judicial disciplinary system, in light of R.M. and other relevant considerations.

In June 2010, the ACJC submitted a detailed report to the PRRC concluding that there is no substantive reason to alter Rule 2:15-20[1], the judicial disciplinary system rule on confidentiality. See Appendix F. The ACJC explained that its rule, as written and applied,

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[1] Rule 2:15-20, "Confidentiality," states in its entirety:

> (a) Except as provided in paragraphs (b) and (c) below and in Rule 2:15-25 (Referral for Administrative Action), the record before the Committee shall be confidential and shall not be available to any person except in the proper discharge of official duties. In all circumstances, prehearing conferences, deliberations of the Committee, and information subject to a protective order shall remain confidential.
> (b) If the Committee files a formal complaint against the judge, the complaint and all further proceedings thereon shall be public except that the Committee may apply to the Supreme Court for permission to retain confidentiality in a matter involving special circumstances, such as when the Committee determines that the privacy interests of a witness or other person connected with the matter outweigh the public interest in the matter.
> (c) If a judge who is the subject of a grievance requests it, the charge, the proceeding of the Committee thereon, and the action of the Committee with respect to the charge shall be made public.

"satisfies the precedent established in R.M." Specifically, the ACJC noted that in judicial discipline proceedings:

> [G]rievants are never advised that they are prohibited from disclosing the fact that they filed a grievance with the ACJC or from publicizing the Committee's disposition. During the investigative stage, if they inquire, they are advised of the benefit to the Committee to retain confidentially in order to protect the integrity of the investigation. After a matter has been disposed, the grievant is advised of the Committee's decision, but is not advised that the decision is confidential. However, all correspondence to the grievant is stamped 'Confidential' on the top of the letter.

The PRRC concurs with the ACJC's conclusion that Rule 2:15-20 requires no amendments to conform to the principles addressed by R.M. However, following further collaboration, the Committees have decided to recommend form language for the ACJC to include on the bottom of notices to grievances that addresses the issue of confidentiality. This is discussed *infra*, Part III ("Non-Rule Recommendations"), Section A.

B. Misconduct by Part-Time Municipal Court Judges: "Dual Discipline" as Judges and as Attorneys

The Chair of the Advisory Committee on Judicial Conduct (ACJC) asked the PRRC to consider reviewing and amending the Rules of Professional Conduct to ensure they sufficiently address those situations in which a part-time municipal court judge's actions, found to have violated the Code of Judicial Conduct, may also constitute professional misconduct contrary to the RPCs that apply to the judge in his capacity as an attorney and, because of the egregious nature of the misconduct, may warrant discipline in both contexts.

The PRRC reviewed information pertinent to this inquiry, including Court decisions and rules relevant to dual discipline. For example, in In re Yaccarino, 117 N.J. 175, 179 (1989), the Court rejected the argument that an attorney's removal from office as a Superior Court judge "obviate[d] any need to subject him to further discipline for the[] same unethical acts based on his status as an attorney," and it disbarred him for having used his position as a judge to advance private interests and for suborning perjury, falsifying evidence, and attempting to conceal his own misconduct. The Court later adopted rules expressly contemplating dual discipline, including Rule 1:20-14(c) ("Where a judge has been removed or disciplined pursuant to R. 2:14 or 2:15, respectively, those proceedings shall be conclusive of the conduct on which that discipline was based in any subsequent disciplinary proceeding brought against the judge arising out of the same conduct. . . ."); R. 1:20-14(b)(3) (creating procedure for OAE to proceed on attorney-discipline matter by filing motion for reciprocal discipline based on Court's imposition of judicial discipline).

The PRRC also considered the various ways in which judicial misconduct may come to the attention of the Office of Attorney Ethics (OAE) to consider for possible attorney discipline. A grievance may be submitted to the OAE Director. R. 1:20-2(b)(2). The Court itself may direct,

in its order of judicial discipline, that the file in the matter be forwarded to the OAE "for such action as may be appropriate." See, e.g., In re Smoger, 173 N.J. 25 (2002); In re Breslin, 162 N.J. 190 (2000). The ACJC may include in a Presentment a recommendation that a judge's conduct be considered as a basis for imposing not only judicial discipline, but also discipline under the RPCs. See, e.g., In re Sasso, 199 N.J. 119 (2009). Although a Presentment is not prepared specifically for the OAE, both it and the Court's ensuing order of judicial discipline are matters of public record. See R. 2:15-20(b) ("If the Committee files a formal complaint against the judge, the complaint and all further proceedings thereon shall be public . . . ."). Moreover, the rules do not appear to preclude the ACJC from referring a matter that has reached the presentment stage to the OAE's attention if it finds the circumstances may warrant consideration of attorney discipline.

The PRRC also observed that if the Director of the OAE determines to institute attorney ethics proceedings following a finding of judicial misconduct, he may do so by filing a motion for reciprocal discipline, Rule 1:20-14(b), or by investigating and filing a complaint, Rule 1:20-14(d) ("Nothing in this rule shall be construed to preclude the Director from filing a complaint pursuant to R. 1:20-4 where the Director determines that procedure to be appropriate."), or the Director may decide that an ethics proceeding is not warranted. See Pressler, N.J. Court Rules, Official Comment to R. 1:20-14 (GANN, 1995) ("[A]ny decisions to institute attorney disciplinary proceedings [following imposition of judicial discipline] will be made in accordance with sound prosecutorial discretion in conformance with caselaw.") (citing Yaccarino, supra, 117 N.J. 175); cf. R. 1:20-2(b)(1)(E) (providing Director with discretion and authority to "exercise exclusive jurisdiction over the investigation and prosecution of . . . any case in which . . . the Supreme Court determines the matter should be assigned to the Director"); R. 1:20-2(b)(2)

(granting discretion and authority to "investigate any information coming to the Director's attention, whether by grievance or otherwise, which, in the Director's judgment, may be grounds for discipline"); R. 1:20-2(b)(18) (providing that Director "shall exercise all of the investigative and prosecutorial authority of an Ethics Committee in addition to any authority invested in the Director under these rules").

Finally, the PRRC considered available empirical data on cases in which attorney discipline was sought and imposed following the imposition of judicial discipline on judges, including but not limited to part-time municipal court judges.[2]

The Committee has unanimously concluded that the current rules are adequate and provide sufficient direction and authorization for the OAE to pursue professional discipline in matters in which the ACJC pursued judicial discipline. Accordingly, the PRRC is not proposing any rule amendments to address the issue of "dual discipline" at this time.

[2] Information on public judicial discipline from mid-2007, including Court orders and ACJC Presentments, are available on the Judiciary's website at www.judiciary.state.nj.us/acjc. Searchable summaries of public attorney-discipline matters since 1984 also are available online. See OAE Discipline Summaries, Calendar Years 1984-2009, available at www.judiciary.state.nj.us/oae/discipline.htm.

III. NON-RULE RECOMMENDATIONS

A. ACJC Form Language on Confidentiality in Communications to Grievants

As noted in Part II.A, *supra*, the PRRC and Advisory Committee on Judicial Conduct (ACJC) are recommending form language on the issue of confidentiality for the ACJC to include on the bottom of notices sent to grievants in judicial discipline matters. Presently, the ACJC uses a "Confidential" stamp on correspondence, including letters informing the grievant that the judge was dealt with privately. The concern sought to be addressed is that, although such a stamp may be indicative of the ACJC's duty of confidentiality as set forth in Rule 2:15-20, recipients could read it as prohibiting their own disclosure.

Both the PRRC and the ACJC recommend that the ACJC include the following form of explanatory language at the end of such communications:

> Records of the Advisory Committee on Judicial Conduct, including any documents you receive shall be confidential. A person who files a grievance against a judge may speak publicly about the grievance. If the Committee files a Formal Complaint, the Complaint and all further proceedings shall become public unless otherwise ordered by the Supreme Court. Internal and investigative records, including any records received by you that have not become public, shall remain confidential.

In addition, the PRRC, but not the ACJC, suggests the following, final statement:

> If confidentiality is maintained by you there is immunity for any lawsuit that may be filed against you for anything you say or put in writing to the ACJC.

The ACJC felt that such a statement "is potentially misleading, incomplete and subject to misunderstanding and misapplication. The question of immunity attributable to a lawsuit filed against a grievant may be timely and sufficiently raised if and when a complaint may be filed."

B. RPC 1.8(g): The Aggregate Settlement Rule

Background

In Tax Authority, Inc. v. Jackson Hewitt, 187 N.J. 4 (2006), the Court considered whether RPC 1.8(g), known as the aggregate settlement rule, prohibits an attorney who represents more than one client (not in a class action) from entering into an aggregate settlement of the clients' claims without each client consenting to the settlement after its terms are known. RPC 1.8(g) states:

> 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 gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

The Court concluded that the rule "forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement. Before a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them." Tax Authority, 187 N.J. at 21. The Court also recognized that some commentators viewed the rule as impeding settlement in multi-plaintiff litigation. Thus, the Court asked the PRRC to review whether RPC 1.8(g) should be amended to permit litigants to give advance consent to be bound by a settlement approved by a majority of the litigants in non-class mass lawsuits ("advance consent waiver"). Id. at 23.

The PRRC conducted an initial review and reported in 2008 and 2010 that there was no immediate need for any rule change, and that the PRRC would resume consideration after the American Law Institute (ALI) finalized a then-pending draft report on the issue. That occurred in mid-2010, with the ALI's publication of "Principles of the Law of Aggregate Litigation"

("Principles").[3] Ultimately, upon review of Principles and scholarly comments on the subject, discussed below, the PRRC recommends that the question whether to amend New Jersey RPC 1.8 be considered by a task force of experts experienced with these type of cases, who may establish what criteria are needed to determine whether there should be a majority decision that controls an aggregate settlement or whether the procedure should not be allowed under any circumstances.

The ALI's Principles of the Law of Aggregate Litigation (2010)

Most pertinent to the referral is Chapter 3, Topic 3 of Principles (§§ 3.15 – 3.18), which analyzes non-class aggregate settlements. Section 3.15 discusses the differences between class and non-class aggregate litigation. Because the ALI found that no state's rule defines "aggregate settlement," Principles § 3.16, cmt. (a) at 258-59, Section 3.16 offers a definition: "a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent." Principles § 3.16 at 258. Sections 3.17 and 3.18 propose sweeping changes to the aggregate settlement rule.

Section 3.17(a) contains a representation of the aggregate settlement rule in existence in all states, with the modification that informed consent can be satisfied with disclosure of the formula by which the settlement will be allocated. Principles § 3.17, cmt. (a) at 264. According to the ALI, "Confidentiality is particularly challenging under the traditional aggregate settlement rule because each claimant must review all of the settlements including confidential details contained therein. The change to existing law proposed in § 3.17(a) . . . imposes a lower risk of

[3] The ALI drafts and publishes "various restatements of the law and proposals for legal reform. Its projects generally are assigned to one of three broad categories: Restatements, model or proposed legislation, or Principles," the latter of which "assume the stance of expressing the law as it should be, which may or may not reflect the law as it is." ALI Projects – Overview Webpage, www.ali.org/index.cfm?fuseaction=projects.main.

disclosure of confidential information than the traditional aggregate-settlement rule." Principles § 3.17, Reporter's Note at 272.

Section 3.17(b) recommends a new rule that would allow claimants to enter into pre-settlement agreements to be bound by a settlement approved by a substantial majority of the claimants, thereby waiving their right to only be bound by a settlement that they individually approve – that is, advance consent waiver. Principles § 3.17(b) at 262. The ALI explains:

> Subsection (b) rejects the view that individual decisionmaking over the settlement of a claim is so critical that it cannot be subject to a contractual waiver in favor of decisionmaking governed by substantial-majority vote. To that end, subsection (b) proposes a contractual-waiver mechanism for settling aggregate cases, while subsection (a) reaffirms that the aggregate-settlement rule remains the default mechanism for aggregate settlement. [Principles § 3.17, cmt. (b) at 265.]

In the ALI's view, advance consent waiver will facilitate large-scale settlements that may have been impeded by the mechanical application of the aggregate settlement rule to mass lawsuits. According to the ALI, there are numerous reported cases in which "reasonable aggregate settlements—achieved after good-faith, arm's-length negotiations and independent review—cannot go forward because one claimant (or a small number of claimants) objects, [and] the other claimants lose the benefit of the collective representation." Id.

Sections 3.17(b)(1) through 3.17(e) provide specific safeguards for the new alternative to the traditional rule. Principles at 262-64. Section 3.17(b)(1) requires that the power to settle remains with the claimants; (b)(2) specifies that informed consent to the waiver agreement must be provided; (b)(3) requires that the agreement include a procedure for approving a settlement offer and the manner of allocation; and (b)(4) requires that the lawyer inform the claimants that they have the option of insisting upon compliance with the traditional aggregate settlement rule, bars the lawyer from terminating representation for claimants that choose the traditional

approach, and provides notices that must be given when an attorney simultaneously represents claimants under the traditional approach and the new alternative. Id. at 262-63.

Section 3.17(c) limits the advance consent waiver provisions to cases involving "a substantial amount in controversy" and "a large number of claimants." Id. at 263. In the ALI's view, although applying the aggregate settlement rule to multiparty cases involving a small number of claimants "poses few practical difficulties" for their lawyer, in large-scale cases, "strong reasons exist for allowing claimants to waive the formalized protections of the aggregate settlement rule"; namely, "to facilitate large-scale settlements" in such cases. Principles §3.17, cmt. (c)(1) at 268. The ALI suggests mirroring the "numerosity" requirement for the minimum number of claimants in a class action pursuant to federal Rule 23(a)(1), where 40 or more members are generally found numerous, and the $5 million jurisdictional minimum for the amount in controversy specified by the Class Action Fairness Act, 28 U.S.C. §§ 1332(d). Id. Principles Section 3.17(c) also requires that the waiver agreement be approved by a "substantial majority of claimants." Id. at 263. In that respect, the ALI suggests mirroring section 524(g) of the Bankruptcy Code, 11 U.S.C. § 524(g), which requires 75 percent for a substantial majority. Principles §3.17, cmt. (c)(2) at 269.

Sections 3.17(d) and (e), respectively, require that the agreement be both procedurally and substantively fair and reasonable to be enforceable and list facts and circumstances to consider in making those determinations. Principles at 264. Section 3.18 provides a final safeguard, permitting a claimant who waived the aggregate settlement rule to seek judicial review of whether the settlement complied with Sections 3.17(b) and (c) or is unfair under Sections 3.17(d) or (e). Id.

Commentators

"The completion of the [draft] Principles in 2009 spurred a host of reactions from attorneys, judges, and scholars from around the nation," leading to a March 12, 2010, symposium hosted by the George Washington University Law School's James F. Humphreys Complex Litigation Center. Roger H. Trangsrud, Aggregate Litigation Reconsidered, 79 Geo. Wash. L. Rev. 293 (2011). Professors Howard Erichson, Thomas Morgan, Nancy Moore, and Charles Silver participated and published articles focusing on "nonclass aggregate litigation, advocating for and against the use of advance consent waivers that bind plaintiffs . . . ." Id. at 295, 302. Three are critical of advance consent waivers, while one favors them. A brief summary of their views follow.

Professor Erichson and his coauthor offer an in-depth review and critique of the ALI's proposal. Howard M. Erichson and Benjamin C. Zipursky, Consent Versus Closure, 96 Cornell L. Rev. 265 (2011). They conclude that the ALI's rule should not be adopted because it gives "lawyers the power to decide whether, when, and on what terms to settle and the power to allocate settlement funds among clients with conflicting interests." Id. at 300. They also raise concerns about "whether clients' advance consent to aggregate settlements could ever be sufficiently authentic to justify the imposition on clients' rights," and contend that "advance consent should not be permitted because the conflicts inherent in most aggregate settlements are nonconsentable in advance." Id. at 299-311. In their view, under Rule 1.7(b), there is not enough information available in advance to allow waiver of the future conflicts of interest that will arise.

Professor Morgan discusses the interplay between the "lawyer's traditional duty of particularized client representation" and "the goal of efficient case administration," and notes that "[t]he only people with a powerful bias toward particularized representation . . . are the clients whose interests the law purports to protect." Thomas D. Morgan, Client Representation

vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements, 79 Geo. Wash. L. Rev. 734, 740 (2011). Professor Morgan opines that lawyers and judges have a bias pointing toward the efficiency end of the continuum because mass settlements are in the interest of defense lawyers, who want to "get rid of as many pesky lawsuits as possible with a discrete sum of money"; plaintiffs' lawyers, who want "a way to leverage the work in one case over hundreds of cases and thereby swell their own potential return on the time they invest"; and judges, who want "to show progress clearing their dockets." Id. Professor Morgan concludes that because "lawyer and judicial incentives are not aligned with those of clients in making tradeoffs between individual client representation and efficient case administration . . . Rule 1.8(g) provides clients with protection that [Principles] are ultimately too eager to reject." Id. at 752.

In response to a prior draft of Principles, Professor Moore has argued that the ALI does not demonstrate that the traditional aggregate settlement rule significantly impedes settlement of mass lawsuits. The American Law Institute's Draft Proposal To Bypass The Aggregate Settlement Rule: Do Mass Tort Clients Need (Or Want) Group Decision Making?, 57 DePaul L. Rev. 395 (2008). She also opines that, if the ALI's advance consent waiver is permitted, inadequate settlements and unfair allocations will result due to attorney opportunism and the lack of financial incentive for the attorney to ensure horizontal equity among the claimants. Id. at 402, 407. Professor Moore asserts that waivers are not likely to reflect true client preferences because attorneys in mass tort lawsuits will be motivated to persuade potential clients—mostly unsophisticated, inexperienced consumers of legal services—to sign the waiver, and to refuse the representation unless they do so. "In such circumstances, true client preferences and autonomy are respected by allowing clients the freedom to accept or reject an aggregate settlement offer only after ensuring that they have received the information that they need to evaluate its fairness

and adequacy." Id. at 415. Finally, like Professor Erichson, Professor Moore finds it unlikely that claimants can waive their conflicting interests in advance under Rule 1.7(b). Id. at 418-419.

On the other hand, Professor Silver favors advance consent waivers because he views the present rule as constraining creative techniques for dealing with aggregate litigation. Charles Silver, Ethics & Innovation, 79 Geo. Wash. L. Rev. 754 (2011).[4] He argues that participants in the judicial system should be permitted to craft agreements that foster benefits from collective action while minimizing lawyer-client and client-client conflicts that may arise in non-class aggregate litigation, yet the present aggregate settlement rule impedes the ability to achieve those goals. Id. at 754, 759-63. Professor Silver finds insufficient support for the assumptions underpinning the aggregate settlement rule—that "clients and lawyers need fixed rules in this area because they cannot reasonably be expected to solve problems on their own"—that is, he views the rule as a "paternalistic intervention[]" that "prevents clients and lawyers with good incentives from innovating." Id. at 771-72.

The ABA Model Rule and Other States

New Jersey RPC 1.8(g) is modeled after the American Bar Association's Model Rule 1.8(g), which in turn supplements Model Rule 1.7, the general rule on current client conflicts of interest. Model Rule 1.8(g), which remains unchanged since the publication of Principles, "is a prophylactic rule designed to protect clients who are represented by the same lawyer and whose claims or defenses are jointly negotiated and resolved through settlement or by agreement." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (February 10, 2006). According to the ABA, Model Rule 1.8(g) "provides a focused application of" three other Rules:

[4] A previous article authored by Professor Silver and Professor Lynn A. Baker, Mass Lawsuits and the Aggregate Settlement Rule, 32 Wake Forest L. Rev. 733 (1997) (arguing that aggregate settlement rule unnecessarily impedes settlement in mass lawsuits), was cited by the Court in Tax Authority, 187 N.J. at 23, in referring this issue to the PRRC.

> . . . Rule 1.2(a), which protects a client's right in all circumstances to have the final say in deciding whether to accept or reject an offer of settlement or to enter a plea; Rule 1.6, which requires that the lawyer have his clients' consent to reveal information relating to his representation of each of them to all other clients affected by the aggregate settlement or plea agreement; and Rule 1.7, which requires consent of all affected clients when the representation of one or more of them will be materially limited by the lawyer's responsibilities to the others. [Id.]

"By complying with Rule 1.8(g), the lawyer protects his clients and himself, and helps to assure the finality and enforceability of the aggregate settlement or agreement into which those clients have chosen to enter." Id.

It does not appear that any state has changed RPC 1.8(g) based on Principles. See Variations of ABA Model Rules of Prof'l Conduct (comparing ABA Model Rule 1.8 to states' rules) (updated Oct. 21, 2010; last visited Nov. 29, 2011), available at www.americanbar.org/content/dam/aba/migrated/cpr/pic/1_8.authcheckdam.pdf. Before Principles was adopted, however, at least one state adopted a rule that appears to permit less-than-unanimous aggregate settlement agreements provided there is court approval. See Ohio RPC 1.8(g) (effective Feb. 1, 2007) (providing that lawyer "shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless the settlement or agreement is subject to court approval" or each client gives informed written consent; further, "lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement").

Also, at least one local bar has addressed advance consent waivers. In 2009, without discussing the then-draft version of Principles, the Association of the Bar of the City of New York (NYCBA) rejected advance consent waiver, stating that there is no compelling need to permit waiver of the informed consent requirement, "which protects clients against inadequate

settlements and unfair allocations." NYCBA Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-06. The NYCBA stated: "The importance of this protection outweighs any 'burden' a lawyer may face in handling the logistics of obtaining the requisite consent of all jointly represented clients. It also outweighs the benefit of making it easier for joint clients to conclude an aggregate settlement by agreeing to be bound by a majority vote." Id. The NYCBA also noted:

> In most cases, at the outset of an engagement, and indeed at any point prior to an actual settlement negotiation, it may be difficult, if not impossible, for a lawyer to possess, and therefore disclose, enough information to enable the client to understand the risks of waiving the right to approve a settlement following disclosure of all material facts and terms. [Id.]

The NYCBA determined, therefore, that the client "would be in no position to intelligently evaluate the waiver of the right." Id.

PRRC Recommendation

Adoption of the ALI approach would be a material shift from New Jersey's longstanding policy requiring every client to consent to a non-class aggregate settlement. It is unclear to the Committee whether this traditional rule has impeded settlements or how frequently judges and attorneys involved in mass litigation face this issue. This is a complex subject that has generated diverging viewpoints. The Committee observes in addition to the option of leaving the aggregate settlement rule intact as it now stands, there are several other options available, including:

- Adding a definition of "non-class aggregate settlement" to the aggregate settlement rule (Principles § 3.16);
- modifying the aggregate settlement rule so that informed consent can be achieved by disclosure of the formula by which the settlement will be allocated (Principles § 3.17(a));
- amending the rule to permit "advance consent waiver," that is, allow claimants to enter pre-settlement agreements to be bound by a settlement approved by a substantial majority of the claimants (Principles §§ 3.17(b) – (e)); and
- permitting less-than-unanimous aggregate settlement agreements conditioned on court approval (Principles § 3.18, and consistent with Ohio RPC 1.8(g)).

The Committee members, however, do not believe they are in a position to recommend whether to amend RPC 1.8(g). Rather, a full understanding of New Jersey-specific concerns that may be impacted by adoption of any variation of the ALI's Principles would benefit from the input of stakeholders with expertise in this area of civil practice, who could better evaluate the competing interests. The PRRC thus suggests that the Court consider appointing a special task force of experts to identify the pertinent issues and submit recommendations to the Court. Such a committee might include judges, judiciary staff, and attorneys whose practices primarily involve these types of mass tort cases in New Jersey. See, e.g., Judiciary Mass Tort Information Center Homepage, at www.judiciary.state.nj.us/mass-tort/index.htm.

IV. OUT-OF-CYCLE ACTIVITY

A. RPC 1.6: Considering a Wrongful-Incarceration Exception to Client Confidentiality

The Court asked the Committee to consider whether RPC 1.6 should be amended to create an exception to a lawyer's duty to maintain confidentiality of information relating to the representation of a client, when the information demonstrates that an innocent person has been convicted of a crime with significant penal consequences ("wrongful-incarceration exception"). In a letter dated May 16, 2011, the Committee reported to the Court on an out-of-cycle basis so it could consider taking further action at that time. The report provided an overview of the relevant rules and their history and summarized the positions and proposals of various stakeholders that the Committee had invited to comment on the matter, including: the Supreme Court Criminal Practice Committee, Division of Criminal Justice of the Office of the Attorney General, Office of the Public Defender, the New Jersey State and County Bar Associations, and others. The report set forth practical concerns and issues the Committee believed should be addressed by a task force appointed by the Court, comprised of members with expertise in criminal law who would be better able to assist in weighing the competing interests at stake. The PRRC concluded that as a general proposition, it is appropriate to consider a wrongful-incarceration exception because the wrong it seeks to remedy, a significant penal consequence, is so great that it warrants an inquiry to determine if it should be rectified. The Committee reported, however, that it could not propose amendments to RPC 1.6 until the myriad issues are addressed, which ultimately will require the Court to balance the value of client confidentiality as against the interest in correcting the grave injustice suffered by innocent persons penalized for crimes they did not commit.

The Administrative Director of the Courts informed the Committee that the Court decided to assemble a task force to conduct an inquiry and make appropriate recommendations.

V. HELD MATTERS

As of the date of this report, there are no referrals pending before the Committee.

Respectfully submitted,

PROFESSIONAL RESPONSIBILITY RULES COMMITTEE[5]

Honorable Walter R. Barisonek, A.J.S.C. (ret.), Chair of the PRRC

Honorable Alan B. Handler, Associate Justice (ret.), Chair, Advisory Comm. on Judicial Conduct

Cynthia A. Cappell, Esq., Chair, Committee on Attorney Advertising

Daniel R. Hendi, Esq., Director and Counsel, Lawyers Fund for Client Protection

Melville D. Lide, Esq., Appointed Member

Charles M. Lizza, Esq., Chair, Committee on the Unauthorized Practice of Law

Steven C. Mannion, Esq., Chair, Advisory Committee on Professional Ethics

Edwin J. McCreedy, Esq., Chair, IOLTA Fund of the Bar of New Jersey

Louis Pashman, Esq., Chair, Disciplinary Review Board

Sherilyn Pastor, Esq., Appointed Member

Steven M. Richman, Esq., New Jersey State Bar Association

Committee Staff:
Holly Barbera Freed, Esq., Court Executive, Supreme Court Clerk's Office
Steven Klutkowski, Esq., Staff Attorney, Supreme Court Clerk's Office

[5] This report is the result of deliberations that spanned the rules cycle from January 2010 to January 2012. The current members of the Committee wish to acknowledge the years of dedicated service by Kenneth J. Bossong, Esq., who retired in mid-2011 from his position as Director and Counsel of the Lawyers Fund, and Joseph A. Bottitta, past President of the New Jersey State Bar Association and a long-time designee member. The Committee also thanks former Supreme Court Associate Justice Peter G. Verniero, for his leadership as its Chair from September 1, 2009 through August 30, 2010, when he was appointed to serve as Vice Chair of the Supreme Court Civil Practice Committee.

TABLE OF APPENDICES

A. June 2010 letter from Richard H. Steen, Esq., NJSBA, enclosing report and proposed amendments to Rule 1:21-1(a)

B. February 2011 report of Committee on Attorney Advertising re: Rule 1:21-1(a)

C. February 2011 report of Advisory Committee on Professional Ethics re: Rule 1:21-1(a)

D. April 2011 report of PRRC Subcommittee on Rule 1:21-1(a)

E. October 2011 report of Unauthorized Practice of Law Committee on RPC 5.5

F. June 2010 report of Advisory Committee on Judiciary Conduct on Rule 2:15-20

NEW JERSEY STATE BAR ASSOCIATION

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RECEIVED
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PRRC
SUPREME COURT
OF NEW JERSEY

June 28, 2010

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GLENN A. GRANT, J.A.D.
ACTING ADMINISTRATIVE DIRECTOR

Honorable Stuart Rabner
Supreme Court of New Jersey
Hughes Justice Complex
PO Box 023
Trenton, NJ 08625

Re: The Bona Fide Office Rule

Dear Chief Justice Rabner:

I respectfully request that the enclosed report and proposed amendment to Rule 1:21-1(a) (the "bona fide office" rule) be considered by the Supreme Court, or the appropriate Court rules committee.

The proposal was approved last week by the New Jersey State Bar Association Board of Trustees and was developed by a joint subcommittee of our Solo and Small Firm Section and Professional Responsibility and Unlawful Practice Committee. The NJSBA believes that the current rule governing bona fide offices does not reflect the realities of law practice today, and imposes significant financial burdens on lawyers, particularly solo, part-time and small firm practitioners. The net result is that the rule erects a barrier to those who wish to practice law in a cost-effective manner and deliver reasonably priced legal services to clients of moderate means.

Our proposal for a rule amendment seeks to add flexibility to the bona fide office rule, without sacrificing the important requirements that serve as the rule's foundation, such as accessibility to clients and courts, and the safeguarding of records and files. The amended rule would eliminate the current requirement for a fixed office location, in favor of functional tests that require a lawyer to structure a practice in a manner that stresses accessibility and responsiveness.

New Jersey Law Center • One Constitution Square • New Brunswick, New Jersey 08901-1520
PHONE: 732-249-5000 • FAX: 732-249-2815 • EMAIL: president@njsba.com • www.njsba.com

I thank you for considering this proposal and I look forward to discussing it with you. If you need further information, or clarification on any point set forth in the report or proposed rule, please do not hesitate to contact me.

Respectfully,

Richard H. Steen
President

c: Honorable Glenn A. Grant
Susan A. Feeney
Mark Neary
Carol Johnston
David H. Dugan, III
Craig M. Aronow
Angela C. Scheck

New Jersey State Bar Association Position: Bona Fide Office Rule

In early 2010, the chairs of the NJSBA's Solo and Small Firm Section, and Professional Responsibility and Unlawful Practice Committee agreed to appoint a joint subcommittee charged with studying the bona fide office requirement of Rule 1:21-1(a), and recommending any changes that it deemed appropriate in light of recent developments in technology and law firm practice management. The initial work of the subcommittee pre-dated the issuance of Joint Opinion 718 (Advisory Committee on Professional Ethics)/41 (Committee on Attorney Advertising)concerning virtual law offices.

The joint subcommittee produced the following report and proposed rule amendments which were discussed and endorsed by the NJSBA Board of Trustees at a June 18, 2010 meeting.

Report of Joint Subcommittee on the Bona Fide Office Rule

We began our task by identifying the underlying policy objectives that the bona fide office rule was intended to advance, then addressing the most effective way to accomplish those objectives to honor the reasonable expectations of clients in the digital age.

The rule's apparent purpose is to assure that attorneys are promptly accessible and responsive to clients, judicial tribunals, government agencies and bar regulatory authorities. We asked ourselves the simple question, is a fixed, physical office location, regularly staffed during normal business hours, the only reliable way to accomplish these goals? After considerable discussion, our unanimous answer was no.

We do not at all mean to suggest that the "traditional" law office is a relic of a bygone era. It remains a viable choice for attorneys and firms who believe that this practice model best reflects their professional style and identity, and most effectively meets the needs of their clientele. But for many attorneys and their clients, mobile telephones, personal digital assistants (e.g., BlackBerries, I-Phones), e-mail and video conferencing offer opportunities for communication and information-gathering far more suited to their needs than a physical office location that the attorney does not require to perform most of the daily tasks of lawyering, and that busy, far-flung clients may have no interest in visiting.

The Subcommittee agrees that attorneys may need to designate physical locations for specific purposes, such as Office of Attorney Ethics audits and service of process. For the day-to-day servicing of clients, however, we could discern no persuasive policy basis for continuing the requirement of a "bona fide office," as presently defined. We note in passing that the current rule undoubtedly increases the cost of legal services to the public, and is a deterrent to lawyers seeking to provide legal services to the large segment of the population whose financial circumstances make it difficult to retain a lawyer or gain access to the legal system. In our view, that would not be reason in itself to dispense with the rule if were necessary to protect clients' interests but, for the reasons expressed above, we do not believe that is the case, at least not any longer.

The Subcommittee therefore proposes an amendment to Rule 1:21-1(a), annexed to this report, that places front and center, more so than even the current rule, the goals of attorney accessibility and responsiveness that remain valid as ever, while offering attorneys flexibility in how those objectives may be achieved. The proposed rule establishes a functional test that we are confident can be understood by attorneys, and enforced by the judiciary. Should the Subcommittee's proposal be accepted, there are other Rules referring to firm addresses that also would require revision that are beyond the scope of the Subcommittee's charge.

Respectfully submitted,

David B. Rubin, Esq., Chair

Randall P. Brett, Esq.

Frederick J. Dennehy, Esq.

Irvin M. Freilich, Esq.

Paul B. Macchia, Esq.

Larry S. Raiken, Esq.

Steven E. Slaven, Esq.

1:21-1. Who May Practice; Appearance in Court

(a) Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and complies with the following requirements.

(i) An attorney need not maintain a fixed, physical location, but must structure his or her practice in such manner as to assure prompt and reliable communication with, and accessibility by clients, other counsel, and judicial or administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court.

(ii) ~~, except as provided in paragraph (d) of this Rule, maintains a *bona fide* office for the practice of law. For the purpose of this section, a *bona fide* office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time. For the purpose of this section, a *bona fide* office may be located in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter "a United States jurisdiction"). An attorney who practices law in this state and fails to maintain a *bona fide* office shall be deemed to be in violation of RPC 5.5(a).~~ An

attorney who is not domiciled in this State ~~and does not have a *bona fide* office in this State~~, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in the preceding subsection. ~~all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court.~~ The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

(iii) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(i).

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- (iv) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.

A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to this action or the guardian of the party; or (2) has been admitted to speak *pro hac vice* pursuant to R. 1:21-2; (3) is a law student or law graduate practicing within the limits of R. 1:21-3; or (4) is an in-house counsel licensed and practicing within the limitations of R. 1:27-2.

Attorneys admitted to the practice of law in another United States jurisdiction may practice law in this state in accordance with RPC 5.5(b) and (c) as long as they maintain a bona fide office.

No attorney authorized to practice in this State shall permit another person to practice in this State in the

attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

(b) Appearance. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action. An attorney admitted in another jurisdiction shall not be deemed to be making an appearance in this State by reason of taking a deposition pursuant to R. 4:11-4.

(c) Prohibition on Business Entities. Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1A (professional corporations), R. 1:21-1B (limited liability companies), R. 1:21-1C (limited liability partnerships), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:6-2(a) (pleas in municipal court), R. 7:8-7(a) (presence of defendant in municipal court) and by R. 7:12-4(d) (municipal court violations bureau), a business entity other than a sole proprietor shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(d) Federal Government Agencies. Staff attorneys employed full time by agencies of the federal government that have an office in New Jersey may represent the interests of that agency in federal and state courts in New Jersey without complying with subsection (a)(i) ~~maintaining a bona fide law office in this state~~.

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COMMITTEE ON ATTORNEY ADVERTISING

TO: Professional Responsibility Rules Committee

FROM: Committee on Attorney Advertising
Carol Johnston, Secretary to the Committee

DATE: February 17, 2011

RE: Supreme Court Remand to Professional Responsibility Rules Committee
Bona Fide Offices and Potential Revision of Rule 1:21-1(a)

The Supreme Court denied the petition for review of Advisory Committee on Professional Ethics Joint Opinion 718 / Committee on Attorney Advertising Joint Opinion 41, 200 N.J.L.J. 54 (April 5, 2010), but referred the record in the matter to the Professional Responsibility Rules Committee (PRRC). Presumably, the Court also seeks a response to the request by the New Jersey State Bar Association to revise the bona fide office rule of Rule 1:21-1(a). The Court directed the PRRC to consult with the Advisory Committee on Professional Ethics and the Committee on Attorney Advertising and "submit a report to the Court with recommendations on whether Rule 1:21-1(a) should be amended to permit the use of a virtual office." The Committee on Attorney Advertising hereby submits its recommendation.

Rule 1:21-1(a) requires that a New Jersey attorney maintain a bona fide office for the practice of law. The Rule defines a bona fide office as:

> a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

[R. 1:21-1(a).]

In the Joint Opinion, the Committees noted that a "virtual office" cannot be a bona fide office since the attorney generally is not present at a "virtual office" during normal business hours but will only be present when he or she has reserved the space. The purpose of the bona fide office rule is to ensure that attorneys are available and can be found by clients, courts, and adversaries.

See Committee on Attorney Advertising Opinion 19, 138 N.J.L.J. 286, 3 N.J.L. 1821 (September 19, 1994).

The Committee on Attorney Advertising does not take a position on the definition of a bona fide office. The Committee's role is to enforce the rules governing attorney communications and a revision to the bona fide office rule does not directly affect attorney communications.

The Committee notes that Attorney Advertising Guideline 1 provides that "[i]n any advertisement by an attorney or law firm, the advertisement shall include the bona fide street address of the attorney or law firm." The Committee has construed this requirement broadly, requiring attorneys to include the street address of the attorney or law firm not only on pure advertising but also on all communications, including letterhead, business cards, and the like. This information reinforces the requirement that an attorney practice law from a bona fide office and permits the Committee to readily communicate with an attorney whose communications do not comply with the rules governing attorney advertising.

Please do not hesitate to telephone if the Committee on Attorney Advertising can be of further assistance.

C.J.

CJ/hsr

c: Mark Neary, Clerk, New Jersey Supreme Court
Holly Barbera Freed, Secretary, Professional Responsibility Rules Committee
Cynthia A. Cappell, Chair, CAA
Committee on Attorney Advertising Members

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

TO: Professional Responsibility Rules Committee

FROM: Advisory Committee on Professional Ethics
Carol Johnston, Secretary to the Committee

DATE: February 17, 2011

RE: Supreme Court Remand to Professional Responsibility Rules Committee
Bona Fide Offices and Potential Revision of Rule 1:21-1(a)

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Rule 1:21-1(a) requires that a New Jersey attorney maintain a bona fide office for the practice of law. The Rule defines a bona fide office as:

> a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

[R. 1:21-1(a).]

In the Joint Opinion, the Committees noted that a "virtual office" cannot be a bona fide office since the attorney generally is not present at a "virtual office" during normal business hours but

will only be present when he or she has reserved the space. The purpose of the bona fide office rule is to ensure that attorneys are available and can be found by clients, courts, and adversaries. See Committee on Attorney Advertising Opinion 19, 138 N.J.L.J. 286, 3 N.J.L. 1821 (September 19, 1994).

In its discussion of whether the bona fide office rule should be amended, the ACPE agreed that clients need to be able to find their attorneys. The Committee also agreed that it is important that there be a place where attorneys can be served. But the Committee was divided on whether the bona fide office rule should be retained in its present form.

The Committee members urging retention of the current bona fide office rule found that the requirement that an attorney practice law from a real office with a known street address that can be accessed by the client during normal business hours provides reassurance to clients of the attorney's accessibility. In accordance with the Court Rule, if the attorney is not at the office at the time the client visits, then a responsible person acting on the attorney's behalf would be present and able to address the client's needs. The client would know exactly where to find the attorney (or responsible person acting on the attorney's behalf).

The Committee members urging a revision of the rule found that the goal of attorney accessibility is not necessarily achieved by the requirement that attorneys practice law from a bona fide office. The 2004 amendment to the Court Rule permitting attorneys to operate from an office outside New Jersey has already diminished the accessibility of attorneys. Further, attorneys who do maintain a bona fide office in New Jersey may, for a variety of reasons, not be accessible to clients at all, or even most, times. Given modern technology, however, attorneys can be available to communicate with clients electronically without regard to a bona fide office. Nevertheless, it was felt that there is a need for a rule that requires attorneys to disclose how the attorney may be contacted or served and where client files will be kept. In short, these Committee members felt that the continuing necessity of a bona fide office rule is questionable, so long as reasonable safeguards are put in place.

In sum, the entire Committee agreed that it is important that attorneys are accessible to clients, adversaries, and courts and there is a place attorneys can be served. It disagreed whether a bona fide office rule is the best way to accomplish these goals.

Please do not hesitate to telephone if the Advisory Committee on Professional Ethics can be of further assistance.

CJ/hsr

c: Mark Neary, Clerk, New Jersey Supreme Court
Holly Barbera Freed, Secretary, Professional Responsibility Rules Committee
Steven C. Mannion, Chair, ACPE
Advisory Committee on Professional Ethics Members

REPORT OF SUBCOMMITTEE ON VIRTUAL OFFICE

An inquiry was made as to whether a "virtual office" could qualify as a *bona fide* office within the meaning of *Rule* 1:21-1(a). The inquiry resulted in the issuance of a joint opinion by the Advisory Committee on Professional Ethics (Opinion 718) and the Committee on Advertising (Opinion 41). The joint opinion defined a "virtual office" as

> ... a type of time share arrangement whereby one leases the right to reserve space in an office building on an hourly or daily basis.

The opinion concluded that such an arrangement did not satisfy *Rule* 1:21-1(a) because an attorney would be present only when he/she had reserved space, and because a jointly used receptionist would not satisfy the requirement of the presence of one who could act on the attorney's behalf.

The opinion further concluded that a "home office" could satisfy the *Rule*. The opinion also dealt with issues concerning satellite offices and letterhead which are not germane to our inquiry.

The Supreme Court referred the matter to the PRRC by Order dated August 5, 2010, directing that the Committee "...in consultation with the Advisory Committee on Professional Ethics and the Advisory Committee on Attorney Advertising ...submit a report to the Court with recommendations on whether *Rule* 1:21-1(a) should be amended to permit the use of a virtual office."

The Committees with whom we were directed to consult submitted reports, both dated February 17, 2011, which have been distributed to the full Committee. The ACPE reported that the committee was divided on whether the *Rule* should be kept in its present form, but thought there should be some rule. The COAA elected not to take a position on what should be the definition of a *bona fide* office. They did note that their Guideline 1 requires any advertisement to include a "*bona fide* street address," admitting that this requirement has been "construed broadly." Both committees stressed the need for a means to communicate effectively with an attorney.

Though the referral to our committee follows the Court's consideration of whether what might be called "flex space" can meet the *Rule*, the subcommittee believes the inquiry should be broader. The term "virtual office" is used in many circles to describe an internet practice, and specifically not a flex space. In fact, the ABA is considering the issue as a part of its "Commission on Ethics 20/20" and, there, the focus is on internet practice.

The subcommittee is of the opinion that whatever form the *Rule* takes, it should retain requirements for the ability of clients and courts (and court-related agencies) to effectively communicate with an attorney. We feel the *Rule* should take into account the technological changes that have occurred, and question whether the "bricks and mortar" concept of a

bona fide office remains viable today.

During the course of the litigation that followed the joint opinion, the New Jersey State Bar Association formed a committee consisting of members of their Solo and Small Firm Section and Professional Responsibility and Unlawful Practice Committee. Their report was approved by the Trustees and submitted by the President to the Supreme Court. They proposed the following form for the *Rule:*

> An attorney need not maintain a fixed, physical location, but must structure his or her practice in such a manner as to assure prompt and reliable communication, with, and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event service cannot be effectuated pursuant to the appropriate Rule of Court.

The subcommittee feels this proposal fairly meets the "communication" requirement that is needed, and may, in fact, strengthen the *Rule* because it puts the onus on communication rather than location. It should emphasize the need for accessibility and availability. The maintenance of a *bona fide* office will, of course, continue to meet the requirements of availability and accessibility. We also conclude that trying to define terms such as "virtual office" or "*bona fide* office" becomes counterproductive. The issue to be addressed is the ability of clients, courts, and adversaries, among others, to meaningfully reach and communicate with the attorney, and when required, for physical access, such as for files or for purposes of service of process. We would add only that there needs to be a requirement that the attorney comply with such registration rules as may be imposed by agencies like the Client's Security Fund, Office of Attorney Ethics, and IOLTA. The title of the *Rule* might be changed from "*Bona Fide* Office" to "Attorney Access and Availability."

Hon. Alan B. Handler, Chair
Edwin J. McCreedy
Steven M. Richman

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW
Appointed by the Supreme Court of New Jersey

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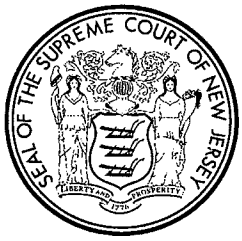


October 20, 2011

Professional Responsibility Rules Committee
New Jersey Supreme Court Clerk's Office
R. J. Hughes Justice Complex
Trenton, NJ 08625

Re: Amendments to Rule of Professional Conduct 5.5

Dear Chair and Committee Members:

In March 2011, the Committee on the Unauthorized Practice of Law (UPL Committee) submitted a proposed revision of Rule of Professional Conduct 5.5 to the Professional Responsibility Rules Committee (PRRC). The PRRC responded informally, noting that its intent was to broaden practice of law in New Jersey by out-of-state lawyers and acknowledging that it inadvertently omitted a requirement that such New Jersey practice be temporary or occasional. The PRRC indicated that it sought to bring New Jersey's Rule more in line with Model Rule 5.5, which permits practice by an out-of-state lawyer "on a temporary basis" when the legal services "are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter." The UPL Committee reconsidered its position and hereby presents a revised recommendation.

By way of background, in 2010 the Court amended Rule of Professional Conduct 5.5 to permit a lawyer admitted in a state other than New Jersey to engage in the lawful practice of law in New Jersey when the lawyer "associates in a matter with a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter." RPC 5.5(b)(3)(iv). After the amendment was enacted, the UPL Committee requested guidance from the Court. The Committee noted that new RPC 5.5(b)(3)(iv) negated the holding of the Court in In re Jackman, 165

N.J. 580 (2000), which held that an out-of-state lawyer in a New Jersey law firm may not provide legal advice to New Jersey clients in New Jersey transactional matters. The UPL Committee noted that under newly-amended RPC 5.5(b)(3)(iv), an out-of-state lawyer merely needs to join a New Jersey law firm – thereby "associating" with New Jersey lawyers – to routinely provide legal advice to New Jersey clients in New Jersey matters. The Court responded by stating it had no intention of overturning Jackman and directed the Committee to propose a clarifying amendment to the PRRC for its consideration and recommendation to the Court.

The UPL Committee has two concerns about RPC 5.5(b)(3)(iv). The first concern is that the amended Rule provides no client-based, matter-based, or time-based limitation on New Jersey practice of law by an out-of-state lawyer. Other subsections of RPC 5.5(b)(3) have such limitations. RPC 5.5(b)(3)(i) limits the New Jersey practice of an out-of-state lawyer to transactional matters when the client is "an existing client in a jurisdiction in which the lawyer is admitted to practice" and the matter is related to the jurisdiction where the lawyer is admitted to practice. Similarly, RPC 5.5(b)(3)(v) limits the New Jersey practice of an out-of-state lawyer to matters "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." RPC 5.5(b)(3)(v) also provides a time-based limitation, in that the practice must be "occasional."

The UPL Committee's initial proposed revision reinserted client-based and matter-based limitations to RPC 5.5(b)(3)(iv). It proposed that an out-of-state lawyer's practice in New Jersey under the Rule be limited to matters that arise out of representation of existing out-of-state clients and relate to the jurisdiction where the lawyer is admitted. On learning that the PRRC intentionally rejected client-based and matter-based limitations, but is open to time-based limitations, the UPL Committee reconsidered its recommendation.

The second concern of the UPL Committee focuses on the bare requirement of "associating" with a New Jersey lawyer. A loose "association" of the out-of-state lawyer with a New Jersey lawyer condones the conduct prohibited in Jackman and exposes New Jersey clients to uninformed out-of-state lawyers handling matters without substantive involvement by a New Jersey lawyer. Substantive involvement of a New Jersey lawyer in the matter should foster compliance with New Jersey practices, procedures, and ethical obligations.

The UPL Committee submits that the Rule should be revised to address the scenario in Jackman and a similar scenario, which recently was brought to the ethics hotline. In Jackman, the out-of-state lawyer was employed by a New Jersey law firm (thereby "associating" with New Jersey lawyers) and, on a routine and recurring basis, provided legal services to New Jersey clients on New Jersey matters. The hotline was recently presented with a similar scenario, in which a New York lawyer formed a firm in New York to pursue consumer debt cases in both New York and New Jersey. The New York lawyer would hire a recently-admitted New Jersey lawyer as "of counsel" to his firm. Through this "of counsel" association with the young New Jersey lawyer, the New York lawyer would provide ongoing legal services to New Jersey clients in New Jersey matters. In both of these scenarios, the

"association" with the New Jersey lawyer is almost illusory and the out-of-state lawyer provides on-going and recurring legal services to New Jersey clients without being admitted to the New Jersey bar.

The UPL Committee decided that these concerns would be addressed by a revision to the Rule that sets a time-based limit, thereby prohibiting on-going and recurring New Jersey practice, and requires the "association" with the New Jersey attorney to be more substantive. Hence, inclusion of a requirement that the practice be "occasional" or "temporary" and that the "association" be in the form of "active participation" in the matter by the New Jersey attorney (as the Model Rule requires) would address the concerns of the UPL Committee.

The proposed revision would read:

> **(iv)** the lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with a lawyer admitted to the Bar of this State who actively participates in the matter and who shall be held responsible for the conduct of the out-of-State lawyer in the matter . . . .

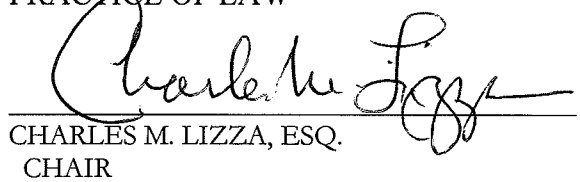
This proposal is aligned with the Model Rules, accedes to the intent of the PRRC to broaden multijurisdictional practice, but emphasizes that the practice in New Jersey cannot be on-going and recurring and the involvement of the New Jersey attorney must be substantive.

The UPL Committee further suggests that an official comment to the Rule may be helpful to New Jersey practitioners who may partner with out-of-state lawyers under this Rule. Specifically, the UPL Committee recommends that a comment highlighting the personal responsibility of the New Jersey attorney in the matter, including potential liability for malpractice by the out-of-state attorney, be included.

Thank you for your consideration of this matter.

Respectfully submitted,

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW



CHARLES M. LIZZA, ESQ.
CHAIR

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

MEMORANDUM

To: Professional Responsibility Rules Committee
From: Advisory Committee on Judicial Conduct
Subject: ACJC Confidentiality
Date: June 25, 2010

We have your request for a status update covering the position of the ACJC concerning issues of confidentiality which was prompted by the Supreme Court's opinion in the matter of R.M. v. Supreme Court of New Jersey, District XIII Ethics Committee, and Office of Attorney Ethics.

Pursuant to your request, enclosed is an analysis and statement of the ACJC in respect of its rule and practice of confidentiality.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

MEMORANDUM

To: Professional Responsibility Rules Committee
From: Advisory Committee on Judicial Conduct
Subject: ACJC Confidentiality
Date: June 25, 2010

On October 19, 2005 the Supreme Court delivered its decision in a case entitled R.M. v. Supreme Court of New Jersey, District XIII Ethics Committee, and Office of Attorney Ethics. The Court held that the confidentiality rule governing attorney ethics matters violated a grievant's rights to freedom of speech, and it directed the Professional Responsibility Rules Committee to draft a revision of the rule. Separately, the Court directed the same committee to take a look at the ACJC confidentiality rule to see if it also needed revision.

R.M. v. Supreme Court

The plaintiff was a grievant in an attorney ethics matter. The grievance form that she filled out contained language informing her that she had to keep all communications concerning the grievance confidential "until and unless a complaint is issued and served." As the matter progressed, the attorney who was the subject of the complaint admitted certain acts of misconduct. The District Ethics Committee decided that the violations were minor and authorized "diversion," which meant that the attorney would not be disciplined but would have to, as appropriate, participate in a rehabilitation program or undergo psychological consulting or satisfactorily complete a course of study. Upon fulfilling the required condition, the ethics matter would be dismissed.

The District Ethics Committee informed the grievant that the matter remained confidential pursuant to Rule 1:20-9(a), which provided that "the disciplinary matter and all written records received and made pursuant to these rules shall be confidential" prior to the filing and service of a formal complaint. The only exceptions are if the respondent attorney waives or breaches confidentiality or if the matter involves a criminal charge or a disciplinary matter from another state, or if some other person or entity has to be informed in order to protect the public or the administration of justice or the legal profession, or the Supreme Court has granted an emergent disciplinary application, or the matter has become one of common public knowledge.

The grievant then brought suit against the Supreme Court, the District Ethics Committee, and Office of Attorney Ethics, alleging that the rule violated her rights of free speech by restricting her ability to discuss the grievance. The grievant wanted to publicize the fact of her grievance, the attorney's admissions, and the diversion agreement.

The Supreme Court held that the confidentiality rule violated the freedom of speech provisions of the federal and state constitutions and that the grievant was free to discuss her grievance, the ethics proceedings, and the outcome of the ethics proceedings. The Court referred the matter to the Professional Responsibility Rules Committee to draft amendments to the ethics rules.

To ensure that the confidentiality of ACJC matters would be consistent with the confidentiality of attorney ethics matters, the Court also asked the Professional Responsibility Rules Committee to undertake a review of those confidentiality provisions, as contained in Rule 2:15-20.

History of ACJC Confidentiality

For the first nine years of the Committee's existence, from 1974 to 1983, there was only one rule regarding confidentiality, and that was Rule 2:15-4(c), which provided:

> All records of the Committee shall be filed and maintained in such principal office of the Committee. All papers filed with and proceedings before the Committee shall be confidential unless and until the Committee files with the Supreme Court a recommendation for the filing of a complaint under N.J.S. 2A:1B-3[the removal statute], and the Court issues orders issuance of such complaint.

In 1983, the Court kept Rule 2:15-4(c) but added Rule 2:15-20, which provided in its entirety:

> The record before the Committee shall be confidential and shall not be available to any person except in the proper discharge of his official duties, provided however that the Committee and its designated staff personnel shall have access to it in the performance of their duties, and provided further that, if a Judge who is the subject of a complaint requests it, the charge, the proceeding of the Committee thereon, and the action of the Committee with respect to the charge, shall be made public.
>
> Upon the issuance of a complaint for removal or an order to show cause, the presentment of the Committee, together with any briefs filed pursuant to an order of the Court, shall be made public. The entire record in such a matter shall, unless the Court otherwise directs, be made public upon the entry of a final order imposing

discipline.

The primary change effected by the new rule cited above was to bring confidentiality to a close not only in removal cases, upon the Supreme Court's filing of a complaint for removal, but also in non-removal cases, upon the Supreme Court's issuance of an order to show cause scheduling oral argument. In this respect, Rule 2:15-20 was inconsistent with the unchanged Rule 2:15-4(c), which continued to provide for cessation of confidentiality only upon the Court's issuance of a complaint for removal.

In 1995, after the Supreme Court acted on the recommendation of the Michels Commission and decided to open attorney ethics proceedings by bringing an end to confidentiality in those proceedings at the time a formal complaint issued, the Court established an ad hoc committee to make recommendations concerning the confidentiality of ACJC proceedings. That committee eventually recommended that no change be made to the confidentiality rule for the ACJC, i.e., that formal hearings continue to be conducted in private and that a matter become public only when the Supreme Court issues a complaint for removal or an order to show cause regarding lesser discipline. However, the Court decided otherwise, and in 1997 applied to the ACJC the same principle that it had applied to attorney ethics proceedings. Since then, Rule 2:15-20 has provided as follows in its entirety:

> (a) Except as provided in paragraphs (b) and (c) below and in Rule 2:15-25 (Referral for Administrative Action), the record before the Committee shall be confidential and shall not be available to any person except in the proper discharge of official duties. In all circumstances, prehearing conferences, deliberations of the Committee, and information subject to a protective order shall remain confidential.
>
> (b) If the Committee files a formal complaint against the judge, the complaint and all further proceedings thereon shall be public except that the Committee may apply to the Supreme Court for permission to retain confidentiality in a matter involving special circumstances, such as when the Committee determines that the privacy interests of a witness or other person connected with the matter outweigh the public interest in the matter.
>
> (c) If a judge who is the subject of a grievance requests it, the charge, the proceeding of the Committee thereon, and the action of the Committee with respect to the charge shall be made public.

In the same revision, Rule 2:15-4(c) was amended to require confidentiality "except as otherwise provided in these Rules."

Comparison of ACJC and Attorney Ethics Confidentiality

In essence, the respective rules for attorney ethics and for ACJC matters require the same thing, viz., that a matter remain confidential if a formal complaint does not issue. Although this Committee does not have mechanisms such as diversion available to it, it does issue private discipline such as letters of caution and admonition, as well as private reprimands. Had the grievant who was the plaintiff in the R.M. case been a grievant in an ACJC matter that resulted in a private reprimand, she could presumably have brought a similar action against the ACJC and the Supreme Court for denying her right to free speech.

However, there is a major difference in terms of practice between what the Office of Attorney Ethics had been doing and what ACJC staff does. As outlined on page 3 of the Supreme Court's Opinion in R.M., the attorney ethics grievance form went into great detail regarding a grievant's obligation of confidentiality, and the information sent to the grievant after the attorney accepted diversion emphasized that the matter remained confidential pursuant to Rule 1:20-9(a).

> [u]nder Supreme Court Rule 1:20-9(a), once you file this grievance form you are REQUIRED thereafter to keep all communications about this ethics matter CONFIDENTIAL during the investigation until and unless a complaint is issued and served. Only at that time does confidentiality end and the matter become public. This investigative confidentiality does not prevent you from discussing the facts underlying your grievance with, or reporting them to, any other person or agency. However, during the investigation you may not disclose the fact that you have filed an ethics grievance to persons other than members of the attorney disciplinary system, except to discuss the case with other witnesses or to consult an attorney.

On the other hand, the ACJC staff informs grievants only once of the confidentiality requirement, and that appears as the standard final paragraph of a letter of acknowledgment. That paragraph reads in its entirety: "I have marked this letter confidential because, by law, the Committee's activities are such unless and until the Committee issues a formal complaint against a judge." The reference is to the fact that letters of acknowledgment are stamped confidential at the top, as are all letters to grievants. However, the cited sentence is the only advice of confidentiality provided to grievants.

From time to time over the years, grievants have asked the ACJC if the confidentiality provision prohibits their publicizing their complaints, and they have been told simply that the immunity they have under Rule 2:15-22(b) applies only to communications made to the Committee or its staff. The grievants seem to have been satisfied with that response.

By the same token, the ACJC have received calls from grievants who saw the confidentiality notice, such as it is, and who objected to being "muzzled." Such callers usually threaten to tell

the press, especially 60 Minutes, everything. The typical response is to ask why they would bother to make a complaint if they planned to compromise any investigation by making it public. However, the grievants are never advised that they are prohibited from disclosing the fact that they filed a grievance with the ACJC.

Private Discipline

When the Committee issues a letter of caution or of admonition or a private reprimand to a judge, we do not provide the grievant with a copy. Instead, we inform the grievant that "the Committee has decided to deal privately with Judge Jones, emphasizing to him the importance of [whatever it was that the judge should have done, such as treating with courtesy and dignity all those who become before him in his official capacity]." That letter to the grievant is stamped confidential, but no mention of confidentiality appears in the body of the letter. It is possible that a grievant receiving such a letter could claim that the confidential stamping and the existence of Rule 2:15-20(b) operate to deprive him or her of the right to freedom of speech under the federal and state constitutions, but the factual differences between the Office of Attorney Ethics and ACJC practice are marked.

Along the same lines, it should be noted that the Court in the R.M. v. Supreme Court of New Jersey case specifically decided that the contents of the diversion agreement were not to be disclosed and that documents obtained during the proceedings were not to be released except as provided for in the rule. The import is that the grievant in the case was entitled to tell the public everything she knew but was not entitled to obtain information from OAE beyond what she already had. By the same logic, an ACJC grievant would not be entitled to get anything further than what such grievants already receive but would be entitled to tell the world whatever they happen to know. In fact, some of them already do that.

On numerous occasions, the ACJC has received telephone calls from members of the press who wanted to verify that a grievance had been made about a certain Judge, information that the reporter obviously received from a grievant. The reporter is always advised that: "We can not discuss whether or not a matter exists, pursuant to Court Rule, unless and until a formal complaint issues."

Revisions to Rules Governing Attorney Discipline

As the PRRC is aware, Rule 1:20-9 was amended following the PRRC's report of March 3, 2006 to the Supreme Court. The rule, in pertinent part, now reads:

> (b) Disclosure by Grievant. For grievances pending on, or filed after, October 19, 2005, the grievant my make public statements regarding the disciplinary process, the filing and content of the grievance, and the result, if any, of the grievance. If the grievant makes a public statement, respondent may reply publicly to any matter revealed by the grievant.

In addition, the ACJC is aware of the following revised language that is contained on the bottom of the Attorney Grievance Form, which is supplied to potential grievants who seek to file ethics charges against attorneys.

> The Supreme Court of New Jersey has held that persons who file grievances "may speak publicly regarding the fact that a grievance was filed, the content of that grievance, and the result of the process." Since disciplinary officials are required by *Rule* 1:20-9(h) to maintain the confidentiality of the investigation process and may neither speak about the case nor release any documents, until and unless a formal complaint is issued and served, you must also keep confidential any documents you may receive during the course of the investigation of your grievance.
>
> To protect the integrity of the investigation process, we recommend that you, as well as all witnesses, not speak about the case other than to disciplinary officials while the matter is under investigation. So long as you maintain the confidentiality of the investigation process, you have immunity from suit for anything you say or write to disciplinary officials. However, the Supreme Court has stated that you "are not immune for statements made outside the context of a disciplinary matter, such as to the media or in another public forum." *R.M. v. Supreme Court of New Jersey, 185 N.J. 208* (2005).

Summary and Conclusion

In summary, it may be helpful to the PRRC to touch upon the current rules that guide the ACJC as it relates to confidentiality.

> Rule 2:15-4(c): All records of the Committee shall be filed and maintained in such principal office of the Committee. All papers filed with and proceedings before the Committee shall be confidential except as provided in these Rules.
>
> Rule 2:15-20(a): Except as provided in paragraphs (b) and (c) below and in Rule 2:15-25 Referral for Administrative Action), the record before the Committee shall be confidential and shall not be available to any person except in the proper discharge of official duties. In all circumstances, prehearing conferences, deliberations or the Committee, and information subject to a protective order shall remain confidential.

> Rule 2:15-20(b): If the Committee files a formal complaint against the judge, the complaint and all further proceedings thereon shall be public except that the Committee may apply to the Supreme Court for permission to retain confidentiality in a matter involving special circumstances, such as when the Committee determines that the privacy interests of a witness or other person connected with the matter outweigh the public interest in the matter.
>
> Rule 2:15-20(c): If a judge who is the subject of a grievance requests it, the charge, the proceeding of the Committee thereon, and the action of the Committee with respect to the charge shall be made public.
>
> Rule 2:15-22(b): Witnesses and persons who bring to the Committee allegations concerning a judge shall be absolutely immune from suit, whether legal or equitable in nature, for all communications to the Committee or to its staff and for any testimony given at proceedings before the Committee, a three-judge panel, or the Supreme Court. This immunity shall not extend to any other publication or communication of such information.

As indicated earlier, grievants are never advised that they are prohibited from disclosing the fact that they filed a grievance with the ACJC or from publicizing the Committee's disposition. During the investigative stage, if they inquire, they are advised of the benefit to the Committee to retain confidentially in order to protect the integrity of the investigation. After a matter has been disposed, the grievant is advised of the Committee's decision, but is not advised that the decision is confidential. However, all correspondence to the grievant is stamped "Confidential" on the top of the letter.

In the ACJC's opinion, the issue in R.M. dealt not only with the language of the Attorney Ethics rules, but also with how they were applied in practice. Because Rule 2:15-20 is applied in a different way by the ACJC, the Committee believes that it is consistent with and conforms to the proscriptions expressed by the PRRC in its recommendation to the Supreme Court, and satisfies the precedent established in R.M. Consequently, the Committee respectfully recommends that there is no substantive reason to change it rules.

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